Centre for Antitrust and Regulatory Studies

Ewelina D. Sage

European Audiovisual Sector:

Where business meets society's needs

Warsaw 2011

University of Warsaw
Faculty of Management Press

Textbooks and Monographs

European Audiovisual Sector:

Where business meets society's needs

Centre for Antitrust and Regulatory Studies
University of Warsaw, Faculty of Management

Eleventh Publication of the Publishing Programme

Series: Textbooks and Monographs (9)

CENTRE FOR ANTITRUST AND REGULATORY STUDIES (CARS)

www.cars.wz.uw.edu.pl

CARS came into being by the order of the Council of the Faculty of Management of the University of Warsaw of 21 February 2007. It was founded in accordance with para. 20 of the University of Warsaw Statute of 21 June 2006 as an 'other unit, listed in the faculty rule book, necessary to achieve the faculty's objectives'. CARS conducts cross- and inter-disciplinary academic research and development as well as implementation projects concerning competition protection and sector-specific regulation in the market economy. It also prepares one-off and periodical publications, and organises or participates in the organisation of conferences, seminars, workshops and training courses. In the future CARS will also act as a patron of post-graduate studies.

CARS consists of Ordinary Members (academic staff of the Faculty of Management of the University of Warsaw), Associated Members (academic staff of other faculties of the University of Warsaw, mostly the Faculty of Law and Administration and the Faculty of Economics as well as other Polish and foreign universities and research institutes) and Permanent Co-operators (including employees of Polish and foreign companies and public and private institutions).

Ewelina D. Sage

European Audiovisual Sector:

Where business meets society's needs

Warsaw 2011

University of Warsaw
Faculty of Management Press

Reviewers:
Prof. Stanisław Piątek – University of Warsaw, Faculty of Management
Dr. Krzysztof Kuik – Head of the Media Unit, DG Competition, EC

Cover: Dariusz Kondefer

ISBN: 978-83-61276-77-7

PUBLISHER
University of Warsaw
Faculty of Management Press
PL – 02-678 Warsaw, 1/3 Szturmowa St.
Tel. (+48-22) 55-34-164
e-mail: jjagodzinski@mail.wz.uw.edu.pl
www.wz.uw.edu.pl

LAYOUT:
ELIPSA Publishing House
PL – 00-189 Warsaw, 15/198 Inflancka St.
Tel./Fax (+48.22) 635-03-01; (+48.22) 635-17-85
E-mail: elipsa@elipsa.pl; www.elipsa.pl

DISTRIBUTION
Economic Bookstore
PL – 02-094 Warsaw, 67 Grójecka St.
Tel. (+48-22) 822-90-42; Fax (+48-22) 823-64-67
E-mail: infro@ksiegarnia-ekonomiczna.com.pl

Contents

LIST OF ACRONYMS

AMS = Audiovisual Media Service
AVMSD = Audiovisual Media Services Directive
CoJEU = Court of Justice of the EU
CoJ = Court of Justice
CFI = Court of First Instance
CIP = Competition and Innovation Programme
EAS = European Audiovisual Sector
EC = European Community
EU = European Union
ECJ = European Court of Justice
ECL = European Competition Law
FP7 = 7th Framework Programme
Kbps = Kilobits per second
Mbps = Megabit per second
EBU = European Broadcasting Union
NCA = National Competition Authority
SIEC = Significant Impediment of Effective Competition
HHI = Herfindahl-Hirschman Index
TEU = Treaty on European Union
ICT = Information and Communication Technology
ICT PSP = Information and Communication Technology Policy Support Programme
IPR = Intellectual Property Right
MR = Merger Regulation
MS = Member State of the EU
MSP = Media Services Provider
PSB = Public Service Broadcaster
SGEI = Services of General Economic Interest
SME = Small and Medium Enterprise
SSNIP = Small but Significant & Non-transitory Increase in Price
TFEU = Treaty on the Functioning of the European Union
TWFD = Television Without Frontiers Directive

INTRODUCTION

The purpose of this book is to introduce its readers to the general framework of **EU intervention in the European Audiovisual Sector** (hereafter: EAS). The first part of the discussion will focus on the primary aim of European Audiovisual Policy – officially known as EU Audiovisual and Media Policy – **to facilitate the creation of an 'inclusive' internal European audiovisual market** accessible and beneficial to the entire EU society both in economic as well as social terms. Emphasis will be placed here on particular goals and forms of EU intervention that affect not only the shape but also the effectiveness of the EAS overall. The following part of the discussion will focus on EU efforts meant **to strengthen the internal market**. Considered here will be the various forms of direct aid granted to the EAS by the EU meant to facilitate its internal growth as well as its protectionist measures meant to support and shield it from external competition. The final part will be devoted to the influence exercised by the EU on the internal working of the EAS in order **to preserve its competitiveness**. Presented first will be the balancing act between EU and Member States' (hereafter: MS) intervention in the context of state aid to Public Service Broadcasters (hereafter: PSBs) providing Services of General Economic Interest (hereafter: SGEI). Limits placed on the conduct of individual businesses by way of European Competition Law (hereafter: ECL) will be outlined in the final chapter. This part of the analysis will focus on specific direct and indirect influences that can be exercised by the EU through ECL enforcement on the formation of business strategies in the audiovisual field.

It is essential to note that the boundaries of this discussion are fundamentally blurred by the fact that **European Audiovisual Policy** (hereafter: EAP) **has no clear or firm structure**. Its fluidity can be traced back primarily to:

- a complicated, politically sensitive division of competences between the EU and its MS;
- the realisation that both the EU and its MS pursue in this field a great variety of goals often aimed at purely economic objectives but sometimes also at essentially social goals;

- the fact that it often overlaps with other EU policies, in particular those affecting the traditional Media field that focuses on 'high' culture as well as on Information and Communication Technology (hereafter: ICT) which focuses on convergence and interoperability;
- its complex nature that encompasses legal, financial, as well as many other instruments of intervention;
- the fact that it applies to an economic sector which in itself is very difficult to define both in technological as well as temporal terms.

A **flexible analytical structure** is used in this book without insisting on rigid delineations to reflect the **fluidity of the topic of this discussion**. The impact of the EU on the shape and internal workings of the EAS could be organised according to its instruments of intervention into: legal and para-legal (directives and soft laws), financial (the MEDIA programme), and other instruments. Alternatively however, a division reflecting the goals of EU intervention could be applied whereby social aims such as 'inclusiveness' or plurality are separated from its economic goals such as making the EAS more competitive globally. Neither of these classifications is without its own advantages and shortcomings. The same instrument of intervention frequently serves more than one purpose – the MEDIA programme helps EU producers create appealing content as well as improve viewer choice. On the other hand, the same goal is often pursued by more than one instrument – viewer choice is facilitated by the MEDIA programme as well as European works transmission quotas. The great multitude of both goals and instruments of EU intervention as well as the complexity of their interrelationships complicate the analysis further.

To provide as much clarity as possible, the book will commence with key general considerations including applicable definitions. Its individual chapters will focus on particular instruments of EU intervention, stressing their characteristics and consequences. Chapters will be grouped into three main parts according to the key impact exercised on the EAS into:
PART I: SOCIO-ECONOMIC GOALS OF THE EAS
PART II: INTERNAL GROWTH & EXTERNAL STRENGTH
PART III: INTERNAL COMPETITIVENESS

1. European Audiovisual Sector (EAS)

Unlike traditional retail or manufacturing industries, defining the audiovisual sector is a largely intuitive and subjective endeavour. Definitions can vary due to the context of the analysis being performed or the policy approach being applied. Most of all, they remain fluid over time, reflecting

technological advancements in related fields. Indeed, the outline of the audiovisual sector is greatly dependent on the evolution of ICT that constitutes its technological backbone. As a result, it is fair to say that the audiovisual sector is very **difficult to define in absolute terms** because the introduction of any new product or service, or indeed the disappearance of another, can easily affect its scope. This fact is well illustrated by the evolution of radio which was traditionally a service firmly placed outside the audiovisual sector. Technology now makes it possible to associate Internet radio with the audiovisual field since it often offers its listeners the possibility of access to visual content alongside its primary audio broadcast. A similar case can be made for on-line newspapers and on-line music services.

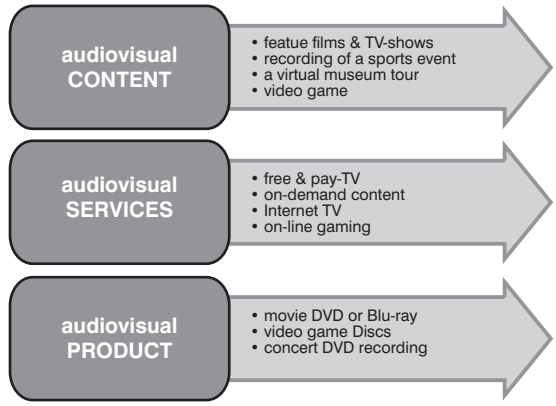
Even with the ever increasing penetration of broadband and the extraordinary popularity of mobile communication, **television is still considered** the most common source of information and entertainment in the EU and thus, **the most important element of the audiovisual sector.**

Fortunately, a strict definition is not necessary in the context of this book. What is emphasised instead is the fluidity of audiovisual markets and the particularities of the interaction of business considerations and social policy goals that they experience. In fact, some 'audiovisual' markets might be as close to traditional Media, Telecoms or ICT *sensu stricte* as they are to the audiovisual sector. Such is the case with on-line newspapers and on-line radio/music downloading services because, by providing more than just their main visual or audio content, they gain a 'multimedia' character which in turn places them in the scope of this analysis. As a rule however, the audiovisual sector is considered to **not cover** the **audio-only radio** (media) or **phone calls** (telecoms) nor the visual-only **newspapers** (media sector) or **private e-mail** (telecoms).

Audiovisual CONTENT (eg video games) must be set apart from **audiovisual SERVICES** (eg on-line gaming services). Consumers do not normally acquire audiovisual content – in the vast majority of cases, they merely subscribe to or acquire a certain type of service which makes it possible to use the required content in a specified way (eg Xbox live

gaming). Audiovisual services have various **means/methods of distribution** including free-to-air, cable, satellite or wireless transmission. Viewers usually chose which type of audiovisual service to acquire – the choice of its distribution method is generally of secondary importance. In fact, availability of alternative means of distribution of a given service (eg cable pay-TV vs. satellite pay-TV) is often limited or indeed outright predetermined by considerations such as geographic location of the receiver (eg rural and mountain areas rarely have access to cable). By contrast, viewers are usually fully in control over which **distribution platform** (eg TV-receiver, PC, game console, 3G mobile phone) to use to access a given audiovisual service. Nevertheless, the more complex the service the more technologically advanced the necessary distribution platform.

Audiovisual content is also distributed on physical carriers (eg DVDs). The trading in such **audiovisual PRODUCTS** (created by 'pressing' content onto a physical carrier) is based on one-off payments (purchase price) that give the buyer essentially unlimited access to their content. Audiovisual products generally fall into the ambit of traditional manufacturing, and retail subject to general rules of EU law such as free movement of goods. Due to the impossibility to control private lending and copying of the content pressed onto carriers such as CDs and DVDs, the industry is gradually discouraging their use.

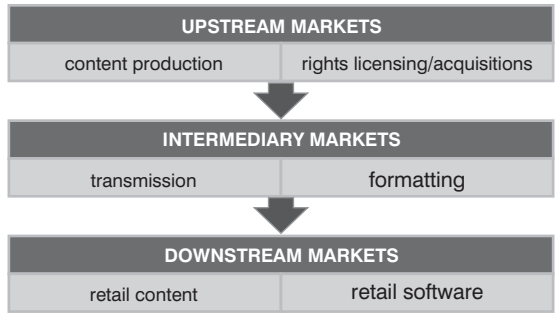


The audiovisual production & distribution chains can be divided into three basic levels:

- **UPSTREAM content MARKETS:** content producers/rights owners (selling side) such as UEFA sell/licence their content to manufacturers

of audiovisual products or downstream Audiovisual Media Services providers (buying side) such as Canal+

- **INTERMEDIARY technology MARKETS:** transmission & decoding of audiovisual content as were as customer & payment managements is generally undertaken by telecoms operators or dedicated mid-level technology operators (selling side) which offer their services to Media Service Provider (buying side)
- **DOWNSTREAM retail MARKETS:** audiovisual products are traded and audiovisual services provided to consumers **= CONSUMER MARKETS**



The **EAS covers the audiovisual industries of all EU MS** – this does not mean however that its markets are always 'European' in geographic reach. In general, the higher the market on the production & distribution ladder the wider its geographic extent is likely to be. The EAS contains therefore a mixture of: local (eg Flanders); national (eg Poland); regional (eg French speaking part of the Benelux); and international markets (eg entire EU). The EAS is therefore an accumulation of a multitude of markets with a different product scope & geographic extent.

The EU's market integration agenda is firmly underway **to complete an INTERNAL MARKET** in the European audiovisual field or, to be more precise, multiple 'single European markets' for particular audiovisual goods/services. Nevertheless, linguistic barriers, diversity of consumer preferences, dissimilarities in the shape of historically-formed infrastructure and fundamental differences in national resources and geographical considerations lie at the heart of the **persistent segmentation** that characterises many markets that form part of the EAS. It is this very fragmentation that constitutes one of its key weaknesses alongside varying, not always resolvable **political considerations** on the national level. The current **financial crisis** puts additional pressure on the overall development of the sector.

In the context of audiovisual products, Europe might soon have to embrace the concept of a **copyright levy** imposed on manufacturers to compensate rights owners for uncontrolled 'secondary' distribution associated with audiovisual products. It is likely that manufacturers will pass on the extra cost to consumers causing an increase in retail prices, creating in turn an additional deterrent for the sale of audiovisual products.

2. Interests and Competences of the EU

The EU plays an important role in the making and regulating of the EAS. Until the recent amendments brought about by the Lisbon Treaty, this impact was directly associated with the functioning of the European Community (hereafter: EC). The EC dealt with the social and economic foundations of the single market, as the first of the three pillars of the EU alongside its foreign policy and internal issues. At present, it is appropriate to simply speak of the EU, and EU intervention, when considering its impact on the EAS. No matter whether national or international, public intervention into the economy should be associated with an overall benefit to society. In the audiovisual sector, this benefit can have a mainly economic or a mostly social nature. Not unlike individual MS, the **EU pursues a variety of goals in the EAS ensuring that its economy and its society grow hand in hand**. For instance, EU support to the switch-over process from analogue to digital broadcasting is meant to create new jobs as well as ensure that progress benefits the whole society in a non-discriminatory manner and on the basis of the principle of equal opportunities. By contrast to the MS which generally pursue national objectives only, the EU is firmly **focused on** what lies in the **European interest** emphasising the position of the EAS as a whole.

2.1. EU vs. MS Competences in the EAS

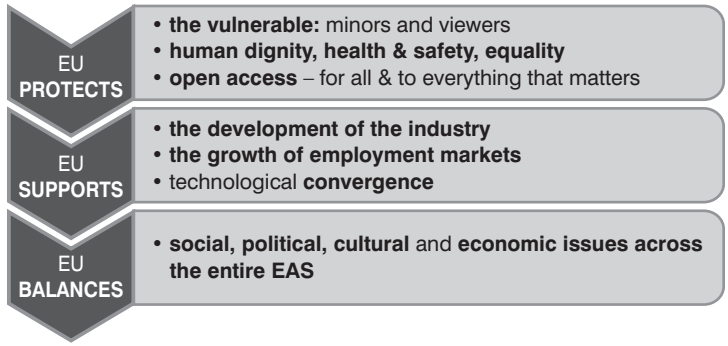
Due to its socio-political importance, the audiovisual field is subject to a complex division of 'interests' between the EU and its MS. The audiovisual field is considered an **area of JOINT COMPETENCE** between the EU and its MS according to Article 4 of the Treaty on the Functioning of the

European Union (hereafter: TFEU). For this reason, where the EU exercises its right to impose binding legal measures concerning issues affecting the sector directly, national laws must comply with the requirements imposed by EU law. Despite the general supremacy of European law, the EU has only legislated on a limited number of issued that concerns the audiovisual field (eg absolute prohibition of TV advertising of tobacco in the entre EU) and thus all other considerations are determined autonomously by its MS (eg definition of public service obligations of Public Service Broadcasters).

MS exercise their **influences primarily through their MEDIA LAWS**, a term which refers traditionally to national legislation that concerns television and radio broadcasting as well as the press. Media laws contain a variety of rules including those on: censorship, editorial responsibility, licensing, journalistic independence, cross-media ownership, media supervisory authorities and the statutes of particular PSBs. In recent times, some countries such as the UK have replaced media law with the term **COMMUNICATION LAWS** which covers the converged Media, Telecoms and Information Technology field.

The EU acts primarily in order to ensure that its citizens & business can benefit economically from the internal market. In other words, the **majority of EU interventions have supra-national economic interests at heart**. Simultaneously, MS pursue their individual economic objectives such as, for instance, encouraging the development of video games in France thanks to a very favourable tax regime. **Socially motivated public interventions** into the internal workings of the EAS **derive mainly from individual MS**. It is not surprising that national governments are extremely concerned about their audiovisual field. MS spend a lot of effort on the national level to protect the socio-political rights of their citizens as well as to support national culture & heritage. In light of the subsidiarity principle, the EU also pursues social goals but mainly only when an intervention on the EU level is necessary to ensure an adequate level of consumer protection potentially endangered by deepening market integration.

The EU has harmonised some of the national laws of its MS **to provide its citizens with a minimum level of protection throughout Europe**. Uniform legal conditions applicable across the entire EU are essential to the growth of innovative audiovisual services in particular. It also continues to supervise MS in their actions concerning technology sensitive areas in order to minimise the risks of market distortions on EU scale. Interoperability of transmission networks and rights management is at the same time being coordinated at the EU level. Finally, the EU pursue an active roles in maximising inclusiveness in the EAS both in economic and social terms. The latter initiatives go alongside the efforts of its MS directed at their domestic economies & societies.



2.2. Competition Protection in the Internal Market

According to Article 3 TFEU, the EU has **EXCLUSIVE COMPETENCES** in 6 areas of its activity only. Among them is the **creation of competition rules necessary for the functioning of the internal market –** ensuring the internal competitiveness of the European economy is an essential pre-requisite of a successful integration process. In this context, the EAS is affected most of all by the application of:

- **EU state aid provisions,** which limit the conduct of MS with respect to their funding of PSBs in order to ensure that their nationally motivated actions do not endanger the pro-competitive goals of the EU (*Articles 107-109 TFEU*), **in connection to EU rules on services of general economic interest** (SGEI) which provide a general exemption from the applicability of other EU law for SGEI (*Article 106(2) TFEU*); and
- **European Competition Law (ECL)** which contains directly applicable rules on the conduct of undertakings with respect to:
  - anticompetitive multilateral practices (*Article 101 TFEU*)
  - abuse of dominance (*Article 102 TFEU*)
  - merger control (*Council Regulatio*n (EC) No 139/2004 of 20/01/2004)

Pro-competitive EU intervention is based on the assumption that the welfare of European consumers depends on the existence of effective competition. To protect it, **ECL restricts the conduct of all undertakings** and **EU state aid rules limit the powers of MS with respect to the financing of their PSBs** making special allowances however for those services, which constitute SGEI.

The enforcement of ECL in the EAS might have been rather frequent and more pro-active (extensive conditions and obligations placed on the conduct of those subject to scrutiny) than in more traditional industries but it **is not essentially different to other economic fields**. The EU continues to use ECL to ensure that the EAS remains competitive internally in cases when effective competition is endangered by the actions of both European and external undertakings. This is equally true for restrictive practices and mergers.

The particularly sensitive socio-political character of audiovisual media is however strongly reflected by a protectionist attitude of national governments towards EU intervention into the EAS on the basis of its state aid rules. **State funding of Public Service Broadcasting** activities is extensive across Europe and **triggers frequent EU interventions** on this basis. At the same time however, acknowledging that most of the activities of PSBs can constitute a SGEI has allowed MS to continue their funding schemes, often significantly distorting audiovisual markets not only on a national but also international scale. It is fair to say therefore, that the general rules banning state aid in the EU due to their competition-distorting effects are enforced frequently but in a very 'flexible' manner in the EAS. Unsurprisingly, the Commission continues to receive complaints from private undertakings suffering from the expansion of the activities of publicly funded operators.

3. Instruments of EU Intervention

The entirety of PART I and II of this book are devoted to the wide realm of influence of EAP which is one of the most influential and wide-spread policies of the EU alongside its agricultural, transport, education, regional, and environmental. It is formulated and overseen by the **Information Society and Media Directorate General**. Among its other competences lie health & safety issues, on-line accessibility, consumer protection, copyright, culture, on-line security, mobile development and radio frequencies. The Directorate formulates and implements the EAP of the EU primarily with the view to foster the single European market that draws on its cultural diversity and, in particular, to:

- foster the single market in light of outside competition (European Works quotas, media training, ICT programmes)
- preserve the EU'S cultural diversity (European Works quotas, the MEDIA programme)

- ensure a minimum common level of protection for vulnerable minors and consumers, including basic societal needs and freedoms such as health, and human dignity (media and advertising standards)
- support technological progress (co-ordination of efforts for the digital switch over, open access initiatives)
- provide a balance between economic and social considerations affecting the media field such as basic freedoms, and medial plurality (EU's approach to state aid, public services, mission, remit).

For the purpose of this analysis, the term **POLICY** will be associated with a **deliberate plan of action** aimed at the achievement of desired and explicitly defined goals (eg the creation of a competitive as well as inclusive EAS). Policies are generally formulated by governments, international organisations such as the EU or major businesses. Policy should be set apart from the term **POLITICS** which **refers to the process by which a group of people makes its decisions**. To achieve its goals, policy uses a variety of instruments including most importantly, the law. Indeed, policy goals form the basic assumptions underpinning legislation. Policy represents a concept far wider that the law having at its disposal other instruments by which it can influence the society such as public consultations or direct/ indirect financing.

The list of the **most important instrument used by the EU to influence the EAS** includes:

- **EU law** (legislation) – binding on its recipients
- **EU soft laws & consultation initiatives** – not binding but influential
- **direct and indirect financing**
- **others** such as media promotions or the training of professionals

For the purpose of this book, the term **LAW** (legislation) should be associated with **a system of legal rules** which usually has a national scope but which **can be supra-national** (EU law). Laws are most likely to be effective if they meet the society's approval (eg most people agree that advertising should not make viewers believe that alcohol will make them better drivers). Only duly appointed public bodies have the competence to legislate (create what is considered to be hard law). The higher the awareness and acceptance of the law is by its addressees, the more likely the law is to be observed. This is an important observation for this analysis as it will be shown that some parts of EU law applicable to the EAS have an excellent compliance record while others are lagging far behind. Laws are made out of **LEGAL RULES** that bind their recipients. This analysis will focus on legal rules contained in EU law that are **directed at MS** (eg obliging them to achieve certain results in terms of advertising time of

consumer protection or limiting state aid) **and those concerning businesses** (eg prohibiting cartels).

Legislation constitutes the most important policy instrument of the EU. However, a comparable impact (including the way in which companies conduct their business) can be achieved by soft laws or public consultation initiatives if they find widespread approval. The concept of **SOFT LAW refers to acts with a similar structure and purpose as hard law but which lack a legally binding nature**. Soft laws are often formulated where it is difficult to reach a legislative consensus or, where it is impossible to legislate in time to deal with an imminent social. They generally derive from specialised authorities that can formulate acts of greater precision than most hard laws. The many 'Notices', 'Communications' or 'Guidelines' issued over the years by the EU Commission have a soft law status informing the interested parties about the strand point take by the Commission without the power to force compliance. 'Recommendations' frequently issued by the Parliament are similar in that respect as they aim to make other EU institutions, or indeed national governments, clearly aware of the views of the assembly.

If the addresses (recipients) of the law fail (ignorance or negligence) or refuse to (premeditation) abide by its rules, legislation can be enforced by appropriate public bodies & courts. The **ENFORCEMENT of EU Law is undertaken primarily by the European Commission** under the juridical review of the Court of Justice of the EU. Both the Commission and European courts rarely stray from their earlier decisions and if so, only if they have an important reason to do so (eg the Commission would adjust its position according to subsequent rulings of the Courts while the Courts would consider new market realities including, for instance, the practical failing of an earlier judgment).

In the context of this analysis, the term **REGULATION** will be associated with a **coercive action taken by** public authorities – usually associated with **national regulatory agencies or authorities**. Regulation is directed at the future (*ex-ante*); prescriptive; sanctioned; its observance is monitored usually by the issuing authority; and subject to judicial review. It often takes the form of individual regulatory decisions addressed to a single entity (eg monopolistic infrastructure holder). Regulatory decisions are often used to control prices/quality – they are associated with 'regulated markets' (eg telecoms) or regulated activities (eg press). The general term 'regulation' (regulatory decisions) must thus be explicitly differentiated from the concept of EU Regulation – a specific type of European legislation.

Direct or indirect financing of certain activities (eg creating artistic audiovisual works that have a European appeal), initiatives (eg supporting

the development of broadband in rural regions of the EU) or even particular entities (eg innovative research & development projects) constitutes another important instrument widely used by the EU to shape the EAS. Other means of achieving the desired goals of a given policy include mass-media promotions (eg widespread advertising of the potentially harmful effects of certain video games on the development of minors) or training (eg creating networking opportunities).

4. Legal Definitions

In order to make the following discussion more accessible and thus easier to understand, it is useful to present some of the key concepts frequently referred to in this book. While their wording has been somewhat simplified and reorganised, all of the applicable definitions originally derive from **Article 1 of the AUDIOVISUAL MEDIA SERVICES DIRECTIVE** (hereafter: AVMSD) – originally known as the Television without Frontiers Directive (hereafter: TWFD).

The most important issue to remember when considering the terminology of the AVMSD is the fact that the directive explicitly covers what is known overall as **AUDIOVISUAL MEDIA SERVICES** (hereafter: AMSs). These are **effectively divided into** two distinct categories:

- **'MASS-MEDIA' services** which can also be called audiovisual media services *sensu stricte* exemplified most generally by traditional scheduled TV and on-demand movie services; and
- **AUDIOVISUAL COMMERCIAL COMMUNICATIONS** such as TV advertising or sponsorship

Preamble AVMSD

(21) For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media...

(22) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose...

Audiovisual media services covered by the AVMSD **are defined as**:

> *Article 1 (a(i)) AVMSD*
> a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC [on a common regulatory framework for electronic communications networks and services].

The above definition covers therefore a number of interrelated criteria that must be fulfilled cumulatively for a particular audiovisual offer to be considered an AMS within the meaning of the Directive and thus subject to its application. Covered by the definition are therefore only:

- **SERVICES**, rather than products (goods), defined in Articles 57 TFEU (ex Article 50 TEC) as 'normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons... in particular...: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions';
- **provided by a MEDIA SERVICES PROVIDER** (hereafter: MSP) defined in Article 1(d) as 'natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised';
- **under his/her EDITORIAL RESPONSIBILITY** defined in Article 1(c) as 'the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided';
- **the principal purpose of which is** to inform, entertain or educate the general public through **the PROVISION of PROGRAMMES** defined in Article 1(b) as '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 the form and content of which are 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';

- **transmitted by ELECTRONIC COMMUNICATION NETWORKS** whereby the latter are defined by Article 2a of Directive 2002/21/EC of the European Parliament and the Council of 7/03/02 on a common regulatory framework for electronic communications networks and services, amended by Directive 2009/140/EC, as 'transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or 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';
- **in the form of a TV BROADCAST** defined in Article 1(e) as 'a linear audiovisual media service...provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule' while Article 1(f) states that a ' "broadcaster" means a media service provider of television broadcasts';
- **or in the form of an ON-DEMAND AMSs** defined in Article 1(g) as 'a non-linear audiovisual media service... provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider'.

Aside from mass-media services, the AVMSD applies also to AMSs in the form of **AUDIOVISUAL COMMERCIAL COMMUNICATIONS** which are, unlike mass media services characterised by a three-way relationship between viewers, a MSP and an advertiser, sponsor or company which engages in product placement. They **are defined as:**

Article 1(h) AVMSD
images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.

The AVMSD mentions several specific categories of audiovisual commercial communications:

- **TELEVISION ADVERTISING** remains the most important forms of audiovisual commercial communications; according to Article 1(i) 'television advertising' means 'any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment';
- **SPONSORING** is defined in Article 1(k) as 'any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting their name, trade mark, image, activities or products';
- **TELESHOPPING is** defined in Article 1(l) AVMSD as 'direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment';
- **PRODUCT PLACEMENT** is the newest type of audiovisual commercial communications covered by the AVMSD; it is defined in Article 1(m) as 'any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration' whereby 'similar considerations' mean in this context 'any alternative forms of compensation for the promotional service offered by the MSP including for instance, the free use of products or infrastructure belonging to the company using product placement';
- **SURREPTITIOUS (misleading) audiovisual commercial communications** are explicitly defined in Article 1(j) as 'the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration'.

REVISION QUESTIONS

1. What makes the audiovisual field a 'special' industry sector?
2. How would you define the EAS and why?
3. 'Who' decides 'what' in the EAS?
4. What is the EU trying to achieve by its European Audiovisual Policy?
5. How and why does the EU protect competition within the EAS?
6. How is the EU influencing the EAS?
7. What are the key elements of the Audiovisual Media Services definition contained in the AVMSD?
8. What is the key difference between Audiovisual Media Services and Audiovisual Commercial Communications?

PART I
SOCIO-ECONOMIC GOALS OF THE EAS

As the fundamental objective of the EU (formerly EC), **MARKET INTEGRATION remains at the heart of EU intervention into the EAS.** What differentiates the EAS from the European economy in general is the profound impact which this industry exercises on the development of societies when it comes to democracy & pluralism, culture & heritage, education & employment, and finally health & safety. Thus, **the EAS can be said to be a special industry where major economic interests come into direct proximity**, and potentially conflict, **with key social objectives.** The 'public hand' of the EU takes extensive economically driven actions directed at market integration and supporting its competitive strength. It however equally often engages in socially motivated interventions which focus on protectionism and inclusiveness. Those market players that wish to act on European audiovisual markets (created, supported and supervised by the EU) must therefore ensure the compliance of their business practices and strategies with both the economic and social objectives pursued by the EU in this special industry.

While the particular economic and social goals pursued by the EU and its individual MS might somewhat differ – the EU helps the 'European' while MS support the 'domestic' – **the fact that economic and social goals of public intervention are very closely intertwined in the audiovisual field is as true for the EU as it is for its individual MS.**

While economically-motivated interventions in the EAS might be more direct, widespread and generous than in other industries, they are similar to the impact exercised by the EU on its economy as a whole – they are meant to create jobs, widen markets to improve their global standing and ensure their competitiveness. The **scale of** its **socially-motivated intervention** in this sector **is** however something **unprecedented**. Indeed, it can be argued that no other industry experiences the impact of social values on the working of

the market in such a direct and extensive way as the EAS does. To illustrate, those creating artistic works with European appeal can get funding from the EU – similar subsidies are not available to commercial content; those contracting and creating advertisements must shape them specifically so as not to endanger the development of children; those showing advertising are not allowed to 'overuse' viewers by advertising too much; those selling key sports rights might need to compromise their profit levels to ensure general accessibility. Thus, the direct influence exercised by the EU on specific market practices taking place in the growingly integrated European audiovisual field cannot be underestimated.

Facilitating the creation of the internal market is the primary economic aim pursued in the framework of EAP. Its impact is complemented by Europe's support to industrial growth as well as ECL enforcement which provides the Commission with a practical means of preserving its internal competitiveness. Dealing with the social side of the internal market remains an equally important objective of EAP's whereby the EU tries to ensure that the economic benefits of market integration are not overshadowed by its potential negative repercussions for the well being of minors for instance. In practice, **the EU** also **intervenes to ensure that the internal market being created is socially responsible, inclusive and safe**. It thus takes extensive socially-motivated actions:

- to preserve Europe's cultural diversity and national heritage alongside harmonisation; to facilitate advancements in culture & education;
- to ensure media plurality (making sure that everyone can be heard) & public service obligations (making sure that everyone can hear) considered to be essential prerequisites of an inclusive and democratic society; and
- to promote social responsibility and an inclusive society which cover paternalism (eg ensuring that alcohol is equated to as an image enhancer) and efforts to ensure that progress is felt by the entire society irrespective of age, education or location.

The EU fully acknowledges that its **cultural diversity** gives it an important economic advantage over more 'cohesive' areas. Europe's cultural diversity **gives the EAS the resources and creative potential needed to produce varied content which is key to the development of new technologies.**

In its entirety, PART I of this book will be devoted to market integration and the associated harmonisation efforts of the EU meant to protect the social interests of its citizens acting in their capacity as consumers of audiovisual products/services (viewers). Chapter 1 will cover general issues and the creation of the single market in the context of *acquis communautaire* (the entirety of the accumulated law of the EU). Chapter 2 will be devoted to the applicable Directive and related soft-laws which together establish minimum requirements for European audiovisual media in relation to the preservation of key social values of the EU.

CHAPTER 1

BASIS OF THE INTERNAL MARKET

1.1. EU Law

EU LAW is a supranational legal system which **operates alongside the laws of its 27 MS**. This fact is of key importance to this discussion because the competences of the EU and its MS closely intertwine in the audiovisual field. Some types of EU law take effect directly without the need for any legal actions to be taken by the MS. For that reason, directly applicable EU rules, such as the basic freedoms, do not need national equivalents to be valid and enforceable. Similarly to international treaties, certain types of EU law must however be 'transposed' into the legal systems of each and every MS – given a national equivalent – creating a complex pattern of similar legal rules applicable on the EU level and in MS.

Being able **to identify the addressee of a given act of EU law is essential to decide who is bound by it**. Some EU laws have many addressees including MS, citizens and even individual companies and their associations. Other acts are directed to MS only and thus they do not normally 'bind' companies as such **–** it is the national rules that are promulgated by individual MS in order to transpose these EU law that are binding on companies established in that MS. Some acts of EU laws are legally binding on specific **MS, companies, or even individuals** only. They can have widespread consequences however, both as a source of precedence and due to the scale of the effects that an individually-binding measure can have on the market overall.

1.1.1. Primary and Secondary EU Law

EU law consists of its primary law, in other words the two existing Treaties, and EU secondary legislation (EU Regulations, Directives and Decisions accompanied by the non-binding Recommendations and Opinions) issued on their basis. **Primary law of the EU forms its constitutional framework** by

establishing the institutions, decision-making procedures and competences of the EU. Primary law is **created by the governments of its MS** (acting by consensus) and thus it is the most difficult type of EU law to promulgate and subsequently change. Primary law status is now also associated with the numerous annexes and protocols attached to the Treaties. Moreover, the Charter of Fundamental Rights of the EU has now gained a legally binding status through the amendments of TEU brought about by the Lisbon Treaty in most MS (but not in the UK for instance). As a result, the obligation it contains to protect human dignity has become a primary legal rule of the EU. As such, it must be observed by all and at all times. It is essential to remember that the 'four basic freedoms of the internal market' constitute primary legal rules of the EU.

Chronologically, the list of European Treaties includes:

- **1951 Treaty establishing the European Coal and Steel Community**
- **1957 Treaty establishing the European Economic Community (TEEC),** known as the Treaty of Rome
  Re-named in 1992 into Treaty on the European Community (TEC) by the Maastricht Treaty
  Re-named in 2007 into **Treaty on the Functioning of the European Union (TFEU)** by the Lisbon Treaty
- 1957 Treaty establishing the European Atomic Energy Community
- 1987 Single European Act – in preparation of the EU
- **1992 Treaty on European Union (TEU)** – a new and separate Treaty introduced by the Treaty of Maastricht which contains the institutional framework and decision-making procedures of the newly created EU
- 1995 Treaty of Amsterdam – amended and renumbered the original TEC
- 2001 Treaty of Niece – focused on EU institutions
- 2007 Treaty of Lisbon – amended some of the institutional rules of TEU; somewhat amended and renamed TEC into TFEU.

EU primary law contains two separate Treaties:

- **Treaty on the European Union (TEU)** from 1992 which contains its institutional rules and
- Treaty of Rome from 1957 → revised & renamed in 1992 into Treaty on European Community (TEC) → revised & renamed by the Lisbon Treaty of 2007 = **Treaty on the Functioning of the European Union (TFEU)**

The development of the audiovisual industry was shaped directly by primary EU law especially in the context of the four basic freedoms (free movement of goods, persons, services and capital within the internal market). **The EAS was influenced particularly strongly by** the enforcement of the primary EU legal rule establishing the **freedom to provide services** (Article 56 TFEU). It was also always subject to frequent interventions on the basis of **primary EU law on competition, SGEI and state aid**, covered by Articles 101-109 TFEU. The impact of *Protocol on the System of Public Service Broadcasting in the Member States* (known originally as the *Amsterdam Protocol*) complementing TFEU & TEU, can also not be underestimated since it effectively delineates the respective competences of the EU and its MS in the context of state aid to public service broadcasting.

Secondary EU law is issued by appropriate EU institutions on the basis of primary EU law. The Treaties list three types of **binding secondary legislation**: **REGULATIONS – DIRECTIVES – DECISIONS**. **RECOMMENDATIONS – OPINIONS** (soft laws) are listed as non-binding acts. Although they are not mentioned by the Treaties, EU institutions also often issue Notices, Communications and Guidelines. Many EU soft laws are widely respected by those to whom they are relevant as key policy documents providing much clarification of the intentions of the issuing body. The impact of EU secondary law on the development of the EAS is associated first and foremost with the 1989 Council Directive 89/552/EEC of 03/10/89 on the coordination of certain provisions laid down by law, regulation or administrative action in MS concerning the pursuit of TV broadcasting activities, generally known as the **Television without Frontiers Directive** (TWFD), which is **now known as the Audiovisual Media Services Directive** (AVMSD) on the basis of the amendment introduced by Directive 2007/65/EC of the European Parliament and of the Council. The EAS has also been profoundly shaped by EU Decision issued in competition law and state aid matters which have directly influenced economic issues such as sports rights licensing policies or the permitted scope of public funding to particular AMSs.

EU Regulations
- obligatory in all their elements
- similar status to primary EU law
- have horizontal direct effect – they do not need to be transposed
- self-executing – they contain their own procedural rules

EU Directives

- generally addressed to all MS
- only binding to their addresses

- require MS to achieve a particular result without dictating the methods
- must be transposed into national legal systems – the content of a Directive is an indicator as to what must the national rules ensure
- specify a transposition timetable – a breach of the timetable is seen as a violation of EU law for which the offending MS is liable
- have a vertical direct effect – citizens can sue a MS for the failure to transpose a Directive in time or to do so correctly as well as for doing so only formally without however ensuring that the rules are respected

EU Decisions

- are issued on the basis of various legislative procedures depending on their subject matter (eg co-decision or consultation procedure) – in some areas such as competition law, the Commission can individually issue Decisions
- commonly used by the Commission when ruling on proposed mergers and day-to-day agricultural matters (e.g. setting standard prices for vegetables)
- binding to their addressee only (an individual MS, a company or a number of companies, or an individual)
- can strongly impact an entire market because they usually relate to key companies or novel economic models

Recommendations & Opinions

- the Commission can formulate or deliver to ensure the proper functioning and development of the internal market
- not legally binding, they can carry a lot of political weight
- similar status is enjoyed by **Communications, Notices or Opinions** even though they are not directly cited in the Treaty

The term '**transposition**' (implementation) of EU Directives, **refers to their conversion into national legislation;** to be correct, transposition does not have to be 'literal' but must however be effective.

1.1.2. Characteristics of EU Law

Among the various **CHARACTERISTICS of EU law** which are relevant to this analysis lies the fact that EU law:

- takes **direct effect** within the legal systems of its MS
- overrides national law in many areas, especially those covered by the Single Market (**supremacy / primacy** of EU law)
- based on the **subsidiarity principle** which limits the sphere of EU actions making it a legal system which covers only some of the areas normally covered by national legal systems
- must aim to be **proportionate, non-discriminatory** and **transparent**
- **complex jurisdictional division because** while most policy decisions are taken at the EU level, the majority of their implementation is left to MS

The concept of DIRECT EFFECT means that both primary and secondary EU legislation can directly confer rights on MS nationals. National authorities are thus responsible for the administrative enforcement of EU law while national courts have the jurisdiction to review it. EU Treaties and EU Regulations take direct effect horizontally, in other words, citizens/companies can rely on the rights granted to them (and the duties created for them) against one another. Directives have direct effect only vertically – in the relationship between citizens/companies and MS. If a MS fails to fulfill its obligations to transpose a Directive, it could be liable to pay damages to individuals/companies who had been adversely affected by lacking implementation of a Directive.

If a MS fails to legislate as required by a Directive, if its laws do not adequately comply with the Directive, or if it fails to abide by its provisions, **the Commission may initiate legal actions against that MS in the Court of Justice of the EU**. Over a thousand such cases are currently open. Spain, Italy and Estonia were among the latest MS to be investigated for non-compliance with EU advertising standards set out in the AVMSD.

The SUPREMACY of EU law, also known as its PRIMACY, means that where a conflict arises between the law of a MS and EU law, the latter takes precedence. In particular, primary EU law cannot under any

circumstances be overridden by national legislation. In the case of the EAS the issue of the supremacy of EU law over the legal regimes of its MS was historically very relevant in the context of transmission barriers hampering the development of cross-border television.

Article 5(2) TEU
In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

In its general form, the principle of **SUBSIDIARITY** states that **any given issue should be dealt with by the most decentralized competent authority** possible. In its essence, subsidiarity is based on the belief that actions are best taken by the authority closest to the recipient since the former is likely to be most in tune with the needs of the later. The principle was established in EU law by the Maastricht Treaty. It is now contained in Article 5(2) TEU (consolidated version following the Nice Treaty, which entered into force on 1 December 2009).

Preamble (104) AVMSD
Since the objectives of this Directive, namely the creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

Subsidiarity is key to the discussion of EU intervention into the EAS not simply because this is an area of joint competence of the EU and its MS, but mostly because national governments are particularly protective of their powers in the 'mass-media' area. The impact of the EAS on the dissemination of information and thus opinion creating ability is essential to the political sphere of any country. The **EU justifies its intervention into the audiovisual field alongside its MS though the 'sufficiency' and the 'benefit' criteria.** In this sense, the EU argues that the actions of individual

governments would not be sufficient to achieve the EU's overall aim – the creation of an internal market. The EU claims also that its actions will bring added value to European consumers in comparison to the actions taken individually by particular MS.

PROPORTIONALITY, NON-DISCRIMINATION and TRANSPARENCY are relevant to the EAS mostly when it comes to the efforts exercised by the European Commission in order to reign in the nationalistic, politically motivated actions taken by individual MS in the ambit of state aid. These 'fairness' criteria generally associated with EU law are not subject to much debate as far as the harmonisation directive (TWFD/AVMSD) is concerned mostly because of its limited scope. Competition law decisions issued in the realm of the EAS might however be perceived as pretty intrusive when it comes to proportionality seeing as the Commission is known to impose very far reaching market solutions.

JURISDICTION determines who has the authority (power/competence) to assess and rule on a particular matter or entity. EU law is characterised by the fact that most of its underlying policy decisions are taken at the EU level by MS representatives or by EU institutions themselves. However, the vast majority of the implementation efforts are undertaken in and by individual MS. As a result, it can be difficult to determine whose jurisdiction a particular entity (or market practice) falls under. The EAS suffered from frequent jurisdictional disputes between MS in relation to broadcasting services covered by the TWFD even though the Directive expressly followed the country of origin principle (the law of the country where the broadcasters were established has to be observed). Their frequency diminished only after the original jurisdictional rules of 1989 were amended in 1997. New jurisdictional provisions were added into the Directive in order to cover new AMSs. By contrast, jurisdiction in competition restricting cases is determined by the place of their effects or by the size of the undertakings concerned (extra-territorial application).

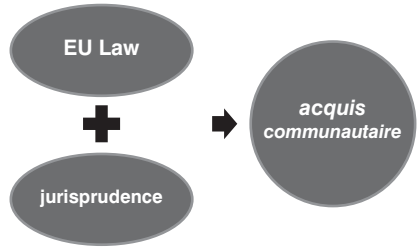
1.1.3. Role of the European Courts

While the creation of EU law is left to the European Commission, Council and Parliament, its interpretation lies within the sole competence of EU courts. Since the Lisbon Treaty, it is the **role of the Court of Justice of the European Union** (hereafter: CoJEU) **to ensure the uniform application and interpretation of EU law.** To this end, it interprets EU law on request from the judiciaries of EU MS as well as supporting and cooperating with them. The CoJEU is also empowered to review the legality of EU legislation

and to supervise the compliance with Treaty obligations by the MS. **The CoJEU consists of:**

- the **'Court of Justice'** (hereafter: CoJ) – known until 2009 as the European Court of Justice (hereafter: ECJ)
- the **'General Court' –** known until 2009 as the Court of First Instance (hereafter: CFI)
- the **Civil Service Tribunal**

The practical interpretation of EU legal rules constitutes a major element of its legal order. Most of EU legislation is very general and thus in need of further clarification to be effectively applied. This is the case especially with the sparse provisions contained in the Treaties. Many of the key concepts of EU law can be traced back to the activities of the ECJ rather than to EU legislation. To illustrate, it took the involvement of the ECJ to clarify once and for all that television constitutes a service falling under the EU rules on free movement. **The interpretative impact exercised over the years by European Courts** (primarily ECJ but also CFI) **is known as its JURISPRUDENCE**.



The General Court (created in 1989 as the Court of First Instance) has jurisdiction to hear and determine at **first instance** the majority of direct actions brought by individuals and MS in: competition, state aid, commercial, social, and regional policy matters. Thus, most importantly for this analysis, it is the General Court that first handles appeals from the decisions of the European Commission (eg the famous 2007 Microsoft judgment of the CFI concerning an appeal of the 2004 Microsoft decision issued by the Commission).

While it is the function of the General Court to act as the first instance appeal court of the EU, the **CoJ acts as its second and final juridical instance**. In other words, if an interested party lodges an appeal in these cases against a decision of the Commission for instance, the appeal will be reviewed by the General Court first and, if an appeal is lodged on a point

of law (not fact) concerning the first instance judgment, the case will be ultimately decided by the CoJ as the second instance court. The Court of Justice sets aside the first judgement and if possible, decides the case. Otherwise, the case must be referred back to the General Court which is bound by the decision given on appeal *(Article 256 TFEU)*.

Aside from its role as a second instance court in the EU, **the CoJ also acts as its supreme / constitutional court**. In this context, the competences of the CoJ include:

- **preliminary rulings** which exist to ensure an uniform application of EU law; national courts can, sometimes must, request the interpretation of EU law so that they can decide on a national case; reference can be made only by a national court but all parties involved in the national case can participate in the proceedings before the Court of Justice *(Article 267 TFEU)*
- **actions against MS for the failure to fulfil EU law obligations** initiated by the Commission or another MS; eg for the failure to transpose a Directive; aside from ruling on the case, the Court of Justice can impose a fine on a MS if it fails to comply with its judgment *(Article 258 TFEU)*
- **applications for an annulment of an EU act** – can be submitted by a MS, the Council, the Commission and Parliament if in doubt whether an EU act is legal; can also be lodged by individuals if the allegedly illegal law affects them directly and adversely *(Article 263 TFEU)*
- **actions for a failure to act** – if one of the EU institutions fails to take actions required by EU law, a MS, another EU institutions and sometimes even individuals/companies can lodge a complaint with the Court of Justice in order to have this fact officially recorded *(Article 265 TFEU)*
- **actions for damages** – anyone who has suffered damage as a result of the action/inaction of the EU/its staff may bring an action seeking compensation

Preliminary rulings are among the most important judgments of the Court of Justice; they are binding to the requesting court as well as on others that have an analogous problem. **Actions for damages are rarely successful** because they are seen as justified only in cases where a manifest error occurred.

1.1.4. Free Movement

It was the primary purpose of the European Economic Community established in 1957 (renamed European Community in 1992) to integrate the economic sphere of its MS. Alongside its gradual expansion to incorporate more MS, Europe's economic integration was supposed to create **first a 'common market', later** to become **a 'single market'**. In reality, the single market was not completed until the beginning of 1993 alongside the creation of the Economic and Monetary Union by the Maastricht Treaty. The creation of the EURO zone in 1999 brought about another change whereby the term 'single market' was **gradually replaced by the concept of 'an internal market'**, officially recognised in 2007 by the Lisbon Treaty. While the TFEU & TEU speak now explicitly of the existence of the internal market, it remains to be seen if and when will Europe take the next step on the road to full economic integration and complete what the European Parliament now calls a **future 'home market'**. In truth, some areas of the EU economy are divided still as illustrated by the EAS which is known to struggle with persistent fragmentation alongside national borders.

Market integration in Europe is primarily based on the directly applicable rules on:

- **free movement of GOODS** *(Article 28 and following TFEU)* – established first of all by the creation of the customs union
- **free movement of PERSONS** which includes:
  - **free movement of WORKERS** *(Article 45-48 TFEU)* and
  - **freedom of ESTABLISHMENT** *(Article 49-55 TFEU)*
- **free movement of SERVICES** *(Article 56-62 TFEU)*
- **free movement of CAPITAL** *(Article 63-66 TFEU)*

The 'audiovisual' field was not of major economic or social concern in the early years. Unlike radio, TV sets were rare and it was thus not until the mid 1970s that European institutions have shown interest in this area. Although **the audiovisual field was not excluded from the integration process** – the basic freedoms applied to it from the outset – it was **nonetheless evolving into a segmented structure of closed off national markets**. For that reason, Europe's first priority was to pro-actively stop MS from going against the integration process by upholding or introducing new means of market segmentation in broadcasting.

Initial interventions took therefore the form of **NEGATIVE INTEGRATION** – **prohibitions** were **imposed on MS** with respect to their discriminatory behaviour and any other restrictive practices which hamper integration by infringing free movement. Negative integration was also

characterised by the **great detail of its EU harmonisation** directives but the audiovisual field has not become subject to such act.

The integration of Europe's audiovisual field has begun in earnest only thanks to the ground breaking Delors Commission of 1985-1994. Among its most important achievements was the introduction of the 'single market' and the Single European Act which laid the foundations for the Maastricht Treaty which created the EU. The approach it followed is known as **POSITIVE INTEGRATION** that moved away from the previous approach of harmonising all details towards concentrating on only the most important aspects (the **'necessary minimum' to achieve integration**). Directives focused increasingly on their aims and left MS with far more flexibility as to the choice of means to achieve them. As a result, not only was the content of subsequent Directives shortened and thus made more accessible, but so was their legislative process. From then on, harmonisation directives were mainly used to ensure basic health & safety standards. This trend was clearly reflected by Europe's treatment of its audiovisual field. When the TWFD was finally issued in 1989 – it covered a very limited number of issues and only with respect to services of a cross-border nature.

The term **COMMON MARKET** does not extend far beyond the removal of physical (borders), technical (standards) and fiscal (taxes) barriers between MS. As a more advanced form of economic integration, a **SINGLE → INTERNAL MARKET** involves EU actions 'taken as one' by the EU both in order to shape the internal workings of the single market as well as its relationships with the outside world.

1.1.5. Jurisprudence on Free Movement of Services

The *Giuseppe Sacchi* judgment of the ECJ is of fundamental importance to the entire European audiovisual field (Case 155/73). Decided in 1974, the ruling explicitly clarified that television broadcasting constitutes a 'service' subject to the directly applicable Treaty rules on the free movement of services. The involvement of the ECJ took the form of a preliminary ruling that addressed a number of questions submitted by an Italian court (*Tribunale di Biella*) in the context of penal proceedings directed at an operator of a private TV-relay station. The operator was charged for the possession of

premises open to the public containing TV sets used for the reception of cable transmissions without having paid the prescribed licence fee.

The Italian court asked the ECJ whether the principle of the free movement of goods applies also to TV signals, in particular in their commercial aspects. The ECJ responded that:

- The transmission of a TV signal, including advertisements, comes within the rules of the treaty relating to services.
- The trade in articles such as sound recordings, films, apparatus and other products used for the diffusion of TV is subject to the rules relating to freedom of movement for goods.

The Italian court asked also whether the exclusive right granted by a MS to a limited company to make all kinds of TV transmissions, even for commercial advertising purposes, constitute a breach of the free movement of services principle. The ECJ responded that:

- Exclusive rights which an undertaking enjoys to transmit advertisements by TV is not incompatible with the free movement of products, the marketing of which such advertisements are intended to promote.
- They would infringe the free movement of product rules if they were used to favour, within the EC, particular trade channels or particular economic concerns in relation to others.
- Measures governing the marketing of products, the restrictive effects of which exceed the effects intrinsic to trade rules, are capable of constituting measures which have an effect equivalent to quantitative restrictions and by this reason are prohibited. Such is the case, in particular, where the restrictive effects are out of proportion to their purpose, such as the organization, according to the law of a member state, of TV as a service in the public interest.

The ECJ explicitly clarified in the *Giuseppe Sacchi* case that TV broadcasting constitutes a service subject to the free movement of services rule.

Europe's audiovisual field was also greatly influenced by the 1979 preliminary ruling in the so-called *Coditel I* case (**Case 62/79**) – *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films*

and others. The ECJ clarified that **the application of the free movement rules must respect justified objectives of national legislation meant to protect Intellectual Property Rights** (hereafter: IPR). Two interrelated questions were submitted here by the Belgian *Cour d'Appel* concerning an action for damages brought by a Belgian movie distribution company (*Cine Vog*) for an alleged infringement of its copyright. The national case was directed at a French licensor (*Les films de la Boétie*) and three Belgian cable TV diffusion companies (Coditel). *Cine Vog* sought compensation for the damage allegedly caused to it by the reception in Belgium of a broadcast by German TV of the film '*Le Boucher*' for which it obtained exclusive distribution rights in Belgium from *Les films de la Boétie*. The Belgian court asked in this context:

- Does the prohibition to restrict free movement of services concern only services between nationals of different MS or do they also comprise restrictions on the provision between nationals established in the same MS which concern services the substance of which originates in another MS?
- If yes, is it permissible for the assignee of the performing right in a movie in one MS to rely upon his right in order to prevent the defendant from showing that movie in that MS by means of cable TV where the movie shown is picked up by the defendant in the said MS after having been broadcast by a third party in another MS with the consent of the original owner of the right?

According to the response given by ECJ, European Treaties do not limit the exercise of certain economic activities which have their origin in the application of national legislation on IPR. The free movement rules would be infringed however if IPR were used as a means of arbitrary discrimination or a disguised restriction on trade between MS (use copyright to create artificial barriers to EU trade). Thus, ECJ clarified that *Cine Vog* could indeed rely on the copyright it legally acquired (licensed) for the Belgium territory to prohibit the unauthorised exhibition of the contested film in Belgium by cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in Germany by a third party (even if it does so with the consent of the original owner of the right).

Paragraph 16 Coditel I
Indeed, whilst copyright entails the right to demand fees for any exhibition of a movie, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and [those it licensed the copyright to] in this regard.

The **ECJ clarified** in the Coditel I ruling **that free movement rules do not disable *per se* the protection**, even by way of geographical partitioning, **granted by national legislation to the owners/holders of Intellectual Property Rights.**

More than thirty years since the *Coditel I* judgment, the CoJ has recently once again ruled on the relation between free movement of services and IPR in the TV-broadcasting field. The judgment in question was delivered on 4/10/2011 in the joint cases likely be known as the *Premier League* judgment – *Football Association Premier League and ors vs. QC Leisure and ors & Karen Murphy vs. Media Protection Services Ltd (***C-403/08 & C-429/08***)*. In a reference for a preliminary ruling, the CoJ answered a number of interrelated questions concerning the interpretation of a variety of EU legal provisions including, most importantly in this context, the possibility of justifying a restriction placed on the freedom to provide services by IPR considerations. As such, the *Premier League* case presents a continuation of the much earlier *Coditel I* judgment reflecting the changed socio-economic situation in the EU as well as the extensive legal developments of the last three decades.

The CoJ ruling concerned a set of civil and criminal proceedings held before the High Court of England and Wales whereby the **Football Association Premier League** (hereafter: FAPL) **tried to put a stop on British pubs using Greek decoding devices to view its Premier League matches**. Key sports broadcasting rights are still distributed in Europe on an exclusive basis generally corresponding to the territories of individual MS – a practice essentially acknowledged by *Coditel I*. National legislation made it possible for contractual relations between the FAPL (licensor) and satellite broadcasters (licensees) to impose a ban on the latter on the sale of decoding devices to nations other than those of the MS of the broadcast. The purpose of that contractual condition was to protect the 'optimum commercial value' of the right associated with the premium paid by broadcasters for territorial exclusivity. However, the commercial value of the same rights varies considerably between MS resulting in a national differentiation of retail prices for a comparable TV offer. It is thus not surprising that some UK consumers (pubs) tried to take advantage of the

better offer available in a different MS (Greece), even in disregard of the will of the FAPL and broadcaster in question.

Most importantly in this context, the High Court of England and Wales asked whether EU law precludes **national legislation that legalises contractual limitations being placed on the import, sale and use of foreign decoding devices** which give access to an encrypted satellite broadcasting service from another MS that includes subject-matter protected by IPR law of that first MS. The CoJ confirmed in this context that such national legislation **would infringe EU rules on the freedom to provide services unless it would be objectively justified**, irrespective of the fact of how the 'legal' devices were obtained. The CoJ stated that a restriction on fundamental freedoms cannot be justified unless:

- it serves overriding public interest reasons;
- it is suitable for securing the attainment of its public interest objective and;
- it does not go beyond what is necessary in order to attain it.

In line with the *Coditel I* judgment, CoJ confirmed first that the need to protect IPR can be seen as **an overriding public interest reason**. This assertion is certainly true since progress and creativity largely depend on the existence and effectiveness of IPR protection. The CoJ emphasised however that the essence of IPR lies in the proprietor's right to exploit the IPR commercially. Nonetheless, the right to exploit the right commercially does not mean that IPR guarantees the right holders the opportunity to demand the highest possible remuneration. What it does translate into is the right to receive **appropriate remuneration for the use of IPR**, that is, a payment reasonable with respect to the economic value of the right reflecting in particular the number of its actual/potential users. The CoJ continued on to clarify that even if remuneration with a premium for exclusivity could be considered appropriate (if it reflects the particular character of the given broadcast), it cannot go as far as to result in artificial price differences being created between national markets.

The need to use decoding devices in satellite broadcasting makes it possible to determine user numbers and so it is in turn possible for the price of a license to accurately reflect viewing figures. **Restrictions on cross-border sales** of decoding equipment **would** thus **constitute an unsuitable means** of ensuring reasonable remuneration for the use of the IPR because an appropriate payment could be made by relating the amount of the licence fee to the size of the audience. Territorial exclusivity resulting in the partitioning of national markets would thus go against the fundamental aim of the EU: the completion of the internal market.

In those circumstances, **national measures meant to protect the premium** associated with territorial exclusivity would **go beyond what is necessary to ensure appropriate remuneration**. Considering all of the above, the CoJ concluded that the restriction of the free movement of services, which consists in the prohibition on using foreign decoding devices, cannot be justified in light of the objective of protecting IPR.

The **CoJ clarified in *Premier League* that the wish to secure maximum remuneration** associated with territorial exclusivity in licensing goes beyond the essence of IPR and thus **cannot justify a restriction of free movement of services.**

Aside from ruling on free movement issues, the CoJ considered also a number of other questions relating to the broadcasting of IPR protected commodities in Europe. It was stated among them that the decoding devices in question were **not 'illicit'** in light of the **Conditional Access Directive 98/84/EC** despite the fact that they were obtained by providing a false Greek name and contact details and that the acquired subscription was meant for private rather than commercial use. Confirmed as a **'communication to the public'** according to the **Copyright Directive 2001/29/EC**, the CoJ stated also that the private subscription did not reflect the 'new audience' to which it was made available. Although the pubs were thus 'authorised' to use the devices, they clearly misused them from a contractual point of view. Still, the CoJ made it clear that the manner in which the devices were obtained did not affect its assessment.

It is worth noting here that a viewer's wish to use a better broadcasting offer available elsewhere in the internal market is not only completely understandable in terms of consumer interest but also somewhat of an inevitable, and yet intended result of progressing market integration. The Premier League ruling goes therefore hand in hand with the Europe 2020 strategy, and especially its Digital Agenda, which prioritises the creation of an internal audiovisual services market. The CoJ confirmed that market partitioning through territorial licensing cannot be justified by optimising revenues. On the other hand, it left no doubt about the fact that rights owners can and should claim their dues. The questionable nature in which the scrutinised pubs obtained and especially used the decoding cards should

thus and could be addressed by IPR legislation which makes it possible to adjust the level of remuneration to the number of expected viewers; later misuse can then be countered by damages claims.

It is worth stressing in conclusion that the CoJ has firmly stated that the ***Premier League* ruling does not conflict with the ECJ *Coditel I* judgment** primarily because of the fundamental difference in the circumstances of the two cases. In *Coditel I*, the cable TV broadcasters in question communicated the contested movie to the public without authorisation (they did not pay the remuneration due). In the *Premier League* case, such authorisation was in fact obtained, albeit by somewhat questionable means. The CoJ confirmed once more the importance of the fact that the remuneration reviewed for the rights (price of the licence agreement between FAPL and the Greek broadcaster) could reflect the number of viewers which actually or potentially subscribed to the broadcasters services. It remains to be seen whether the *Premier League* judgment will prove to be a simple continuation of earlier jurisprudence as suggested by the CoJ or if it becomes, in fact, the basis for an abolition of territorial exclusivity in broadcasting rights licensing. There can be no doubt however that its future impact will go hand in hand with progressing market harmonisation efforts.

Paragraph 118–121 Premier League

118 Doubt is not cast on this conclusion by the judgment in *Coditel I* [...]

119 [...] made in a context which is not comparable to that of the main proceedings.

121 Finally, account should be taken of the development of European Union law that has resulted, in particular, from the adoption of the Television without Frontiers Directive and the Satellite Broadcasting Directive which are intended to ensure the transition from national markets to a single programme production and distribution market.

1.2. Harmonisation Directive

1.2.1. From Negative Integration to the Audiovisual Directive

It is certainly true that European audiovisual markets have been steadily developing over the whole of the later part of the 20th Century. The focus of that evolution lies in the 1980s which show the technological revolution of the broadcasting field. At the same time, the notable segmentation of Europe's audiovisual markets along national borders or, linguistic areas at most, was reflected in its increasingly growing deficit in audiovisual trade. In

other words, while the entirety of Europe was consuming more and more audiovisual content, that programming came primarily from the outside world, predominantly America. Although MS were producing some content, that content was not being exported. Not only did little of it reach global markets, trade in audiovisual content was limited even between the MS.

It became evident that **a common/single broadcasting market would not be created unless the EU took pro-active steps to facilitate it**. Europe's audiovisual field thus became the object of positive integration because:

- negative integration did not achieve adequate results in terms of market integration: national application of the free movement rules combined with 'sporadic' interventions by the ECJ, did not manage to eliminate market segmentation characterising the European audiovisual sphere
- television became the most popular source of information and entertainment in Europe making it essential to support its further development as well as to supervise its future evolution in order to ensure that economic growth does not endanger social values

To facilitate effective market integration in the European audiovisual field, pro-active intervention on the EU level was needed in accordance with the subsidiarity principle. The resulting Council Directive 89/552/EEC of 03/10/89 on the coordination of certain provisions laid down by law, regulation or administrative action in MS concerning the pursuit of TV broadcasting activities, generally known as the **Television without Frontiers Directive** (TWFD) was an explicit example of the use of legal instruments of EU intervention in the audiovisual sector.

The TWFD **harmonised** what the EU believed to be **'the necessary minimum'** to guarantee the freedom of cross-border television broadcasting. It did not affect the responsibility of the individual MS and their authorities with regard to the organization (including the systems of licensing, administrative authorization, or taxation), financing, and the content of television programmes. By applying a minimalistic approach to harmonisation, the independence of cultural development and the preservation of cultural diversity remained unaffected. The scope of the harmonisation provided by the TWFD was limited first and foremost by the fact that the TWFD was **applicable to cross-border television broadcasting only** – television services which were intended for national distribution only were not subject to harmonisation. Moreover, only a limited number of issues relevant to the audiovisual field were actually harmonised by the TWFD. The Directive contained:

- general provisions (including definitions) and jurisdictional rules
- promotion of the production and distribution of European programmes

- TV-advertising, teleshopping and sponsoring
- protection of minors and the right to reply

The TWFD is not only one of the best known EU Directives to date, it can also be considered to be one of the most successful in achieving its goals – the facilitation of a common market in television broadcasting in Europe.

The TWFD has been subject to **major amendments in 1997** on the basis of Directive 97/36/EC of the Parliament and Council of 30/06/97. The amendment provided much needed clarifications **with respect to jurisdictional issues** and expanded the scope of the original harmonisation. **New provisions** were added to the TWFD **on events of major importance to society**.

The second amendment of the TWFD came into force **on the 19/12/09** on the basis of Directive 2007/65/EC of the European Parliament and of the Council issued on 11/12/2007. First of all, **the name** of the TWFD **was changed to the Audiovisual Media Services Directive** (AVMSD). In other words, the original harmonisation Directive was not repealed but merely re-named and modernised – the AVMSD is thus the newer version of the TWFD rather than its replacement. The key purpose of the recent change was to provide more legal and economic certainty for new media market players in light of the digital revolution that took place in the last decade. The amendments were also meant to stimulate competition within the EAS, to increase consumer choice while protecting the EU's rich cultural diversity and to accelerate its overall growth. The new act was meant to prepare the EAS for forthcoming global challenges.

The consolidated version of the AVMSD contains:

- Preamble (points 1–105) which gives essential insights into the policy considerations underlying the AVMSD
- Chapter 1: Definitions (Article 1)
- Chapter 2: General provisions (Articles 2–4) including detailed conflict resolution and jurisdictional rules
- Chapter 3: Provisions applicable to all AMSs covered by the AVMSD (Articles 5–11) including rules on the protection of human dignity,

minors, the environment, prevention of the dissemination of hatred and discrimination
- Chapter 4: Provisions applicable only to on-demand AMSs (Articles 12–13)
- Chapter 5: Provisions concerning exclusive rights and short news reporting in TV broadcasting (Articles 14–15) including the so-called "lists of sporting events of major importance to societies"
- Chapter 6: Promotion of distribution and production of TV programmes (Articles 16–18) – the so-called European works media quotas
- Chapter 7: Television advertising and teleshopping (Articles 19–26)
- Chapter 8: Protection of minors in TV broadcasting (Article 27)
- Chapter 9: Right of reply in TV broadcasting (Article 28)
- Chapter 10: Contact Committee (Article 29)
- Chapter 11: Cooperation between national regulatory bodies (Article 30)
- Chapter 12: Final provisions (Articles 31–36)

The TWFD has been effectively replaced by the AVMSD but while it modernised its original provisions in order to respond to technological convergence, it has **preserved its core principles merely adapting them** to the new audiovisual environment & **adding only few new elements** (eg rules on product placement).

The ultimate goal of the TWFD can be described as the creation of a common/single market in TV-broadcasting. Its direct aim was to enable free movement of TV-broadcasts by preventing MS from restricting diffusion of cross-border television and by harmonizing national rules concerning the provision of TV services. Once these objectives were mostly achieved, the amended Directive now extends its reach to all audiovisual media services, rather than to cross-border TV-broadcasts only. It was designed explicitly to provide much needed legal certainty to the new media and to increase flexibility in media financing. The Directive was always meant to preserve cultural diversity, protect minors & consumers, safeguard the plurality of media, and combat discrimination and hatred.

1.2.2. Harmonisation of Audiovisual Media Services

The harmonisation provisions contained in the TWFD were subject to a two-fold limitation: the act related to 'TV broadcasts' only, and solely in their cross-border capacity. Both of these limitations have now been lifted seeing as the progressing digital revolution, and especially the associated popularisation of on-demand services, has notably blurred both national and technological boundaries in media related services. It must be stressed therefore that **the AVMSD is applicable to audiovisual media services that can be received directly or indirectly in one or more MS.** This very general rule is somewhat restricted by the consideration that reception needs to be possible with standard consumer equipment (to be defined by competent national authorities). As a result, **AMSs intended exclusively for non-EU countries** which cannot be received in the EU with standard consumer equipment **are not subject to harmonisation by way of the AVMSD.**

Article 2(6) AVMSD
This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.

Preamble 54 AVMSD
Member States are free to take whatever measures they deem appropriate with regard to audiovisual media services which come from third countries and which do not satisfy the conditions laid down in Article 2, provided they comply with Union law and the international obligations of the Union.

It is essential to stress that the AVMSD applies to: mass-media services such as TV or an on-demand content service as well as audiovisual commercial communications exemplified best by TV advertising or sponsoring.

An **AUDIOVISUAL MEDIA SERVICE is**:
- **a SERVICE** (not a product or content)
- **provided by a MEDIA SERVICE PROVIDER (MSP)**
- **in the form of a LINEAR programme** with a programme schedule **or** an **ON-DEMAND** service

- **under** the **EDITORIAL RESPONSIBILITY of a MSP**
  - a person – natural (individual) or legal (company)
  - holding editorial responsibility (effective control over the selection and organisation of programmes) for the choice of the audiovisual content of the service
  - also holding the power to determine the way in which that audiovisual content is organised
- providing **programmes for the general public**
- whereby the term 'audiovisual' should be understood as **moving images with or without sound** *(Preamble 23 AVMSD)*

Editorial responsibility equals the power to decide on the content/outline of the AMSs – it does not necessarily imply that a MSP is liable under national law for the content or the services provided.

While the Directive covers both broadcast as well as on-demand AMSs, they are treated as two distinct categories whereby it is the 'power over the service' which is decisive in this context. A **BROADCAST** equals a linear service provided **for simultaneous viewing** of programmes by many users **on the basis of a schedule.** By contrast, **users decide what to watch as well as when to watch it with respect to ON-DEMAND SERVICES.** As a result, the degree of control exercised by viewers over the content of the acquired service is thus essential. On-demand services are thus subject to much lighter EU intervention because users have greater control over the offer and thus can take more responsibility for what they ultimately acquire. The tailor-made character of on-demand services is also relevant here since it limits the potential impact of the non-linear offer on society as a whole.

In practice, the Directive covers:

- converged technologies, platforms and services eg traditional TV, internet TV, IPTV (digital TV delivered by an internet network), web TV, TV on mobile phones and other mobile devices
- expanded fixed broadband, digital TV and 3G networks
- new delivery services: Video On Demand, peer-to-peer exchanges of audiovisual content
- a blend of traditional and on demand services

- new advertising methods: search-related ads on the internet or SMS advertisements on mobile phones

Thus the AVMSD does not cover:

- **non-economic activities** such as non-commercial blogs
- any form of **private correspondence**
- traditional **radio**
- **platforms for the exchange of user generated content** such as YouTube unless there is editorial control

Audiovisual commercial communications are without a doubt the most heavily harmonised category of AMSs subject to the Directive. The **new definition of audiovisual commercial communications** contained in the AVMSD **is very broad** in order to ensure that all their types are caught by the EU harmonisation and, as a result, covered by the same common set of rules irrespective of their mode of delivery. Nevertheless, the level of protection given to minors with respect to TV advertising, a specific type of audiovisual commercial communications, is far higher than with respect to any of their other categories. Accordingly, audiovisual commercial communications consist of:

- images with or without sound
- designed to promote
- in return for payment or similar (also for self-promotional purposes)

1.2.3. Country of Origin Jurisdiction

Keeping in mind that EU Directives are addressed to MS rather than to individuals or companies and that they require MS to achieve a given goal without prescribing the means of doing so, each MS is obliged to transpose them into its own legal system by a certain date. As a result, **the EAS is subject to 27 national legal regimes of the EU MS rather than to the AVMSD itself.** The Directive can be relied upon as a source of legally binding EU rules only in the vertical relationship between a MS that failed to implement or follow the provisions of the Directive and an individual/company that suffered from that failure.

Leaving aside the matter of failed implementations, deciding whose legal rules are applicable to a particular entity (its market practices) is an essential prerequisite of acting in the EAS. For this very reason, the Directive contains specific jurisdictional rules which are meant to clarify what the division of competences is between its MS. The Directive continues to follow the **COUTRY OF ORIGIN PRINCIPLE** according to which a MSP is subject to the rules applicable in its own country only. From the point of view of

the business world, this rule means that **a MSP is only subject to one legal system** – it must act according to the rules **of the country of its establishment** rather than the law of the 'receiving' country. This is a key realisation for those that wish to develop cross-border services in particular. From the point of view of a MS, the country of origin principle translates into its obligation to ensure that all services covered by the Directive transmitted by MSPs under its jurisdiction comply with the laws of that EU country (those legal rules applicable to AMSs intended for the public in that MS). *(Article 2(1) AVMSD)* Incidentally, as with most of its other provisions, the essence of the jurisdictional rules contained in the Directive remains unchanged. What has changed is the scope of its application – the TWFD originally only covered TV broadcasts but the AVMSD applies to all AMSs.

Preamble 40 AVMSD
Articles 49 to 55 of the [TFEU] lay down the fundamental right to freedom of establishment. Therefore, [MSP] should in general be free to choose the [MS] in which they establish themselves. The Court of Justice has also emphasised that 'the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established' Case C-56/96 *VT4 Ltd* v *Vlaamse Gemeenschap* [1997] ECR I-3143, paragraph 22.

Companies benefit greatly from the fact that the AVMSD contains specific jurisdictional rules helping them in realising whose legal regime they must submit to. A Media Service Provider is deemed to be **under the jurisdiction of a MS if it has its head office** in that MS and the **editorial decisions** about its relevant audiovisual offer are taken in that country. If it has its head office in one MS but the relevant editorial decisions are taken in another, its place of establishment will be associated with the country where a significant part of its **workforce** is involved in the pursuit of its audiovisual activity. The Directive provides also that with respect to satellite broadcasting, a MSP is considered to be under the jurisdiction of a given country if it uses a satellite up-link located in that country or alternatively, if it uses the satellite capacity associated with that MS. *(Article 2(2))*

On 10 September 1996, the ECJ has delivered two important judgments concerning free movement of TV-broadcasts in the EU after the adoption of the TWFD. In both cases, one concerning cable TV the other concerning satellite broadcasting, the ECJ confirmed that it is the explicit aim of the TWFD to ensure that EU broadcasters are to comply with a single national legal regime only (an essential prerequisite for the creation of an internal market). It is for that very purpose that the Directive provides its own

detailed jurisdictional criteria. The use of other jurisdictional criteria, the attempt to enforce national laws to a broadcaster under the jurisdiction of another MS and discrimination between broadcasters of different origin was therefore explicitly condemned as a breach of EU provisions by the 'infringing' MS.

In *Commission vs. Belgium* **(Case C-11/95)**, an action was brought against this MS for failing to properly transpose the TWFD into its legal system. Belgium was said to have **infringed** its obligations **because it maintained**, in some of its geographic regions**, a system of prior authorization for the cable retransmission** of TV-broadcasts from other MS. Belgian legislation required also prior authorization, subject to certain conditions, for the cable retransmission of TV-broadcasts from other MS containing adverts or teleshopping especially intended for viewers in those regions and in the bilingual Brussels. Both requirements were in breach of the TWFD which established that broadcasters were to comply with the laws of its MS of origin only. The ECJ stressed in this case that:

- it is solely for the originating MS to monitor the application by TV-broadcasts of its laws and to ensure compliance with the TWFD
- the receiving MS is not authorized to exercise its own control
- Belgium's authorization systems was therefore in breach of its obligations under TWFD

In *Commission vs. UK* **(Case C-222/94)**, an action was brought against the UK for its failure to comply with the provisions of the TWFD. The UK used the criteria of its own Broadcasting Act 1990 to determine jurisdiction of satellite TV-broadcasts rather than follow those specified in the Directive. By doing so, the UK applied to non-domestic satellite services a different legal regime from that applicable to domestic satellite services. The judgment delivered by the ECJ clarified that:

- jurisdiction for satellite broadcasting is decided by criteria stated in the TWFD: the place of establishment
- **the UK was in breach of the TWFD by using other jurisdictional criteria** than the place of establishment irrespective of the fact what criteria were used
- the TWFD prohibits MS from exercising control over broadcasts falling under the jurisdiction of another MS
- the UK was in breach of the TWFD not only because it exercised control over foreign broadcasters but also because it applied to them a differentiated licensing system (less stringent rules for foreign services)

1.2.4. Limits on Free Movement

The AVMSD continues to impose specific obligations on MS with respect to the creation of a single/internal market. These provisions are a reflection of the free movement of services principle and must be seen as such. In this light, **MS must ensure freedom of reception** of services originating elsewhere in the EU – they are prohibited from restricting the (re)transmission on their territory of AMSs originating in another MS for reasons which fall within the fields coordinated by the harmonisation Directive.

As a result, MS are **permitted to restrict the free movement of AMSs for reasons other than those covered by the Directive**. Editorial matters and technical considerations are good examples of permissible restriction causes available to MS despite EU harmonisation. **In particular**, MS are allowed to restrict TV broadcast of **unsuitable content** provided they follow the procedures specified in the AVMSD (cooperation, circumvention). Similarly, they can take certain steps to restrict the retransmission of unsuitable on-demand AMSs for instance, if it contains neo-Nazi propaganda or if it endangers public health. *(Article 3 AVMSD)*

Moreover, given how few issues the Directive at all covers and the minimum level of harmonisation it provides, **MS are free to legislate on the issues covered by the Directive in a stricter or more detailed manner than the EU**. For example, while the AVMSD sets out that advertising cannot take up more than 12 minutes out of each broadcasting hour, a given MS can legislate that broadcasters under its jurisdiction cannot include more than 10 minutes of adverts per hour (stricter rules) or even entirely forbid advertising during pre-school children programmes. *(Article 4 AVMSD)*

The ECJ considered both the admissibility of retransmission restrictions as well as stricter national rules. A particularly important preliminary ruling was delivered on 25/07/91 with respect to the relationship between free movement of TV-broadcasts and national cultural policy considerations. The ECJ confirmed here that media plurality (connected to the freedom of expression), can constitute an overriding general interest requirement which justifies a restriction on the freedom to provide services. Similarly, restrictions on the broadcasting of TV adverts may be justified by general interest reasons relating to consumer protection.

In *Mediawet I* (Case C-288/89), the ECJ was asked to consider a reference for a preliminary ruling concerning the compatibility of national conditions for the cable transmission of radio and TV programmes broadcast from other MS which contain advertising specifically intended for the Dutch public. The preliminary questions concerned a national case between the

Dutch media authority and a number of cable operators. The latter claimed that Dutch Media Law (the Mediawet) was contrary to EU rules on the free movement of services.

Mediawet imposed on foreign broadcasters a number of conditions concerning their advertising activities, the use of their advertising revenue and profits. The Dutch government maintained that these conditions were justified by social and cultural policy reasons such as guaranteeing the non-commercial nature of broadcasting and their financial backing. Foreign broadcasters were also subject to a prohibition of Sunday advertising, limits on their duration and strict identification rules. However, the aforementioned requirements related only to the market in advertising intended specifically for the Dutch public and for that reason, they had a protectionist character. In its analysis, the ECJ accepted that media plurality, programme quality and consumer interests are all valid social considerations that might justify a restriction on the freedom to provide broadcasting services or the imposition of stricter national rules that those specified in the Directive (no TV adverts on Sundays). In this case however, the ECJ ruled that the special conditions imposed by Mediawet on foreign broadcasters were not objectively justified by overriding general interest considerations.

REVISION QUESTIONS

1. Why is the difference between primary and secondary EU law important?
2. How relevant to the EAS are the different characteristics of EU law in practice?
3. What are the most important primary EU rules affecting the internal market?
4. What does it mean that all EU Directives must be transposed and what direct consequences does this fact have for those acting in the EAS?
5. What would be a good example of the relationship between EU law and the jurisprudence of European Courts in the EAS?
6. How does the term ‘positive integration’ relate to the general principle of free movement of audiovisual services?
7. What is the relationship between the TFWD and the AVMSD?

8. In light of the AVMSD, how do you classify: TV advertising, on-demand movies, newspapers, music CDs, audiovisual content streaming services, sponsoring, YouTube, product placement, e-mail and pay-TV?
9. Why is the country of origin principle so important in the EAS?
10. What issues are relevant when trying to decide on jurisdiction?
11. Can national legislation be different to the provisions of the AVMSD and if so, when and how?
12. Can free movement of audiovisual services be restricted?

CHAPTER 2

SOCIAL OBJECTIVES

The social issues considered in the Mediawet I case and their relationship with the freedom to provide broadcasting services in Europe provide a good introduction to the following discussion. Chapter 2 will be devoted to EU initiatives taken in the European Audiovisual Sector (EAS) in order to ensure that essential social values continue to enjoy a minimal common level of protection in light of growing market integration. This Chapter will focus on the AVMSD, the EU's most important legal instrument formulated specifically to shape its audiovisual field. Other acts will also be noted including the Charter of Fundamental Rights of the European Union (hereafter: Charter) as well as some important soft laws that either precede or complement binding EU legislation. The latter includes most importantly the *Communication from the Commission on the protection of consumers, in particular minors* (hereafter: *Video Games Communication*).

Communication from the Commission on the future of European regulatory audiovisual policy states that aside from its primary economic goals, the **EU** also **safeguards** certain public interests that are of particular relevance to the EAS. The list of social values protected within the framework of the European Audiovisual Policy (EAP) includes:

- **Europe's cultural diversity**
- **right to information & media pluralism**
- **protection of minors**
- **consumer protection** in their capacity as viewers
- creation of an **'informed' digital society**
- **media literacy**

Some of these social objectives, such as media literacy for instance, are pursued mostly by way of non-binding instruments of EU intervention. Others, most of all the protection of minors and consumers in their capacity as viewers, are pursued with the help of the legally binding Audiovisual Media Services Directive (AVMSD). Indeed, the Directive explicitly states

that its objective is to create an area without internal frontiers for audiovisual media services (AMSs) ensuring simultaneously a high level of protection of general interest objectives. The latter include the protection of minors and human dignity and the facilitation of the rights of disabled viewers/ users. *(Preamble 12AVMSD)*

There is no doubt that **PATERNALISM,** in other words **actions** taken by public authorities, national or international, **intended to keep individuals from harm even against their wishes** (eg the prohibition of the sale of alcohol to minors or the obligation to wear seatbelts), is a necessity of modern life. Many of the goods (eg cigarettes or diet products) and services (eg tattoos or violent video games) readily available both in retail shops and on-line can seriously harm the health & safely as well as the social wellbeing of their users. It is not surprising therefore that the EU has taken extensive steps intended to ensure a certain level of 'social responsibility' of all AMSs available in Europe. These measures are meant to protect non-commercial interests of EU citizens such as their dignity, safety or access to key information. These actions are complemented by initiatives intended to protect its citizens in their capacity as viewers – where their 'consumer interests' might be endangered by the interests of those providing audiovisual commercial communications. In this context, **the Directive aims to**

- **ensure that all AMSs are 'socially responsible'**
- **minors are not endangered**
- **consumer interests are not excessively restricted in relation to audiovisual commercial communications**
- **access to important content is not unduly precluded**

The consolidated version of the text of the Directive issued in January 2010 divides its provisions primarily according to the types of services it covers. Aside from its general provisions, it contains rules concerning all AMSs (with a special division for audiovisual commercial communications), provisions applicable to on-demand services only, rules on sponsoring and product placement and finally, provisions concerning the TV environment. The arguable advantage of such categorisation (making it easy to identify which rules apply to which types of services) is largely lost however because the rules of the Directive had to be transposed into national legislation. A classification following the specific goals to be achieved by the AVMSD could have proven easier to follow for individuals at least (private or commercial).

Chapter 2 will follow a 'goal oriented' categorisation in order to clearly identify the effects which the AVMSD is meant to achieve. Focusing on the key objectives of EU legislation not only reflects the fundamental characteristics

of EU Directives (prescribe the goals but not the means to achieve them); it also makes it easier to put national experiences into an European perspective. Accordingly, the following discussion will cover: social responsibility requirements (human dignity, inclusiveness, hatred, environmental protection and editorial responsibility); the protection of minors; consumer interests (sponsoring, product placement and TV advertising); content of major importance to society and; cultural diversity (media quotas for the production & distribution of European and independent European works).

The individual goals pursued by the AVMSD are the same for all types of Audiovisual Media Services (eg protecting minors) **what varies is the strength of EU intervention in relation to the different categories of services covered** – in general, the more control end-users have over the shape of the AMS they are exposed to, the lesser the degree of EU intervention.

2.1. General Social Responsibility Requirements

Alongside all its efforts meant to facilitate market integration, the EU is taking extensive actions to ensure that key social values are not endangered by the growth and evolution of European audiovisual markets. First of all, **the EU takes actions** to protect the 'social sphere' of its citizens by **ensuring that all AMSs in Europe are 'socially responsible'**

- **in relation to their portrayal of humans** (human dignity, the disabled) **and human relationships** (no discrimination or incentivising hatred) even providing for the possibility of those negatively affected by broadcast AMSs to intervene (right of reply in television broadcasting)**.**
- **by refraining from persuading their users to endanger themselves and others** (general health & safety considerations such as banning cigarette advertising as well as especially stringent rules on the protection of minors) **as well as the environment;**
- **through the facilitation of a certain level of integrity of AMSs** primarily by ensuring clarity as to who is responsible for its content (sponsors/ advertisers cannot affect the programme for which the media service provider is responsible)

2.1.1. Basic Social Values

Preventing any form of incitement to hatred lies among the key social objective pursued by the EU in the audiovisual field. For this reason, no AMS can contain any form of incitement to hatred on the basis of race, gender, religion or nationality. In this respect, the Directive places an obligation on all MS to ensure by whatever means they believe to be appropriate for their own country that all AMSs providers under their jurisdiction do not provide audiovisual services that contain such incitement. *(Article 6)*

The EU is also firmly focused on **facilitating an 'inclusive' EAS** which is **accessible to all its citizens including those with disabilities.** MS are thus requested, but in this case not obliged, to encourage their MSPs to gradually enable access to viewers with a visual or hearing disability for instance by providing subtitling or audio description of their programmes. *(Article 7)* An excellent example of a practical application of this non-binding EU rule is the British Broadcasting Corporation's (BBC) children channel CBeebies which not only provides sign language for many of its programmes but also contains both disabled presenters as well as participants.

The EU also aims to **shield viewers/users from the potentially negative influence of audiovisual commercial communications.** MS are thus obliged to ensure that all MSPs under their jurisdiction do not include or promote discrimination (based on gender, race, nationality, religion, age, disability or sexual orientation) in their audiovisual commercial communications. Additionally, they are not allowed to encourage actions which can endanger health & safety or behaviour greatly endangering the environment. Considering their well-publicised and yet greatly ignored negative impact on human health, the AVMSD specifically states that cigarettes/other tobacco products can never be the subject of any form of audiovisual commercial communications in Europe. A similar prohibition concerns medical products and treatments which are not generally available (available on prescription only in the MS within whose jurisdiction the service provider falls). In this case, EU intervention is meant to protect the interests of a particularly vulnerable part of its society – patients and their families. *(Article 9.1.c.ii-iv & Article 9.1.d & Article 9.1.f.)*

The **protection of the 'social sphere' belonging to EU consumers** lies at the heart of EU rules on accountability of MSPs and the integrity of their services. Their accountability is considered a necessary requirement for the protection of the social rights of consumers acting in their capacity as the viewers/users. To achieve that, users should be able to identify who

(which provider) is responsible for the AMS they use and be able to contact such entity. In order to do so, MS are obliged to ensure access to all the necessary data is easily, directly and permanently available to users/viewers. *(Article 5)* Furthermore, MSPs must remain responsible for their own services even when a third party (eg an advertiser) is directly involved in their creation. EU rules on sponsoring and product placement thus aim **to ensure the 'integrity' of mass-media services.** According to the Directive, neither sponsors nor companies using product placement can have the power to affect the content and, in the case of TV-broadcasting, also the schedule of the primary programme. Thus MS must ensure that sponsors & companies using product placement do not have the power to affect the content of services which remains the responsibility of the MSP. *(Article 10–11).*

Interestingly, the Directive also contains a very specific rule obliging MS to ensure that their MSP respect contractual distribution windows for cinematographic works (movies). Movies are generally distributed according to specific exploitation windows. In order to protect box office intake, which constitutes by far the most important source of revenue for movie rights holders, cinema distribution precedes all other forms of exploitation. If the cinema distribution window (usually the first 3 months after its release) was 'infringed', in other words, if a film still shown in movie theatres was made available via an AMS, box office intakes would suffer greatly. This rule is considered necessary to **protect** the effectiveness of copyright protection which is considered to be a pre-requisite of **creativity** in audiovisual productions which in turn benefits viewers both socially and economically through greater choice. *(Article 8)*

Movies are released according to specific exploitation windows: cinema release → rental & sales of physical copies → premium pay TV → VOD → pay TV → free TV. The duration of each of these windows varies in the region of about 12 weeks each. A violation of a given 'window' significantly lowers the 'value' of the respective exploitation right.

2.1.2. Fundamental Rights

Article 1 of the Charter of Fundamental Rights of the European Union
Human dignity is inviolable. It must be respected and protected

There can be no doubt about the fact that human dignity constitutes one of the most important social values of the EU. Its special relationship to Europe's audiovisual field was considered in detail by the non-binding Recommendation of the European Parliament and Council of 20/12/06 on the protection of minors and human dignity and on the right of reply. It was not until the Lisbon Treaty however, that the **inviolability of HUMAN DIGNITY** contained in the *Charter of Fundamental Rights of the European Union* has gained the status of a primary legal rule of the EU without the need for it to be transposed into national legislation of its MS. This fact is of great relevance to the EAS because unlike the AVMSD (which is applicable to AMSs only), the Charter must be respected by all entities engaging in any type of activity in the entire EU. As a result, **all service providers** (not only MSPs as defined in the AVMSD) **are obliged by EU law to respect human dignity** and **no service can contain material that would violate human dignity.**

Aside from human dignity, the Charter also protects many other fundamental social rights and freedoms of EU citizens. Article 11, 16, 17 of the Chapter concerns **the FREEDOM of EXPRESSION** and information, **the freedom to CONDUCT BUSIENSS** and **the RIGHT TO PROPERTY,** intellectual property in particular. While human dignity clearly is a key social right of EU citizens, so is the freedom of speech. The AVMSD stresses in point 60 of its Preamble that **measures taken to protect human dignity (and minors) 'should be carefully balanced with the fundamental right to freedom of expression** ... The aim of those measures ... should thus be to ensure an adequate level of protection of ... minors and human dignity' without unduly restricting the freedom of expression. The Directive acknowledges the importance of human dignity for the audiovisual field by listing it among the reasons that might justify a restriction on the provision of on-demand AMSs. *(Article 3(4(a(i)))* Its inviolability is also directly emphasised in relation to audiovisual commercial communications in particular where the Directive explicitly obliges MS to ensure that no audiovisual commercial communications provided by an MSP under their jurisdiction violates human dignity (Article 9(1(c(i))).

Censorship, in other prior verification of the substance of AMSs by public bodies, is **not required by the AVMSD** in order to protect human dignity or minors. *(AVMSD Preamble 62)*

Closely connected to the notion of human dignity is the right of reply. The AVMSD states that 'anyone (natural or legal person) regardless of his/her nationality, whose legitimate interests (eg reputation) have been damaged by an assertion of incorrect facts on TV, must have **a right of reply or equivalent remedies**.' An application to exercise this right can be refused only if it is not justified, would involve a punishable act, would render the broadcaster liable to civil-law proceedings or would transgress standards of public decency. The AVMSD obliges MS to provide a judicial review system to solve disputes as to the exercise of the right of reply. MS must also ensure that the exercise of the right is not hindered by the imposition of unreasonable terms or conditions:

- the reply shall be transmitted within a reasonable time subsequent to the request being substantiated and
- at a time and in a manner appropriate to the broadcast to which the request refers
- a right of reply shall exist in relation to all broadcasters under the jurisdiction of a MS
- MS must ensure that a sufficient time span is allowed
- MS must ensure that the procedures are such that the right can be exercised appropriately by natural or legal persons resident or established in other MS. *(Article 28)*

2.2. Protection of Minors

2.2.1. Minors & Audiovisual Media Services

Minors are generally considered to be the most vulnerable part of any society. It is not surprising therefore that a variety of aspects of their daily life enjoys special protection such as strict safety standards for toys or baby food. The audiovisual field is no exception – indeed, TV in particular has proven to exercise a huge impact on the development of children as an opinion and trend

setting forum. Unlike adults however, children cannot 'filter' for themselves the 'bad' from the 'good' content. This threat is growing alongside the evolution of new AMSs which increases the availability of harmful content making it a concern for parents, national regulators, and the EU overall.

The EU has taken extensive steps to provide at least a minimum level of protection of minors first in cross-border TV (TWFD) and now in all AMSs (AVMSD). Indeed, alongside the protection granted to human dignity, health & safety and the unconditional ban on incentivising hatred or discrimination, the AVMSD follows in the footsteps of the TWFD in its attempt to specifically **protect the physical, mental, and moral development of minors.** The Directive associates the danger to minors mostly with pornography and gratuitous violence but also recognises other harmful content such as the recent attempts to limit advertising of unhealthy foods. *(AVMSD Preamble 61)*

The Directive obliges MS to**:**

- **prohibit any audiovisual commercial communications for alcohol specifically directed at minors** and in fact, to encourage anyone to their excessive consumption *(Article 9.1.e.)*
- **prohibit TV advertising & teleshopping** (as the most influential type of audiovisual commercial communications) **for alcohol aimed specifically at minors** or showing alcohol consumption by minors *(Article 22.a.)*
- **prohibit audiovisual commercial communications that can cause physical or moral detriment to minors** for instance by directly exhorting them to get certain goods or services by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons *(Article 9.1.g.)*
- **prohibit all audiovisual commercial communications from unreasonably showing minors in dangerous situations** as that might encourage them to commit dangerous acts *(Article 9.1.g.)*

Advertising 'unhealthy' food and drinks in children's programmes is seen now as a growing threat for the well-being of children. Thus, the AVMSD states that MS and the Commission shall encourage MSP to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended. Importantly however, unlike most of its other rules, the provisions of the AVMSD in this respect are not binding – MS are thus expected to work towards this goal rather than achieve it. *(Article 9.2.)*

The AVMSD contains separate and **far more detailed provisions concerning the protection of minors in TV broadcasting** which remains the most popular form of AMSs. MS are obliged in this context to ensure that MSPs under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors and in particular, pornographic content and programmes that involve gratuitous violence. This ban extends to other programmes which might endanger the development of minors unless minors in the area of transmission will not normally hear or see them due to its time slot (appropriate selection of the time of the broadcast) or other safety measures such as subscription. If potentially dangerous programmes are broadcast in an un-encoded manner, then MS must ensure that viewers are well informed about this fact either through a sound warning preceding the programme or by the presence of a visual symbol throughout its duration. *(Article 27)*

The AVMSD extends the protection previously given to the development of minors in relation to cross-border TV broadcasts only to all types of AMSs. **On-demand AMSs are thus also prohibited from impairing the development of minors.** The AVMSD states that MS must take appropriate measures to ensure that on-demand AMSs provided by MSP under their jurisdiction (which might seriously impair the physical, mental or moral development of minors) are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services. *(Article 12)* Special access codes or age verification systems used for on-demand services containing 18+ rated programmes can be seen as one of the possible means of ensuring the application of that rule.

The aforementioned provisions of the AVMSD should be viewed in conjunction with a major consultation and 'awareness building' initiative conducted by the EU within the framework of its Safer Internet Programme for 2009–2013, a continuation of the Safer Internet Plus Programme for 2005–2008. The initiative aims to promote a safer use of the Internet and new online technologies, particularly for children, as well as to combat illegal and unwanted content presented to end-users. The protection of minors in the EAS is also served by the *Recommendation of the European Parliament and Council of 20/12/06 on the protection of minors and human dignity and on the right of reply which*, while not legally binding, **recognises the importance of safety measures such as**:

- **access to up-to-date information**
- **filtering systems**
- **appropriate labeling**

2.2.2. Minors & Video Games

There is no longer any doubt that **video games are one of the favourite leisure activities for EU citizens** of different ages and backgrounds. The introduction of the Nintendo Wii and Nintendo DS consoles has been particularly influential because they reinvented the image of video games as a key avenue for cross-generation audiovisual entertainment in Europe. Their cross-country impact is also growing thanks to technologies such as Xbox live and other gaming networks (which allow people across the globe to connect to each other and play multiplayer games in real time). Their growing popularity has nevertheless once again put a question mark on what the limits of the freedom of expression of both game creators (what they choose to create) and gamers (what they choose to play) should be.

Bans on video games or equivalent measures are rare. 'Carmageddon' was banned in the UK as early as 1997, all copies of 'Manhunt' were confiscated in July 2004 in Germany which also banned 'Dead Rising' in 2007. The most widespread ban in the EU related to 'Manhunt 2' in 2007.

Video games have long since been **recognised as dangerous to minors.** Although a degree of apprehension remains, adults have grown to embrace them to a much greater extent than in the past because they have not only learned to use them for their own entertainment but also because video games are now increasingly played by entire families. Differentiated access is however necessary to inform buyers about their content and to stop minors acquiring unsuitable games. Nevertheless, the **proven positive impact of video games** should not be overlooked**,** such as improving memory & fine motor skills and indeed, bridging the generation gap. While control over age appropriate games is thus necessary, outright discouragement of minors playing them is certainly not.

The impact of video games on minors has not escaped the attention of the EU. The European Council has issued in this context a *Resolution of 01/03/2002 on the protection of consumers, in particular young people,*

*through the labelling of certain video games and computer games according to age group***.** This important act of EU soft law was followed by an extensive questionnaire sent to MS concerning issues such as: age rating and content rating systems; sale of video games in retail shops; bans; on-line games; and, most importantly, their opinion about a cross-platform, pan-European rating system (PEGI).

PEGI (Pan European Game Information) was developed by the Interactive Software Federation of Europe with the support of the EU. Over 15,000 games were rated by PEGI up until 2010 in 5 age categories. The vast majority of games gain the 3 & 7 certificates, 18+ video games are a clear minority.

The EU supported the creation of a pan-European rating systems for video games to replace existing national schemes. A common scheme would not only help protect minors which could source their games from other EU MS with potentially lesser rules, but also contribute to market integration. The responses originally received from the questionnaire showed the support of the majority of MS. Some, including Poland were sceptical about its introduction. Germany, well known for its strict minor protection rules, considered its own system satisfactory. PEGI was officially adopted in 2003 and is now used in about 30 countries. The **PEGI** labels that can be found on most video games in the EU provide buyers with an age-appropriate rating of 3, 7, 12, 16, 18 as well as more detailed warnings concerning the content of the game such as violence, bad language or sex. The gaming industry has suffered in the past from its bad reputation concerning its bad influence on minors. PEGI Online was launched in 2007 co-funded by the EU's Safer Internet Programme.

More recently, the Commission issued the *Communication on the protection of consumers, in particular minors, in respect of the use of video games.* The act shows that about half of EU MS consider the current measures to be effective. Among the objectives of the *Video Games Communication* is the development of effective methods of information exchange and a classification system not just for PEGI but for PEGI On-line in particular.

EU efforts meant to protect minors go hand in hand with the impact of the EU Council Framework Decision 2004/68/JHA of 22/12/2003 on combating the sexual exploitation of children and child pornography, all MSP which fall under the jurisdiction of any of the EU MS must be prohibited from the dissemination of child pornography.

2.3. Consumer Interests

The aforementioned measures are mostly concerned with social (non-commercial) interests of EU citizens such as their dignity, safety of their children, or ability to protect their reputation. However, the **EU recognises** also **the commercial role played by individuals in their capacity as final consumers of audiovisual media services**. Unlike the professional side of the EAS, represented by content or service producers as well as advertisers, consumers suffer from an information deficit. They might experience difficulties in acting on their preferences or even in recognising whether they are viewing 'editorial' content or a hidden form of advertising. Moreover, when it comes to linear services which remain the most popular AMSs, consumers lack control over their make-up and scheduling. As a result**,** the EU has taken proactive legislative steps in the AVMSD to ensure that viewers/users are not misled as to the nature of AMSs, that they remain well informed about the content and source of the AMSs and that their viewing/use is not unduly affected (interrupted) by audiovisual commercial communications..

Nonetheless, **consumer protection remains generally within the national competence of MS.** The fact that the EU decided to take actions on the supranational level is based on the belief that growing integration of audiovisual markets makes it necessary to ensure a certain minimal common level of consumer protection in relation to the ever growing availability of AMSs. The EU is especially aware of the impact of TV on the democratic and social needs of EU consumers, even with the growing popularity of new audiovisual services, television is set to continue to be the main source of information and entertainment in the EU. The EU is thus concerned with the potentially very significant detrimental effects of growth in TV

(unlike on-demand services which are characterised by a far greater level of user control over exactly 'what' and 'when' service is being accessed).

2.3.1. Sponsoring & Product Placement

Sponsorship and product placement are an alternative to advertising and thus represent two specific forms of audiovisual commercial communications covered by Articles 10 & 11 of the AVMSD respectively. Their economic rationale is clear – they provide those who wish to attract consumers with a new form of exposure. They are also a great source of funding for media service providers. Sponsorship and product placement are also indirectly beneficial to consumers on the assumption that the more funds are available to MSPs the better their offer. Sponsorship and product placement are however a somewhat indirect/covert form of business promotion without the clear persuasive message usually conveyed by advertising. The necessity to protect consumers from being misled goes therefore in parallel with the wish to make it possible for MSPs to benefit from these new business models.

SPONSORSHIP constitutes **a contribution** (financial or physical) made by a public or private undertaking or natural person who is not engaged in providing AMSs or production of audiovisual content, **to the financing of AMSs or the programmes that they include.** The purpose of sponsorship is **to promote its name, trade mark, image, activities or products**. Sponsorship can be very beneficial to the market since it is a good way of popularisation (exposure) of certain companies or brands especially if they wish to create a link between the image of a company name/brand and a specific audiovisual product, and is also a great source of income for MSPs. That 'extra' income might very well decide whether they can offer their viewers a certain service which, in turn, benefits viewers.

The EU affirms the **general permissibility of sponsorship**. However, **viewers should not be misled as to the existence and nature of sponsorship.** In other words, sponsorship should create exposure without affecting the integrity of the primary programme. The Directive obliges MS to ensure that

- MSPs under their jurisdiction remain independent and fully responsible for their own AMS – sponsors cannot affect the content and, in the case of TV-broadcasting, the scheduling of primary programmes
- sponsored programmes are not acting as sales vehicles for the products or services of the sponsor – sponsorship should not be allowed to directly encourage consumers to purchase/rent certain goods/services, in particular by making special promotional references to those goods/services

- sponsored programmes are to be clearly identified as such to ensure that viewers are fully aware of their existence – inclusion of the name/logo of the sponsor in an appropriate way for programmes at the beginning, during and/or at the end of the programmes

The Directive aims to give media service providers the chance to benefit from sponsorship without however unduly endangering consumer interests. According to the AVMSD, MS can prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes**.** The Directive explicitly obliges MS to

- prohibit sponsorship by companies primarily engaging in the manufacture or sale of cigarettes and other tobacco products
- prohibit sponsorship by a specific not generally available medicinal product/treatment, those making/selling medicinal products and treatment may use sponsorship to promote their name/image only
- prohibit sponsorship of nature, news and current affairs programmes

PRODUCT PLACEMENT constitutes a specific type of audiovisual commercial communications whereby **a product, service or trade mark of the entity that wishes to be promoted is inserted**, or reference is made to it, **into a programme**. Product placement takes place in return for payment or for similar consideration such as for instance, a physical 'donation' to MSPs. Similarly to sponsorship, product placement provides exposure for 'advertisers' and additional income for the provider which can, in turn, translate into better programming for consumers. Although the use of product placement has become common practice for independently produced audiovisual works, especially features films, the **TWFD did not contain any rules on product placement**. The absence of harmonisation was seen as an obstacle to the creation of the single market – individual MS dealt with product placement in different ways. The lack of EU law was not only felt by content producers and service providers but also by consumers, who have the right to know who has a financial stake in AMSs.

Product placement is characterised by the fact that it **is 'hidden' inside another programme** and thus can easily be used to mislead viewers.

Despite its clear financial benefits, the EU remains apprehensive about the use of product placement. This negative sentiment is reflected by the AVMSD which states that **product placement is generally prohibited in Europe.** Acknowledging its economic inevitability however, the Directive defines a number of conditions under which product placement is permitted. Nonetheless, the AVMSD explicitly stresses that MS remain free to adopt stricter rules provided that they comply with EU law. Since the harmonisation provisions on product placement were inserted into the AVMSD in 2007, they only apply to programmes produced after 19/12/09. Incidentally, that date was postponed for those MS which experienced a delay in implementing these provisions, such as Poland for instance, which did not transpose the Directive until spring 2011 (amendment of 25/03/2011 – rules on product placement apply to programmes produced after the entry into force of the amendment 30 days later).

While the EU allows its MS to impose stricter national laws applicable to MSPs under their jurisdiction, the Directive specifies that **product placement is admissible in Europe**:

- **in cinematographic works**, films and series, **sports** programmes **and light entertainment** programmes **aside from children's programmes OR**
- **if it is free of charge** – if it takes the form of the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme *(Article 11.3.)*

Similarly to the rules on sponsorship,

- **viewers should not be misled** in any way as to the existence and nature of product placement – consumers should be aware that a third party has a commercial interest in the AMSs (which might thus affect its content)
- **'promoters' cannot affect the content of mass-media service**; MSPs must be independent and fully responsible for the content/schedule of their AMSs
- **programmes containing product placement cannot serve as a direct sales vehicle** by directly encouraging the purchase/rental of goods/services, in particular by making special promotional references to them
- MSPs cannot give undue prominence to the product in question
- **viewers must be clearly informed by the existence of product placement** by appropriate identification at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

Similarly to the rules on sponsorship, the Directive obliges MS to **prohibit:**

- **product placement of tobacco products/cigarettes** or of undertakings whose principal activity is their manufacture/sale
- **product placement of medicine or limited availability medical treatments** (available only on prescription in the MS within whose jurisdiction the MSP operates)

MS can choose to waive the need for constant identification of the use of product placement if the programme has neither been produced nor commissioned by the MSP itself or a company affiliated to it. This is an important rule considering that product placement is very common **in US movies**.

In summary, the scope of EU harmonisation has been expanded in the AVMSD in comparison to the TWFD to cover product placement. Due to its essentially 'hidden' nature, product placement is however prohibited in the EU as a basic principle. Tobacco and certain medical commodities cannot be the object of product placement in any of the EU MS. Similarly, product placement cannot be allowed to overly affect the primary AMS and viewers must always be clearly informed about the use of product placement. On the other hand, MS have the right to decide whether to permit MSPs under their jurisdiction to insert product placement into: movies, TV series, sports and light entertainment programmes (not children's programmes). MS are also free to permit free of charge product placement (also in children's programmes). To illustrate, according to amendment of 25/03/11 implementing the AVMSD, the Polish legislator decided to use its right to impose stricter requirements than those provided by the Directive and outright prohibited product placement in children's programmes even if it is free (Article 17a Polish Media Law).

2.3.2. TV-Advertising & Teleshopping

TV-advertising remains the most important type of audiovisual commercial communications. Unlike sponsorship and product placement which create exposure without the element of direct 'persuasion' to acquire a certain commodity, the purpose of **ADVERTISING** (including TV-advertising) is

explicit persuasion to buy/use the product/services in question. It is an announcement broadcast 'for a return' by a public or private undertaking or indeed a natural person in connection with some business. The purpose of TV advertising is to promote the supply of goods or services including immovable property and well as rights and obligations. TV-advertising needs to be set apart from **TELESHOPPING** the purpose of which is to present **direct offers** broadcast to the public **with a view to supply goods/services** including rights and obligations.

The EU takes many measures **to ensure that viewers are not misled** as to the existence and nature of TV-advertising. The AVMSD explicitly states that MS must ensure that both TV-advertising and teleshopping are readily recognisable and distinguishable from other parts of the programming. In other words, they should be kept distinct from editorial content by optical/acoustic/spatial means. Isolated advertising and teleshopping spots, other than in transmissions of sports events, should remain the exception considering viewers could easily misinterpret their 'nature'. *(Article 19)* Moreover, MS are under the unequivocal obligation to ensure that **SURREPTITIOUS** (misleading) **TV-advertising is explicitly prohibited** by their legislation. In other words, representations in words/pictures of goods, services, name, trade mark, activities when the MSP means to use them as advertising but that fact is not clear to viewers (they might mislead the public as to their nature). Such audiovisual commercial communications are seen as intentional on the part of the MSP if they are done in return for payment or similar compensation.

Aside from the fact that no audiovisual commercial communications (sponsorship, product placement and TV advertising) are allowed to 'mislead' consumers, the EU also takes steps to protect the integrity of mass media TV programmes, including the rights of their creators as well as what can be seen as the rights of the viewers (the 'viewing pleasure'). According to the AVMSD, MS are meant to ensure that the insertion of TV-advertising or teleshopping into TV programmes respects their integrity. Media service providers should take into account the natural breaks in the programme to be interrupted, their duration and nature. The **transmission of mass media TV programmes** including movies made for television (excluding series, serials, documentaries), cinematographic films and news **can be interrupted only once for each scheduled period of at least 30 minutes**. Children's programmes can be interrupted once for each scheduled period of at least 30 minutes but only if its scheduled duration is over 30 minutes in length. As a result, no advertising can be inserted into

a typical 10 or 20 minutes long cartoon. Finally, religious services cannot be interrupted for advertising or teleshopping. *(Article 20)*

The AVMSD obliges MS to ensure also that **no teleshopping for medicinal products subject to a marketing authorization,** or similar medical treatment is used by MSPs under their jurisdiction. *(Article 21)*

Purely social considerations such as road safety place **considerable constraints on TV-advertising and teleshopping of ALCOHOL.** The AVMSD obliges MS to ensure that TV-advertising and teleshopping for alcoholic beverages is subject to at least the following conditions:

(a) may not be aimed specifically at minors or, in particular, show alcohol consumption by minors
(b) alcohol consumption cannot be linked to an improvement in physical performance or driving
(c) cannot create the impression that alcohol consumption improves social or sexual attractiveness
(d) cannot claim that alcohol has therapeutic qualities, acts as a stimulant or indeed sedative, or that is helps resolving personal problems
(e) cannot encourage immoderate consumption or present abstinence or moderate alcohol consumption in a negative light
(f) cannot equate high alcoholic content as a positive quality *(Article 22)*

The AVMSD imposes a limit on the amount of advertising to be shown on European television. The proportion of **TV-advertising and teleshopping spots** within any given clock hour is not allowed to exceed 20% (**maximum 12 minutes per each 60 minutes).** However, announcements made by the broadcaster in connection with their own programmes and ancillary products directly derived from those programmes, sponsorship announcements and product placements are not counted as TV-advertisement and are thus excluded from the calculation. *(Article 23)*

While the AVMSD has improved the flexibility of the rules on programme interruption, **the 12 minutes per hour limit for TV-advertising remains unchanged** since the TWFD.

In line with all of its other provisions, the AVMSD imposes an obligation on MS to ensure that all **teleshopping** windows are to be **clearly identified**

as such and are of a minimum uninterrupted duration of 15 minutes. *(Article 24)*

The provisions of the AVMS Directive apply *mutatis mutandis* (by changing what needs to be changed), in other words, to TV channels exclusively devoted to TV-advertising, teleshopping or self-promotion which are very common in pay-TV. The aforementioned limits on insertion and amount do not apply. *(Article 25)*

The AVMSD provides the minimum necessary level of harmonisation to facilitate the operation of the single market without prejudice to key social values of the EU. **MS are** thus **allowed to require MSPs under their own jurisdiction to comply with more detailed or stricter rules** than what has been harmonised by the Directive, provided that such rules are in compliance with Union law. *(Article 4)* As an example, Polish Media Law, as amended on 25/03/11, bans all interruptions of news, current affairs, religious and children programmes as well as documentaries shorter than half an hour. The rules are even stricter for the PSB which can interrupt its programmes, in order to air advertising or teleshopping, only during natural breaks in the transmitted events, such as intervals in sports games for instance (Article 16a Polish Media Law). The Polish PSB is therefore completely precluded from interrupting movies for instance.

By contrast however, MS are allowed to subject **local TV-broadcasts** (intended only for the national territory which cannot be received directly or indirectly by the public in one or more other MS) to **less strict conditions** on the frequency *(Article 20(2))* and amount of TV-advertising and teleshopping *(Article 23)* in order to facilitate local broadcasting which could not be sustained if it was to follow EU standards *(Article 26)*.

2.3.3. Jurisprudence on Advertising Standards

While TV advertising rules are among the issues covered in most detail by the TFWD, the interpretative competences of European Courts were nevertheless called upon in this context also. Indeed, despite the fact that the harmonisation Directive has now been in force for over two decades in the EAS, new business models make the need to ensure the uniform application of EU law as valid now as it ever was. For instance, in a relatively recent judgment of 18/10/07, the ECJ had to set out a number of specific criteria to help determine whether a prize game organised during the broadcast of an entertainment programme could be classified as 'teleshopping' or 'TV advertising' within the meaning of the legal definitions contained in the original TWFD.

The ECJ judgment in *KommAustria vs. ORF* (Case C-195/06) was based once again on a reference for a preliminary ruling submitted this time by the Austrian regulatory authority responsible for communications (*Bundeskommunikationssenat* known as *KommAustria*). The questions submitted to the ECJ related to the proceedings between *KommAustria* and the Austrian PSB (ORF). In the course of the 'Quiz-Express' programme, the presenter would make an offer to the public to participate in a prize game by dialling a premium rate phone number displayed on the screen. Some of the callers would then be asked to answer a question on the programme. Those that did not participate in the programme would enter a 'weekly prize' draw.

The ECJ was asked:

- whether an announcement made within the TV programme, or parts of it, whereby the broadcaster offers its viewers the opportunity to participate in a prize game by way of immediately dialling a premium rate telephone number (= in return for payment) constitutes 'teleshopping' or 'TV advertising' according to the definition contained in the TWFD

The ECJ observed first that **the definitions** of 'TV advertising' & 'teleshopping' contained in the TWFD **must be given an autonomous and uniform interpretation** throughout the EU because **'the protection of consumers, as viewers, from excessive advertising'** was considered to form an essential objective of the TWFD. Although the ECJ left the final decision to the national authorities assessing the case on the facts, the Court noted that the scrutinised game could constitute 'teleshopping' provided ORF actually offered its viewers a service in return for payment by allowing them to participate in the game. The ECJ stressed that the national court had to decide whether ORF's programme, or part of it, constituted 'a real offer of services' (an activity which enables users, in return for payment, to participate in a prize game) or a mere offer of entertainment within the primary TV programme. To do so, a number of considerations would have to be assessed by the national court:

- the purpose of the TV programme of which the game forms part,
- the significance of the game within the primary programme (eg how much time did it take and how much economic impact would it have)
- the relationship between the content of the game and the programme

In order for the game to be categorised as TV-advertising ('television advertising' in the form of self-promotion), its contents would have to indirectly promoted the merits of the programme for instance by using questions concerning the programme or prizes related to it. The ECJ noted in this case that while ORF clearly wanted to promote its programmes through

that game, this in itself does not mean that any form of announcement seeking to make the programme more attractive constituted TV-advertising. The relationship between the game and the programme was once again a question to be answered by the national court. The ECJ noted in this context that a prize game would be likely to constitute TV advertising if it tried to encourage viewers to buy the goods/services presented as prizes to be won or seeks to promote the merits of the programmes of the broadcaster in question indirectly in the form of self-promotion.

Despite the increasing flexibility of the definitions used in the AVMSD, further interventions by the ECJ are likely, especially with the arrival of new advertising techniques.

2.4. Information Access

Charter of Fundamental Rights of the EU
Article 11 Freedom of expression and information
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

According to the Charter of Fundamental Rights of the European Union, all EU citizens enjoy **FREEDOM OF EXPRESSION and INFORMATION**. In other words, freedom of expression, as well as the related pluralism of media, must be respected at all times in the entire EU. The 'active side' of the freedom of expression represents an individual's freedom to hold and state his/her opinion – a concept outside the field of audiovisual policy but crucial to media law and democracy considerations. What is expressly relevant to this discussion is the 'passive side' of the freedom of expression – an individual's right to receive and impart information and ideas without the interference of the state (no censorship) and regardless of national frontiers. Restrictions on free access to information could therefore be considered, and indeed often are, to be a violation of the freedom of expression. *(Charter Article 11)*

Charter of Fundamental Rights of the EU
Article 16: Freedom to conduct a business
The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17 Right to property
1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

While freedom of expression refers to an individual's socio-political sphere, the Charter is also expressively concerned with an individual's economic right to conduct business and the right to property. The Charter explicitly states that the latter applies to physical goods as well as intellectual property such as, most importantly in this context, to copyright in audiovisual content. Broken down, the **RIGHT TO PROPERTY** translates into the right of its exclusive use & the right to a fair return on the investment incurred to acquire it. It is essential to stress here that the right to property **covers also INTELECTUAL PROPERTY**. In the ambit of intellectual property, they translate into the right of an IPR owner to license it to the 'highest bidder' even if that means that access to that content will be foreclosed to some viewers on the basis of an exclusivity clause.

Whether it is competition protection or access to information, **EXCLUSIVITY clauses are the key to the balancing act between the rights of IPR owners and the rights of others**, be it competitors or consumers in their capacity as viewers. Copyright licensing is essential for the audiovisual field which depends on the availability of content such as movies or sports for the provision of the vast majority of its AMSs *sensu stricte*. Exclusivity has many positive economic effects: it generally allows the highest possible return on the investment in the intellectual property, facilitates transaction cost savings and facilitates offer differentiation. It is the very exclusivity however which can hinder free access to information. Exclusive copyright licensing can thus form a strong practical barrier to media pluralism, which is dependent on the wide dissemination of information, irrespective of the fact whether the content is licensed on an exclusive basis by territory (eg licences covering individual MS only) or type of AMS (eg premium pay-TV).

The terms 'freedom of expression' & 'access to information' are usually associated with the media while the audiovisual field generally speaks of content/programmes. The focus of the former is on news and ideas in their raw form while the latter concerns 'pre-packaged' commodities.

Exclusive licensing is very much a justified and frequently used form of IPR exploitation. This means however that important audiovisual content can be acquired by a specific MSP on an exclusive basis precluding those that are not its customers from accessing that content freely (eg to access it they would have to subscribe to a pay-TV). As such, an ever present **conflict** emerges **between the need to protect the economic basis of creativity & innovation** (exemplified by IPR regimes) **and the need to promote pluralism** through the general availability of diverse content.

Preamble point 48 AVMSD
Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.

The conflict between the freedom of expression and IPR, especially were exclusive licensing is at stake, is explicitly acknowledged by the AVMSD. In CHAPTER V entitled: "Provisions concerning exclusive rights and short news reports in television broadcasting", the Directive harmonises two types of access to audiovisual content: events of major importance to society and short news reporting. *(AVMSD Article 15 & 14)*

2.4.1. Major Events

The conflict between freedom of expression and the right to property can affect all audiovisual content – an intervention by public authorities is thus often needed to resolve it. It has become most acute however in relation to audiovisual recordings of sporting events which are considered to be of 'major importance' to a given society. The AVMSD defines

MAJOR EVENTS as **outstanding events of interest to the general public** in the EU overall, in a given MS or in an important part of a MS. Such events must be **organised in advance by an organiser** (such as UEFA) **who is legally entitled to sell the exploitation rights** (eg live transmission on pay-TV) **associated with those events**. *(Preamble point 52 AVMSD)* It is worth noting here that the 'significance' of an event is usually association with fostering national or regional identity.

Pay-TV is an integral part of the EAS providing its subscribers with a 'better' offer than that available on free TV at a considerable extra cost. The essence of pay-TV is thus expressed by selective access, in other words, content acquired by the pay-TV provider is available to its subscribers only. **PREMIUM CONTENT: major sporting events &** generally only recent **mainstream movies & special cultural events**, remains the driving force behind pay-TV penetration. Premium audiovisual content is the key commodity for attracting and sustaining pay-TV subscribers. Considering the growing internationalisation of many pay-TV providers (eg Canal+) that allows them to acquire rights of the EU scale, the EAS has gradually become subject to considerable foreclosure of access to key events.

The AVMSD lists the Olympics, the football World Cup and the European Cup as the most common examples of events of 'major' importance to most societies. The popularity of other sports, such as ski jumping, is however more diversified illustrating the fact that what is considered 'major' by the society of one MS, can be of no importance at all to another.

Rather than outright harmonising the issue on the European level, the EU decided however to leave the final decision in the hands of its individual MS. This policy decision reflects market differentiation, and thus the level of access foreclosure, between the MS as well as diversity of national tastes. The 1997 amendment saw the EU insert a new rule into the original TWFD expressly acknowledging that MS can take appropriate measures meant to ensure that their citizens retain access to key sports. *(Article 3a & Article 3j TWFD)*. In effect therefore, the EU has permitted **a trade off** to be made on the national level **between IPR and the freedom of expression in favour of the latter**. MS were thus allowed by the EU to limit the freedom to

exercise IPR associated with most significant sporting events in order to ensure the freedom of expression of the citizens.

The EU's approach to major events reflects its willingness to sacrifice its general economic aims for the sake of the freedom of expression.

The problem persists and thus major events provisions are still to be found in the new AVMSD. Unlike its predecessor however, the Directive contains now an extensive preamble where it explains the policy decisions underlying its rules. It is stated therein that the EU took steps on the supranational level to reconcile social goals protected by MS, the freedom of expression, with the economic consideration of market integration pursued by the EU with respect to the audiovisual field. Indeed, while the EU's primary concern is the creation of an internal market – the segmentation and segregation of right licensing envisaged in the context of major events goes clearly against this very purpose.

According to the legally binding rules of the AVMSD, each **MS can take appropriate measures,** provided they are compatible with EU law, **to ensure that broadcasters** under its jurisdiction **do not broadcast** on an exclusive basis **events of major importance** for that society **in such a way as to prevent a substantial part of its citizens of the possibility to follow such events** by live coverage or deferred coverage on free-TV. The concept of 'free television' covers broadcasts without payment other than the usual funding model in that MS such as licence fees and/or the basic tier subscription fee to a cable network.

MS are allowed to make a list of major sporting events that have to be available on free-TV **but they are by no means obliged to do so.**

It is important to stress here that the condition that major sport events (as well as other key events such as music festival of an enormous national importance) must be made available on free-TV is fulfilled not only by PSBs, which are free by nature, but also be commercial stations provided

they are accessible without a charge. This is an important realisation which should limit MS from trying to use this EU rule in order to improve the viewing figures of their PSBs – an objective often pursed by national governments. National measures arbitrarily restricting this rule even further by stating that major events are to be shown by PSBs, would therefore not be proportionate to their aim (freedom of expression). Lack of full coverage by free broadcasters other than the PSB could however justify such an additional restriction. *(AVMSD Article 14(1))*

While the MS are free to decide whether they wish to take advantage of these EU provisions allowing them to designate major events, the AVMSD is binding with respect to the procedure they must follow to do so. **If a MS actually decides to take such a measure, it must:**

- **make an official list of the designated events** (national or non-national) in order to enable the market to exactly predict which events will be subject to special access requirements
- make that list in a **clear and transparent** manner and **in due time** so as to enable the market to prepare itself for the extra requirements
- clarify whether the required availability will cover the entire or partial event in the form of live or deferred transmission *(AVMSD Article 14(1))*
- **immediately notify to the Commission** any measures taken or to be taken which must verify the measures within 3 months, communicate them to other MS, consult the contact committee and publish them in the Official Journal *(AVMSD Article 14(2))*

Unlike the voluntary character of the EU rules on designating major events in their own country, MS are obliged by the AVMSD to ensure that the broadcasters under their jurisdiction do not exercise their own exclusive rights purchased after 18 December 2007 in a way that would foreclose access of the large part of the population of another MS to events designated by that other MS *(AVMSD Article 14(3))*

Only a minority of MS have created lists of major events. The Olympics and key football tournaments are the most common examples of listed events. The importance of other sports is far more divided: the French list includes cycling, Finland listed hockey and the British list includes horse racing. Interestingly, key music events were listed in Austria, Belgium and Italy.

2.4.2. Jurisprudence on Major Events

The creation of a national list of major events effectively creates 'special' conditions of trade in the designated events. That in itself is a serious limitation of the right to property and the freedom of establishment. The *Infront* case illustrates well the market effects of these socially-driven actions of national governments and the role assigned to the Commission and EU courts in this respect. In the first stages of the proceedings, the UK notified its measures concerning major events and the Commission approved them in a decision contained in a letter of 28/07/00. The original decision was later appealed by Infront (a broker of TV-broadcasting rights) who claimed that it was negatively affected by the content of the decision even though it was not its addressee. The decision was subsequently annulled by the CFI on 15/12/05 (Case T-33/01 Infront WM vs. Commission). Disagreeing with the approach represented by the CFI, the Commission appealed the judgment to the ECJ. The ECJ upheld however the original judgment delivered by the CFI (Case C-125/06 P Commission vs. Infront).

The Courts agreed that in order to limit legal uncertainty affecting the market by the creation of a designated events list, the Commission must take a formal decision for or against the measures proposed by a given MS. It is therefore the responsibility of the Commission to assess whether the notified measures conform with EU law (eg proportionality & transparency rules). An official decision of the Commission is to ensure that the list and its implementation rules are communicated and applicable to all EU operators that can acquire broadcasting rights for these events on the given territory. This is an important consideration considering that rights to major sports are generally traded on EU-wide markets. It is this very decision that enables MS to impose restrictions of the economic rights of copyright owners.

However, as a general rule, **EU acts can be appealed by** their addressees. Appeals can be lodged by **non-addressees**, private/commercial individuals, **only if they can demonstrate that they are directly & individually concerned by it.** The decision was not addressed to Infront but to the UK government. In fact, the appellant was not even directly covered by the measures approved by the Commission seeing as they were meant for broadcasters and Infront was a broker of TV-broadcasting rights. Nonetheless, Infront owned the exclusive rights to several of the football events on the UK list and thus the EU courts agreed that it was directly and individually concerned by the Commission decision approving the measures. Infront was therefore entitled to appeal the contested decision. Infront's ability

to freely dispose of its rights (re-sell them to broadcasters) was impeded by the decision which allowed the UK to strip its broadcasters of their exclusive rights to the designated events. By doing so, they restricted the transfer of the rights to the listed events to non-UK broadcasters only that wished to show these events outside of the UK. **The impact on Infront of the Commission decision was** thus

- **DIRECT** in so far as it enables the implementation of the UK measures.
- **INDIVIDUAL** character also because it specifically concerned Infront as the exclusive rights owner

It is essential to stress here just how far reaching the effects of a national list can be. The Infront case shows that EU approval of the notified national measures can subject the rights holders to trade restrictions which did not exist when the rights were first acquired as well as render their exercise far more difficult overall. Here, not only was the re-sale value of Infront's rights impacted but also their very re-saleability rendering Infront's original business plans impossible to achieve due to the socially motivated intervention of the UK government. The practical use of the EU rules of major events is thus of crucial importance to the entire European sports rights and broadcasting market.

The overriding importance of freedom of expression, as opposed to property rights, has been once again emphasised by the General Court in its recent *FIFA and UEFA vs. Commission* (**Cases T-385/07 & T-55/08 & T-68/08** of 17/02/11). While Infront objected to the effects of the UK list, FIFA and UEFA **objected to the content of the list prepared by the UK** and Belgium. FIFA, as the organiser and holder of the broadcasting rights to the World Cup felt that designating all of its cup matches was overly restrictive with respect to its economic rights. An analogous claim was made with respect to the UK only by UEFA as the holder of the right to the EURO Championship. However, in light of the absence of EU harmonisation of which events are of 'major' importance, the Court clarified that the correctness of the substance of each list must be assessed individually – **different lists might be equally compatible with the AVMSD**.

Both sports associations disputed the fact that the UK/Belgian list included all of their matches (rather than just the finals for instance). The Court stressed the inappropriateness of generalisations – including the fact that the entire tournament might be compatible with EU law because they are regarded as single events or because it is impossible to predict beforehand how well the national team will do. Listing all matches might however not be justified if it is shown that 'non-prime' matches of the World Cup and/or 'non-gala' matches of the EURO are not of 'major'

importance to the society of a given MS. Referring back to the Preamble to the AVMSD that list the World Cup and EURO as examples of major events, the General Court stated however that MS are not obliged to further justify their inclusion.

Just because Point 18 of the Preamble to the AVMSD lists the World Cup and the European Championship, alongside the Olympics, as examples of major events does not mean that they can always be 'validly included in its entirety in such a list, irrespective of the interest in World Cup matches in the Member State concerned' *(FIFA vs. Commission Para 60).*

2.4.3. Short News Reporting

Only a limited number of sporting events can be justifiably considered 'major' enough to warrant such an intrusive limitation of the right of property. In other words, **the 'major events to society' category of audiovisual content is narrow**. Indeed, most MS have no such list at all relying on market forces to offer their viewers the content they wish to see. Among the reasons for such cautious use of this particular EU rule lies its economic impact – a socially-oriented intervention meant to aid the freedom of expression puts a significant economic burden on both rights owners and broadcasters limiting therefore their right to property. There are many more events, both sporting and not (such as a major music event), that are of high interest to the general public. In light of the principle of proportionality, they cannot all be subject to public intervention as intrusive as those for the major events list, which outright precludes some categories of MSPs from acquiring certain rights.

The EU has thus obliged MS to introduce into their legal regimes a less intrusive form of information access applicable to all events of general interest. **SHORT NEWS REPORTING** is **the right to present a short coverage of general interest events in news programmes**. Although EU rules on 'major events' allow MS to impose extremely intrusive limits on property rights, they affect a very limited number of events and entities. By contrast, EU provisions on news extracts have a far 'lighter touch' but are applicable on far more numerous occasions. Both rules are however

meant to achieve the same social goal – to ensure and promote the free flow of information.

The AVMSD explicitly states that **the purpose of EU rules on short news reporting is to safeguard the fundamental freedom to receive information** as well as to ensure that the interests of viewers in the EU are fully and properly protected.

Those that exercise exclusive TV-broadcasting rights to an event of high interest to the public should grant other interested parties the right to use short extracts of that event. The AVMSD obliges MS to ensure that for the purpose of short news reporting:

- short extracts can be **inserted into general news programmes only.** The AVMSD stresses here the primarily informative function of this rule by clarifying that a compilation of the extracts into an entertainment programme does not fall into the 'general news programmes' category *(AVMSD Article 15(5))*
- **all broadcasters established in the EU have the right to access news extracts**
- the extracts should **not exceed 90 seconds** *(Preamble point 55 AVMSD)*
- **access terms should be communicated in a timely manner** – the market should be informed ahead of time of the access terms applicable to short news reporting in order to enable interested parties to request access to the short extracts
- **access is granted on a fair, reasonable and non-discriminatory basis**
- short news reporting **covers all events of high interest** which are transmitted on an exclusive basis by a broadcaster under their jurisdiction
- the requesting party should have **the right to freely choose short extracts** from the transmitting broadcaster's signal
- **the sources of the short extract should be identified**, unless practically impossible

The right of MS to legislate on the matters covered by the AVMSD in a more detailed or stricter manner than the Directive, provided their measures are in line with EU law, has once more been used by the Polish legislator to limit the use of news extracts within 24 hour only (Article 20c(4) Polish Media Law). Alternatively, MS can set up an equivalent system

as long as it achieves access on a fair, reasonable, and non-discriminatory basis through other means (eg pre-event access to its venue). *(AVMSD Article 15(1–4))*

Considering cross-border cases, the AVMSD specifies that if a local broadcaster has the exclusive rights to the sought event, then access should be requested from that broadcaster first before approaching entities from different MS. In the latter case, the country of origin principle provides that terms of access are governed by the laws of the 'supplying MS' (the MS that has jurisdiction over the entity which supplies the extract) but terms of transmission are governed by the laws of the 'receiving' MS (the MS that has jurisdiction over the receiving/transmitting party).

While the level of intrusiveness of short news reporting is lower than with respect to major events lists, the EU applies an even softer approach to information access in the on-line environment primarily because users have better control over their content choices. As a result, **the use of news extracts in the on-line environment is limited.** Media service providers should be able to provide their live TV broadcast news programmes in the on-demand mode after live transmission without having to omit the short extracts but only with respect to 'identical' programmes by the same provider. *(AVMSD Article 15(5))*

Still, **access to short news extracts does not have to be granted for free**. Indeed, the AVMSD obliges MS to ensure that the conditions of compensation associated with access to news extracts are defined (compensation arrangements, maximum length of extracts, time-limits regarding their transmission) rather than prescribing what they should be. However, short news reporting **is not meant to generate profits for the broadcaster from whom access is being sought.** The AVMSD clearly states that where compensation is provided for the extracts, it must not exceed the additional costs directly incurred in providing the access requested. *(AVMSD Article 15 (6))*

REVISION QUESTIONS

1. According to the EU, what characteristics must the internal market possess to fulfil the social expectations of EU citizens?
2. How does the EU justify its involvement in the audiovisual field?
3. Why is cultural diversity of key importance to the EAS?
4. Why is it important to be able to identify who is responsible for the content of an Audiovisual Media Service?

5. Although both protect human dignity, how does the influence differ exercised on the EAS by the AVMSD and the Charter?
6. How are minors protected in the EAS?
7. What are the minimal requirements of viewer protection relating to all ACC?
8. If you were to promote an alcoholic beverage using audiovisual media, how would you approach this task?
9. Is it true that TV-Advertising is the most heavily affected audiovisual activity and if yes, how and why?
10. Why does the freedom of expression clash with the right to property?
11. What is the role of the EU with respect to access to events of major importance to the society of EU MS?
12. How and why are on-demand AMS treated differently to linear services?

PART II

INTERNAL GROWTH – EXTERNAL STRENGTH

The creation of an internal market that respects key social values of the EU is without a doubt the primary purpose of its harmonisation initiatives in this field. However, merely creating an internal market does not necessarily make it effective in achieving the underlying socio-economic aims of positive integration. In other words, eliminating internal borders in audiovisual trade is unlikely to single-handedly increase consumer welfare to the expected level. The following discussion will be based on the assumption therefore that **economic integration** in the audiovisual field **can only then be effective if the resulting internal market is strong enough** overall to be externally independent and competitive (competitive 'on the outside') **and subject to internal competition** (competitive 'on the inside')

EU actions meant to facilitate and protect competition within the sector are covered in PART III of this book. Suffice to say at this point that the concept of 'internal' competitiveness of the EAS concerns the level and condition of competition found on particular audiovisual markets – it focuses on their internal workings and consumer benefits associated with the existence of effective competition therein. In this context, EU interventions:

- have an economic focus usually associated with state aid and competition law regimes (surrounding the notion of effective competition)
- have mainly a supervising and, if necessary, penalising character
- concern business and public bodies irrespective of their origin as long as they affect competition on EU markets – on the basis of objective criteria without recourse to preferential treatment
- tend to be tailor-made to their recipients – seeing however that they are usually directed to major companies (necessary trading partners to many other market players), they frequently have far reaching market consequences

PART II will be devoted to the far more intuitive relationship between **EU support of the internal growth and external strength of the EAS** or, in the words of the MEDIA I programme, **stimulating its competitive supply capacity**. The fact that such support exists is unarguable. The EU secures

substantial and secure demand for EU content. It continues to help fund its creation and distribution. It also works behind the scenes to advance Europe's technological development for the benefit of both businesses and individuals. But why are all these initiatives taken on the EU level? Are these socially driven actions in aid of its cultural diversity? Or is their primary purpose to be found in economic considerations? In other words, is the EU trying to sever its dependence on the imports of mass appeal foreign content for our 'social' or 'economic' good?

It is most likely that the **EU aims to achieve social and economic gains simultaneously** in the EAS and it is often impossible to separate them. Importantly, the two types of goals are not exclusive: the pursuit or achievement of one by no means precludes the other. Moreover, the same objective can be reached through different policy instruments while the same instrument can be used to achieve multiple goals. It is assumed in this context that citizens will benefit 'socially' from access to more European content → more demand for European content will in turn facilitate the economic growth of its production facilities → which will in turn benefit EU citizens 'economically' in terms of jobs and GDP. Similarly, EU led technological advancements will carry with them important benefits in the 'social' realm (such as growing inclusiveness) but carry with it significant 'economic' gains also.

This analysis will focus on those EU initiatives that directly and actively **facilitate the strengthening of the economic potential of the EAS as a whole, without negating the fact that they often also result in important social benefits.** In this context, EU interventions tend to:

- have a distinctly socio-economic focus which stresses the advantages of stronger EU production and distribution capacity for its social & cultural as well as economic growth and general welfare of the entire EU
- have a supporting and co-ordinating character in most cases
- benefit 'European' audiovisual businesses & professionals: preferential treatment is given to what is 'European' as opposed to 'national' or 'foreign'
- apply to the market on general terms: their positive effect on the sector as a whole is associated with a commutation of small but widespread support

As a result, Part II will cover EU efforts that strengthen the EAS both internally (internal growth) and externally (competitive potential). Chapter 3 will cover legally binding transmission quotas set out in the Directive which secure demand for European content and the extensive means of financial support available to the production and distribution of European content. Chapter 4 will be devoted to the variety of instruments used by the EU to facilitate the switch-over from analogue to digital transmission.

CHAPTER 3

EU SUPPORT TO THE AUDIOVISUAL SECTOR

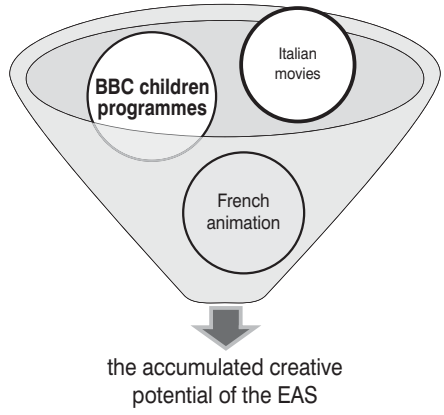
The origins of direct EU actions which have strengthened the EAS can be traced back to the end of the 1980s. Free movement has done little in terms of market integration and economic growth. The European audiovisual field continued to suffer from fragmentation in content production and distribution as well as from limited mobility of scarce resources. Technological growth was in most MS limited to increasing penetration of cable and satellite TV – their creative segments were lagging far behind. The EAS of the 1980s thus demanded more and more content to satisfy the growing 'appetite' of EU viewers but supplied little of its own.

Technological divisions, such as geographically motivated differences in the penetration of cable TV, are largely unavoidable in the audiovisual field. Other than that, it was Europe's **CULTURAL DIVERSITY** that was **causing persistent market fragmentation** alongside national borders**.** Differences in language, heritage and tastes acted as a social road block to economic integration and thus, to an overall growth of the audiovisual field. All this changed with the onset of convergence and mass digitalisation of the 1990s. It was at this point in time that growing demand for mass-appeal content was complemented by an ever increasing demand for special interest (minority) programming. The EU swiftly recognised the huge economic potential of its cultural diversity in this respect seeing as it gave the EAS as a whole the ability to deliver an infinitely wide range of varied content. The EAS had thus the potential to contribute to fulfilling global demand for special interest programmes such as minority sports, culinary programmes, or high culture events.

From then on, the EU has found a new focus – rather than a hindrance to market integration, cultural diversity and creative fragmentation were **recognised as an economic advantage of the EAS as a whole.** This realisation was particularly important from the 'external' point of view. The EU long since realised the difficulties experienced by the EAS in the context of global competition. At the end of the 1980s, Europe's deficit in audiovisual

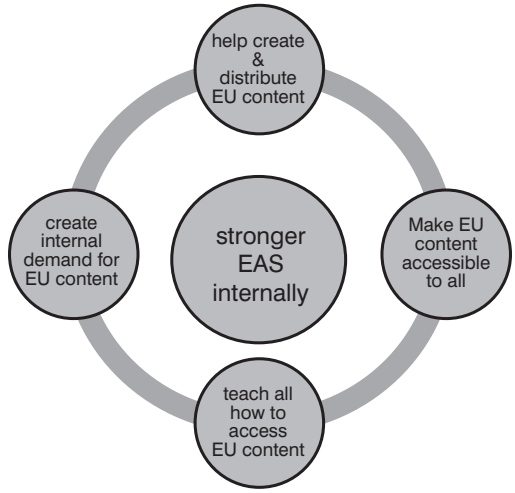
trade was truly vast. It was not an exaggeration to say that the then limited capacity of European TV was flooded by non-EU programmes which were desirable because of their appeal and often low purchase price. Indeed, foreign content was often cheaper than that created or acquired locally and thus it was more economical for broadcasters to create their own programming or shop away-from-home. For instance, US productions enjoyed significant economies of scale in terms of content creation (as opposed to the fragmented and often very small domestic production capacities of particular MS) and intentional distribution. This fact stood in stark opposition to European-made programmes which have very little appeal outside the country or region of their source. Limited viewing figures, and thus low advertising or subscription revenues, generally discouraged European broadcasters from investing in local content.

To achieve market integration in general and to overcome the specific problems of the EAS in particular, the EU introduced the aforementioned instruments of positive integration meant to actively facilitate the creation of an internal market AMSs. However, they did not prove sufficient to overcome the economic weakness of the sector. However, rather than remain passive in accepting the unquestionable social right of its MS to preserve their national identities with its unavoidable separatist effect, the EU has decided to take steps to **support the EAS as a whole, embracing its cultural diversity as a reflection of its creative potential.**



By facilitating the creation and encouraging the consumption of European-made content internally, the EU has started to **PRO-ACTIVELY foster the internal growth of the EAS**. First, MS were required to force their broadcasters to make or acquire more European content. Second,

an extensive EU support programme was created for the content creation, promotion, and distribution of European content. Third, widespread co-ordination and aid was given to the technological development of the infrastructure and transmission side of the sector. Finally, a number of measures were taken to improve the skills, knowledge, resource-sharing capabilities and employment opportunities of European audiovisual professionals. Interestingly, by **directly helping European businesses and professional**, the EU has managed to **indirectly strengthen the global economic potential of the EAS.**



The scale of direct EU support to the EAS is unusually large when compared to other industries because of its key socio-political importance as well as unparalleled economic potential.

Consumer welfare is generally associated with free competition that delivers the best ratio of quality to price. This is not necessarily the case in the European audiovisual field however. The EU has **greatly elevated the importance of** a European origin, in other words, the **'made in the EU' criterion**. Indeed, the EU treats 'European' content in a clearly preferential way to non-European programmes. Thus, its audiovisual markets are strongly

influenced by the realisation that it is not always the better & cheaper product that will win the funding race. Not only must European broadcasters source the majority of their content locally, similar requirements are now also attached to non-broadcast AMSs. The 'made in the EU' label has thus become a major advantage for audiovisual productions often outweighing traditional economic reasons of appeal or price.

It is worth noting that strengthening the economic potential of the EAS as a whole illustrates well the observance of EU's subsidiarity principle.

The EU has applied a pro-active and direct method of intervention in order to create a more united and in turn stronger 'European' audiovisual field – the EAS. Nonetheless, **EU actions were** always **meant to complement** rather than hamper the multitude of **national initiatives** taken by its MS and directed at their own audiovisual sectors. The list of the instruments used by the EU contains in this context:

- harmonisation by was of the TWFD/AVMSD: EU rules on content production and distribution
- financial help: though the MEDIA and the ICT PSP programme
- facilitating switch-over from analogue to digital transmission: generating investments, technological coordination, sharing of resources

3.1 Transmission Quotas

Preamble Point 73 AVMSD
National support schemes for the development of European production may be applied in so far as they comply with Union law.

Preamble Point 74 AVMSD
The objective of supporting audiovisual production in Europe can be pursued within the Member States in the framework of the organisation of their audiovisual media services inter alia through the definition of a public interest mission for certain media service providers, including the obligation to contribute substantially to investment in European production.

Cultural diversity has always been **a cornerstone of Europe's social sphere** and thus MS were always left largely free to support their own cultural and creative industries. Historically, the role of the EC was limited in this respect to promoting cultural dialogue between its MS and ensuring that cultural diversity was preserved on the European level in light of progressing market integration. All this changed when the EU recognised the positive economic implications of cultural diversity expressed in its close correlation to the creative potential of the EAS. Without negating its social implications or the actions taken individually by its MS, the EU has begun to support cultural diversity facilitating as a result internal growth in the sector as a whole**.** There can be no doubt that the EU was well aware of the fact that an internally stronger EAS would have a far better chance to become independent from external imports and ultimately also able to compete on global markets.

EU law represents the key policy instrument which directly supports the internal growth of the EAS. The EU chose to use legislation – **the TWFD/ AVMSD – to** limit the presence of foreign content on European TV and **create demand for European content inside the EU** facilitating at the same time economic growth in the creative segment of the EAS. In the last 20 years, the EU has indeed managed to significantly increase demand for European productions by means of the original TWFD. Equivalent EU rules are now found in CHAPTER VI of the AVMSD entitled: "Promotion of distribution and production of television programmes". *(Article 16-18*). Chapter IV of the new Directive entitled: "Provisions applicable only to on-demand audiovisual media services", expands the need to promote European-made content into the on-demand environment. *(Article 13)*

3.1.1. European Works

For the purpose of this definition it is usual to note that the AVMSD considers content to be 'European' if it originates from EU MS or European third States party to the *European Convention on Transfrontier Television of the Council of Europe*. **The AVMSD defines EUROPEAN WORKS** as:

> *Article 1(1(n)) AVMSD*
> (n) "European works" means the following:
> (i) works originating in Member States;
> (ii) works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 3;
> (iii) works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.

According to the AVMSD the category of content considered to form European works consists of:

- **works originating in EU MS**;
- **some works originating in European third countries** party to the Council of Europe's *European Convention on Transfrontier Television*
- **some co-produced works**

Keeping the above in mind, audiovisual content will be deemed to **ORIGINATE** in Europe, that is EU MS or other countries covered by the AVMSD, **if it is mainly made with 'European' authors & workers** (that is, residing in one or more of these countries). However, to be considered to originate in a European country, **the creative process must be controlled primarily by EU producers.** Audiovisual content must therefore also comply with at least one of the following three conditions:

- they are made by one or more producers established in one or more European countries
- the production of the works is supervised and actually controlled by one or more producers established in one or more European counties
- the contribution made by European co-producers to the total costs is predominant and the co-production is not controlled by one or more producers established in non-European countries *(Article 1(3))*

Co-production agreements are extremely common in the content production field especially with respect to expensive projects such as feature films. In fact, hardly any Hollywood movies are made by a single studio only. Co-production makes it possible to not only share the costs but also

the risks involved. Some are limited to the division of content 'creation' (eg filming) and distribution activities, others are joint ventures. To respond to this market reality, programmes which are not 'European works' according to the aforementioned definition are to be treated as such if they are produced in the framework of bilateral co-production agreements concluded between MS and third countries. This concession is applicable only if EU co-producers supply a majority share of the total cost of production and the creative process is not controlled by producers established elsewhere in the world**.** *(Article 1(4))*

In its Preamble, the AVMSD explicitly notes that MS can establish more detailed definitions of European works applicable to MSPs under their jurisdiction, provided they comply with EU law and do not endanger the objectives pursued by the AVMSD. *(AVMSD Preamble 32)* It is essential to emphasise in this context also that **the definition of European works contained in the AVMSD is not conditional on cross-border cooperation.** Indeed, for content to fall into this category it merely requires that **the production must originate in ONE or more EU MS**. This fact is of key importance for the following discussion of the transmission quotas and especially the realisation that they are respected across Europe.

Content made entirely in <u>one</u> EU MS fulfils the legally binding definition of European Works contained in Article 1 AVMSD! Thus, by being made in the EU, a French movie or a Polish TV-drama will be considered European works.

3.1.2. Television Transmission Quotas

It is essential to know for business entities which types of audiovisual content constitute European works because the AVMSD places an explicit obligation on all MS to ensure that TV broadcasters under their jurisdiction reserve a **majority proportion of their transmission time for programmes of EU origin**. While the EU aim to strengthen the EAS was clearly both necessary and justified, it is essential to note in this context that the burdens associated with this rule did not only affect non-EU content suppliers but also European broadcasters. Originally, broadcasters were able to choose freely which content to show – after 1989, they had to adjust their business

patterns in order to accommodate the objectives of Europe's Audiovisual Policy and its insistence on strengthening the production segment of the EAS. The introduction by the EU of European works transmission quotas has indeed created a positive environment for European content creators. It has simultaneously encouraged broadcasters to expand their own production activities. In order to compensate for the difficulties and potential losses resulting from EU limits being placed on their content choice, European broadcasters embraced content production.

Statistics suggest that European TV stations show an often overwhelming amount of European content (fulfilling the AVMSD criteria of European works). Despite what the numbers suggest, some viewers are not convinced that this is really the case. The frequent unawareness of European audiences of the predominance of EU made programmes on their TV derives from the fact that a great proportion of the general transmission time is not counted for the purpose of the transmission quota obligation. European works are to be used for the majority of the total transmission time but only **after deducting the time appointed to news, sports events, game-shows, advertising, teletext services and teleshopping**. In other words, a considerable proportion of the usual broadcasting time is not counted for the purpose of this rule. (A*VMSD Article 16)*

Moreover, the aforementioned majority requirement can be, and in the vast majority of cases actually is, fulfilled by purely domestic, as well as international, content. While the **AVMSD does require MS to encourage their broadcasters to show EU made works that derive from other European countries** – it does not oblige its MS to do so. Although a similar requirement concerns MSPs, national content producers and audiovisual professionals, once again it lacks binding force. While the AVMSD was meant to strengthen the EAS overall by creating large scale secure demand for 'European' programmes, its definition of European works made it effectively possible to use EU legislation to secure output sources for national content.

Preamble Point 70 AVMSD
Member States should encourage broadcasters to include an adequate share of co-produced European works or of European works of non-domestic origin'.

Preamble Point 75 AVMSD
Media service providers, programme makers, producers, authors and other experts should be encouraged to develop more detailed concepts and strategies aimed at developing European audiovisual fiction films that are addressed to an international audience.

The question of why the EU would not impose a stricter rule here, forcing cross-border production in the EU, is easily answered. The applicable obligation is acceptable to both the governments and voters of individual MS; an EU obligation to show a certain proportion of EU content created in cooperation by multiple MS or even originating exclusively from other MS would be strongly opposed to. As a result, Europe's further reaching policy intentions in this context are merely expressed in the Preamble to the Directive which requests that MS encourage their broadcasters to show 'European', as opposed to domestic, content. Still, even if the transmission quotas were to support national production facilities only, the EU is experiencing intended growth of the EAS overall from the accumulation of the developments of the individual capacity of all its MS.

Many European viewers are not aware of the existence of the seemingly very restrictive EWs transmission quotas primarily because the **method of calculating the total transmission time** and the fact that the **definition of EWs covers purely national content** (produced exclusively in and with the resources of that country).

In its Preamble, the AVMSD expressly advocates the use of **PRAGMATISM with respect to its transmission quota rules**. The obligation to fulfil the quotas is limited to situations where this is practicable. MS are free to choose the appropriate means of doing so on the basis of suitable criteria considering the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public. The EU expects a progressive improvement and envisaged the need to take into account economic realities. All of these adjectives are inherently undefined – in other words, they make it easy for MS to justify any potential digressions *(AVMSD Preamble Point 67 AVMSD)*. Interestingly enough, pragmatism has not proven necessary here since **European works quotas are generally embraced by the MS –** they are among those EU rules with the best enforcement statistics.

The AVMSD also attempted to ensure that the economic benefits expected from the introduction of EU-wide transmission quotas are not limited to large companies only (such as broadcasters). The AVMSD thus

obliges MS to ensure that **broadcasters** under their jurisdiction **reserve at least 10% of their transmission time to** European works created by producers who are independent of broadcasters – the so-called **INDEPENDENTLY PRODUCED European works.** To establish 'independence of broadcasters', MS must consider ownership of the production studios, the amount of the content supplied by the producer to the same broadcaster and ownership of exploitation rights. In other words, if the broadcaster controls the rights to the content, its producer will not be considered independent. *(AVMSD Preamble 71)*

Improving flexibility without compromising the immediate aim of these provisions, MS can **alternatively** require their broadcasters to reserve at least **10% of their content budget** for independently produced European works. Furthermore, specifically in order to facilitate new economic growth, broadcasters are to be required to fulfil these quotas by earmarking an **'adequate' proportion of the time or funds for recent works** (transmitted within five years of their production). Similarly to general transmission requirements, independent production quotas are also subject to pragmatic enforcement and exclusions on transmission time calculation. *(AVMSD Article 17)*

The transmission quota requirements do not apply to TV broadcasts intended for local audiences and which do not form part of a national network *(Article 18).* They are also not applicable to channels broadcasting entirely (or substantially) in a foreign language *(AVMSD Preamble Point 72).*

There can be no doubt that general European works transmission quotas are meant to stimulate growth of the EAS overall. It is the specific aim of the independent production quotas to secure demand for Small and Medium-sized Enterprises (hereafter: SME), to support diversity of content sources and to help audiovisual professionals. Indeed, the Preamble to the AVMSD explicitly states that creating demand for independent European works is intended to offer 'new opportunities and marketing outlets to creative talents, to cultural professions and to employees in the cultural field'. *(AVMSD Preamble Point 68)*

According to the biennial Commission report issued on the 23/09/10 on the effectiveness of EU rules in promoting European works on European TV screens covering the period 2007-2008 (IP/10/1163), European works transmission quotas are widely respected. Statistically, **more than 63% of Europe's TV is devoted to EU made programmes**. By 2008, only Cyprus (30%), Slovenia (44%) and Sweden (45%) were below-target. The broadcasting figures are far higher than the EU requirement in a vast majority of MS. Denmark, Poland and the Netherlands led the way achieving an average of over 80% of their total broadcasting transmission time devoted to European works. They amount to over 70% in Austria, Hungary, France and Luxemburg.

Independent production quotas are respected by all EU MS with **an average of nearly 35% of Europe's broadcasting time**. Clearly in the lead is Germany (62%), followed by Luxembourg (56%) and Austria (48%). Greece places last with 15%, still however above the AVMSD requirement. While the overall proportion of independent productions broadcast in the EU has fallen by about 1% since 2006-2007, nearly $^2/_3$ of them are considered 'recent', that is, broadcast within 5 years of their production (nearly 64% in 2008). The latter figure suggests that independent works continue to be produced and traded in the EU.

It is interesting to note that there seems to be no definite correlation between production capacity, or indeed time to adjust to the requirements of the directive, and the European works figures achieved by individual MS. The creative industry of the UK is among the best developed in the EU. It has clear linguistic advantages and production studios with the necessary experience to create audiovisual programmes of international appeal. In fact, the input of the BBC alone makes it a global player when it comes to children's programming or documentaries. Despite all this, the UK barely fulfils the majority requirement contained in the AVMSD when it comes to transmission time of European works (50.7% in 2008). The exact opposite is true for Denmark which has a small production capacity and yet achieves over 80% of EU made programmes on its TV. It is also not true that new MS place lower on the table – Poland continues to achieve extraordinarily high European transmission times ever since it joined the EU in 2004. Statistical data suggests that **the actual level of EU programmes on European TV is greatly influenced by non-economic considerations** of which national taste seems the most likely.

3.1.3. On-demand Quotas

Preamble Point 69 AVMSD
On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity.

EU requirements concerning TV transmission quotas have stayed largely unchanged since their introduction by the TWFD in 1989. They remain a key instrument of Europe's Audiovisual Policy which facilitates internal growth of the creative part of the sector by ensuring a high level of secure demand for European works. Seeing as their underlying purpose is as valid now as it ever was, it is not surprising that the EU has taken steps in order to exercise a like-minded impact on the newer on-demand environment. The 2007 amendment has expanded the scope of EU harmonisation whereby the Directive now requires MS to ensure that **on-demand services** provided by MSPs under their jurisdiction **PROMOTE**, where practicable and by appropriate means, **the production of and access to European works**. *(AVMSD Article 13)* The implementation statistics concerning this brand new rule are not yet available. All MS are required to submit an appropriate report to the Commission by the 19/12/11, at which point the Commission will compile the first EU-wide report. *(AVMSD Article 13(2 & 3))*

It is worth stressing that no quantitative criteria are set for the requirement 'to promote' European works in on-demand audiovisual media services. The Directive specifies only that the condition 'to promote' could be fulfilled by means of

- a **financial contribution to the production and rights acquisition** of EU made programmes eg an on-demand MSP covering part of the costs of recording a sports event or music concert taking place in a European venue
- devoting a minimum **share and/or special prominence in the on-demand catalogue** to European works eg by creating a special on-demand category of European movies or music/music videos by European artists
- an attractive presentation of European works in electronic programme guides so as to **encourage the actual 'consumption' of EU made programmes** eg by heavily advertising European-made programmes *(AVMSD Article 13(1) & Preamble 69)*

It is the very concept of 'to promote', as opposed to the requirement 'to reserve', that sets apart the EU rules on European works quotas applicable

to television and those affecting on-demand services. Both serve the same immediate purpose: increasing internal demand for EU made programmes, whether it is to ultimately foster cultural dialogue (socio-political aim) or simply to secure large demand for European producers (economic aim). Both do so by means of legally binding rules which force MS to place special obligations on their MSPs (primarily broadcasters) making them commit a considerable amount of their resources into European works. On-demand services are subject to a far lighter 'touch' when it comes to EU intervention because while users can be encouraged to choose European works – they cannot be forced to do so. If it did, it would deny on-demand AMSs their *raison d'être* – the ability to offer their users free choice in content access.

3.2. MEDIA Programme

3.2.1. Past MEDIA Programmes & i2i Audiovisual

Within just two years of the promulgation of the TWFD, the EU opened an extensive support programme meant to help finance the creation and distribution of European audiovisual works – the MEDIA programme. The initiative has proven so successful that it has been continued ever since. The programme is in its fourth stage now; past initiatives covered the years:

- **1991–1995: MEDIA I**
- **1996–2000: MEDIA II** which covered:
  - Media II Development and Distribution for the creation and popularisation of European works
  - MEDIA II Training which explicitly focused on training support for European audiovisual professionals
- **2001–2006: MEDIA Training** which benefited audiovisual professional **in parallel to**
- **2001–2006: MEDIA Plus** aimed at content creation and distribution
  + 2004: i2i Audiovisual was integrated into MEDIA Plus
- **2007–2013: MEDIA 2007** with a budget of €755 million

MEDIA I was established by the decision of the European Council with a **budget of €200 million**. It was divided into 19 sub-programmes including: SCRIPT which offered tailor-made support for script and screenwriting activities and EUROPA providing support for European cinemas. It was the aim of MEDIA I to stimulate 'the competitive supply capacity' of the EAS. The EU assumed in this context that increasing the market share of European companies would help them overcome their competitive weakness

in global terms enabling them to take full advantage of the then single market. As a result, the impact of MEDIA I was focused on European audiovisual businesses, SMEs in particular, and audiovisual professionals. Incidentally, the EU put special efforts to improve managerial skills in the sector and to promote the use of new technologies particularly those developed in the EU.

MEDIA II was established by two separate decisions of the European Council with a total budget of €310 million: MEDIA II Training had a budget of €45 million while MEDIA II Development & Distribution had at its disposal a far larger sum of €265 million. MEDIA II Training supported the creation of EU-wide training networks which would help European audiovisual professionals to compete internationally. MEDIA II Development & Distribution focused on trans-national initiatives. Although MEDIA II has proven to be an extremely successful programme and has done a lot to improve the global standing of the EAS, non-EU movies continued to dominate Europe's cinemas. Realising that European content had to gain far more mass appeal, the level of EU funding made available to European audiovisual projects in the framework of the MEDIA initiative was notably raised.

According to the Commission, the success of MEDIA II is well illustrated by the fact that **every €1 invested into the EAS through MEDIA II generated €5.75 of private investments.**

Two separate programmes operated simultaneously between 2001 and 2006: MEDIA Training & MEDIA Plus. They were originally designed to end in 2005 but were later extended over the year 2006 with an extra budget meant to answer the needs of the new MS that accessed the EU in 2004. **MEDIA Training** was established by a decision of the European Parliament and Council with a budget of €50 million; an additional €10 million was added later to cover 2006. The programme **focused on** improving the understanding and use of new technologies by European audiovisual professionals, emphasising in particular the great potential of **the Internet**. In this context, it encouraged online training and cooperation. Similarly to its predecessors, MEDIA Training supported script-writing and helped

improve management and legal skills but focused them on **areas with a low production capacity** (eg restricted geographical or linguistic scope).

MEDIA Plus was established alongside MEDIA Training with a budget of €350 million; an additional €100 million was added to cover the year 2006. Without losing its focus on supporting **independent companies**, especially SMEs, the EU has recognised the importance of mass appeal for the long term development of the EAS. As a result, MEDIA Plus was meant to aid **projects intended for distribution in the ever growing single market or even internationally**. Similarly to MEDIA Training, emphasis was placed on the use of **digital technology for the creation of European works** and the use of new services and technologies for their distribution.

MEDIA Plus contributed over €0.5 billion to 8,000 projects.

2004 saw the incorporation into the MEDIA Plus programme of the EU 2001 action plan entitled "Growth and Audiovisual: **i2i Audiovisual**". This widespread policy initiative was meant to shape existing EU support schemes so as to answer the needs of the ever growing on-line environment. Policy wise, i2i was set up in order **for the EU: 'to become the most competitive and dynamic knowledge-based economy in the world'** by fostering low cost, high-speed Internet access and the development of advanced ICT in the European audiovisual field. I2i was also meant to aid cohesion by ensuring that content is made available in all MS. The aims of the i2i programme were very much in line with other EU initiatives designed to facilitate the internal growth of the EAS: to promote the creation of independent European content with mass appeal (aimed at the European and international markets) and to promote projects that use novel technologies be it for content creation or distribution.

Without negating the direct importance of EU funding provided for the creation of European works within the MEDIA programme, this in itself would not normally be sufficient to complete a project. **Access to credit facilities** is also essential in this context. Indeed, it became apparent in the last decade that independent companies struggle to gain the financial backing they need to create audiovisual content. This was true especially for projects with a strong cultural message but without mass appeal, and thus

unlikely to generate profits. i2i Audiovisual was meant to remedy just this situation by helping independent European film and audiovisual production companies (in particular SMEs) to gain access to credit. The idea behind the i2i initiative was thus to provide small EU businesses with a certain level of EU funds (to cover some of the costs of the guarantees required by banks/financial institutions and/or part of the costs of bank financing), in order to make it easier for them to gain credit 'on the market', be it from a bank or direct investor.

About €3 million are available for this initiative in 2011. The Commission has provided potential beneficiaries with a list of requirement which must be met in order to be able to benefit from the support granted through i2i:

When to apply?
- as soon as the contract or contracts with a bank and/or completion guarantor and/or insurance company has/have been signed

Who can apply?
- independent audiovisual production companies registered in an EU MS or a country participating in the MEDIA Program and owned, either directly or via a majority shareholding, by nationals from such countries

What types of projects are eligible for the i2i funding?
- works **produced with significant European participation** (generally 10 points are necessary: 3 for EU director, 3 for EU screenwriter, 2 each for actors and 1 each for others such as composer or editor)
  - works of fiction – at least 50 minutes long
  - animation – at least 24 minutes long
  - documentaries – at least 25 minutes

How much funding is available?
- applications between €5,000 – €50,000 per project
- maximum 2 projects per each applicant
- maximum 50% of: Insurance Costs, Completion Guarantee Costs, Financial Costs (the interest on a loan) (60% for countries with low audiovisual production capacity)

What are the selection criteria?
- points are given to a project for the following:
  - already receiving support under the MEDIA programme
  - if a bank loan has already been granted for it
  - if it is from a country with low audiovisual production capacity or a new EU or candidate country
  - if it has a European dimension

How long does the procedure take?
- two deadlines a year (January & June); applications should be assessed as soon as possible – within 5 months at most

3.2.2. MEDIA 2007

The Commission carried out an **extensive public consultation initiative** in preparation for the current MEDIA 2007. The consultation allowed the EU to identify what interested parties believed the programme should achieve in the future. They included: support for market developments relating to digitisation; help EU professionals acquire the skills needed to successfully embrace the particularities of the converging economy; addressing the specific problems experienced by the professionals of new EU MS; and continued support of access to credit for SMEs. The MEDIA 2007 programme was established by the decision of the European Parliament and Council of 15 November 2006 concerning the implementation of a programme of support for the European audiovisual sector (1718/2006/EC). Its **total budget was set at €757 million for 2007-2013**. The Commission has listed a number of specific objectives to be achieved by MEDIA 2007 including:

- a stronger EAS that reflects & respects EU's cultural identity
- facilitating an 'inclusive' EAS
- promoting intercultural dialogue, in other words, supporting the creation of cross-border projects
- increasing the circulation of European works inside the EU and globally which can be achieved primarily though their widespread promotions
- answering the problems associated with digitalisation both in terms of technology and professional training
- strengthening the competitiveness of the sector by: facilitating access to financing SMEs & promoting use of digital technologies

Funds available within the MEDIA 2007 programmes are assigned according to a number of separate considerations. The **MEDIA 2007 FUNDING CRITERIA** include:

- the **creative process**
- the cultural value of **EU heritage**
- the positive impact on **SMEs** including the spread of a positive business culture and facilitating private investment
- **reducing imbalances between the MS** with high production capacities such as UK & France and those without and those with a wide and a restricted linguistic area (UK or Spain vs. Latvia or the Czech Republic);
- the preservation and enhancement of **cultural diversity and inter-cultural dialogue**
- the **encouragement of cross-border transmission of European works**

The budget for EU funding associated with single projects reached €7 million in 2010. Individual grants were awarded in the region of €10,000–€60,000; feature-length animations for theatrical release could receive up to €80,000.

Who can apply?
- independent production companies
- registered for at least one year
- those that have produced a previous work, which has been distributed during the period between 1 January 2007 and the date of submission of their application

What types of works are eligible?
- dramas animations and creative documentaries
- must be of minimum length
- applicant must hold the copyright

What is the likelihood of receiving a grant?
- applications are ranked by merit at the end of the selection procedure
- funding is awarded to the best until the available budget is exhausted
- about 20-25% applicants are successful (188/863)

Slate funding (funding given to a single entity for more than one project at a time) in 2010 had a budget of €6 million with grants awarded in the region of €70,000–€190,000.

Who can apply?
- independent European production companies
- legally registered for at least three years
- already have international experience
- have the financial capacity to undertake more than one project simultaneously

Which types of works are eligible?
- dramas animations and creative documentaries
- must be of minimum length
- applicant must hold the copyright

What are the applicable special requirements with respect to previous experience?
- companies from France, Germany, Italy, Spain and the UK must prove that they have completed two works in the 5 years before the application
- companies from other MS must prove that they have completed one work in the 5 years preceding their application
- all applicants must prove that the previous work(s) was distributed internationally

How likely are applicants to receive slate funding support?
- about 30% of the applications are successful (74/242)

Alongside an application for EU funding to eligible audiovisual works (Single Project or Slate Funding), it is also possible to apply for a contribution to the financing of interactive work that is meant to accompany it. Indeed, EU support is also available in order to assist EU producers with the additional costs involved in creating multiplatform projects. Financial support for the development of on-line and off-line interactive works is the region of €10,000–€150,000. The total available budget for 2010 was estimated to reach €2 million.

Who can apply?
- independent European companies
- their main object & activity must be audiovisual production and/or the production of interactive works (or equivalent)
- originating from MEDIA 2007 countries
- must have completed a previous eligible interactive work
- must prove that the work has been commercially distributed

Which types of productions are eligible?
- concept development (up to a first playable application) of digital interactive content complementing an audiovisual project (drama, creative documentary or animation
- specifically developed for at least one of the following platforms: Internet, PC, console, handheld device, Interactive TV
- the applicant must hold the copyright at least to the concept
- this digital content must present:
  - substantial interactivity with a narrative component
  - originality, creativity and innovation against existing works
  - European commercial potential

What is an eligible complementary audiovisual work?
- Only the following types of audiovisual projects intended for commercial exploitation can be complemented by the submitted interactive work:
  - a drama at least 50 minutes long (the total length of the series in the case of a series)
  - a creative documentary at least 25 minutes long (length per episode in the case of a series)
  - an animation of least 24 minutes long (the total length of the series in the case of a series)

Alongside MEDIA 2007, successful independent EU producers and distributors can also gain from the **Media Promotion** initiative which helps them to participate in both European as well as international events such as the Oscars. Similarly, the EU continues to give its support to over 100 **FESTIVALS** every year. To strengthen international cooperation, a new

MEDIA Mundus programme was opened in 2011 with a modest budget of €15 million until 2013.

The practical **success of the MEDIA initiative is visible most clearly at the Oscars**. Over the years a great number of MEDIA co-funded movies have been not only nominated but actually received Oscar awards. In 2011 alone, **'**The King's Speech' (UK) received an award for Best Picture, Best Director, Best Actor and Best Original Screenplay while the Danish 'In a Better World' received the Oscar for Best Foreign Language film. Both movies received over €500000 in distribution support to encourage distribution outside the country of its origin. Two further MEDIA co-funded films were nominated: 'Dogtooth' (Greece) for Best Foreign Film and 'The Illusionist' (UK/France) for Best Animation. The 2009 'Slumdog Millionaire' is among the best known recent Oscar winners which received EU funding. Other examples include 'March of the Penguins' (France) which won Best Documentary in 2006 which received over €1 million for distribution outside of France.

The MEDIA programme is managed by the Education, Audiovisual and Culture Executive Agency on behalf of and under the control of the European Commission

Revision Questions

1. What makes audiovisual content 'European'?
2. Why are European works transmission quotas important to the EAS?
3. How do European works transmission quotas differ between linear services and the on-demand environment?
4. What are the main areas of influence of the MEDIA programme?
5. What kind of projects can benefit from EU support through the MEDIA programme?
6. What makes the MEDIA programme successful?

CHAPTER 4

TECHNOLOGICAL ADVANCEMENT

While its key social importance cannot be denied, the audiovisual sector is only a single one out of the many segments of the EU economy. European works transmission quotas and the MEDIA programme are both instruments designed specifically for the needs of the EAS. In parallel, the EU is engaging however in many other far more widespread initiatives which are either directly or indirectly meant to support the internal growth of its economy. Current policy goals are expressed in the new **Europe 2020 Strategy to promote smart, sustainable and inclusive growth** introduced in 2010. In its framework, the Commission addresses the current economic crisis and some of the challenges expected further ahead. The Strategy focuses on creating new employment opportunities in the EU, on fostering a sustainable economy and supporting social **COHESION**. The latter concept, understood here as unified/balanced development, is closely related to the term **INCLUSIVENESS** which concerns efforts to ensure that no part of the EU society is excluded from the benefits associated with progress. Both concepts are closely linked with Europe's **REGIONAL POLICY** that has traditionally addressed its internal disparities by transferring very large EU funds to under-developed regions.

Europe 2020 has seven key initiatives including, most importantly here, the **Digital Agenda for Europe** (hereafter: DAE) which strongly **emphasises the key role of ICT** for Europe's economic and social development until 2020. The DAE aims to maximise the use of the Internet for the benefit of business as well as individuals. Indeed, the roles of the Internet cannot be underestimated seeing as it provides a unique possibility to develop new business models & employment opportunities, novel forms of entertainment & communications, better social & cultural services and enhanced information access. The Agenda is thus explicitly designed to 'spur innovation, economic growth and improvements in daily life for both citizens and businesses' by facilitating Europe's technological advancement.

Alongside the tailor-made aid given to audiovisual production and distribution companies, the internal growth of the EAS is greatly facilitated by EU support of the ICT field in general. ICT constitutes the technological backbone of the audiovisual sector, it is however equally important to Telecoms and Communications as well as all other converging industries. The importance of ICT goes however far beyond the relationship between technology and network-based economies. ICT can be an important contributing factor to solving some of the most challenging social problems of our age, such as: unemployment; education; health; environmental protection; the preservation of cultural heritage; and current limitations in the availability of public services. EU support of the ICT field is thus fuelled by a mixture of **social and economic reasons exemplified by**: **social inclusiveness –** ensuring that all EU citizens can benefit from the advancements associated with progressing digitalisation and convergence – and **maximising the unprecedented economic potential of ICT-based economy**. It is not surprising therefore that EU support to technological growth is by no means limited to the EAS but extends over its entire social and economic sphere from digitalisation of cultural material, though e-health to the interoperability of communications networks.

In practice, EU support of the ICT field is based on **a mixture of POLICY DOCUMENTS and** financial instruments. Its numerous ICT Communications & Strategies identify the social & economic challenges being addressed by the EU at any given time as well as the objectives being sought. These goals are then pursued with the help of an extensive array of **FINANCIAL INSTRUMENTS** which 'inject' considerable EU funds into the ICT field. EU funds are available to innovative European ICT projects, which have the potential to aid the technological advancement of the EU economy in comparison to its global competitors. They are also widely available to under-developed regions, which aid the technological advancement of areas that must catch up with the rest of the European economy. The former is thus meant to push the EU economy forward, the latter is meant to close existing technological development gaps between various EU regions.

European support to the ICT field is distributed in the framework of three separate initiatives:

- **the Competitiveness and Innovation Framework Programme** (the so-called **CIP)** which provides financial support to innovative market implementation and facilitation initiatives which includes the **Information and Communication Technologies Policy Support Programme** (the so-called **ICT PSP**)

- **the 7th Research Framework Programme** (the so-called **7FP)** which funds innovative research
- **Structural/Regional/Cohesion Funds** which inject EU funds to under-developed areas

4.1. Competitiveness & Innovation Framework Programme

Certain elements of EU support to the ICT field are part of its widespread Competitiveness and Innovation Framework Programme (hereafter: CIP) adopted in 2006 by the decision of the European Parliament and Council (1639/2006/EC) for the years 2007-2013. CIP has three segments:

- the Entrepreneurship and Innovation Programme (EIP);
- the Intelligent Energy-Europe Programme (IEEP) and;
- the **Information and Communication Technologies Policy Support Programme**

The EAS is affected most directly by the Information and Communication Technologies Policy Support Programme (hereafter: ICT PSP). It is the aim of the ICT PSP to stimulate innovation and by doing so, to facilitate the external competitiveness of the converged EU economy. The road to achieve this is by encouraging a widespread use of ICT by businesses (which have long since realised the economic potential of the Internet), citizens and MS governments. The programme associates growth with innovation and technological interoperability which will facilitate a wide range of new business and social opportunities. It is a means to foster the development of an internal market in novel products and services based on the use of ICT. Its primary **focus** is thus **on supporting the development of INNOVATIVE EU BUSINESSES**.

Unlike the direct support available through the MEDIA programme, ICT PSP works **primarily behind the scenes** – it aims to improve market conditions and services available to SMEs rather than providing them with direct aid. Thus, rather than funding research, the ICT PSP might fund the development of its practical application; rather than funding the creation of a network, it might fund the necessary works to ensure its EU-wide interoperability. ICT PSP funding is available for the preparation of market studies, benchmarking activities, and conferences concerning the objectives of the DAE. The **e-Procurement** initiative, which allows SMEs to gain access to public procurement offers in other MS, **is a popular example** of the type of initiative supported by the EU in the framework of the ICT PSP.

The current **ICT PSP 2011** work plan stresses however the need to pull the EU's resources into a small number of key areas which are in need of

EU funds and which will notably improve the innovativeness of the EU. The Commission has decided that the ICT PSP will focus in 2011 on: ICT for a low carbon economy and smart mobility; ICT for health, ageing well and inclusion; innovative government and public services; open innovation for Internet-enabled services; and digital content.

Most relevant to the EAS among the five ICT PSP funding areas is EU support to the improvement of digital libraries & digital preservation technologies, such as, digitalisation of printed material or the conversion of analogue feature films into a digital form. The ICT PSP acts here as a means to addressing the issues identified in the Commission Recommendation on the digitisation and online accessibility of cultural material & digital preservation of 25/08/06. Its explicit goal is to maximise the full economic and cultural potential of Europe's heritage (both cultural and scientific) through the Internet. Digital preservation and the online presence of culturally diverse material from all over the EU will not only have major social gains, it can also be beneficial to business acting as an important source of content for new AMS and as such foster growth in the EAS.

The EAS is affected most directly by ICT PSP funding of the digitalisation of Europe's cultural material, its aggregation in the Europeana portal, improvements to its accessibility, and the promotion of its widespread use. The EUROPEANA opened in 2008 as a portal that provides access to digital resources that represent Europe's cultural and scientific heritage. It remains the most important direct 'beneficiary' of ICT PSP's 'content digitalisation' budget already providing access to over 15 million: images (eg paintings, maps, photos of museum exhibits); text files (eg books, newspapers, letters); sound recordings (eg music, radio broadcasts); and finally videos (eg feature films, TV broadcasts). To succeed in receiving EU funds, an application for ICT PSP support must prove that the proposed digital preservation project is truly worthwhile.

For example, within the digital content aggregation initiative, the applicant must show that the project:

- will have a considerable impact (critical mass of quality content) on the availability of digital content in Europe
- demonstrate the European added value of bringing the selected content to the Europeana designed to be the most comprehensive freely accessible database of European content
- be able to resolve all related IPR issues, and
- be able to ensure that it will be accessible and retrievable by the target group.

ICT PSP funds are available to projects which will improve EU markets in order to foster innovative European businesses and business models.

4.2. 7th Research Framework Programme

Contributing to the technological advancement of the EAS and thus also to its internal growth is the funding made available by the EU to research activities in high-innovation fields such as the ICT through the currently applicable **7th Research Framework Programme** (hereafter: FP7). EU funded research is **meant to improve the** global **competitiveness of the European economy and thus by association, it has the ability to foster future growth in the audiovisual field.** There can be no doubt that the **€9 billion available to ICT research within FP7** will contribute to its technological development and thus help make Europe into a strong global player. The FP7 work programme for the support of ICT research in 2011–12 has **eight specific 'Challenges' which represent the current key aims** of the EU in this field. The EAS is affected by EU funding for research into ICT infrastructure improvements which falls under Challenge 1: Pervasive and Trusted Network and Service Infrastructures. Similarly to the ICT PSP work programme 2011, the EAS can also benefit from EU funded research undertaken under Challenge 4: Technologies for Digital Content and Languages, and Challenge 8: ICT for Learning and Access to Cultural Resources of the current FP7.

The total number of ICT research projects sponsored by the FP7 is truly vast– **DigiCult** is perhaps the best know of their thematic categories with direct relevance to the audiovisual field. Unsurprisingly, DigiCult constitutes another EU instrument meant to **support the growing use of Europe's cultural and scientific resources in the digital environment.** Its priorities for 2011-2012 include once again interdisciplinary research on d**igital preservation (part of Challenge 4) with a budget of €**30 million. **Another €4**0 million is available to **its other current task namely research on 'ICT for access to cultural resources' (part of Challenge 8).**

The influence exercised by the FP7 on the ICT field is too vast to try to outline it all. Video Games are a **good example** of a specific economic

segment belonging to the EAS the technological advancement of which can benefit greatly from the funds available through FP7. **Video Games** are the most dynamic creative segment of the EAS; they are a key driver of hardware development. video game sales have a higher EU growth rate than in the US. Their total revenue exceeds €7.5 billion which is about half of the revenue of the EU music market and more than its cinema box office intake. On-line video games have now also become a key driver of broadband technology and 3G mobiles. There can be no doubt that any support given now to the technological advancement of game software or hardware will have a positive effect on the future strength of the sector. Indeed, it would be difficult to find another segment of the EAS that demonstrates so well the closeness of the link between technological advancement, economic growth, and new business models.

The European Games Developer Federation, an association of some 500 European game studios with over 17,000 employees, listed data protection and Artificial Intelligence among the most promising ICT research areas relevant to the European video games industry. Hardware manufacturers as well as individual game studios, which often have dedicated software technology teams, academic institutions offering computing courses, and innovation companies alike are all eligible to apply for EU funding of research projects that have the potential to facilitate the technological advancement of video games. This is true particularly for projects which would improve Europe's innovativeness as opposed foreign markets.

GAMES@LARGE is a good practical example of the beneficiaries of the FP7 in the European Video Games sector. It is a research project that brings together 13 different EU business and academic institutions to enhance existing Multimedia distribution platforms (eg set top boxes) which currently lack the computing power of game consoles (eg PS3) or even normal computers. The project aims to provide users with the technological solutions that would give them a more varied gaming environment in their homes, hotel room or Internet cafes. The solutions that Games@Large aims to develop are meant to be affordable enough to make them attractive to both business and consumers.

Another interesting FP7 funded projects with the potential to foster the technological advancement of the EAS is **I3DPOST: intelligent 3D content extraction and manipulation for film and games.** It is the aim of this project to create the software necessary to capture film sets in 3D. A fully automated system for three-dimensional modelling of film sets could not only lower the costs but also the time necessary for post-production of movies and for film-based game development.

FP7 funds are available to research initiatives which will improve the innovativeness of the EU economy and by doing so, improve its overall strength and global competitiveness.

4.3. Structural & Regional Funds

Social and economic cohesion is the ultimate goal of Europe's Regional Policy and the ICT field is by no means excluded from its reach. Leaving the major economic, social and territorial **disparities would undermine some of the foundations of the EU in particular the internal market and the EURO.** Regional development **is served by 2 structural funds currently in operation:** the European Regional Development Fund (ERDF) and the European Social Fund (ESF) and the separate Cohesion Fund created in 2006. Under-developed regions also benefit from funds distributed under **the** Common Agricultural Policy (CAP) through the European Agricultural Guarantee Fund (EAGF) and, most importantly in this context, the European Agricultural Fund for Rural Development (EAFRD). Despite its overtly 'agricultural' focus, the EAFRD is of great relevance to the EAS because it provides key funding necessary for broadband infrastructure developments.

The **DIGITAL DIVIDE** remains the focus of Europe's regional aid to the EAS. It reflects the **difference between the availability of Internet access in urban & rural areas** as well as **in richer & poorer geographic regions**. Internet access has become commonplace in the vast majority of European MS but its 'speed' varies considerably depending on the available infrastructure – the larger the bandwidth – the higher the speed of the connection – the more data can travel at the same time. Low-speed Internet connections do not exceed 56 Kilobits per second (hereafter: Kbps), high-speed connections offer speeds above 56Kbps but generally reach at least 512Kbps. Many EU households have Internet connections with a speed of between 1 Megabit per second (hereafter: Mbps) and 20Mbps (1Mbps = 1,024Kbps). 3G (third generation) mobiles phones offer speeds of between 1Mbps, and up to about 7Mbps.

Considering therefore the technological advancements of recent years and especially the popularisation of 3G mobiles, it is now appropriate to

speak of a digital divide in terms of the availability of a high speed Internet connection rather than any connection at all. **Over 90% of Europeans can**, if they so choose, **have a high speed Internet connection** and yet many rural areas are not covered by the necessary network infrastructure, be it cable or mobile coverage. High speed Internet connection, **commonly referred to as BROADBAND**, is necessary in order to use most of the advanced AMSs.

The Commission believes that the creation and operation of broadband infrastructure will create 1 million additional jobs in the EU and boost its economy by €850 billion before 2015. However, by 2008 only about half of all Europeans had access to an advertised minimum speed necessary to use advanced AMSs such as Internet TV, that is, a download speed of approximately 5 Mbps and up load speed of 100 Kbps (compared to 37% in the US).

'Advertised' speeds overestimate actual speeds because speed worsens with distance from the exchange and number of simultaneous users. To protect consumers from misleading advertising, Ofcom is now taking steps to stop the advertisement of 'up to speeds' arguing for the use of 'typical speed' instead.

The European **BROADBAND GAP POLICY concerns the geographical aspects of the digital divide** among EU regions. As the gap between broadband penetration-rates grew, in 2006 the Commission issued the *Bridging the Broadband Gap Communication* which addressed the resulting disparity. The Broadband Gap Policy was originally part of the i2010 strategy designed to: create by 2010 a Single European Information Space; support innovation & investment in ICT research and; most importantly in this context, to ensure that the resulting benefits can be enjoyed by everybody (the e-Inclusion policy). While the i2010 strategy ended without achieving its aims partially at least due to the onset of the global financial crisis, its objectives have been taken over by the DA, a key flagship project of the current Europe 2020 strategy. The goal now is 'to have 100% broadband coverage by 2013, and to increase coverage bandwidth to 30 Mbps for all

Europeans by 2020 with 50% or more of European households subscribing to internet connections above 100 Mbps.' The **immediate goal** of the European Broadband Gap Policy remains the same over time **–** it **is to bridge the gap of**:

- access (availability)
- connection speed
- quality of the services
- price in broadband access

Multiple billions of Euros were injected in recent years into Europe's structural and regional funds in order to facilitate broadband infrastructure investments and information society services. Interestingly, regional aid (EAFRD) was made available from 2009 to all MS, seeing as even the richest EU countries had gaps in their broadband coverage where it was not feasible to invest in the necessary infrastructure. Unfortunately, their absorption rate (actual use) remains low. The UK region of Wales is an example of a well publicised region that has repeatedly missed out on available EU contributions. More successful are the actions taken by the European Investment Bank which is already lending over €2 billion a year to economically viable broadband projects across the EU supporting, in particular, public-private partnership initiatives.

Unlike the distribution structure of the MEDIA programme, the ICT PSP or the FP7, **EU funds** for the development of broadband in rural areas **are managed & distributed by national rural development authorities**. The types of projects eligible for EU funds include the creation of new broadband infrastructure, upgrades to existing infrastructure, necessary civil engineering works and synergy projects with other infrastructure elements. Indeed, the costs of civil engineering works are the single largest category of investments associated with the rollout of broadband networks. Unsurprisingly therefore, most of the EU funds dedicated to bridging the broadband gap are absorbed by large or even incumbent network operators working alone or in partnership with local authorities

EU structural/regional funds are managed in MS – funding applications are thus to be submitted to rural development agencies and not to the European Commission.

4.4. Switchover Support

The term **SWITCHOVER** reflects the **transition from analogue to digital broadcasting**. As a complex technological process, switchover affects all segments of the broadcasting value-chain forcing technological upgrades on all its stakeholders. **Analogue SWITCHOFF** should take place **when digital broadcasting has achieved almost universal penetration** in order to minimise social costs associated with the change. The switchover route varies from MS to MS not just in terms of speed and overall length of the process but also with respect to the parties involved and the degree of government intervention. Local circumstances including network types, user categories (eg cable v. satellite) and financial stability of the stakeholders play an essential role in determining the cost and speed of switchover in any given country.

Although switch-over affects the entire production and distribution chain, **the main hurdle falls on the reception side**. Consumers must replace or upgrade analogue receivers and connection points (antennas, dishes, cabling).

Switchover brings with it significant modification costs and risks concerning coverage and accessibility. Neither can be ignored seeing as some of the most vulnerable parts of the EU society, the elderly most of all, rely on TV broadcasting for all their information and entertainment needs. The inability to afford or adjust to new reception equipment poses an important social problem for most MS. Digitalisation and switchover are nevertheless extremely beneficial long term both socially and economically. Better processing and compressing digital data technology:

- improves the range and quality of broadcasting services (digital compression) resulting in more choice for consumers
- eliminates spectrum scarcity by increasing spectrum efficiency it opens the way to new services
- it is an important step to e-Inclusion
- increases the competitiveness of and within the EAS

Switchover is sure to result in significant internal growth of the EAS seeing as it will pave the way for new market entrants thanks to a more

efficient spectrum use and resulting new AMSs. Moreover, switchover makes it possible to re-use some of the best parts of the now increasingly free radio frequency spectrum opening the way to a multitude of novel convergent services combining communication with broadcasting. However, switchover will **not influence all of the stakeholders in the same way.** On the one hand, it is bound to stimulate growth of the audiovisual equipment market seeing as most consumers will have to upgrade their receivers. Network operators can also gain from the expected rise in revenue generated by the emergence of new AMS. Neither of these entities have an incentive to internalise the costs and contribute to the switchover. On the other hand therefore, broadcasters fear price rises for transmission services seeing as the network owners are very likely to pass on at least some of their modification costs. Although **switchover** is advantageous in overall economic terms, the process **may be delayed or develop in a very asymmetrical way if left entirely up to the market** justifying public intervention in this field.

The EU accepts the need for public intervention in relation to switchover – the overwhelming majority of actions taken in this respect take place on the level of MS and not the EU.

EU intervention in relation to switchover is once again backed by a mixture of social and economic reasons. The EU is acutely aware of the potential for economic growth in digital broadcasting especially with respect to internal demand for European content. It also wishes however to ensure that switchover occurs in a non-discriminatory manner and based on the principle of equal opportunities. EU actions are thus driven by the belief that **digitalisation is a necessary step on the way to economic progress as well as social inclusion**. The EU has appointed itself with the role of the internal market co-ordinator (benchmarking, equipment standards, consumer information, facilitating and promoting access to added value services); facilitator of co-ordination and cooperation between the various stakeholders; and guarantor that the benefits of switchover will be passed on to consumers. Most of all however, the EU supervises the actions of its MS with respect to the switchover process. While switchover is merely a means to an end (social & economic progress), it provides a good example of the

type of actions undertaken by the EU in order to **ensure that the interests of EU citizens are not hampered by the interests of other stakeholders**, be it business or national governments.

EU switchover policy is implemented primarily by way of soft-law instruments, the most important of which is the 1999 *Communication from the Commission: Towards a new framework for electronic Communications infrastructure and associated services – the 1999 communications review.* This key document has set out 5 basic principles that the Commission believes MS must follow with respect to their digitalisation efforts. In truth, the above act is not binding on MS – the only entity bound by its content is the Commission itself which can step away from its wording only if it can prove that it has justifiable reasons to do so. Seeing as it is the role of the Commission to ensure the observance of EU law and that MS use a variety of measures to facilitate switchover (regulation, state aid, promotions), the aforementioned act is thus an essential indicator as to what criteria the national measures must fulfil in order to avoid an intervention by the Commission.

The *Communication from the Commission: Towards a new framework for electronic Communications infrastructure and associated services – the 1999 communications review* specifies that **MS actions must**:

- be **based on clearly defined policy objectives**
- be **the minimum necessary to meet those objectives**
- **further enhance legal certainty in a dynamic market**
- aim to be **technologically neutral**
- be **enforced as closely as possible to the activities being regulated**

Leaving aside national sector-specific regulation, which lies outside of the scope of this discussion, **state aid remains the most important measure used by MS to facilitate switchover**. State aid is used most often to overcome market failure (market forces alone fail to deliver in terms of social welfare) or facilitate social cohesion provided it can be demonstrated that it is the appropriate means to address the problem at hand, that it is limited to the minimum amount necessary, and that it does not unduly distort competition.

It is thus worth looking at a recent practical example of an EU intervention into the switchover process of one of its specific MS. The Slovak authorities realised that their broadcasters would not switch off their analogue transmission earlier than the legally set switch off date (end of 2012) because citizens were not willing to acquire digital decoders. In November 2010, the Commission authorised Slovakia to give €7 million aid to support temporal parallel analogue and digital broadcasting to smoothen the switchover process. A 50% contribution was given to qualifying broadcasters

and network operators towards eligible extra costs. The measures proposed by Slovakia were not only in line with the applicable EU state aid rules, they were also very much in agreement with the requirements specified in the 1999 *Communication from the Commission: Towards a new framework for electronic Communications infrastructure and associated services – the 1999 communications review.* The proposed measures:

- did not infringe Article 107(3)(c) TFEU which permits aid to facilitate the development of certain economic activities
- were justified by clearly defined policy objectives – to facilitate an earlier & smoother transition, to avoid a 'last-minute' switchover and reception black spots
- distorted competition to the minimum degree necessary – the period of parallel transmission was limited to 12 months ending a year before the switch off date, the aid would take the form of matching funds and target only the extra costs (analogue signal transmission for broadcasters, purchase or rental of temporary mobile analogue transmitters for network operators)
- enhance legal certainty – eligibility was based on open non-discriminatory criteria for both broadcasters & network operators as well as the extent and period of the measures; annual reports will be submitted to the Commission
- the scheme would not favour one technology over another

A number of other policy documents and soft-laws were issued in the last decade concerning the European switchover process. They include the Action Plan *eEurope2005* that requested MS to publish their intentions regarding switchover by December 2003 and the 2005 *Communication from the Commission on accelerating the transition from analogue to digital broadcasting*. The latter document **proposed** the deadline of **2012 for switch off** throughout the EU. Truthfully however, no obligation of this sort was ever imposed on the EU level and the advancement of the switchover process is indeed diversified within the EU. Many MS have already switched off all analogue transmission (starting from the Netherlands as early as 2006). The switchover process is however still underway in many MS. The progress in Poland is especially slow with a switch off date set only for the end of July 2013. Considering therefore that **no switch off date has ever been imposed on the EU level**, MS are generally free to follow their own switchover plans. The way in which those plans are formulated and implemented falls under the scrutiny of the Commission which must ensure that MS actions are: transparent; justified; proportionate; non-discriminatory; technologically neutral; and timely in order to minimise the risks of market distortion.

Revision Questions

1. How would you define 'inclusiveness' of the EAS?
2. How important is it for the EU to ensure cohesion?
3. Does EU support to the content creation side of the EAS differ from its support to technology developments?
4. What would you look for in the Europeana?
5. What is the 'broadband gap'?
6. What is the relationship between EU and MS intervention in the switch over process?

PART III
INTERNAL COMPETITIVENESS

Competition is the essence of economic freedom – it reflects the free & fair rivalry of independent firms. Competition is also the basis of economic effectiveness and consumer welfare. **FREE COMPETITION** is associated with **markets void of unnecessary state intervention (Smith)** as well as **free from interference from other market players (Hoppmann)**. Free competition, however, is a largely unobtainable goal in modern economies. There are a growing number of social values considered basic by most consumers, such as access to key information for instance. The need to accommodate social goals frequently used to justify limits being placed by the State (eg the rightful owner of the copyright in a major sporting event might be precluded from selling the live transmission rights to a pay TV operator) and sometimes even by other undertakings (eg a downstream competitor 'forcing' access to infrastructure) on the individual freedom of economic activity.

Pro-competitive EU intervention is generally based on a somewhat different concept of **EFFECTIVE COMPETITION** deriving from the 1940 theory of workable competition (Clark). The level of competition within a market is seen as effective if it is **capable of ensuring the achievement of the primary goals of European Treaties** (TFEU & TEU). The concept of effective competition is thus closely related to the so-called **'practical logic' of competition protection** whereby effective competition is protected by controlling market power and preventing its creation or increase. Practical logic is based on the assumption that market power will profitably deprive consumers of the benefits resulting from effective competition. The enforcement of European competition law is thus based on the assumption that **effective competition benefits consumers** in terms of

- lower prices
- higher quality of products / services
- great choice = a wide selection of goods / services
- more innovation & progress

As it was shown above, the EU takes many actions to enable its citizens to benefit from a safe, inclusive, creative and innovative internal market in AMSs. To ensure their long-term effectiveness, these initiatives are

accompanied by extensive **EU interventions meant to ensure that the EAS remains competitive within** (internal competitiveness). In other words, the EU takes direct actions to preserve, and at times even actively create, competition within particular European audiovisual markets. Those actions are **based on** its **STATE AID rules** primarily as they are applied to Public Service Broadcasting (the EU aims here to minimise competition distortions resulting from the selective financing of a given PSB by its MS); **and European COMPETITION LAW** (ECL) applicable to anticompetitive agreements, abuse of dominance & mergers (the EU aims here to protect internal competition from market forces).

The notion of 'free competition' is not completely alien to the EU seeing as Article 119 TFEU speaks of the economic policies of the EU and MS being 'conducted in accordance with the principle of an open market economy with free competition'.

EU interventions meant to protect the 'internal' competitiveness of the EAS:

- concern the level (how much competition is present) and condition (how effective is existing competition) of competition on particular markets
- remain focused on competition but also directly consider socio-political aims such as media plurality and thus;
- explicitly acknowledge the exclusive competence of MS to organise and finance their PSBs in order to ensure inherently national socio-political objectives such as fostering national identity and an informed citizenship
- tend to have a supervising and, when necessary, penalising character
- concern all entities irrespective of their territorial origin or legal standing as long as their actions influence the internal competitiveness of the EAS
- are based on objective criteria, they do not favour one type of undertaking over another merely on the basis of its territorial origin
- tend to be tailor-made to their recipients – their widespread influence on the sector can be traced back to the market position of their recipients

MS intervene into the internal workings of their domestic audiovisual markets on the basis of national Media Laws and Competition law regimes. By doing so, they protect 'national' social (eg media plurality) & economic interests. Market practices with competition effects limited to localised

markets (smaller than national) are generally subject to national legislation and law enforcement only. National media & cross-media ownership rules tend to be far stricter than general concentration rules belonging to the realm of competition law because they are meant to protect the additional socio-political objective of ensuring the plurality and objectivity of media.

Respecting the competences of its MS, the EU takes steps to protect 'European' interests by minimising distortions of effective competition on the EU scale. Still, it is generally assumed that a practice affecting the territory of an entire MS has an effect on the entire internal market – partitioning alongside national boundaries is thus of interest to the EU. As a result, pro-competitive EU intervention is used to supervise market practices that have, or can have, an effect on the functioning of the internal market. **EU jurisdiction** is thus primarily based on the effect on trade between MS criterion aside from EU merger control which is triggered by the size of the parties (formally known as 'Community dimension', seeing as the MR was not amended, but now called 'EU dimension' because of the general rewording brought about by the Lisbon Treaty). The EU can intervene only with respect to:

- **state aid that affects trade between MS**
- **multilateral agreements if they have/can have effects on trade between MS**
- **abuse of dominance if it has/can have effects on trade between MS**
- **concentrations** (mergers & acquisitions) if they are concluded between large parties, in other words, **if they have an EU dimension**

The amendments introduced by the Lisbon Treaty into primary EU law (TFEU & TEU) are not great in relation to competition issues. It is nevertheless necessary to at least note some of the key semantic changes as well as the change in the numbering of the Treaties. First of all, **the term 'common market' was replaced by** the term **'internal market'** while European **'Community'** was replaced by European **'Union'** (thus, for instance, Community dimension has become EU dimension). While the change was 'implied' for all EU secondary legislation such as the Merger Regulation, both Treaties: TFEU (previously known as TEC) as well as TEU, were directly amended:

- Article 3(1)(b) TFEU states now that the EU has exclusive competence in the area of 'the establishing of the competition rules necessary for the functioning of the internal market' (ex Article 3(g) TEC spoke of a system ensuring that competition in the common market was not distorted)
- Article 3 TEU states now that the EU 'shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive market economy, aiming at full employment and social progress, and

a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.'

- Article 119 TFEU states now that to achieve this, the EU and its MS shall adopt an economic policy 'based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.' (ex Article 4 TEC)
- Unlike the draft EU Constitution, which saw competition policy as one of the goals of the EU, competition policy is now covered by the *No. 27 on the Internal Market and Competition attached to the Lisbon Treaty*, which states that 'Considering that the internal market as set out in Article 3 of the TEU includes a system ensuring that competition is not distorted' [...] 'To this end, the Union shall, if necessary, take action under the provisions of the Treaties'.

It is also essential to emphasise that aside from once again **changing the name of the Rome Treaty of 1957 (known as TEC between 1992–2007) into TFEU** its **provisions were renumbered**. The numbering of European competition rules has already been once amended by the Amsterdam Treaty in 1995. The shift brought about by the Lisbon Treaty represents therefore the second time the numbering of the relevant primary EU rules has changed. While historic developments might seem irrelevant here, they must be kept in mind because the vast majority of European case law refers to the old numbering. Pro-competitive EU intervention is based primarily on four specific Treaty Articles which have been renumbered into:

1957-1992	1992-2007	Since 2007
Art.85 TEEC	**Art. 81 TEC**	**Art. 101 TFEU**
Art.86 TEEC	**Art. 82 TEC**	**Art. 102 TFEU**
Art.90 TEEC	**Art. 86 TEC**	**Art. 106 TFEU**
Art.92 TEEC	**Art. 87 TEC**	**Art. 107 TFEU**

PART III of this book will cover the EU's key efforts to supervise the 'internal' competitiveness of the EAS primarily through the application of directly applicable EU law and related soft-laws: Chapter 6 will be devoted to state aid issues surrounding the competition between private media operators and public service broadcasting. The influence on the EAS of European Competition Law will be discussed in Chapter 7.

CHAPTER 5

PUBLIC SERVICE BROADCASTING, STATE AID & SERVICES OF GENERAL ECONOMIC INTEREST

Most of the European Audiovisual Policy instruments presented in PART I and II of this book foster the cultural diversity of the EAS and facilitate its internal growth & external strength. This realisation is true irrespective of whether diversity is seen as its 'goal' or 'means'. Does the EU foster diversity to facilitate economic strength? Does it help the economy in order to aid culture? There can be no doubt that the EU pro-actively supports its diversity by securing internal demand for locally made programmes, preventing content foreclosure and funding support. Indeed, the EU is well aware of the socio-political inevitability as well as the economic potential of cultural diversity for the future of the EAS. However, **Europe's cultural diversity is the sum of the national identities and heritage of all its MS.**

Fostering the identities and heritage of each and every European nation remains the prerogative of its MS. Domestic funding schemes are often used for that purpose as an equivalent of the MEDIA programme. Unlike the policy instruments available to the EU however, **MS use PUBLIC SERVICE BROADCASTING as a key means of** reaching their media & cultural policy goals. The EU acknowledges the role of Public Service Broadcasters (PSBs) for the socio-political well being of its nations. Thus, despite the often competition-distorting effects of their financing structures, the EU accepts the continuing existence of PSBs primarily because of their role in **fostering** Europe's **cultural diversity**, albeit in a more indirect way than the pro-active instruments mentioned above.

MEDIA PLURALISM constitutes one of the many aspects of cultural diversity. It is a concept closely related to the freedom of expression which associates diversity with a 'difference of opinion', as opposed to cultural heritage for instance. In other words, media pluralism is the **basis for cultural diversity when the diversity of opinion derives from varying**

EU acceptance of public broadcasting is controversial seeing as their existence contradicts some of its foundations:

- the quintessentially 'national' character of PSBs **reinforces borders within the internal market**
- selective **state funding of PSBs can distort competition on an EU-scale**

cultural backgrounds. Media plurality is a derivative of one of the most basic social freedoms of our time – the freedom of expression which encompasses an active portrayal of diverging world views as well as their passive communication to the audience. While there can be no doubt that **private media outlets contribute to pluralism**, it is generally assumed that **an adequate level of media plurality can be ensured only by the continuing existence of PSBs**. The latter are meant to counterbalance the influence exercised on the offer of private MSPs by their profit-making character.

Truthfulness, objectively, quality, and comprehensiveness of media coverage are all requirements associated with the active side of the freedom of expression. They constitute the quintessential goals of national media/ press laws and thus lie outside the scope of this book. What is relevant to this analysis is the passive side of the freedom of expression as it is reflected in media plurality – **ensuring that the audience can access all types of programming**. Private operators generally offer mass appeal content only, such as popular sports, movies, or drama series. It is traditionally the role of PSBs to fill the gaps, providing the audience with minority programming such as high culture events, documentaries, or less popular sports. It is to fulfil this very purpose that they receive most of their public funds.

Truthfully, it is easy to negate the programming difference between public and private broadcasters considering recent growth in special interest channels. It is equally true however that some parts of EU society, the elderly for instance, do not possess the means or indeed ability to effectively use pay-TV. Seeing as **some parts of the European audience continue to rely solely on PSBs as the most accessible form of TV broadcasting,** the programming gap remains relevant to this analysis. At the same time however, media pluralism is used by PSBs to justify their increasing presence in the on-demand environment. For this reason, the need to ensure pluralism has become a key social consideration not just for broadcasting but for an increasing number of audiovisual markets.

EU intervention into public funding of PSBs constitutes the most complex matter covered in this book. No other aspect of the audiovisual field generates as much controversy and delicate political balancing between the EU and its MS as public service broadcasting. The size of the subsidies received by PSBs, the generally growing scope of their activities funded through state aid, and the protectionist attitude of most MS towards them means that **all those that wish to take part in the EAS must know how to 'work' around the market presence of public broadcasters. Private** operators of both traditional as well as new media must thus be fully aware of the socio-political and economic background of PSBs and the respective roles played in this context by MS and the EU. In the end, it is not the role of private providers to accommodate justified socio-political goals of their country of origin. This function is assigned to the Commission that must also however protect the 'common' economic interest of the EU by minimising market distortions created by PSBs. **It is** thus **the European Commission and Courts to whom private MSPs reach out in order to safeguard their justified economic interests** when endangered by public service broadcasting.

The following chapter will cover the various characteristics of PSBs and emphasise the difficulty in objectively evaluating their effectiveness in socio-political terms (Point 5.1). The next fragment will introduce the relevant EU rules on state aid and Services of General Economic Interest (SGEI) (Point 5.2). The final part will present the relationship between EU state aid and SGEI rules and public funding of PSBs (Point 5.3). The following steps of a state aid assessment will be considered here:

- does the public funding granted to PSBs constitute state aid, or compensation not subject to EU state aid rules
- is the state aid of EU importance, in other words, does it affect EU trade
- can aid be permitted under the cultural exemption or does the activity of the PSB for which the aid was granted constitute a SGEI subject to its own exemption

5.1. Public Service Broadcasting

5.1.1. Characteristics of Public Service Broadcasting

Public service broadcasting is a controversial topic primarily because of the competition distorting influence exercised on the market by the selective, and often overly generous, public funding received by PSBs. In reality, **particular public service broadcasting systems can vary depending on a number of criteria:**

- **funding mechanisms:** single financed and those based on dual-financing
- **nature:** entirely non-commercial and those that engage in commercial as well as non-commercial activities
- **scale of operation:** national, regional, or even local
- **legal status:** most are public undertakings but some are independent
- **goals:** PSBs should fulfil their public service remit but some are used as political tools instead
- **effectiveness:** some PSBs are more successful in achieving their remit

The position and activities of public broadcasters vary greatly between different MS for a number of reasons such as their funding structure, size, legal status or priorities.

Many different **FUNDING** mechanisms can be used to finance public service broadcasting. PSBs can receive some or all of their funds from the public, from individuals through voluntary donations, a specific tax (eg a TV licence fee or by taxing private operators) or indeed, direct funding by the State. **Dual-financing** occurs **when** a PSB receives part of its **funds from public sources and** part **from the market,** primarily from advertising revenues. Dual-financing remains the most controversial form of PSBs funding because thanks to the public backing, PSBs can benefit from a more stable financial position than their private counterparts when engaging in commercial activities. As a result, not only can PSBs win a bidding war for key content but they can also undercut advertising prices to the detriment of private operators. Dual-funding is thus often believed to cause major distortions of competition to TV advertising markets.

The character of the funding received by a particular PSB is reflected by its **NATURE.** Completely **'non-commercial'** PSBs are rare, most have a **'mixed'** nature – they can engage in at least some market activities although preferably, commercial activities are left to a separate entity working within or alongside the normal structure of the broadcaster. PSBs generally act on a **national SCALE** but **local** operators are sometimes used especially in regions occupied primarily by a minority. Most European PSBs have the **LEGAL STATUS** of **public undertakings** owned or controlled by the State. They are usually not expected to be economically viable or generate profits because they are primarily meant to achieve social objectives. Their non-economic

focus sets them apart from state-owned enterprises designed to undertake commercial activities on behalf of the owner (government), even if they can also pursue public policy objectives. No matter what their current legal status is, European PSBs all used to hold a legal monopoly. Although their original market position has progressively diminished with the emergence of commercial broadcasting, some experience trouble retaining audience shares while others are thriving.

PSBs receive in Europe cumulatively more than €22 billion annually in subsidies. They place third, after agriculture and transport, among state aid recipients in the EU. **The size of the subsidy alone makes them into major market players in the EAS**, a fact reinforced by their advertising revenue.

PSBs vary also because of the actual aims they pursue. Their primary purpose should be to ensure **an adequate level of media pluralism** in order **to improve society as a whole by informing its viewers**. It is this general objective that constitutes their **largely universal PUBLIC SERVICE MISSION (goal)**. It is for this reason that PSBs are designed so as to:

- have geographic universality
- cater for all interests and tastes including of minority content including that intended for racial and linguistic minorities
- show concern for national identity and community values and thus PSBs are generally expected to produce a significant amount of their own content to ensure that all social needs are met
- create high quality & novel content despite its economic value
- be impartial – they should be independent from the government as well as from the industry

By contrast, even though they also serve media plurality – the aim of commercial MSPs is to provide popular content that attracts a large audience in order to maximize revenue. PSBs are **NOT meant to generate PROFITS** in the economic sense of the word – their achievements should be felt in the socio-political sphere of each nation. Their programming decisions in particular should thus not be ruled by purely economic considerations. They are also **NOT meant to be used as POLITICAL TOOLS** for the ruling party. In practice, some governments consider controlling their PSBs as a key

prerequisite of governance. As a result, government controlled broadcasters are sometimes used as a tool to purposefully influence the opinion-making process of the national audience. By presenting a subjective (partial) rather than objective (comprehensive) world view, they fail in their public service mission leaving it up to the 'free' media to ensure the plurality of media.

It is the quintessential function of PSBs to fulfil a PUBLIC SERVICE MISSION = REMIT, that is, **to inform, educate and entertain the entire society**.

Closely connected to the notion of a public service broadcasting mission or remit is the issue of its **EFFECTIVENESS in achieving its socio-political purpose.** However, this is without a doubt the most difficult characteristic to assess. Leaving aside fully politicised PSBs which largely disregard the requirements of their remit, how is it possible to find out whether a PSB manages to fulfil its socio-political goal? In other words, how is it possible to differentiate a 'good' from a 'bad' or a 'successful' from an 'unsuccessful' one? In truth, this question is nearly impossible to answer, whether in quantitative or qualitative terms. A number of **factors influence the effectiveness of particular PSBs** including: audience shares, programming, independence and financial backing.

The first requirement in this respect is to be able to achieve a certain **minimum audience share –** PSBs cannot hope to fulfil their social obligations if they do not manage to reach the general public. However, audience shares alone are an insufficient indicator – they must be achieved on the basis of **varied, objective, high quality programming** that leaves no part of the society without representation. Among other conditions determining the effectiveness of a given PSB lies in the **form of control** exercised over it. Governmental control has a detrimental effect here as it can destabilise the position of a public broadcaster over time and result in a loss of objectivity and thus audience share. Parliamentary, corporate, or professional control is more likely to foster a successful PSBs because of their greater stability, impartiality and professionalism in designing funding mechanisms. The **amount and form of funding** received by a public broadcaster is also relevant. Dual-financing can be the most effective at

least in terms of audience shares as it provides a balance between the safe public 'funds' and competitive market income. Unfortunately, the political sphere generally believes that control over public media is a necessary condition to effective governance. If politicians cannot gain control over their PSBs in a legal manner, funding cuts are often used instead in order to force compliance. Political pressure can thus have a very detrimental effect on the performance of public service broadcasting.

It is very difficult to evaluate the effectiveness of PSBs because it is impossible to assess how large was the contribution of the given PSB to fulfilling the public's socio-political needs.

The European Commission issued in 2009 a *Communication from the Commission on the application of State aid rules to public service broadcasting* (hereafter: 2009 *Broadcasting Communication)* presenting its current position on Public Service Broadcasting replacing its 2001 predecessor (hereafter: 2001 *Broadcasting Communication*). The Commission first of all re-confirmed that it associates the **economic rationale of** the continuing existence of **PSBs** with the **PROGRAMMING GAP –** provision of programmes not supplied by the market because they are unprofitable, to the social detriment of citizens. Lack of viability was associated with an imbalance between the social benefit resulting from the provision of minority content to those who actually seek it but cannot access it in commercial media outlets, and the benefit to advertisers from reaching such minority audiences. The 2009 *Broadcasting Communication* also explicitly acknowledged the **positive impact** that can be exercised by public service broadcasting **on INNOVATION** in the audiovisual field. Their financial stability and independence from normal market forces allows them to act as pioneers in introducing new content types. Cooking, home improvement, and high quality children's programmes are some examples of programming tested out by PSBs first before they were 'copied' by commercial stations. Thus, it is often the case that where public broadcasters lead, private operators follow – improving consumer choice and spurring innovation in the process.

It is worth noting however that the rather positive picture of public service broadcasting painted by the 2009 *Communication* was somewhat dampened

by the statement that **PSBs can foreclose markets to the detriment of private operators.** This danger is particularly relevant where they increasingly enter the non-broadcast environment of the Internet, potentially crowding out commercial competitors that cannot accommodate equally high economic risks. Finally, the Commission has acknowledged that **national governments might fail to address wastefulness and the issue of overcompensation** where the costs of public funding exceed its benefits.

2009 *Broadcasting Communication*
Commercial broadcasters claim that the shift to the multi-channel, on-demand broadcasting offered by digitalisation will enable the market to cater for all needs and therefore also fulfil the public service obligations currently assigned to public broadcasting institutions. However, there is no guarantee about the quality and independence of such provision, or that it would be free-to-air, universally accessible and constant over time. It is recognised that there can be an overlap with commercial broadcasting in popular genres. However, the growing commercialisation and concentration of the media sector combined with the resulting "dumbing down" of general quality vindicates, when this concerns public service broadcasters, those who criticise the use of public money for such purposes.

The changing situation of Public Service Broadcasting in Europe has also been tackled by a Recommendation issued in 2004 by the **Council of Europe.** Unlike the EU and in particular the Commission acting as its enforcement arm, the Council of Europe is a body focused on democratic values surrounding the European Convention on Human Rights (ECHR) and thus free from the constraints resulting directly from economic integration goals. Its input into this debate is worth noting because it takes a more critical view of the region's PSBs than EU institutions. *Recommendation on public service broadcasting* **stressed that many European PSBs lack INDEPENDENCE from their governments** *(Point 3).* Moreover, while it welcomes the move to better funding transparency & accountability advocated by the EU, it expressed concerns that governments might try to use this development as an excuse to exert new pressure on their PSBs *(Point 4).* The competences of the Commission with respect to the organisational structure or internal workings of PSBs are very limited, it is not entitled to address their independence as this would be seen as an overstepping of its powers. The criticism expressed by the Council of Europe in this respect is thus very important here as it concerns an issue outside EU competences and thus complements some of the key initiatives taken by the Commission in this field.

The 2004 *Recommendation on public service broadcasting* issued by the Council of Europe has also contributed greatly to the clarification of **the difference between PSBs and commercial operators.** The distinction **was associated with** the existence of a specific public service **REMIT** which reflects closely the concept of their mission. The Council of Europe stated in this context that it lies within the remit:

- to provide information, culture, education and entertainment to the entire society
- to enhance social, political and cultural citizenship and promote social cohesion – to which end PSBs must
  - be universal in terms of content and access
  - guarantee editorial independence and impartiality
  - provide a benchmark of quality
  - cater for the programming needs of societal groups
  - be publicly accountable
- but to do so independently of those holding economic and political power

The universal socio-political purpose of PSBs represents their public service mission (general term relating to all SGEI) **known in the audiovisual field as their REMIT.**

In summary, despite its concerns which relate mostly to how individual governments perceive and use their PSBs, the Council of Europe has taken a very positive stance to their continuing existence in two separate Recommendations issued in 2007 which concerned recent technological developments. Both the *Recommendation on media pluralism and diversity of media content* and the *Recommendation on the remit of public service media in the information society* identified not only **a number of reasons justifying the continuing operation of PSBs** but also **arguing for the expansion of their activities** into new media **and the provision of funds sufficient for that purpose**. Among the most interesting arguments presented here were the increasing difficulties of private operators to accommodate social values in light of growing economic pressures, the firm preferences of the younger generation to use new media services and the role of PSBs in promoting

e-Inclusion. In the new Information Society age, the Council of Europe believes that **the public service broadcasting offer should, as a whole, constitute an added public value** compared to those of other broadcasters and content providers.

5.1.2. Examples

Italy constitutes an interesting example of an unusual relationship between the effectiveness of a PSB and the journalistic independence and political culture of a given EU nation. In terms of political culture, Italian society has a strong preference to access solely 'their' own media, in other words, the TV channel/newspaper that follows their own political views. Audiences show little interest in 'objectivity' and truth seeking and thus journalists act more like 'presenters' than 'interviewers'. In this climate, politicians are free to present their views without much interference. As a result, rather than providing objective and diversified information as would be expected from an operator with a public service mission, the Italian PSB offers its viewers a multitude of partial opinions – each channel serves one point of view which together provide what can be called a plurality of partiality.

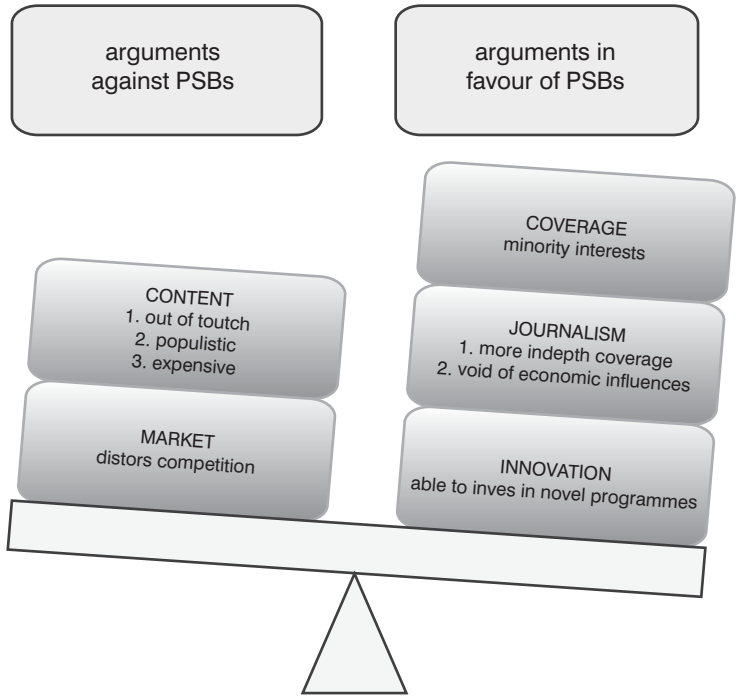
Poland illustrates well how the high audience shares of a given PSB must not necessarily be a reflection of its effectiveness in terms of public service remit. The Polish PSB is by far the most well established operator in the country and remains the only one with universal coverage. At the same time however, the overwhelming majority of its editorial decisions are based on commercial, rather than socio-political considerations and thus its programming shows a great degree of similarity with the offer of its private competitors. While there is little difference in the offer between the Polish public and private operators, the former is in a far superior financial position. More than half of its funds derive from advertising but it is also privy to substantial State aid. Because of the extra funds, it is able to undercut advertising prices and still offer somewhat more expensive entertainment than its commercial counterparts. It is thus not surprising that the PSB still holds about half of the Polish audience share while the two main private operators achieve about 20% and 16% respectively.

The **BBC** is generally considered the pinnacle of PSB, primarily because of its continuing efforts to produce high quality content and its extensive representation of ethnic minorities. The level of political independence and thus also trust in the objectivity of the BBC remains very high. It

has to be said however that the British political sphere is far less partisan then most other European countries and thus 'objectivity' is easier to achieve. Interestingly, the financial crisis has had a double-sided effect on the relationship between the BBC and the market. While its move into the Internet environment has narrowed the gap between the public and the private sector in the new media field, the withdrawal of commercial operators from local/regional markets and content production has once again emphasised the 'special' character of the BBC.

Public service broadcasting is now a particularly current topic in **France**. French Television manages to reach about a third of the national audience following an integrationist approach characterised by an under-representation of minorities. The pursuit of the 'French' identity has thus overruled many other factors traditionally associated with a public service remit such as universal representation. Moreover, French public broadcasting has traditionally been subject to a great level of state intervention – its instrumentalisation by President Sarkozy has been particularly noticeable. The current government's acute interest in its PSB became even more evident when its broadcasting law of 2009 took the power of appointment of the head of the French PSB from the regulator back to the political executives. The regression of the PSB in terms of independence is likely to deepen thanks to the decision to gradually change its funding systems by withdrawing advertising revenue. This amendment, completely opposite to recent Scandinavian initiatives, will make its finances fully dependent on public resources and therefore the government. President Sarkozy stressed however his intention to elevate the PSBPSB from commercial influences and emphasised the need to provide a true qualitative difference between the programming offer of the PSB and private operators. While the French reform certainly goes against the current trend, it remains to be seen whether the quality of its PSB will actually improve in socio-political terms.

The 2009 French broadcasting law introduced stricter European works transmission quotas for their PSBs (50% European & 50% domestic) than on private broadcasters (60% & 40% respectively). Still, both criteria fulfil the AVMSD requirements.



5.2. State aid & Services of General Economic Interest

Before analysing the relationship between EU and MS competences in relation to public service broadcasting and the influence exercised in this respect by the European Commission, it is necessary to present the EU law background applicable to this extremely important part of the EAS. First presented will be the EU rules governing state aid (funds given by MS to particular market players) followed by the special provisions applicable to services of general economic interest.

5.2.1. State aid

A **SUBSIDY**, also known as a subvention or financial aid, is usually given to **help a company or industry in financial difficulty** (eg most recently banks and airlines). Subsidies are most commonly divided into direct (money transfers) and indirect (eg tax relief). Their immediate aim is to: protect consumers (eg from the collapse of the mortgage market), ensure that the price of final products remains low (eg milk), achieve social objectives such as

creating new jobs (eg broadband) or strengthen the external competitiveness of a particular industry as is the case in the audiovisual field. In the latter case, subsidies can constitute a form of trade barriers increasing the external competitiveness of the 'internal' offer in comparison to what it would be without public help. Subsidies can originate from a variety of bodies including the EU as shown by the funding given to European audiovisual companies within the framework of the MEDIA programme. **State aid is a type of subsidy** given by a particular country (government).

Subsidies **distort market competition**. Their negative influence on market competition is by far the largest if they are selective, and **especially if the selection procedure is NOT based on objective criteria** that can be qualitatively and quantitatively evaluated. Subjective favouritism tends to place those that were overlooked at a significant competitive disadvantage on the market. The distortion of competition resulting from subsidies is often aggravated by the fact that their recipients are often far less efficient than their competitors because they are not subject to normal market competition. This concern has been frequently noted with respect to PSBs which tend to employ significantly more staff than their commercial counterparts. Despite their competition distorting character, subsidies **can constitute an effective market failure remedy.** The EAS is often in need of subsidies because of the disparity between its 'effectiveness' in economic and socio-political terms for instance, where universal accessibility goes against economic viability.

5.2.1.1. EU Opposition to State Aid

> *Article 107 TFEU*
> 1. Save as otherwise provided in the Treaties, any aid granted by a [MS] or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between [MS], be incompatible with the internal market.

The EU focus on 'effective' economic integration is reflected by its negative stance against state aid. However, two separate points must be made with respect to EU opposition to state aid – the first widens the scope of EU intervention in this respect while the second narrows it down. First, **TFEU defines STATE AID** in a very wide manner**.** As a result, **any aid granted by a MS or through state resources in any form whatsoever** is considered to constitute state aid. Be it a financial contribution to the production or distribution/sales process, a state guarantee necessary to secure a loan, or indeed a tax relief, they all fall within the EU definition of state aid.

EU scrutiny extends over all FORMS of aid granted by MS be it direct subsidies or a favourable tax system.

Secondly, EU jurisdiction is limited to state aid which affects trade between MS. Accordingly, unless otherwise stated in the Treaties, **TFEU prohibits state aid** (incompatible with the internal market) **if it distorts or threatens to distort competition,** by favouring certain undertakings or the production of certain goods, **on an EU scale only** (as it affects trade between MS) *(Article 107(1)).* Aid given by individual MS to non-EU exports or the provision of services on a local market is thus not of concern to the EU.

The EU is only concerned with state aid that has EU wide effects – affects trade between MS.

5.2.2.2. General Derogations

Article 107 TFEU

1. Save as otherwise provided in the Treaties, any aid granted by a [MS] or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between [MS], be incompatible with the internal market.
2. The following shall be compatible with the internal market:
   (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
   (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
   (c) aid granted to the economy of certain areas of ... Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:
   (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
   (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a [MS];
   (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
   (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
   (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

EU opposition to state aid is subject to **three types of derogations under review by the European Commission** which acts as the overseer of all state aid in the EU. State aid in Europe can benefit from:

- *de jure* derogations *(Article 107(2) TFEU)*
- discretionary derogations *(Article 107(3) TFEU)* and,
- a special derogation covering not only EU state aid rules but also ECL, applicable to services of general economic interest *(Article 106(2) TFEU)*

Article 107(2) lists three types of state aid as compatible with the internal market. In other words, they are permissible by law **(*de jure* derogation)** even if they distort or threaten to distort competition and affect trade between MS:

- some types of socially-motivated aid to individual consumers provided that it is granted without discrimination related to the origin of the products concerned *(Article 107 (2(a))*
- aid in the event of natural disasters *(Article 107 (2(b))*
- and, for at least 5 years after the entry into force of the Lisbon Treaty, aid associated with the re-integration of Germany *(Article 107(2(c))*

Article 107 (3) contains a list of **five explicitly defined** categories of aid that can be considered to be permissible even if they distort competition with EU effects because of their important social benefits **(discretionary derogation)**. The list of state aid that might be compatible with the internal market contains:

a) aid to underdeveloped areas of the EU
b) aid to important European projects and those to remedy a serious disturbance of the economy of a MS

c) aid to some economic activities/areas, as long as it does not adversely affect trading conditions to an extent contrary to the common interest
d) aid to promote culture & national heritage conservation provided it does not affect trading conditions and competition in the EU to an extent that is contrary to the common interest
e) other aid specified by decision of the Council on a proposal from the Commission. *(Article 107(3))*

In order for a given state aid to benefit from this derogation, MS must inform the Commission first about the planned measures – the latter can be implemented only after they are approved by the Commission. In other words, **the decision whether given aid is permissible lies in the discretion of the Commission.** If a MS is found in breach of EU state aid rules, the Commission might not only order the return of the incompatible aid but also fine that MS. Finally, a formal complaint against it can be submitted to the Court of Justice by the Commission and other MS *(Article 108).*

The five categories of state aid which the Commission can permit must be interpreted in a strict manner – only aid granted specifically for the listed purpose can be approved.

5.2.2. Services of General Economic Interest

5.2.2.1. Public Services

Particularly relevant here is the relationship between EU state aid rules and the provision of **PUBLIC SERVICES** whereby **society considers their universal accessibility as an essential element of modern life** in social (eg safe energy supplies) or political terms (eg access to information) **irrespective of the cost** of their provision. Public services can be provided:

- by the government directly to its citizens through state-owned undertaking of the public sector
- by private entities but funded by the state
- by the market without state support but subject to strict sector-specific regulation

Article 14 TFEU
Without prejudice to ... Articles 93, 106 and 107 [TFEU], and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council ... shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Public services are known in the EU as **SERVICES OF GENERAL ECONOMIC INTEREST (SGEI) –** the importance of their effective provision is firmly stressed in the TFEU. Accordingly, SGEI are **essential for cohesion** providing what is seen as necessary even to those that cannot afford it and **fulfil a key role in the shared values of the EU.** *Protocol No. 26 on services of general interest* attached to the TEU & TFEU by the Lisbon Treaty contains additional interpretative provisions concerning what comprises the shared values, listing in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising SGEI as closely as possible to the needs of the users;
- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising SGEI as closely as possible to the needs of the users;
- the diversity between SGEI and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights

SGEI lie in the area of joint competences between the MS and the EU – they must both ensure, within their respective competences, that SGEI operate in a way that allows them to fulfil their mission. The shared nature of their competences is reflected in the fact that it is the role of the European Parliament and Council to establish the principles and conditions, particularly economic and financial, which enable those providing SGEI to fulfil their missions. It is however the role of MS to provide SGEI directly, to commission their provision, and to fund them.

According to Article 2 of the *Protocol on services of general economic interest*, **the TEU & TFEU do not affect in any way the competence of MS to provide, commission, and organise non-economic services of general interest.**

5.2.2.2. SGEI and EU law

Article 106 TFEU

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties....
2. Undertakings entrusted with the operation of [SGEI] or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties ... in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

It is important to emphasise that SGEI are not excluded from the applicability of primary EU law**.** Most importantly, they must comply with TFEU provisions:

- on state aid to SGEI *(Article 106 TFEU)*
- as well as general state aid rules *(Article 107 TFEU)*

The provision of SGEI is usually **entrusted to PUBLIC UNDERTAKINGS.** In this context, the term 'public' refers to a State controlled entity providing SGEI; the term 'undertakings' refers to entities that carry out an economic activity (a hospital that 'sells' plastic surgery). Public entities that do not carry out any economic activities, such as self-regulating bodies, are not subject to EU law. Public undertakings are **NOT** ***per se*** **excluded from the applicability of** EU law be it its state aid rules or ECL *(Article 106(1))*. Although both public undertakings and SGEI are subject to EU law, the EU respects the need for MS to finance the provision of SGEI (eg public funding of Public Service Broadcasting) in order to fulfil justified social expectations (eg universal coverage for broadcasting transmission). *Article 106(3) TFEU* provides therefore that public undertakings (such as PSBs)

ARE excluded from the need to abide by EU law, including state aid and ECL, **if its application would make it impossible for them to fulfil their justified social objectives.** Thus, they remain subject to EU law (including its opposition to state aid) only if its application does NOT obstruct the performance, in law or in fact, of their assigned tasks. It is the role of the Commission to supervise the observance of EU law by public undertakings acting on behalf of their MS in their pursuit of SGEI.

Nevertheless, **the disruption of EU trade** resulting from state aid for the provision of SGEI **must be proportional to their function**. The SGEI derogation is only applicable to situations where the development of EU trade is not affected to such an extent as would be contrary to its overall interests. *(Article 106(2))* This derogation is thus applicable under the condition that the social gain resulting from the incompatible state aid to SGEI outweighs the economic loss associated with the distortion of competition caused by it on an EU scale. Ultimately therefore, public undertakings providing SGEI:

- must abide by EU law even with respect to SGEI
- are derogated from EU law if its application obstructs their justified social functions (eg services 'within' the public service remit)
- but only if the disruption to EU trade they cause is proportionally smaller to the social gain they bring

EU state aid rules are subject to a special derogation for SGEI *(Article 106(2) TFEU)* **applicable to services within the remit** (justified social expectations) **provided the distortion of EU trade does not outweigh their social benefits.**

5.3. Permissibility of State Funding of Public Service Broadcasting

It is now necessary to consider in detail the relationship between Public Service Broadcasting, EU state aid rules, and the derogation applicable to SGEI. The relationship has been fundamentally shaped by the *Protocol on the system of public broadcasting in the Member States* (generally known as the *Amsterdam Protocol)* attached to the Amsterdam Treaty in 1997. An essentially identical *Protocol No. 29 on the System of Public Service Broadcasting in the Member States* (hereafter: *PSB Protocol)* has been

attached to the TEU and TFEU by the Lisbon Treaty. It constitutes a formal declaration of the intentions of the combined European political sphere. By doing so, it effectively **establishes the balance of power,** or to be more precise competences**, between the EU and its MS in relation to PSBs**.

PSB Protocol
THE HIGH CONTRACTING PARTIES,
CONSIDERING that the system of public broadcasting in the [MS] is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism;
HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the [TEU & TFEU]:
The provisions of these Treaties shall be without prejudice to the competence of [MS] to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each [MS], and insofar as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.

The Protocol explicitly associates the role of PSBs with the democratic, social and cultural needs of each society and to the need to preserve media plurality.

5.3.1. Provision of Services

The fact that **public service broadcasting can** at all **be considered a SGEI** was confirmed by the European Commission in its 2001 *Communication on Service of General Economic Interest* (hereafter: *SGEI Communication)*.

2001 *SGEI Communication*
... the digital revolution does not call into question the need for audiovisual policy to identify relevant general interests and, where necessary, to protect them through the regulatory process. Technological developments, however, call for ongoing evaluation of the means and methods used, in order to ensure that they continue to be proportionate to the objectives to be achieved. Whilst the means of distribution (and notably whether point to multipoint or point to point) clearly remains crucial, some

new types of service may also require other factors to be taken into consideration when assessing the necessity and proportionality of any regulatory approach (e.g. encryption or in the clear).

However, the *PSB Protocol* confirms first of all that public service broadcasting plays an important role in the EU especially because it is directly related to the democratic, social & cultural needs of each society and to media pluralism. In practice, PSBs provide a multitude of services **not all of which can be considered SGEI** as they have little or even no relation at all to the justified social objectives associated with the public service remit. Some of the services provided by PSBs:

- fulfil a socio-political function with no relation to economic considerations at all, such as news or consumer awareness programmes – these are seen as SGEI
- have a mixed nature that are difficult to categorise such as entertainment programmes – these can potentially be seen as SGEI
- are clearly commercial in character such as TV advertising – these cannot normally be seen as SGEI

The primary purpose of PSBs is meant to be the provision of SGEI, rather than to generate income for the treasury for instance. Adequate public funds are made available to public undertaking such as PSBs to provide SGEI. Most agree that certain elements of the transport, water, or energy supply system constitute SGEI. State funding of drainage activities for instance is thus not called into question because without it, these services would not be offered by the market at all. By contrast, most broadcasting services are economically viable and thus available on the market albeit often to a degree which is considered insufficient in socio-political terms. As a result, only some broadcasting activities can be considered to be public services because the social essentiality of their provision is not absolute. For this reason, **public funding of public broadcasting services is only justified with respect to** those services that are associated with a public interest **(SGEI)**.

The Commission believes that where broadcasting is concerned, a general economic interest can be found in services closing the programming gap – those unlikely to be provided by private operators on grounds of lacking economic viability such as:

- universal coverage, that is, broadcasting that reaches even to the most remote locations irrespective of the cost
- minority programming including high culture events, content of interest to ethnical or religious minorities, and less popular sports

- transmission accessible to special needs viewers
- highest quality children's programming

In reality, PSBs provide many types of services – only some of them can be considered SGEI justifying MS funding.

The audiovisual field differs greatly from other network industries. Here, a valid general economic interest is not generally associated with the fact that **the market** does not fulfil the needs of its citizens but rather that it **does not fulfil social expectations to a sufficient degree**. However, it is inherently difficult to decide what level of fulfilment should be considered 'satisfactory' in social terms. The resulting subjectivity arises in particular in the classification of services fostering media plurality since both programming diversification and journalistic objectivity are also served by private media. In this respect, a general economic interest is certainly found in a broadcasting offer that fills the gaps in representation (ie programming gaps).

It is even more difficult to objectively judge when a general economic interest can be found in services meant to fulfil socio-political goals such as fostering national identity and informed citizenship. While **news and consumer-awareness programmes** would clearly **fall within the SGEI category**, they can suffer from low ratings. However, a public broadcaster can only then hope to achieve its socio-political goals if its programmes actually reach a large enough proportion of the population. In other words, the minimal requirement for some of its goals to be reached is for a given PSB to get adequate viewing shares. In many cases, this can only be achieved if viewers are 'lured in' by mass appeal content, for instance by interspersing news within general programming. However, mass appeal content is commercial by nature. It is thus difficult to prove that its provision constitutes a SGEI. Still, the availability of at least some mass appeal content is considered necessary for PSBs to ensure adequate viewing shares. Moreover, the public service remit contains not only a cultural and educational but **also an entertainment function** because for some parts of society (eg the elderly) their PSB remains the only generally available entertainment outlet. The resources needed to produce or acquire entertainment programming would have to come from public funding. This realisation **fundamentally blurs the boundary between SGEI and the commercial activities** provided by PSBs.

Finally, the fact that PSBs are designed primarily so as to provide SGEI does not preclude them from providing broadcasting services which are fundamentally commercial in nature. Most importantly, the majority of public broadcasters derive a large proportion of their funds from advertising revenue. Among other **commercial activities** frequently undertaken by PSBs lies sponsoring and game shows that encourage viewer participation by calling 'premium numbers'.

It is often difficult to present a clear cut division between which services offered by a PSB are socially justified and which constitute purely commercial activities – general economic interest is associated with an inherently imprecise concept of preserving an 'adequate' level of media plurality.

5.3.2. Public vs. Private Competition

The *PSB Protocol*, both the original of 1995 and its current version, makes it clear that MS have the sole competence to define the public service remit of their PSBs as they see fit (often called their public service mandate). In other words, it is left to the **MS** to **decide what services are considered to be SGEI in their country**. It is generally agreed that a PSB must be able to provide a wide range of programming in order to cater for all interests. While its exact specialisation must comply with the remit defined by its MS, a diversified offer, including mass appeal content is seen as necessary in order to address the needs of the society as a whole. It is thus perfectly legitimate for a PSB to seek to reach wide audiences to provide broad public access, without discrimination as a necessary precondition for fulfilling the special media plurality obligation of PSBs. This approach was confirmed by the Commission in 2001.

Point 13 **2001** *Broadcasting Communication*
a public service mandate encompassing *'a wide range of programming in accordance with its remit'* [..] can in principle be considered legitimate, as aiming at a balance and varied programming,, capable at preserving a certain level of audience for public broadcasters and, thus, of ensuring the accomplishment of the mandate i.e. the fulfilment of the democratic, social and cultural needs of the society and the guaranteeing of pluralism.

The public funding of SGEI in the audiovisual field causes a significant distortion of competition on a number of European audiovisual markets. Although public funding should be associated with SGEI only – the need for which is not adequately addressed by the market, it provides PSBs with a large and secure source of income, significantly lowering the economic risk associated with their activities overall. This fact allows them to employ market practices such as under-cutting prices. TV advertising price squeeze lies at the heart of the frequent complaints submitted to the Commission by private operators suffering from the fact that PSBs engage in commercial activities in direct competition to private entities but on non-market terms. The **market proximity and interdependence of the commercial activities of PSBs and private operators** lies at the heart of the controversy between public vs. private competition in the audiovisual field, especially when public broadcasters provide SGEI that are difficult to differentiate from their commercial activities. The Commission has received over the years numerous complaints, both official and unofficial, from private broadcasters against the impact of state funding on the market activities of PSBs. Most of the allegations stated that:

- public service tasks (remit) was not described in a clear manner
- there was no adequate independent supervision of the spending patterns of the given public broadcaster
- accounts were not transparent
- PSBs received more funding than necessary for their assigned public service tasks

2001 *SGEI Communication*
The funding by [MS] of [PSBs] has been the subject of a number of complaints to the Commission by private commercial broadcasters, notably about the presence of [PSBs] on the advertising market. The problems raised by these complaints relate in general to [dual funding]. The choice of the financing scheme falls within the competence of the [MS], and there can be no objection in principle to the choice of a dual financing ... rather than a single funding scheme ... as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the EC interest.

In practice therefore, **state aid to PSBs is controversial** because:

- it is often difficult to determine which broadcasting services can be considered to constitute a SGEI and which are essentially commercial in nature – not deserving of public funding – and thus in turn, the appropriate amount of state aid needed for its provision;

- the provision of SGEI is interrelated with purely commercial activities undertaken by the public broadcaster – aid granted for SGEI considerably lowers the economic risk associated with the activities of PSBs overall giving them a competitive advantage in their commercial activities; and
- not having to 'compete' for funds on the free market can cause inefficiencies in the use of public resources causing superfluous public spending.

Considering the great market proximity of PSBs and private operators and the competition distortion effect of selective state funding, the EU is faced with numerous complaints against individual funding schemes of its MS.

5.3.3. Classification and Assessment of State Funding of Public Service Broadcasters

EU state aid rules are applicable to the entire European economy. The audiovisual field constitutes however a 'special' sector also subject to other EU rules that give special allowances when it comes to the admissibility of public funding of PSBs. General **EU law provisions on SGEI and state aid** (Article 106 & 107 TFEU) **are enforced by the Commission in the light of the** *PSB Protocol* which gives MS a great degree of freedom with respect to their PSBs leaving only a very small margin of competences for the EU. The *2001 SGEI Communication* confirmed that the Commission is well aware of its role. While public funding of PSBs for the provision of SGEI will usually have the form of state aid subject to EU state aid rules because it has an effect on EU trade, the Commission is only going to ensure that PSBs are not overly compensated. As a result, **the Commission:**

- **can intervene in relation to the amount of the funds** – assessing whether the aid was proportional to the assigned task
- **cannot normally intervene in relation to its legality** – whether it should have been given at all, to whom, for what purpose or on what conditions

2001 *SGEI Communication*
The broadcast media play a central role in the functioning of modern democratic societies ... This sector has always been subject to specific regulation in the general interest based on common values, such as freedom of expression and the right of

reply, pluralism, protection of copyright, promotion of cultural & linguistic diversity, protection of minors & of human dignity, consumer protection.
It is for the [MS], in conformity with EC law, to decide whether they want to establish a [PSB], to define its exact remit & decide on the modalities of its financing. Due to the nature of their funding, [PSB] may become subject to [EU] State Aid rules. The Commission must notably ensure that public funding of [PSB] is proportional to the public service remit as defined by the [MS] concerned, i.e. in particular that any State-granted compensation does not exceed the net extra costs of the particular task assigned to the [PSB] in question.

When it comes to the assessment of state aid to PSBs, **the *Protocol* effectively limits the competences of the EU to the evaluation of its proportionality.**

In its 2001 *Broadcasting Communication*, the Commission set out the **assessment procedure** with respect to public financing of PSBs:

1. Does the public funding constitute State Aid and if it does, does it/can it distort competition with EU-wide effects?
2. Can it be justified under Article 107(3(d)) as an aid to culture and if not, can it benefit from the Article 106(2) derogation to SGEI provided it fulfils its conditions concerning:
   2.1. Definition of mandate
   2.2. Entrustment of mandate
   2.3. Proportionality of aid

Only in the unlikely event that the aforementioned conditions are not met, state aid to PSBs is declared incompatible with the internal market and thus is required to be returned.

The **first step** of the assessment of public funding of PSBs considers **the status of the funding scheme**. Public financing of PSBs could be classified as:

- **compensation** compatible with the internal market **OR**
- **state aid**
- permissible state aid to cultural activities *(Article 107(3(d))*
- permissible state aid to SGEI *(Article 106(2))*
- incompatible with the internal market *(Article 107(1)*

Theoretically at least, public funds assigned to a PSB could be considered to constitute a form of **COMPENSATION** (reimbursement) **for the discharge**

of certain obligations inherent in the concept of public services rather than State Aid. The quintessential element of the EU definition of state aid contained in Article 107 TFEU is that a market player is 'aided' by the state, in other words, that it receives an economic advantage. If there is no gain to be had, the transfer of public funds to cover the costs of a public service (eg fees for the subtitling for disabled viewers) will not fall within the definition of state aid. The ECJ clarified on 24/07/00 in the *Altmark* case (Case C-280/00) that compensation for the costs incurred in the discharge of a public service obligation does not qualify as state aid if it fulfils certain criteria. According to the so-called **Altmark test**, the granting of state funds will constitute compensation rather than state aid if:

- the public service obligations are very clearly defined and thus possible to evaluate;
- the parameters for determining the compensation are pre-determined and thus it is possible to discern 'cost'
- by determining the cost to reimbursement ratio it is possible to establish that no overcompensation took place;
- operators are selected in a tender whereby the objectively best participant wins; and
- the amount of the compensation is determined with reference to the costs of a typical, well-run firm

No public broadcaster has managed to meet the Altmark test yet: most lacked objective pre-defined criteria for determining the aid, tenders were not used, and compensation was not determined by comparison to the costs of a typical well-run undertaking.

Since the funding received by PSBs is unlikely to be qualified as compensation, its overwhelming majority constitutes **STATE AID**. Considering that PSBs funding is not awarded on the basis of objective tender procedures, they **nearly always distort competition** by favouring certain undertakings. By not being subject to normal market competition, their distorting effects are at least probable. However, only aid which distorts (threatens to distort) competition is incompatible with the internal market, and thus prohibited, provided it affects trade between MS. EU trade must be regarded as affected when the aid strengthens the position

of one undertaking compared with others. State financing of public service broadcasting (eg funds for rights acquisitions) generally has an **effect on EU trade** especially since the ownership structure of commercial broadcasters often extends to more than one MS *(Article 107 (1))*.

5.3.4. Application of the SGEI Derogation

In the **second stage of the assessment,** the Commission discerns if the state aid received by a given PSB can benefit from a derogation. Considering their very specific list, the three existing *de jure* derogations do not apply to PSBs. Public funding of PSBs, which takes the form of state aid and distorts or threatens to distort competition with EU-wide effects, **may be approved** by the Commission **on the basis of the discretionary derogation applicable to state aid to cultural causes** *(Article 107(3(d)))*. However, discretionary derogations are interpreted in a strict manner – only funds specifically assigned to finance audiovisual activities of a truly cultural nature can benefit from this rule. As a result, unless a MS provides its PSB with separate and specific funding for high culture programmes such as recording an exhibition of national cultural treasures, such aid cannot be approved under Article 107(3(d)). Ultimately therefore, this derogation is of limited importance and not often used in the realm of public service broadcasting.

Public funding of European/MS cinemas and the production of European/MS movies is considered to form state aid that can benefit from the derogation on cultural grounds contained in Article 107(3(d)) TFEU.

Where the cultural derogation does not apply, the Commission moves on to assess the state aid granted to a PSB in light of the derogation applicable to SGEI. The SGEI derogation provided by Article 106(2) TFEU covers all EU law, including its state aid rules and ECL rules, and is applicable to all SGEI including the activities of PSBs (broadcasting was confirmed as a potential SGEI in the 2001 *SGEI Communication*). Competition distorting state aid to PSBs can thus be approved even if it has EU-wide effects, if the public broadcaster would be otherwise prevented from providing its

assigned SGEI. The SGEI derogation applies unless the common interest would not be overly hindered by the use of that derogation.

European jurisprudence has established, confirmed both by the 2001 *SGEI Communication* and 2009 *Broadcasting Communication*, that **for the SGEI derogation to apply three basic conditions must be met:**

- **DEFINITION** – the service in question must be a SGEI and clearly defined as such by the MS concerned
- **ENTRUSTMENT –** the undertaking must be explicitly entrusted by its MS with the provision of that SGEI
- **PROPORTIONALITY –** the application of EU law must make it impossible to perform the tasks assigned to them and the derogation must not affect EU trade to an extent that would be contrary to its interests

When it comes to public funding of PSBs, the practical use of these criteria must be adapted **in the light of the *PSB Protocol*** which refers to the:

- public service remit as conferred, defined and organised by each MS (definition & entrustment)
- in so far as such funding is granted ... for the fulfilment of the ... remit ... and ... does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit ... shall be taken into account (proportionality)

The exact relationship between the use of the SGEI derogation and the *PSB Protocol* has been explained in detail by the Commission in its 2009 *Broadcasting Communication*. By replacing an analogous act issued in 2001, the Commission aimed to enhance legal certainty in view of the fundamental changes that have occurred in the last decade in the EAS including: convergence; changing consumption patterns; new business models; and shifting competition patterns. The new act **focuses on:**

- **accountability** of PSBs
- **effective control** over the PSBs at the national level
- challenges of the **new media**
- maintaining a **level playing field** between public and private operators

5.3.4.1. Definition & Entrustment of the Remit (Mandate)

It is difficult to present an unequivocal definition of the term public service remit which is a media-specific equivalent to the general term public service 'mission' – it is the existence of the remit that differentiates public from private operators. For the purpose of this analysis, the term **REMIT**, as defined by the Council of Europe, refers to a **general set of values characterising public service broadcasting**. A remit includes, most

importantly, universal availability, high quality standards, diversification of programming, and a sufficient level of independence both from the political as well as economic sphere. By contrast, the term public service **MANDATE,** as it is used in the 2009 *Broadcasting Communication,* is understood here as **a specifically defined competence list assigned by a given MS to its PSB**, such as: on-line presence, creating high quality children's programming, or catering to the needs of hearing impaired viewers. A given mandate represents therefore the way in which the remit has been implemented in a given country – ideally, the mandate should meet all of the criteria of the public service remit but that is not always the case. In practice, not all PSBs are truly representative of their entire population and many lack political independence. Incidentally, *Recommendation on the remit of public service media in the information society* issued by the Council of Europe in 2007 stressed that its members have the **right to have their mandate diverge from the criteria of the public service remit due to national circumstances**.

REMIT is understood here as its universal characterisation (known as public service 'mission' in other industries) that distinguishes PSBs from private operators. By contrast, the term **MANDATE reflects the specific list of SGEI it is to provide** (formulated and conferred) **by its MS**

However, MS are free to define which type of services provided by their PSBs constitute SGEI – the competences of the Commission are limited in this respect to checking for manifest errors only. In order for state aid to PSBs to meet the criteria of Article 106(2), it is first necessary to establish an official DEFINITION of their public service mandate, in other words, MS must set out in a formal act the competences of their PSB.

2001 *SGEI Communication*
22. Member States' freedom to define means that Member States are primarily responsible for defining what they regard as services of general economic interest on the basis of the specific features of the activities ... In areas that are not specifically covered by Community regulation Member States enjoy a wide margin for shaping their policies, which can only be subject to control for manifest error. Whether a service is to be regarded as a service of general interest and how it should be

> operated are issues that are first and foremost decided locally. The role of the Commission is to ensure that the means employed are compatible with Community law. However, in every case, for the exception provided for by Article [106(2) TFEU] to apply, the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts)... This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment.

The exact tasks to be fulfilled by a given PSB must be defined in a clear manner such as, for instance, whether it will seek mass appeal content such as major sports events. Although MS are free to decide which of the services provided by their PSBs are to be considered as SGEI, account must be taken of the overall concept of SGEI which covers non-viable services as well as those that are not provided by the market to a satisfactory degree. Still, **MS can apply a 'wide' definition** of which services constitute SGEI in order to cater to all needs and parts of the society extending even beyond 'programmes' in the traditional sense of the word (eg on-line information). The only limitation imposed by the EU MS is that the mandate **cannot include commercial activities** such as premium content pay TV, e-commerce, or advertising. As a result, state aid used to fund such services would be incompatible with the internal market.

The definition of the mandate should be precise to:
- allow the Commission to assess it
- allow private operators to formulate accurate business plans
- effectively monitor compliance

The competences of **the Commission** are very limited in this respect. It **is only entitled to check for MANIFEST ERRORS in the definition** of a public service mandate **–** whether it is not evidently wrong by containing an unquestionably commercial activity. A manifest error would occur if the mandate covered e-commerce which cannot be reasonably considered as meeting the 'democratic, social and cultural needs of each society'. Importantly however, the 2009 *Broadcasting Communication* clarified that **services subject to a user payment are not *per se* excluded from the possibility to be included in the mandate solely because they are to be**

paid for. Seeing as the costs of creating advanced on-line services can form a barrier for PSBs to invest into their provision – it is thus rational to share the financial burdens with the interested consumers. It is likely for instance that paid on-line services providing parents with the opportunity to have unlimited access to high quality children's programming on-line would satisfy this condition. Nevertheless, there are some paid services which can never be qualified as public services and thus must remain outside the public service mandate such as: premium content on a pay-per-view basis, or viewer's participation in prize games by dialling a premium rate phone number.

Recent years have seen a gradual expansion of public service mandates of many European PSBs. The trend covered both the roll-out of new public services in the on-line environment (innovative service), as well as the provision of new specialised TV channels such as an all day children's channel. The 2009 *Broadcasting Communication* confirms that MS are entitled to include **new services** into their mandates providing however that they conduct a transparent and accountable assessment process of the needs of their society, the value for the public of the planned services, and their market impact. The provision of new services by a PSB should take place only if it is concluded after the assessment that the market fails to fulfil a specified social need.

State aid intended to fund the expansion of mandates so as to include new services was a key focus of the **2005 investigation** conducted by the Commission with respect to PSB funding schemes in existence in **Ireland**, the **Netherlands** and **Germany.** The Commission took action after numerous complaints were submitted by private operators that felt endangered by the expansion of public broadcasters onto new markets. EU scrutiny covered here the financing of services outside the traditional TV activities of PSBs including the Internet in the Dutch and German cases. The fact that online information services may form part of a public service mandate was not contested however. The Commission stressed that commercial online activities, such as e-commerce or in fact mobile telephone services cannot be justifiably regarded as SGEI.

The second condition for the application of the SGEI derogation to state aid for PSBs is the **formal ENTRUSTMENT** of their mandate in order to maximise legal certainty on markets affected by the activities of PSBs. The specific tasks assigned to a given PSB must be specified in an official act issued by the competent national authority. Moreover, the fulfilment of the assigned tasks needs to be monitored by an independent domestic supervisory body. MS have the right to decide on the organisation and

financing of their PSBs but they must meet certain principles of 'good governance' as set out in the *PSB Protocol* which states that MS have the competence to fund the provision of SGEI assigned to their PSBs in their remit (mandate) as conferred, defined and organised by each MS. Moreover, while the realisation of the remit is to be considered, state aid cannot affect trading conditions and competition in the EU to an extent which would be contrary to the common interest.

The 2001 Communication of SGEI clearly states that **for the Article 106(2) derogation to apply, 'the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts)... to ensure legal certainty as well as transparency** vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment.'

5.3.4.2. Proportionality

The proportionality criterion is without a doubt the most difficult of the factors assessed in order to determine the permissibility of state funding of public broadcasters on the basis of the SGEI derogation. The *PSB Protocol* established a delicate balance between the socio-political aims of the public service mission of PSBs and the socio-economic goals associated with effective competition and progress. Accordingly, **state aid to PSBs is permissible** if it is necessary to fulfil their remit, in other words, if they would not be able to provide the SGEI assigned to them without public funds. At the same time however, the aid **must not** affect trading conditions and competition in the EU to an extent which would **be contrary to the EU INTEREST**.

The earlier parts of this book should have left no doubt that the economic and technological **PROGRESS of the EAS** lies very much in the common interest of the EU. Without negating their key social role therefore, the **PSBs should not be allowed to hinder** that progress. That would be the case in particular if state aid was used in a way that would distort competition by forcing a private operator out of its market or foreclosing new business models. PSBs should not be able to hinder competition unless that is absolutely necessary in light of their remit. Nevertheless, further

expansion of public service broadcasting can in itself be beneficial to the EAS and not just in social but also economic terms primarily due to its accessibility and leading role in terms of innovation. To sum up, state aid to PSBs is permissible unless it would endanger EU trading conditions and competition to an extent that would hinder the progress of the EAS.

2001 *SGEI Communication*
23. Proportionality under Article [106(2) TFEU] implies that the means used to fulfil the general interest mission shall not create unnecessary distortions of trade. Specifically, it has to be ensured that any restrictions to the rules of the EC Treaty, and in particular, restrictions of competition and limitations of the freedoms of the internal market do not exceed what is necessary to guarantee effective fulfilment of the mission. The performance of the service of general economic interest must be ensured and the entrusted undertakings must be able to carry the specific burden and the net extra costs of the particular task assigned to them. The Commission exercises this control of proportionality, subject to the judicial review of the Court of Justice, in a way that is reasonable and realistic, as illustrated by the use it actually makes of the decision-making powers conferred to it by Article [106(3) TFEU].

The **proportionality requirement** concerning the permissibility of state aid to SGEI is closely connected to EU general 'good governance' principles applicable to public undertakings. MS are not allowed to allow their state aid to distort competition to a degree higher than necessary by granting to their PSBs more funds than is necessary for the provision of their SGEI. Public broadcasters are at the same time not allowed to misuse them. Competition distorting effects of state aid should be minimised thanks to general **EU transparency and accountability rules** which oblige PSBs to carry out their commercial activities in line with market conditions and to keep separate accounts for both public and commercial services. Moreover, MS are required to establish an independent supervisory authority to control SGEI spending in order to minimise the misuse of public funds. Indeed, **effective national control over the spending patterns of PSBs** was emphasised in the 2009 *Broadcasting Communication*.

The Commission does not use an overly strict approach when assessing 'necessity' with respect to the actual amount of the state aid granted to European PSBs. It assumes that aid is necessary in order to carry out the remit because fulfilling it entails costs not normally encountered by broadcasters such as the need to provide universal coverage or minority programming. As a general rule, state aid **must not exceed the net COSTS of the SGEI** specified in the given public service mandate. However, not only is it often difficult to establish the actual cost of a specific SGEI it is

also nearly impossible to discern the relation their costs as opposed to the expenditure incurred by the public broadcaster in its pursuit of commercial activities. The minimum requirements for the Commission to be able to assess the proportionality of the amount of state aid are:

- **a precise definition** of the public service mandate
- **separation of public and commercial activities** – ideally, commercial activities should be carried out by a separate undertaking
- **separation of accounts –** the *Transparency Directive* 80/723/EEC as amended by Directive 2000/52/EC, clarifies that the costs of SGEI need to be determined on the basis of separate accounts

Public broadcasters benefit greatly from the fact that public service costs can be allocated exclusively to SGEI rather than having them assigned in proportion to all of the activities that benefit from them. In other words, the cost of the recording studio used to provide news (clearly a SGEI), is assigned entirely to the public service even if it is also used to record prize game shows (generally not a SGEI). The 2009 *Broadcasting Communication* confirms such an approach is necessary because it is often difficult, if not outright impossible, for PSBs to separate their accounts in terms of costs. On the other hand, the Commission considers other revenues derived from the mandate (eg advertising income) when verifying the state aid vs. cost ratio.

Considering the difficulty in assessing the costs of SGEI and the Commission's favourable cost assignment method, how can **OVERCOMPENSATION** be established? Surprisingly, the proportionality of the amount of state aid to the cost of SGEI might be discerned when looking at the commercial activities of the scrutinised public broadcasters. Although EU state aid rules do not preclude them from generating an income, the proportionality criterion requires them to refrain from distorting competition more than what is required by their public service mandate. As a result, PSBs must carry out their **commercial activities on (under) normal market conditions**. Competition is distorted because of the competitive advantage enjoyed by public broadcasters when engaging in commercial activities (eg because many of their costs can be assigned solely to SGEI even if they also benefit their commercial activities) thanks to the state aid that they receive. **Undercutting the prices of commercial activities** below the normal market level **indicates overcompensation**. Market behaviour that distorts competition beyond the requirements of the public service remit, would infringe the balance set out in the *PSB Protocol* by affecting trading conditions and competition in the EU to an extent which would be contrary to the common interest.

2009 *Broadcasting Communication*
94. ... A public service broadcaster might be tempted to depress the prices of advertising or other non-public service activities (such as commercial pay services) below what can reasonably be considered to be market-conform, so as to reduce the revenue of competitors, in so far as the resulting lower revenues are covered by the public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest" and thus infringe the Amsterdam Protocol.

In practice, most state aid decisions concerning PSBs in Europe originated in complaints and the trend is rising. Unlike in the past, complaints derive now not only from private broadcasters but also from newspapers and new media providers. Most allege that the extensive use of public funds to expand the mandates has foreclosing effects in the on-line environment. The **Commission is often seen as the last resort on a road to fairness.** The great interest shown in PSBs by most national governments can lead to their unwillingness to accommodate the concerns of the private sector. Vagueness of public service mandates, excessive generosity of public funding schemes, economic ineffectiveness of PSBs, and the fact that they are known to depress advertising prices make private operators doubt that they can have their problems resolved 'at home'. The Commission seems to believe that the number of complaints will diminish if transparent mechanisms are put into place in all MS to reflect the social value and impact of extending the public service remit to new services.

State aid made available for the provision of **new services** is clearly among the most difficult market scenarios to judge right now. According to the Commission, MS should perform a **'market impact test'** in the course of an *ex ante* assessment procedure preceding the introduction of any major new SGEI in the broadcasting field. The test should not only answer whether the launch of a new service (for instance a dedicated children's channel) is at all justified by unfulfilled societal needs but also help establish the conditions to be met for the new service in order to minimise the distortion of competition which would surely occur. The market impact test should at the very least use common sense when looking at the effects of the new state aid on the affected markets. It remains to be seen however whether that alone will prove sufficient to stabilise the market which, unlike the PSBs, suffers greatly from the current economic crisis.

5.3.4.3. Examples

Among the most publicised state aid cases of recent years concerning PSBs is the 2004 decision issued by the Commission in *TV2/DANMARK* **(Case 2006/217/EC)**. The Commission approved here the majority of the public funding granted between 1995 and 2002 to TY2, the Danish PSB, in the form of licence-fee resources and other measures such as a tax relief. At the same time however, the Commission **obliged TV2 to return** DKK 628.2 million (**€84.3 million**) plus interest **in incompatible aid** because in its opinion, this amount constituted an overcompensation**.** The original decision was **annulled by the Court of First Instance (CFI)** in 2008 (Case T-309/04). The Court explicitly endorsed the Commission's approach respecting the right of the MS to define the public services remit in wide, general, and qualitative terms. The decision was annulled however essentially because the Commission's assessment of the state aid vs. cost ratio was lacking in substance and justification. This rare example of a Commission decision obliging a MS to retrieve incompatible state aid to PSBs illustrates its ability to assess the quantitative proportionality of state aid. It also shows however just how **difficult** it is **to actually prove overcompensation** in the inherently vague realm of European PSBs.

CFI 2008 TV 2/Danmark v Commission Joined Cases T-309, 317, 329, 336/04

203 ... the Court of First Instance considers that that failure to provide an adequate statement of reasons is attributable to the Commission's complete failure to examine seriously, during the formal investigation procedure, the actual conditions which, during the period under investigation, governed the setting of the amount of licence fee income payable to TV2.

217 ... by not examining information that nevertheless had a direct bearing on the question whether the measures at issue constituted State aid within the meaning of Article [107(1) TFEU], the Commission failed to fulfil its obligation to examine, a failure which in turn explains its failure to provide an adequate statement of reasons ....

The Tv2 case is interesting because it sheds some light on the ability of public broadcasters to build **financial reserves**. The Commission believed that the unused funds accumulated over time by the Danish PSB constituted overcompensation. If a buffer against a drop in advertising income was indeed seen as necessary in order to ensure the uninterrupted provision of SGEI by Tv2, a transparent reserve should have been created for that purpose. In order to clarify this point, especially considering the Court's damning opinion of the Commission's assessment of this case, the 2009

Broadcasting Communication explicitly tackles the problem of reserve. In order to help PSBs adapt to the challenges of the new media age, the new act applies a more flexible approach to public service broadcasting services than to other SGEI by allowing PSBs to fix the maximum reserve with respect to the 'annual budgeted expenses' rather than the usually applicable level of 'annual compensation'.

In **2003,** the Commission performed an *ad hoc* evaluation of the public service broadcasting schemes used in **France, Italy, Portugal, and later Spain**. Despite their age, these investigations are worth noting because they illustrate the kind of influence the EU can exercise in the context of PSBs. In its assessment, the Commission expressed serious concerns about the lack of compliance of national legislation with EU transparency & accountability principles contained in the Transparency Directive 80/723/EEC & Directive 2000/52/EC. While the internal spending patterns of the PSBs were seen as largely unclear and thus impossible to evaluate, the Commission did not interfere with their internal workings. What has been achieved as a result of this investigation however, is that all of the scrutinised MS had to modify their national legislation so as to improve the internal accountability of their PSBs**.**

The need for MS to establish **an effective control procedure over the spending patterns of their PSBs** was stressed by European courts. In the *SIC* (T-442/03) judgment of 2008, the CFI assessed an over a decade long controversy surrounding state aid given to RTP, the Portuguese PSB. SIC is a commercial Portuguese TV operator competing with RTP. The SIC saga started in the 1990s and involved a number of legal steps taken by the private operators at the national as well as EU level primarily in order to scrutinise the spending patterns of RTP by accessing its audit reports. On the request of SIC, the CFI judgment largely annulled the Commission Decision 2005/406/EC which approved certain *ad hoc* state aid granted to RTP and established that other measures did not constitute state aid at all. The Court found a number of significant inadequacies in the analysis performed by the Commission in particular as it failed to assess the contested audit reports and by doing so, failed to assess RTP's cost structure. The Court left no doubt about the fact that it held the Commission responsible for verifying in full the effectiveness of national control procedures.

CFI judgment SIC T-422/03

254. ... the Court of First Instance finds that the Commission, in not requiring the Portuguese Republic to disclose the contractual external audit reports, failed to fulfil its obligation to undertake a diligent and impartial investigation.

> 255. That being the case, the Commission failed to place itself in a position in which it had information which was sufficiently reliable available to it to determine the public services actually supplied and the costs actually incurred in supplying them. In the absence of such information, the Commission was unable to proceed subsequently to a meaningful verification of whether the funding was proportionate to the public service costs and was unable to make a valid finding that there had been no overcompensation of the public service costs

In conclusion to the discussion of public funding of PSBs and the efforts of the EU to limit their negative effects on competition, it is worth turning once more to the **French reform** of 2009. In the light of its considerable public service costs, the Commission has approved an immediate payment of €450 million in state aid to *France Télévisions* to cover its expenses of 2009. At the same time, it opened an **in-depth investigation** into the long term funding mechanism set up by the new broadcasting law introduced by President Sarkozy. Until the reform, the French PSB was subject to the now most usual dual-financing system, receiving part of its funds from state resources and gaining another on the market by providing commercial AMS (primarily TV advertising) in direct competition with private operators. According to the new law, *France Télévisions* will gradually cease its activities on the advertising market theoretically at least severing its competition distorting impact on commercial AMS. The loss of advertising revenue will be compensated by the introduction of two new taxes on advertisements and electronic communications. The new funding system would give the French PSB a combined annual subsidy of more than €2 billion by 2012. Without interfering into the new definition of the mandate of *France Télévisions*, the Commission has decided to open a formal investigation into several specific aspects of the new funding scheme in order that reform does not lead to overcompensation. A decision is imminent.

Revision Questions

1. What are the key elements of a public service broadcasting remit?
2. Why is public service broadcasting generating opposition from the private sector?
3. What is the rationale of state aid?
4. Is state aid allowed in the EU and who decided this?

5. What services of general interest can you name?
6. Can a MS finance the production/recording of high culture events?
7. Why is the programming gap important?
8. Considering the content of the Protocol, can the Commission stop a MS from financing its public broadcaster?
9. What three basic conditions must state funding of public service broadcasting fulfil in order to be permitted?
10. What broadcasting activities cannot be seen as SGEI?

CHAPTER 6

EUROPEAN COMPETITION LAW

The EAS is rapidly developing in both technological and creative terms. Its economic potential is among the greatest the economy has to offer, especially with respect to content creation and broadband development. Nevertheless, the EAS is likely to remain a somewhat divided economic field. Some partitioning can never be eliminated due to its inherent language differences for instance. Other divisions persist for socio-political reasons such as the particularly strict minors' protection rules applicable to video games in Germany which affect their circulation in its territory only. Despite its cultural diversification, **increasingly many factors encourage cross-border expansion in the EAS persuading private undertakings to exploit the possibilities created by the internal market**. They include:

- the right/ability to do so thanks to the abolition of legal, administrative, and regulatory rules in light of the impact exercised by the TWFD/AVMSD
- major cost savings associated with the use of the same infrastructure for the provision of complementary services
- widespread financial (and other) support offered by the EU
- the advantage or even necessity of technological and territorial expansion in light of increasing convergence
- lower economic risk thanks to a wider spread of business activities
- legal advantages, for instance, where copyright is concerned

Unchecked market expansion tends to result in high market concentration levels, in other words, it can easily create market power. This type of 'internal' growth can increase the supply capacity of the EAS and thus strengthen it externally but it can also endanger competition 'within' the internal market. High concentration levels tend to be detrimental to consumers because they usually fail to deliver the optimal price versus quality ratio, can hinder innovation, and increase market transparency which can in turn induce collusion (cartels). In other words, **if business**

practices taking place in the internal market were to go unchecked, the level and effectiveness of its 'internal' competitiveness would be likely to suffer. Despite potential benefits in external terms, the lack of competition 'within' the internal market **would become a major hindrance to the welfare of EU citizens** in the long term. Its negative effect would be felt both economically (market power tends to result in price rises) and socially (concentration tends to limit diversity).

6.1. General Considerations

In order to understand the influence that can be exercised on the internal market by way of ECL it is first necessary to address a number of general questions:

- What is ECL?
- What is the purpose of ECL?
- Who is subject to ECL?
- What practices are covered by ECL?
- What is ECL's jurisdictional reach and what criteria are used to decide it?

6.1.1. Scope of ECL

ECL is part of the overall legal system of the EU. It **comprises Article 101 and 102 TFEU as well as** *Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings* **– the Merger Regulation (hereafter: MR)**. The legal rules that form the core of ECL have the status of primary EU law. ECL constitutes primary EU law. It is directly applicable in the entire EU. If a conflict arises, ECL takes precedence before equivalent national competition rules.

The primary rules of ECL are complemented by several important acts of **secondary legislation**. Key among them is *Council Regulation 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* and *Commission Regulation 802/2004 of 7th April 2004 implementing Council Regulation 139/2004 amended by Commission Regulation 1033/2008 of 20th October 2008* which set out the procedural conditions necessary for the enforcement of Article 101 & 102 TFEU and the MR respectively. The relatively sparse legal rules of ECL are greatly expanded on by the **jurisprudence of EU courts** as well as a number of **soft laws** issued over the years by the European Commission. Many key aspects of ECL derive from jurisdictional developments rather than

legislation, such as dominant position or hardcore competition restrictions for instance. The 1997 *Commission Notice on the definition of the relevant market for the purposes of Community competition law* is the best known ECL soft law. Soft laws increase legal certainty by explaining to the market the views of the issuing body. While the market does not have to abide by soft law rules – the issuing authority is generally bound by its own acts. Save for exceptional circumstances, the Commission will thus follow its own Notices, Opinions or Guidelines. It is worth noting that recent EU soft laws closely follow and codify the interpretative efforts of EU courts. This trend not only increases the quality of the content of soft law but also provides the market with a comprehensive overview of EU case law developments of recent years.

ECL contains primary rules of **Article 101 & 102 TFEU and the 2004 Merger Regulation** as well as a number of important acts of secondary legislation and soft laws.

Surprisingly perhaps considering its widespread application, the underlying aim of ECL is not clearly stated. The achievement of the primary aim of the EU, which can be expressed most generally as progressive improvement of consumer welfare of all EU citizens, is believed to be conditional upon the creation of a competitive internal market. Thus, **the primary purpose of ECL is generally associated with improving CONSUMER WELFARE.** In order to do so, ECL protects effective competition on the internal market. Still, questions remain surrounding the meaning of what constitutes 'effective' competition in the realm of ECL. Considering that the EU is a supra-national body, market integration constitutes a separate specific goal of ECL particular to the overall concept of the EU. This aim is most clearly reflected by its firm stance against dividing the internal market from within (market sharing/market partitioning). It also finds its general expression in the prohibition of practices 'incompatible' with the internal market. Thus, while market integration is facilitated most directly by harmonisation initiatives, the EU uses ECL to ensure that its general efforts are not hindered by market forces themselves. A certain level of new uncertainty has been created in this context by the Maastricht Treaty (Articles 1 & 2) which introduced the concept of 'an open market economy with free

competition' into TFEU and the notion of 'a highly competitive market economy' into TEU.

ECL is used to protect effective competition and the market integration process **for the ultimate benefit of consumers** (**consumer welfare**).

ECL constitutes a branch of BUSINESS LAW which is generally **directed at companies** rather than individuals. The relationship between ECL and the economy is thus very close: it directly concerns the market and the practices taking place on that market. As a result, ECL is firmly based on concepts such as:

- market participants;
- market position (monopoly, dominance, oligopoly);
- market share (the proportion of the sales market);
- market power (primarily the ability to increase prices above the competitive level);
- market practices (mergers and competition restricting practices including abuse & anticompetitive multilateral practices)

Only those that engage in an ECONOMIC ACTIVITY are subject to ECL. It is applicable to entities that engage in any economic activity even if commercial activities are not the primary function of the scrutinised body eg the sale of exploitation rights by the Olympic Committee provided the entity participates in a market place. **ECL is to be observed by all types of UNDERTAKINGS and their associations.** It follows a functional approach to the definition of 'undertaking'. It covers businesses (companies/firms); entities organising or rendering SGEI such as local authorities; free professionals and even natural persons having control of at least one undertaking. The application of ECL is irrespective of the fact whether the undertaking acts in order to make profits, of its legal form or ownership structure, or indeed national origin.

ECL applies to all undertakings irrespective of their form, legal status, and primary purpose.

Although ECL applies to all types of economic activities, it divides them into three distinct categories. Each of them is covered by a specific set of rules:

- **anticompetitive MULTILATERAL PRACTICES (Article 101 TFEU)**
  - agreements (primarily contracts but often also cartels)
  - decisions taken by associations of undertakings (eg joint selling of rights by UEFA)
  - concerted practices (eg cartels)
- ABUSE of dominance (Article 102 TFEU)
  - held by one undertaking (single dominance)
  - held jointly by multiple undertakings (collective dominance)
- CONCENTRATIONS (MR)
  - mergers
  - acquisitions including full function joint-ventures

ECL contains specific rules on:
- restrictive practices (competition restricting practices):
  - anticompetitive multilateral practices
  - abuse of dominance
- concentrations (mergers & acquisitions)

6.1.2. Jurisdictional Reach of ECL

In order to protect effective competition in the internal market, ECL is applied irrespective of the country of origin of the companies under scrutiny. **Because of the EXTRA-TERRITORIAL JURISDICTION of ECL, it is not uncommon for a company to be obliged to abide by more than one set of competition rules with respect to a single market practice**. As a result, a US based company (eg Microsoft) can be bound by ECL in relation to contracts concluded with non-EU manufacturers (eg producers of PCs) if these contracts (eg Microsoft software installation on new PCs) have effects on EU trade (eg EU consumers have no choice but to buy PCs with Windows installed on them). **The country of origin principle is inapplicable with respect to ECL.** Instead, **ECL uses its own specific JURISDICTIONAL CRITERIA** to decide whether it is applicable in any given case:

- **'effects on EU trade' for restrictive practices** and
- **EU dimension (formally 'Community dimension') for concentrations**

The applicability of ECL is NOT **based on** the 'country of origin principle'. Its jurisdictional criteria are: **'effects of EU trade' for restrictive practices & 'Community dimension' for mergers.**

6.1.2.1. Effect on Trade

The term 'restrictive practices' (practices restricting competition) refers to practices explicitly covered by Article 101 & 102 TFEU: anticompetitive multilateral practices and abuse. Unlike concentrations, they have a common legal basis (TFEU) and procedural rules (Reg 1/2003) and, most importantly in this context, they are subject to the same jurisdictional criteria.

In order to exclude operations without EU-wide consequences from the ambit of ECL, **Article 101 TFEU is applicable only to those multilateral practices that MAY AFFECT TRADE between MS**. This condition is met by cross-border practices as well as those with effects extending over the territory of an entire single MS due to their partitioning effects (partitioning the internal market which goes against the EU's economic integration). **Article 102 TFEU is also applicable only to unilateral practices that MAY AFFECT TRADE between MS**. However, in order for ECL to apply, **the dominant position** being abused **must be held on the internal market** or a market that forms a **substantial part of it** (such as the territory of an entire MS, an airport or a major sea port). Article 102 TFEU enforcement is most likely to be triggered with respect to those dominating markets of key importance to the EU economy overall due to their comparative size, location, uniqueness, or innovativeness.

The 'effects on EU trade criterion' has been explained in detail in the 2004 *Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty.* **The Commission has emphasised here that EU jurisdiction is limited to those practices which may have an APPRECIABLE EFFECT on EU trade. The scale of the effect depends predominantly on** the market position and importance of the scrutinized undertakings, the nature of the practice, and the nature of the commodity under consideration. Cross-border practices are likely to have such an effect

even if they concern SMEs. In its 1997 *Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) (de minimis),* the Commission stated that agreements between SMEs rarely affect EU trade to an appreciable degree because of the usually local character of their effect. **A multilateral practice is not normally able to have such effects if:**

- **the combined market share** of its parties on any affected relevant market in the EU **does not exceed 5% and;**
- **in the case of horizontal agreements, the aggregate annual EU turnover of the undertakings concerned in the products covered by the agreement does not exceed EUR 40 million.**

It should be noted here to that the notion of 'appreciability' has two distinct uses in the realm of ECL. Multilateral practices must have an appreciable effect on EU trade to be caught by EU jurisdiction at all. In other words, irrespective of what type of practice is being considered, **Article 101 TFEU does not apply to multilateral practices between undertakings with a combined market share lower than 5%** unless they have a cross-border character. Appreciability of effects on trade must be distinguished from appreciability of competition restriction. Multilateral practices of undertakings with an EU market share between 5% and 10%/15% (horizontal/ vertical agreements respectively) although likely to be caught by EU jurisdiction, will not normally be seen as infringing Article 101 because they do not appreciably restrict competition unless they contain black-listed provisions such as price fixing.

Anticompetitive multilateral practices are caught by ECL jurisdiction only if they have/can have an appreciable effect on EU trade. Practices between SMEs (<5% market share and < EUR 40 million EU turnover) are unlikely to have an appreciable effect unless they are specifically cross-border in character.

An influence on EU trade is assumed to exist in the EAS when the multilateral practice relates to cross-border trade relations (concluded by parties from different MS or international organisations), even when the contract area is a single MS. The application of this jurisdictional criterion

is clearly visible with respect to the accumulated EU case-law concerning the European Broadcasting Union (hereafter: EBU). EBU is an association of mostly public broadcasters from all EU MS that engages, among other things, in rights exchange between its members and joint sports rights acquisitions in the name of its members. The international nature of its membership and cross-border extent of joint selling clearly point to an effect on EU trade of its activities. The fact that its influence is appreciable was fulfilled in this case by the realisation that the contracts at hand covered commodities forming an important part of the relevant market.

EBU 93/403/EE
'Although international events form only a relatively small proportion of all sports broadcasting, some of them … are of such widespread appeal, and ... economic importance, that their impact ... is not adequately reflected by their expression as a mere percentage.'

According to Regulation 1/2003, **EU jurisdiction is non-exclusive with respect to Article 101 & 102 TFEU**. Thus, even if a restrictive practice affects/can affect EU trade, **the application of ECL does not preclude the applicability of national competition law regimes.** In this light, the Polish Competition Authority issued in 2010 a commitment decision concerning the potentially abusive practices of the Polish copyright collecting society **ZAIKS** which held a dominant position on the national rights management market and by doing so fulfilled the jurisdictional criteria of both Polish competition law and ECL.

ECL jurisdiction over restrictive practices in NOT exclusive - not only does ECL apply in parallel to the competition laws of external countries such as the US due to their extra-territorial nature, **it also applies alongside the laws of the EU MS**.

6.1.2.2. EU (Community) Dimension

EU jurisdiction is far easier to discern with respect to concentrations because unlike the somewhat subjective 'effect on trade' condition, EU merger control depends entirely on turnover thresholds. **A concentration falls within EU jurisdiction if the companies concerned simultaneously achieve a given World-wide and EU-wide turnover,** if they have a **COMMUNITY DIMENSION** (Article 1 (1) MR) – now known as **'EU dimension' due to the general re-naming following the Lisbon treaty**. Their origin or location of the operation is irrelevant here. Even if they are based and principally act outside of the EU, they fall under EU jurisdiction if its territory forms part of their global sales market. **The MR** established that EU merger control rules are **only applicable to those mergers that have an EU dimension defined in** Article 1(2) and (3) MR as:

> the combined aggregate world-wide turnover of all the undertakings concerned is more that EUR 5,000 million, and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 200 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same MS.
> […] the combined aggregate world-wide turnover of all the undertakings is more that 2,500 million EURs; in each of at least three MS, the combined aggregate turnover of all the undertakings concerned is more than 100 million EURs; in each of at least three MS included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than 25 million EURs; and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 100 million EURs; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same MS [...].

With respect to its MS, but not external countries, the **EU has EXCLUSIVE JURISDICTION over concentrations with an EU dimension.** The application of MS competition laws is precluded with respect to such mergers even if a given operation is of direct relevance to their economy **– the applicability of ECL precludes the applicability of MS rules**. On the other hand, smaller or purely national mergers (within the meaning of Article 1 MR) stay within the sole jurisdiction of MS – the EU has no competence to assess them.

It is essential to stress however that **the applicability of EU merger control rules does not preclude the applicability of external regimes** and

thus major mergers are frequently assessed under ECL as well as other legislation on the control of concentration such as US rules for instance.

Major concentrations are subject to exclusive EU jurisdiction – **MS laws are inapplicable to operations with Community dimension**. However, **ECL jurisdiction over major mergers does NOT preclude the applicability of external merger control regimes.**

6.1.3. Commission Enforcement of ECL

The fact that ECL is widely applicable does not mean that it is observed in practice. **ECL infringements are common** – some are intentional (cartels) others result from miss-interpretation or unawareness, especially with respect to multilateral practices. **ECL is often 'enforced'** by public bodies and sometimes even by private entities including businesses and individuals. In other words, businesses can be forced to abide by ECL by an intervention by public or indeed private entities. The economy in general and the EAS in particular are especially affected by the ECL enforcement practice of the European Commission.

PUBLIC ENFORCEMENT of ECL takes the form of administrative proceedings **conducted by the European Commission or National Competition Authorities** (hereafter: NCA). Its *ex officio* nature (by decision of the authority), as opposed to 'on request' of interested parties, is meant to prevent the 'instrumentalisation' of competition bodies by the interested businesses. Without the ability to force authorities to take actions, complaints are nevertheless common and help uncover and prove ECL violations. By contrast, **PRIVATE ENFORCEMENT** of ECL is designed to protect the individual interests of those harmed by an infringement of ECL rules. Private enforcement of ECL **is initiated by 'private' bodies,** that is, not the competent national competition authority, such as a competitor or a consumer association, **and takes place in front of domestic civil courts** – often their special branch responsible for business matters. Its effects on the economy overall are generally very limited due to its sporadic nature and infrequent use. Unlike in the US, private enforcement of ECL **is still rare in Europe,** with the noteworthy exception of the UK which shows major

growth in this respect. The same problem applies to private enforcement of national competition rules.

Public enforcement of ECL is most typically undertaken by the Commission but also increasingly by NCAs (restrictive practices). **Despite its great potential advantages for market players, private enforcement of ECL is very uncommon in the EU** – it is used in practice only in very few MS such as Germany.

The enforcement of EU merger control rules is straightforward. **The Commission remains the only body entitled to assess concentrations with an EU dimension**. The enforcement of the MR is thus based on the so called '**one-stop shop' principle – concentrations with an EU dimension are to be notified to and assessed by the Commission only**. This system is intended to create the most effective merger control system in the EU: lower costs, shorten the waiting time, and increase legal security for the market the future of which depends on the outcome of the pre-emptive investigation. The exclusiveness of EU competence to assess major concentrations is subject to three exceptions. MS can request the referral of major operations if they primarily affect their country (Article 9 MR – **German clause**). MS can also request for the Commission to assess a merger without an EU dimension (Article 22 MR – **Dutch clause**). Finally, MS can also take steps for the protection of their **legitimate interests** endangered by a proposed merger (Article 21(3) MR) including: public security, plurality of media and prudential rules provided their actions abide by EU law (cannot be arbitrary). MS can take actions to protect their other legitimate interests provided they notify the Commission first and receive its approval.

EU merger control is limited to large operations only. The enforcement of the MR is **based on the one-stop-shop principle** – notification and assessment by the Commission only.

While efficiency considerations favour the use of single point of ECL enforcement with respect to major mergers, the opposite is true for restrictive practices. The Commission is increasingly less and less able to assess all practices affecting the trade between MS – the more integrated the internal market is, the more common EU-wide effects are likely to be. **The enforcement of Article 101 & 102 TFEU is thus undertaken in parallel by the Commission and NCA** (under juridical review of EU/MS courts respectively). According to Article 3(1) Reg 1/2003, if a NCA enforces national competition law to a practice which it finds to also fall under Article 101 or 102 TFEU, it is obliged to assess the case in accordance with both legal systems at the same time. This was the case in the aforementioned ZAIKS investigation of 2010 where the NCA found the actions of ZAIKS to infringe both Polish Competition law and Article 102 TFEU. As a result, the decision issued in this case was based on both legal regimes simultaneously. However, legal certainty considerations make it necessary to create 'a level playing field' for multilateral practice whereby neither NCAs nor national courts can prohibit a practice with EU effects which does not infringe Article 101(1) or is exempted by Article 101(3). MS are however free to apply stricter abuse rules than ECL (Article 3(2) Reg 1/2003).

The **conditions of parallel enforcement of Article 101 & 102 TFEU** by the Commission and NCAs are specified in Regulation 1/2003 (Articles 11–16). They **include information exchange and widespread consultations**. The Commission must be informed about the opening of ECL proceedings by NCAs and their planned decisions. Similar information may be provided to other NCAs and national courts. However, it would be wasteful and overly restrictive for the same case to be assessed by multiple authorities. The fact that a case has already been opened somewhere in the EU is reason enough to suspend, refrain from opening, or refuse to open analogous proceedings in another MS. NCAs cannot start proceedings if the Commission has done so already; even the latter can open a case in a matter already under national investigation only after extensive consultation. In order to **preserve the uniform application of ECL**, the rulings of NCAs and national courts cannot contradict a decision issued by the Commission. National courts can however, and often do so in practice, stay their proceedings in order to wait for the Commission to reach its own decision so as to avoid conflicts.

The Commission opens ECL proceedings on the EU level *ex ante* (on its own initiative but often prompted by complaints) or on request and with the full cooperation of a single or multiple MS. Seeing as NCAs are increasingly capable of 'handling' EU cases, the Commission tends to focus on the gravest of ECL violations only, on cases concerning the entire internal market and

novel issues which have not yet been subject to an ECL investigation. **The Commission is pragmatic in its enforcement practice –** it follows a functional rather than legalistic approach. Market practices are thus judged by their purpose and effects rather than their legal basis or form. *The 1997 Notice on agreements of minor importance* established that practices with no major negative effects on the EU economy will be considered to not infringe Article 101(1) TFEU. Aside from hard-core restrictions such as price fixing, which are black-listed *per se,* the Commission thus 'overlooks' minor practices. The pragmatism of its enforcement practice shows also in its treatment of cartels which are extremely difficult to detect and prove. According to its *2007 Notice on immunity from fines and reduction of fines in cartel cases*, the Commission can grant lenient treatment (fine reduction or even immunity from a fine) to those participants of a cartel that help the Commission uncover and prove the existence of a cartel (so-called 'whistle-blowers').

EU scrutiny, evaluation and ruling on the permissibility of given market practices by the Commission often has a fundamental impact on the economy. **Most companies can find themselves under investigation by NCA**, only a small minority of them will concern ECL as well. **Although not many businesses will find themselves subject to a Commission investigation**, **their impact cannot be underestimated because where they affect a key market player they often create wide-spread market effects**.

The small size of a company (SME) **does not in itself preclude the possibility of EU scrutiny** primarily with respect to joint actions by an association of the SME or a close business relationship with a larger market player.

6.1.4. Decision Types

Four types of decisions are used in the framework of ECL enforcement:

- **clearances** – Article 10 Reg 1/2003 & Article 8(1) MR
- **commitments decisions (conditional approvals)** – Article 9 Reg 1/2003 & Article 8(2)MR
- **negative decisions –** Article 7 Reg 1/2003 **infringement decisions** & Article 8(3)MR **merger prohibitions**
- **interim measures** – Article 8 Reg 1/2003 & Article 8(5)MR

CLEARANCES (Article 10 Reg 1/2003 & Article 8(1) MR) represent an official confirmation that the scrutinised practice does not violate ECL. They **used to be extremely common with respect to multilateral practices** which had to be notified to the Commission. Since the abolition of the notification duty with respect to Article 101 TFEU, clearances are no longer in use with respect to agreements but **still very frequent in merger cases** (over 80% of mergers notified to the Commission are unconditionally cleared). A clearance decision is issued if:

- the authority fails to establish a past infringement or finds that an operation does not endanger competition
- the authority establishes that the positive effects of the practice/operation outweigh its anticompetitive effects

CONDITIONAL DECISIONS are issued when the benefits of a practice do not outweigh its anticompetitive effects 'as is' but could do so 'on condition' that given steps will be taken or indeed, refrained from (eg acquiring additional undertakings of the same type). Conditions & obligations agreed upon in concentration cases are called **MERGER REMEDIES or 'undertakings'** (not to be confused with 'undertakings' as in companies) because the merging parties 'undertake' (promise) to abide by them. Conditions & obligations **in cases of restrictive practices are usually called COMMITMENTS** since the parties commit themselves to fulfil them. Overall, they can be divided according to the types of influence they exercise into conditions which have a negative character (eg do not buy more stock) and obligations which force the scrutinised parties to take certain actions (eg sell some stock, dissolve a contract). They can also be **divided into structural remedies/undertakings** (change the structure of the market eg by selling part of the business) **and behavioural remedies/undertakings** (prescribe how to behave in the future eg sell rights in small packages to multiple buyers). Although behavioural remedies are seen as less intrusive than structural ones, their implementation is very difficult to monitor.

Conditions & obligations attached to ECL decisions can shape market structures (**structural**) as well as market conduct (**behavioural**). They can have a **positive character** obliging the parties to take certain actions **or a negative nature** prohibiting them from taking certain steps in the future.

Conditional decisions (called also conditional approvals/clearances) **were always used in the framework of EU merger control** (Article 8(2) MR). Merger remedies allow the Commission to exercise a decisive influence on market developments not just by approving the concentration (pre-emptive character of EU merger control) but also by prescribing its terms. The *AOL/Time Warner (M.1845)* merger of 2000, now infamous because of its ultimately disastrous economic effects for the companies involved, presents a very clear example of how merger remedies can be used by the Commission to exercise a pro-active influence on the economy. On the structural side, the Commission was concerned about content market foreclosure and thus it made clear that it would not allow the parties to accumulate any more rights. As a result, Time Warner abandoned its plans to merge with EMI. On the behavioural side, the *AOL/Time Warner* merger was permitted under the condition that the new entity will not format its right in a propriety manner (closed to others).

Conditional decisions were also frequent until 2004 because all multilateral practices which could benefit from an individual exemption (Article 101(3) TFEU) had to notify their transactions to the Commission first and receive clearance to proceed. Similarly to the pre-emptive EU merger control, conditional approvals were thus very common in individual exemption cases. They were not however used at all with respect to abuses. **The growing pragmatism of ECL enforcement has resulted in** the abolition of the notification duty for multilateral practices. The advantages for ECL enforcement of the use of conditional decisions were not lost however – instead, they were re-introduced in the form of **COMMITMENT DECISIONS – a true negotiated instrument of ECL intervention that can be used for both types of restrictive practices: multilateral co-operation and abuse** (Article 9 Reg 1/2003)**.** Albeit their use in abuse cases is likely to remain less frequent, commitment decisions have largely filled the gap left after the discontinuation of the use of individual exemption decisions for multilateral cooperation.

Conditional decisions have proven of particular relevance to the EAS where they were used to shape future business relationships inside a production & distribution chain. This realisation is well illustrated by the Commission's UEFA **individual exemption decision** where detailed conditions were imposed on UEFA concerning its future licensing practice (*Joint selling of commercial rights of the UEFA Champions League case IV/37.398*). Those conditions have not only shaped the European football rights acquisition market but also many related markets such as content over mobile phones which emerged after the appropriate rights became available.

Moreover, banning bulk sales opened the market to small buyers limiting the wasting of unused rights through black-out clauses (major TV-operators would buy all rights in order to foreclose other means of transmission). It is interesting to note that **the first ever commitments decision** to be issued on the basis of Article 9 Reg 1/2003 not only concerned the EAS directly, but was very much a follow up on the earlier UEFA individual exemption decision. *Deutsche Bundesliga* concerned the joint selling of media rights for football matches of the Bundesliga and the 2nd Bundesliga by the German Football League (*Joint selling of the media rights to the German Bundesliga* Case COMP/C-2.37214). Although the case started as an Article 101(3) TFEU notification (application for an individual exemption), it was carried on according to Article 9 Reg 1/2003. In practice, both the reasoning and conditions imposed on the German Football League were similar to those used in the UEFA case – what changed was merely the type of decision by which they were imposed.

Although **the possibility to issue a conditional decision is not precluded in abuse cases (Article 102 TFEU)**, **commitments are rarely used in this context** because of the fundamentally anticompetitive nature of abuse which rarely has any positive effects at all. Thus, once abuse is suspected it is unlikely that its negative effects can be balanced by the use of conditions & obligations. Moreover, a commitments decision in abuse cases does not unequivocally establish that an infringement has taken place – only that it was likely – thus they restore competition but do not penalise the offender. According to Article 9 & paragraph 13 of the Preamble to Regulation 1/2003, they **can be used only if an abuse is likely but not very severe** (eg unintentional) **and thus, does not justify the imposition of a fine**. The aforementioned Polish *ZAIKS* case which was based both on national competition law and Article 102 TFEU is a good example of a commitments decision in an abuse case. The NCA believed that the actions of the dominant collecting society were likely to have been 'abusive' but decided that shaping its future actions by imposing behavioural 'commitments' was a more efficient way to protect competition than the imposition of a prohibition which in Poland cannot contain positive obligations. (ZAIKS 24/08/10).

ECL enforcement can also take the form of negative decisions which put a stop to an illegal practice or prevent it from happening. **Infringement decisions** (Article 7 Reg 1/2003) are relatively uncommon because restrictive practices are explicitly prohibited by Article 101 and 102 TFEU – they are thus illegal without the need for a decision to ascertain that fact. In such cases, the enforcement of ECL takes the form of **declaratory** decisions that confirm that a given practice/operation is/has violated ECL. If the practice

continues, infringement decisions place an **obligation** on the offender/ offenders **to terminate the infringement**. Behavioural & structural remedies can be imposed in order to force the offender to stop the ECL violation. Importantly also, infringement decision **impose a fine** (financial penalty) on the offender which reflects the gravity of the violation committed. Infringement decisions are most characteristic for abuse cases and cartels as well as when black-listed clauses are being used in multilateral agreements such as price fixing. The Commission has never issued a prohibition of multilateral practices to directly affect the EAS. On the other hand, the Microsoft case is a very clear example of an abuse prohibition which not only imposed a large fine on the violator but also extensive conduct remedies to force Microsoft to cease its abusive behaviour (*Microsoft vs. Commission* case T-201/04).

Merger prohibitions are even less common than infringement decisions (Article 8(3) MR). Unlike the above, they are not a result of an ECL infringement but a means of stopping undesirable market developments, in particular the elimination of competition resulting from the scrutinised concentration. Seeing as they are not normally related to an ECL violation, merger prohibitions do not impose fines (unless formal requirements were not met such as the obligation to notify a large merger). Surprisingly perhaps, the EAS was subject to as many as 5 separate merger bans in the early stages of its development (*MSG Media Services* M.469, *NSD* M.490, *RTL/ Veronica/Endemol* M/553, *Bertelsmann/Kirch/Premiere* M.993, and *Deutche Telecom/Beta Research* M.1027). All of these mergers were stopped by the Commission in order to ensure that technological advancement was not precluded long term.

The purpose of decisions imposing **INTERIM MEASURES** is to protect effective competition during the time it takes for the Commission to reach a final verdict (Article 8 Reg 1/2003 & Article 8(5) MR). Reg 1/2003 states in particular that the Commission can issue such decisions in cases of urgency where the risk of serious and irreparable damage to competition exists due to a *prima facie* finding of infringement.

According to Article 8 Reg 1/2003 & Article 8(5) MR – the Commission can also impose **interim measures** if they are necessary in the given case when a serious threat exists to the interests of the requesting party.

Considering the timing of the public intervention, **the enforcement of ECL is either pre-emptive** (before the operation has been implemented) **or has an *ex-post* character** (after the practice has already occurred). The timing of the enforcement depends on the types of practice under scrutiny. **The enforcement of**

- **the MR is pre-emptive** – all mergers with an EU dimension have to be notified to the Commission before they are implemented; they must be cleared in order to proceed; ex-post interventions in merger cases occur only in exceptional cases when the parties failed to notify an operation or failed to comply with merger remedies (Article 8(4)MR)
- **Article 102 TFEU has a fundamentally *ex-post* character** reflecting the unconditional nature of the prohibition of dominant position abuse
- **the prohibition contained in Article 101(1) TFEU is also considered in an *ex-post* manner**, provided the conditions of Article 101(3) are not met; if the Commission thus uncovers a price cartel for instance, it will issue a prohibitive decision forcing the parties to cease the practice
- **the legal exception (exemption) contained in Article 101(3) TFEU is pre-emptive in its nature** but **its application is no longer individually 'enforced'** – companies are obliged to self-assess their conduct rather than seek its pre-emptive approval from the Commission although the latter retains its power to enforce Article 101(3) TFEU on its own initiative (*ex-ante)* or exceptionally, on request of the parties concerned; on the other hand, **Group Exemptions by way of an EU Regulation are still in use.**

Although legally possible, **pre-emptive enforcement of Article 101(3) is now only likely with respect to exceptionally novel business models or particularly complex issues which exceed the self-assessment capacity of market players.**

Press Release IP/02/1739
During the last forty years […] a great number of individual decisions have been made applying the exemption criteria of Article 81(3). National competition authorities and national courts [which will now apply Article 81(3) directly] are therefore well aware of the conditions under which the benefit of Article 81.3 can be granted. Individual exemptions taken by the Commission are thus no longer indispensable to ensure a uniform application of Article 81(3).

6.1.5. Framework of ECL Assessment: the Relevant Market

ECL enforcement protects existing competition, rectifies past misconduct and prevents future distortions. **Businesses should be able to self assess their practices from the point of view of ECL** in order to be able to prevent or, if necessary, be able to deal with a public intervention into their business practices. Companies that act or wish to act in the EAS should know:

- do their practices fall within the scope of ECL in light of their actual or potential effects (rather than their legal form or rationale) or size?
- is ECL applicable to them – considering the extra-territorial character of competition law/antitrust jurisdiction, are they under single or multiple jurisdictions including ECL?
- do their practices infringe ECL and what possible consequences might this fact have?
- can they benefit from any of the applicable exceptions due to the scale or scope of the practice?

Before any of the aforementioned questions can be answered, **it is necessary to establish the analytical framework applicable to the practice and market situation at hand.** ECL is firmly based on the concept of a **RELEVANT MARKET –** a precise framework to evaluate the level of competition preceding the scrutinised practice, accompanying it or of the conditions of competition likely to be found in its wake. While **delineating relevant markets** is not a goal in itself – it **is** nevertheless **the most important tool to evaluate an operation from the point of view of ECL**.

The 'relevant market' is a frame of reference for the assessment of ECL permissibility of given business practices in specific market circumstances. It does not have to correspond to the notion of 'market' as it is understood by businesses or by consumers outside the realm of ECL.

The Commission *Notice on the definition of relevant market for the purpose of community competition law* of 1997 is its best known soft law in the realm of ECL. Despite its age, the Notice remains a useful interpretative tool for business and national enforcement agencies alike, summarising applicable EU jurisprudence and case law. Market players do not have to comply with the

Notice but doing so increases the chances that their self-assessment will find approval by the Commission. The Notice stresses that **the real objective of defining relevant markets is to identify competitive constraints** (the business of which companies affects their own market practices) **placed on the scrutinised company**. Hence only these products/services that can influence the behaviour of the scrutinised business should be taken into account in analysing the permissibility of its operation. Relevant markets are thus defined by reference to what is known as the basic **COMPETITION CONSTRAINTS:**

- **substitutability of demand**
- **substitutability of supply**
- **potential competition** which is not generally assessed within the market definition stage but it is impossible to avoid considering it when evaluating supply side substitutability

DEMAND SUBSTITUTABILITY reflects the variations in consumer acquisition patterns deriving from permanent changes in price. Only those goods/services that compete with the products in question and can influence their price can be treated as forming the same product market. If enough consumers would switch acquisitions so as to make the original increase in price unprofitable, due to the loss of sales, then both products would form the same product market. By contrast, **SUPPLY SUBSTITUTABILITY** reflects the ability of other providers to change, relatively quickly, their production patterns as a result of a permanent variation in price. The more flexible the supply side of the market and the faster it can adjust, the stronger its competitive influence. The supply side substitutability in the EAS is greatly influenced by rights and infrastructure access as well as access to proprietary technology. In most cases, only those entities that actually have or can easily have access to necessary content and/or transmission facilities can be seen as **POTENTIAL COMPETITION** to those already in operation.

SUBSTITUTABILITY (availability of an alternative) **is the key consideration for the definition of 'relevant markets'.**

Two key aspects of the relevant market must be identified & assessed cumulatively in order to verify the conditions of competition applicable to the given case:

- the type of goods/services in question – **the product market**
- geographical limits within which the scrutinised conduct or its effects take place – **the geographical market**

A relevant PRODUCT MARKET contains all those products/services which are regarded as interchangeable or substitutable by the consumer by reason of their characteristics, price, and intended use. A relevant product market implies a sufficient degree of inter-changeability between the goods/services that form it. 'Substitutability' is the key to product market definition. However, substitutability is not a permanent variable especially in fast moving industries such as the EAS where consumer preferences and industrial trends can change within short periods of time. It is also very difficult to objectively assess the relative importance of product characteristics in copyrighted material – how important is, for instance, the fact that an event is transmitted live as opposed to the fact that it is transmitted for free? As a result, product markets are relatively narrow in the EAS reflecting the growing differentiation of the audiovisual offer.

Determining GEOGRAPHICAL MARKETS identifies alternative supply sources from the perspective of their location. Similarly to product markets, demand substitutability is also of essence for the delineation of geographical markets. It relates to situations in which, as a result of a rise in price, consumers would switch to a supplier from a different area. If so, such areas would constitute part of the same relevant market. A relevant geographic market covers the area in which the firms concerned are involved in the supply of products or services and the **conditions of competition are sufficiently homogenous**. In other words, the area in question must be distinguishable from its neighbours because of an appreciable difference in the conditions of competition. **Market entry and exit barriers** are particularly relevant here seeing as they cause geographic isolation. On the other hand, price differentiation cannot be treated as a sufficient reason to establish separate geographic markets primarily because of the influence on prices exercised by **transportation costs**. Products with low transportation costs in comparison with their value tend to have wide geographical markets because transporting them over long distances does not notably increase their price. High transportation costs and small product value normally imply narrow markets. As transportation costs are generally negligible in the EAS, they do not normally influence geographical markets. The sector is unusual in the fact that market delineation is based primarily on cultural and language reasons and not on actual costs.

PRODUCT relevant market = all products that are substitutes for each other (alternatives).
GEOGRAPHIC relevant market = area from which consumers would source their acquisitions

In practice, **two distinct methods can be used to delineate relevant markets:**

- **the ad hoc method** focuses on the character, price and intended use of the scrutinised product/service. It is now mostly used in cases lacking in verifiable financial data such as those concerning emerging markets. it is based on product comparisons in terms of substitutability with an alternative offer (eg free TV was found to be not substitutable with pay-TV because they have a different offer, price and coverage in a number of cases including *Bertelsmann/Kirch/Premiere* M.993 and *Newscorp/Telepiu* M.2876)
- **the SSNIP test** (Small but Significant & Non-transitory Increase in Price) also known as **the hypothetical monopolist test.** It is more objective than the ad hoc method and now the preferred method of relevant market definition in the EU. The Notice specifies that a 5-10% price rise would constitute a small but significant price increase for the purpose of the SSNIP test (eg SSNIP was used in the *France Telecom* vs. Commission case T-340/03 to prove that low speed/dial-up Internet access was not an alternative to high speed access, 80% subscribers declared that they would maintain their subscription even if its price rose by up to 10%).

Relevant market = key change in characteristics or price rise of 5-10% would make consumers switch from product A to B (**demand substitutability in product terms)** or from supplier A to supplier B located further afield **(demand substitutability in geographic terms); alternatively,** suppliers would switch production from product A to B (**supply side substitutability).**

6.2. Restrictive Multilateral Practices: Article 101 TFEU

Effective competition can exist only if companies determine independently their business policy, without negating the fact that they can intelligently adapt to the actions of their competitors, suppliers or customers. **ECL forbids any direct or indirect contact between independent companies that can influence or uncover their conduct to each other**. ECL is particularly strict with horizontal practices between competitors which are generally anticompetitive and rarely benefit those other than the parties (their negative effects generally outweigh their positive effects). Vertical practices take place between companies acting on different levels of the same production and distribution chain (suppliers & customers). They are less likely to be anticompetitive and even if they are, they usually also have benefits for the economy which can outweigh their restrictive effects. Conglomerate practices involve companies from different segments of the economy and are usually not anticompetitive.

Anticompetitive multilateral practices that appreciably affect EU trade **are the object of Article 101 TFEU which contains** four distinct elements:

- **prohibition** *Article 101(1) TFEU*
- **exemplary list** *Article 101(1) TFEU*
- **invalidity of practices subject to the prohibition** *Article 101(2) TFEU*
- **legal exception to the above prohibition including a list of four pre-defined exemption conditions** to be met for the prohibition to be inapplicable *Article 101(3) TFEU*

Article 101 TFEU (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   – any agreement or category of agreements between undertakings,
   – any decision or category of decisions by associations of undertakings,
   – any concerted practice or category of concerted practices,

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In its entirety, **Article 101 TFEU imposes a 'conditional' prohibition on anticompetitive multilateral practices** with appreciable effects on trade between MS.

6.2.1. Prohibition – Article 101(1)

Article 101(1) TFEU PROHIBITS as incompatible with the internal market:

- **ALL AGREEMENTS** between undertakings, decisions by associations of undertakings, and concerted practices
- **which may AFFECT TRADE BETWEEN MS and**
- **which** have as their **OBJECT or EFFECT** (are by design or effect)
- **PREVENTION or RESTRICTION or DISTORTION of COMPETITION** within the internal market (ANTICOMPETITIVE)

The prohibition contained in Article 101(1) covers ALL FORMS of multilateral conduct following a functional approach which concentrates on the intentions behind the conduct and its effects and not on its form. **AGREEMENTS (contracts)** are the most common form of conduct caught by Article 101. Agreements constitute a formal form of cooperation between at least two independent companies, even if the involvement of one of them is not influential or in fact only implied. **DECISIONS taken by ASSOCIATIONS OF UNDERTAKINGS** (eg UEFA) are a less common but equally influential form of formal multilateral practice caught by

Article 101 TFEU. They are covered by ECL because they co-ordinate the market behaviours of the members of the association (eg sports clubs). Acknowledging their economic efficiencies, decisions of associations of undertakings cannot impose competition restrictions greater than necessary for the fulfilment of the association's legitimate aims. **CONCERTED PRACTICES (cartels/collusion)** represent an informal & coveted form of multilateral cooperation. They are designed to at the very least facilitate information exchange but often also to coordinate the business practices of their participants, effectively distorting or even eliminating effective competition. However, parallel conduct cannot be used as the sole proof of collusion unless there is no other plausible explanation for such behaviour.

Article 101 TFEU applies to MULTILATERAL practices, that is, **practices between at least 2 independent entities** even if not all of them are participating in the practice 'actively'. It does **not** cover business **operations within a single economic unit.**

According to the jurisdictional rules of ECL, the applicability of the Article 101(1) TFEU prohibition is limited to multilateral practices which **affect or can AFFECT TRADE BETWEEN MS to an appreciable degree**. In other words, multilateral practices between SME are rarely subject to Article 101 TFEU at all because of the marginal (below 5%) market share of their participants.

The prohibition of Article 101(1) TFEU applies solely to RESTRICTIVE (anticompetitive) multilateral practices. Thus only those multilateral practices which **PREVENT or RESTRICT or DISTORT COMPETITION** on an EU scale are caught by it. However, the applicability of the prohibition covers anticompetitive multilateral practices that restrict competition:

- **by their very OBJECT** (purpose, aim, intention behind it), in other words, their objective goal rather than subjective opinion of parties on intents or incentives of their behavior **OR**
- **by their EFFECT** (result), in other words, their negative influence

So, if the colluding parties do not try to infringe competition (object), or if their behaviour does not endanger it in practice (effect), then it is not forbidden. **If a multilateral practice has an anticompetitive OBJECT**

(explicit purpose), it is not necessary to analyse its effects but in many cases, the latter are nevertheless assessed in order to 'strengthen' the case. In other words, if it is the intention of a multilateral practice to bring about anticompetitive effects, then it is prohibited irrespective of the fact of whether it has actually managed to achieve them. Practices not meant to harm competition can however still be anticompetitive, and thus find themselves subject to the Article 101(1) prohibition, if competition is endangered unintentionally by their effects.

ECL is concerned with a number of anticompetitive **EFFECTS** that can follow a multilateral practice. **Foreclosing** practices are particularly important in sectors as innovative as the EAS where the whole of its distribution chain is dependent on access to proprietary commodities (*Eurovision* case IV/32.150). The internal competitiveness of the EAS can also be harmed by **discrimination** in trading conditions or membership criteria in relation to trade associations putting non-members at a great competitive disadvantage (eg *Screensport/EBU* case IV/32.524 and its appeal in *Metropole Television SA and ors vs. Commission* Joint cases T-528,542,543,546/93). The most important question that arose so far in relation to Article 101 in the EAS is that of the legal implications of the **exclusivity** in licensing agreements. Exclusive licensing of technology is rarely permissible but exclusivity with respect to content (in terms of both time scale and quantity) would only infringe Article 101(1) TFEU if it exceeded the necessary minimum to accomplish its justified aim (eg *Film purchased by German television stations* the so-called *ARD* case IV/31.734 and *UEFA Champions league* case COMP/C.2-37.398).

The effects of practices not meant to harm competition (without an anticompetitive objective) must be verified. An anticompetitive intent constitutes enough reason to prohibit an operation irrespective of its scale or effects if not for any other reason, then at least in order to ensure deterrence. Reflecting the lesser level of 'fault' of those involved in practices not designed to harm competition yet doing so unintentionally, **only those multilateral practices that have an APPRECIABLE NEGATIVE EFFECT on EU competition are actually prohibited** by Article 101(1) TFEU. This so-called *de minimis* **principle** was officially introduced in 1997 in the *Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1)* [currently Article 101(1) TFEU]. According to the Notice, **multilateral practices are not considered to be anticompetitive**, and thus not prohibited by Article 101(1), **if the market share of their parties does not exceed 10% & 15% in relation to horizontal and vertical practices respectively.** If their participants assume

in good faith that an agreement is covered by the Notice, the Commission will not fine them even if it comes to a different conclusion.

Appreciability of 'restrictive effects', which triggers the applicability of the prohibition of Article 101 TFEU, **must be differentiated from appreciability of 'effect on EU trade'** which triggers EU jurisdiction.

Article 101(1) TFEU contains an exemplary list of restrictive multilateral practices. The list does not have a closed character – other types of multilateral cooperation can thus be caught by its prohibition. Accordingly, Article 101(1) TFEU states that its **prohibition applies in particular to:**

(a) **PRICE FIXING & FIXING OF OTHER CONTRACTUAL CONDITIONS –** direct or indirect; purchase or selling prices; or any other trading conditions
(b) **OUTPUT & MARKET RESTRICTIONS –** limiting or controlling production, markets, technical development, or investment
(c) **MARKET SHARING –** including the sharing of supply sources
(d) **DISCRIMINATION –** use of dissimilar conditions to equivalent transactions and by doing so placing the recipients' at a competitive disadvantage
(e) **BUNDLING/TYING** – making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or commercial usage, have no connection with the subject of such contracts

Bundling = combined sale of product A and product B (pure bundling if A and B can only be purchased together).
Tying = product A (tying product) **is always sold together with product B** (tied product) **but product B can be sold separately**.
Mixed bundling/commercial tying = product A and B can be purchased separately but getting them together is cheaper

The list provided by Article 101(1) has an exemplary character – while it contains the most common and severe forms of anticompetitive cooperation, other practices can be caught by the prohibition. Similar lists can be found in national competition law regimes albeit they also contain tender-fixing (tender-rigging) which constitutes one of the most severe competition restricting multilateral practices. Discrimination was the key offence committed by EBU with respect to its membership criteria (*Metropole Television SA and ors vs. Commission* Joint cases T-528,542,543,546/93 – *Metropole Television I*). Output and market restrictions were the basis of EU intervention into UEFA's licensing policy (*UEFA Champions league* case COMP/C.2-37.398)

6.2.2. Sanctions

The aforementioned prohibition has fundamental consequences as far as contract law is concerned – **CIVIL LAW SANCTIONS**. According to Article 101(2), **multilateral conduct prohibited by Article 101(1) TFEU is automatically void**. No administrative decision or judgement is necessary to bring about this invalidity – any decisions/judgements in such matters merely have a declaratory character. As a result, **parties to multilateral practices prohibited by Article 101(1) TFEU**, such as collusive agreements, **cannot benefit from any type of legal certainty normally granted by contract law.** For instance, they have no means of enforcing the agreement or indeed suing their partners for breach of contract. It is essential to emphasise in this context that ECL jurisprudence has clarified that **price fixing**, **output restrictions,** and **market sharing constitute what is known as HARDCORE RESTRICTIONS** (also called black-listed provisions). Their presence is seen as proof of the existence of an anticompetitive object (purpose) of multilateral practices. Provisions of this character **are, as a general rule, void in terms of civil law**.

ECL SANCTIONS of an infringement of the Article 101(1) TFEU are specified in Article 23 Regulation 1/2003. An infringement decision contains:

- **an obligation to bring the anticompetitive practice to an end** (stop the violation)
- **a FINE of up to 10% of the turnover in the preceding business year** whereby the amount of the fine actually imposed in any given case is 'moderated' according to the severity and duration of the infringement

According to Article 24 Regulation 1/2003, the Commission can also impose periodic penalty payments of a maximum of 5% of the average

daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them to comply with its decision.

In line with its 2006 *Notice on Immunity from fines and reduction of fines in cartel cases,* the Commission offers **'leniency' for whistleblowers** in other words those that have provided the authority with key information allowing it to find **a horizontal cartel** (concerted practice or agreement between competitors). On this basis, the first entity to approach the Commission with new and important information can avoid a fine altogether while subsequent applicants can have their fine reduced. The use of the leniency programme is precluded for ring leaders.

Damages & other civil law sanctions are available to those harmed by Article 101 TFEU, as well as Article 102 TFEU, **offences in the framework of the private enforcement of ECL**.

6.2.3. Legal Exception: Article 101(3)

Article 101(3) TFEU states that **Article 101(1) may be declared inapplicable in the case of a multilateral practice which cumulatively fulfils four specified conditions** – two positive and two negative ones. The exception is based on the assumption that the positive effect of a multilateral practice that meets these criteria outweighs its negative consequences. **The benefit of this legal exception is limited to multilateral practices that are anticompetitive by object or effect but at the same time**:

(+) **BRING ABOUT ECONOMIC EFFICIENCIES** by contributing to improving the production or distribution of goods or promoting technical or economic progress

(+) **SHARES ITS ADVANTAGES WITH CONSUMERS,** that is, allows consumers a fair share of the resulting benefit

(–) **NOT BE DISPROPORTIONATE** by imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives

(–) **NOT ELIMINATE COMPETITION** in respect of a substantial part of the products in question.

A multilateral practice must bring about efficiencies in the production or distribution of the commodity in question or promote progress. Not only must the improvement be the result of the practice, it must surpass its restrictive effects (*Screensport/EBU* case IV/32.524). Also, **the benefits must be 'objective'**, in other words, the advantages must be felt by more than just the parties. A **fair part of the benefit** resulting from the practice **must be passed on to consumers** (customers). Long time benefits will generally outweigh short time gains; it is not uncommon to assume that increased competitiveness will benefit consumers in the long run. In *Screensport/EBU,* the immediate benefit to consumers resulting from the creation of a new channel was outweighed by the elimination of potential competition for the future.

A practice can benefit from this exception only if it does not impose indispensable restrictions. **The Commission has frequently used the proportionality condition to eliminate all those elements of a notified multilateral practice which it objected to**. Conditions and obligations imposed in this context have, for instance, greatly affected the notion of exclusivity. ECL cannot ban exclusivity *per se* considering its IPR rationale. The enforcement practice of Article 101(3) has however effectively limited the permissible extent of exclusivity both in qualitative and quantitative terms (maximum duration and number of rights covered by exclusive agreements). Proportionality assessments were essential for individual exemption cases. Lacking analysis was the basis of the revocation of the *Screensport/EBU* decision by the ECJ (*Metropole Television I*).

The practice is not allowed to **eliminate competition in respect of a substantial part of the relevant good/service**. Delineating the relevant market is a pre-condition of this assessment. Although this condition does not *per se* exclude large undertakings from the benefit of the legal exception, a multilateral practice of major market players might be exempted only if enough competition remains on the given market (*BiB* case **IV/36.539**). Conditions and obligations can also be used in order to prevent the elimination of competition after the operation.

An anticompetitive multilateral agreement caught by Article 101(1) **can be exempted by Article 101(3) only if it fulfils ALL FOUR CONDITIONS** of an exemption.

Certain categories of multilateral practices that affect trade between MS **are assumed to be anticompetitive** (fall under Article 101(1)) **but at the same time assumed to fulfil the exemption conditions** of Article 101(3). They are generally believed to bring about efficiency gains and share their benefits with consumers; they are seen as proportionate and not overly foreclosing. These types of multilateral practices are subject to **BLOCK EXEMPTIONS.** Agreements caught by a block exemption do not have to be assessed individually with respect to the exemption conditions **provided their parties do not exceed a certain market share specified in each block exemption.** The most important current block exemptions include:

- Commission Regulation (EU) No 330/2010 of 20/4/10 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices (**VERTICAL AGREEMENTS**)
- Commission Regulation (EU) No 1217/2010 of 14/12/10 on the application of Article 101(3) [TFEU] to certain categories of research and development agreements (**R&D**)
- Commission Regulation (EU) No 1218/2010 of 14/12/10 on the application of Article 101(3) [TFEU] to certain categories of specialisation agreements (**SPECIALISATION**)
- Commission Regulation (EC) No 772/2004 of 27/04/04 on the application of Article [101(3) TFEU] to categories of technology transfer agreements (**TECHNOLOGY TRANSFER**)
- Commission Regulation (EU) No 461/2010 of 27/05/10 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (EU) 461/2010 (**MOTOR VEHICLE**).

BLOCK (group) EXEMPTIONS create a **'safe harbour' from ECL for the given types of practice. Businesses acting in the EAS can benefit in particular from the vertical agreements and R&D block exemptions.**

6.2.4. Examples of Multilateral Practices in the EAS

The enforcement practice of Article 101 TFEU **in the EAS** has been shaped by two separate characteristics of the sector: the fact that the scrutinised **practices often relate to** proprietary commodities protected by **IPR** and the fact that they are often novel in economic and/or technological terms. Both reasons speak for a restrained use of ECL with respect to the parties involved: not only do IPR deserve protection, companies cannot be expected to single-handedly assess the permissibility under Article 101(3) TFEU of 'novel economic models' such as the influence of TV right licensing on the development of the Internet. At the same time however, the widespread use of IPR in the EAS makes it easy to foreclose markets and thus hinder progress.

The specific relationship between ECL rules on multilateral practices and IPR was assessed by European courts on a number of occasions starting with the ground breaking ***Coditel* I** judgment of 1979 (**C-62/79**). The ECJ established therein that the provisions of the Treaty, in other words both free movement as well as competition rules, cannot in principle preclude the possibility of using geographical limits in licensing in order to protect the licensors' and licensees' right to remuneration for the use of IPR. *Coditel I* confirmed therefore that the essence of IPR lies in the holder's right to exploit it commercially (receive remuneration for its use) and that this basic right cannot be precluded by competition law considerations. This finding was further clarified in the ***Coditel II*** judgment of 1982 (**C-262/81**). As a continuation of *Coditel I*, the request for a preliminary ruling concerned here an action for damages associated with the unauthorised retransmission into Belgium of the German broadcast of '*Le Boucher*' to which Cine-Vog had exclusive distribution rights. The ECJ set forth first of all a distinction between the existence of IPR and its exercise. It was then explicitly stated that an exclusive licence contract extending for a specific time in the territory of a single MS is not, as such, prohibited by, what is now, Article 101(1) TFEU. The manner in which the exclusive right conferred by such contract is exercised must however be subject to a comprehensive analysis. It must be ascertained therein whether, in the circumstances of the case, the object or effect of the exercise of the IPR is to appreciably prevent or restrict the distribution or to distort competition on the given market considering its specific characteristics. Finally, the ECJ listed a number of possible scenarios suggesting the anti-competitiveness of the way in which an exclusive right was exercised including:

- practices creating barriers which are artificial and unjustifiable in terms of the needs of the industry:

- actions that make it possible to charge fees which exceed a fair return on the investment and;
- duration of the contract which is disproportionately long.

The importance of ***Coditel II*** lies in the fact that the ECJ distinguished therein between **the existence and exercise of IPR** whereby **the former does not infringe competition law** in itself **but the later might** eg because of its excessive duration.

The *Coditel II* ruling can be seen as the basis framework in which the relationship between IPR and EU rules on multilateral practices developed over the last thirty years. In its light, the Commission has taken on the role of protecting 'the common interest' of the EU and its citizens by protecting the future competitiveness of the internal market even if using ECL enforcement amounts to the limitation of the free use of property rights. Acknowledging both the justified nature of IPR protection and its foreclosing potential, **the Commission has** repeatedly chosen to 'intervene' into the internal workings of the EAS. Rather than taking the *ex-post*/penal road of Article 101(1) prohibitions, it has instead chosen to use the individual exemption procedure of Article 101(3) TFEU. On this basis it **issued a number of important 'conditional' individual exemptions** (predecessors of the current 'commitments decisions' issued on the basis of Article 9 Reg 1/2003) **that influenced the 'how'** rather than the 'if' **IPR could be used on an exclusive in light of the prohibition contained in Article 101(1) TFEU**.

The Commission has shown its willingness to acknowledge the rights of IPR holders to use their property on an exclusive basis without penalising them for their market foreclosing effects. Even without prohibitions, the Commission has greatly influenced the internal workings of the EAS, in particular with respect to the distribution of audiovisual content**.** To avoid an intervention by the Commission, exclusive licensing contracts with EU effects cannot be overly long and cannot cover more than the rights necessary to accomplish their justified aim. It is fair to say therefore that **multilateral practices which hinder economic or social progress or waste resources** (eg using black-out clauses, the only purpose of which is to stop others using the rights) **are likely to come under Commission scrutiny even if they are based on IPR**.

No case shows better the direct influences exercised by the Commission on the EAS by way of Article 101(3) TFEU enforcement than its treatment of **UEFA,** the governing body for European football. Its membership is open to all European national football associations (usually one per MS) which organise the sport at a national level. From the point of view of ECL, UEFA is an association of undertakings (national football associations) which organises: UEFA European Football Championships, the UEFA Champions League, and the UEFA Cup. Its key role is thus without a doubt social rather than economic. However, UEFA also **has an ancillary role whereby it markets broadcasting rights to the football events it organises – its actions in this respect constitute a decision of an association of undertakings**. Joint (collective) selling of sports rights has important economic (eg lower transaction costs) as well as social advantages (eg single branding). It is thus not anti-competitive by nature (object). It does however also restrict competition because it lowers the number of suppliers (effect). The restriction is clearly of a considerable nature if it concerns rights as important as those held by UEFA.

In 1998, the Commission opened an investigation against UEFA for an alleged breach of [Article 101(1) TFEU]. The *UEFA Broadcasting Regulation* (case IV/37.576) was ultimately approved in 2000 allowing its members (national football associations) to block TV coverage of football matches during 2½ hours either on Saturday or Sunday to protect stadium attendance and amateur participation in football (sports solidarity). This case constitutes a good example of the fact that the Commission must sometimes reconcile competition rules and the special characteristics and social importance of sports. Around the same time however, UEFA asked the Commission for a decision stating that its practices did not infringe the EU prohibition of anticompetitive multilateral practices (negative clearance under Article 101(1) TFEU). If that was impossible, UEFA requested an individual exemption under Article 101(3) TFEU in respect of its **arrangements for the joint selling of the exploitation rights to *UEFA Champions League* matches** (*Joint Selling of commercial rights to UEFA Champions League* case IV/37.398).

Although fully in line with its IPR, **the Commission strongly objected to UEFA's practice** of selling all of its Champions League TV rights in one package to a single broadcaster on an exclusive basis for up to four years at a time. The buyers were often free-TV broadcasters that could, but did not have to, sub-licence some rights to pay-TV broadcasters. As a result, many matches remained unused, and thus wasted. There was also no Internet or mobile coverage of UEFA matches because the exclusive licence covered all transmission modes. The broadcasters were thus willing

to pay a premium for acquiring all rights, even though they only used the free-TV rights, since they recognised the importance of the Internet's potential competitive pressure. The **Commission cleared the joint selling scheme in 2003 but only after UEFA made extensive concessions** to create a balance between its rights as the owner of the copyright in the league matches and the needs of competition protection:

- **14 separate packages** limited to a certain number of matches, types of transmission (live vs. deferred) and types of exploitation (TV vs. other)
- **the sale of rights by UEFA as well as individual clubs involved in the games** – while the right to sell the exploitation rights to UEFA matches will initially be exclusive to UEFA, if the association fails to sell them by a give time – clubs are allowed to market them independently
- **the elimination of black-out clauses for new distribution models**
- **a 3 year limit for exclusive licence contracts**

The Commission's pro-active take on UEFA's sports right licensing which used the possibility of conditional clearances in order to force the parties to amend their competition restricting practices even though they were based on IPR **had great economic and technological repercussion for the entire EAS**. It opened sports rights markets to more differentiated entities (including Internet and mobile providers as well as intermediary agencies). It made it possible for sports to be shown on the Internet and mobile phones to the great benefit of both viewers and new media providers. Overall, it greatly limited the wasting of exploitation rights eliminating black out clauses and making it possible for individual clubs to sell at least some TV rights to their matches. Because of this, UEFA matches without national but with great local appeal could be sold by individual clubs to local broadcasters which could never afford to acquire a large package directly from UEFA. Although the market has certainly evolved since the decision was issued, the impact and exemplary role of the UEFA decision cannot be underestimated as it has become a milestone for the development of sports right licensing in the EAS.

The recent **Premier League** ruling of the CoJ (joint cases **C-403/08** & **C-429/08**) confirms the applicability of the above findings taking them potentially a step further along the road of creating a truly 'internal' European audiovisual market. In line with *Coditel II*, the CoJ confirmed that the fact that a right holder has granted territorial exclusivity, and thus prohibited transmission by other entities in that territory during a specified period of time, is not sufficient to justify the finding that such a contract has an anti-competitive object within the meaning of what is now Article 101(1) TFEU. The **existence of IPR** protection conferred by MS legislation

and **the actual grant of an exclusive territorial licence** thereto **is thus not called into question**. Of great concern to competition law is however the manner in which that right is exercised if it can result in a division of the internal market. A ban of cross-border sales of decoding equipment, an additional contractual stipulation imposed in order to protect broadcasting exclusivity, has a market partitioning effect by definition which must be equated to a restriction of competition by its very object. The CoJ found that those clauses of an exclusive agreement that have an anti-competitive object, such as the ban of cross-border sales, constitute a practice prohibited by Article 101(1) TFEU. It was later confirmed that the **ban on cross-border sales of decoding devices** does not meet the requirements of Article 101(3) TFEU and thus, it **is subject to the prohibition contained in Article 101(1)**. The Premier League case shows therefore that while the granting of exclusive territorial licences is still 'formally' possible in the EU, imposing effective means to execute them is becoming increasingly difficult to justify especially in light of pro-active consumer efforts meant to overcome them. It remains to be seen however how much of a change in the commercial practices of the EAS the Premier League case will cause.

It is worth noting also that aside from affecting the selling side of sports rights in Europe, **the Commission also influenced** (albeit in a far more indirect way seeing as its decisions ended up being annulled by the CFI) **the buying side of sports rights markets in the EU.** The EAS has always been under the influence of the **European Broadcasting Union (EBU).** EBU is Europe's most important association of, primarily, public broadcasters which engages in right sharing and joint (collective) right acquisitions. Similarly to joint sales, collective acquisitions have many economic advantages including transaction cost savings, a single point of sale, and uniformity of trading conditions. The high prices of broadcasting sports rights can also make it necessary for multiple broadcasters to pool their resources to buy them jointly and then share their exploitation. However, collective rights acquisitions can restrict competition if they are undertaken by direct competitors. EBU's scheme falls under Article 101(1) TFEU because although it claims to be an association of PSBs only (implying one member per MS), it has in fact admitted a number of non-PSBs into its midst. As a result, in MS with more than one representative, EBU's joint selling scheme restricts downstream competition between the members of EBU acting on the same geographic broadcasting markets.

In order for a multilateral practice of that type to qualify for an individual exemption, its benefits must thus clearly outweigh its restrictive effects. The EBU case shows that the balancing act is not always easy. EBU was twice

allowed by the Commission to engage in rights sharing and joint acquisitions (*93/403/EC EBU/Eurovision* case *IV/32.150 & 2000/400/EC Eurovision* case *IV/32.150*) and yet both of the individual exemptions were annulled by the CFI (*Métropole télévision I* case *T-528 and others & Métropole télévision II* case *T-185/00 and ors*). Three separate issues are worth noting with respect to the impact on EAS of the *Métropole télévision I* judgment in particular:

1) The CFI confirmed the right of a non-member to appeal the approval of a statute of an association of undertakings if it enables the association (in this case EBU) to exclude the appellant from the benefit of the competitive advantages arising out of its membership (in this case, rights sharing and joint buying).
2) The CFI clarified that membership criteria cannot be deemed proportionate unless they are precise enough to be able to objectively assess their usage.
3) The Court stressed that the fulfilment of a public service mission is not a sufficient reason to consider that limiting membership in a broadcasters association to PSBs only is truly indispensable in the context of the proportionality condition of Article 101(3) TFEU.

The CFI stressed therefore **the fundamental importance for competition of the conditions of membership in trade associations.** Seeing as joint actions can be very beneficial for the participants, preferential membership criteria give an unfair competitive advantage to those 'in' the association as opposed to those 'left out'. The CFI also confirmed that **the restrictive actions of PSBs are not considered indispensable** (from the point of view of the 'proportionality criterion' contained in Article 101(3) TFEU) **only because they lie within their remit**. Thus, just because a multilateral practice is undertaken by PSBs, this does not mean that its restrictions are proportionate.

1996 Métropole télévision I T-528 and ors vs. Commission
2. ... an individual exemption pursuant to [Article 101(3) TFEU] supposes that the agreement or the decision by an association of undertakings fulfils all four conditions set forth in that provision. It is sufficient for one of the four conditions not to be met in order for exemption to have to be refused. In order to assess, more specifically, whether the restrictions of competition resulting from the membership rules of a trade association of radio and television organizations which afford competitive advantages to its members are indispensable within the meaning of the aforesaid provision, the Commission must first consider whether those membership rules are objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner vis-à-vis all potential active members. The indispensable nature of the restrictions in question cannot be correctly assessed unless that prior condition is fulfilled.

In the same context, the Commission is not entitled to use as a criterion for granting exemption, without other justification, simply the fulfilment by the members of the association of a particular public mission defined essentially by reference to the mission of operating [SGEI], inasmuch as that provision is not applicable. Whilst, in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty, it must show that such considerations make it indispensable for the restrictions of competition entailed by the rules of the association to exist.

6.3. Dominance and its Abuse

Most companies are unaware of the constraints placed on their multilateral conduct by competition rules in general and ECL in particular. They are generally more conscious of the prohibition of dominant position abuse primarily because of the publicity it generates, see Microsoft for example. Even these rules are often overlooked however when it comes to small companies which tend to assume that abuse is attributable to large corporations only. Despite this preconception, competition law is concerned with all those that have market power irrespective of their actual size and dominance can be surprisingly easily found in specialised fields. While national competition rules apply to the conduct of those in control of local markets, **ECL is concerned with UNILATERAL ABUSE of market power (monopoly & dominance) on an EU scale.** Still, even though Article 102 TFEU recognises that **dominance can be held collectively by multiple entities**, ECL does not recognize collective abuse.

Article 102 (ex Article 82 TEC)
Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The 'unilateral' aspect of Article 102 TFEU concerns the notion of 'abuse', 'dominance' can be held collectively – **each entity is seen as individually abusing its dominant position even if that position is held collectively.**

6.3.1. Dominance

The applicability of Article 102 TFEU is directly based on two separate concepts: **DOMINANCE** and **ABUSE** whereby the existence of the latter is conditional upon the establishment of the former. According to the jurisprudence of the ECJ, **dominance implies the existence of enough MARKET POWER to free the scrutinised company from any notable competition constraints**, in other words, a dominant undertaking can act however it wishes without having to adjust its conduct to the actions or preferences of other market participants. A dominant position gives the undertaking at hand **'power over the market'** – it is able to have at least an appreciable influence on the competitiveness of the relevant market, if not to prevent effective competition on the relevant market all together.

United Brands [1978]
'relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'

Hoffman-La Roche [1979]
[Dominance makes it possible for the dominant undertaking] 'if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop'

A MONOPOLY is the most severe form of dominance which **occurs when a single entity controls the whole sellers/suppliers market**. Legal monopolies are now primarily associated with the provision of SGEI even though they used to be more common in the past (covering the production of spirits for instance). Natural monopolies are typical for network industries where

the existence of competition is economically ineffective (average production costs decline considerably with volume). Particularly relevant to the EAS are IPR-based monopolies which result from the need to protect innovation and creativity. By contrast, **MONOPSONY occurs when the entire buyers market is controlled by a single entity**.

Dominance cannot be established unless the relevant market is defined first. A dominant position is always held on a specific relevant market. Nevertheless, it is not uncommon for dominance held on one market to affect the scrutinised party's position on another. **'Spill-over' of market power** takes place when dominance is naturally transferred from market to market. Market power usually spills-over from upstream to downstream markets. It occurs most often in industries where control over limited input can foreclose downstream distribution markets. By contrast, **'leveraging' of market power** takes place by a conscious action of the dominant undertaking which tries to extend the market power it already holds onto a market it does not yet dominate. Seeing as **dominance can be easily found on markets delineated too narrowly,** an incorrect definition of the relevant market will have fundamental repercussions for an Article 102 case.

A dominant position (market power) can only be held on a relevant market – correct relevant market definition is thus a pre-requisite of the application of Article 102 TFEU.

Dominance can only be established within the boundaries of a given relevant market because **MARKET SHARES act as the key parameter of dominance.** ECL generally associates dominance with a market share **over 40%** but this assumption can be disproven in the context of a given case especially on volatile or fiercely competitive oligopolistic markets. Very large market shares indicate dominance in themselves only if they are held for a considerable period of time – **their permanence is** thus **decisive for the establishment of dominance** especially in fast-moving sectors such as the EAS. A market leader in technological terms will control the market for a limited period of time enjoying the 'first mover advantage'. High market shares will lead to dominance only then however, if no alternative supply emerges in the not too distant future. For this reason, very high or **even**

monopolistic market shares are not likely to create dominance if they are only transitory (temporal).

Hoffman-La Roche [1979]
'An undertaking which has a very large market share and holds it for some time, [...] is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which already because of this secures it, [...], that freedom of action which is the special feature of a dominant position'

The comparative size and strength of competing undertakings must also be assessed in order to establishing dominance, along with any other relevant market characteristics**.** These **'FACTORS INDICATING DOMINANCE' include** most importantly barriers to entry, consumption patterns, and countervailing buying power. **ENTRY BARRIERS** make it difficult for potential competitors to enter a given market, ensuring the permanency of high market shares. **Economic barriers** include economies of scale, control over essential input, or superior know-how. **Legal barriers** can relate to a variety of matters including IPR, sparse resources, or media plurality. **Artificial barriers** result from restrictive and/or abusive practices (exclusionary conduct); **natural barriers** result from higher economic efficiency.

Dominance can also be created due to **CONSUMER PREFERENCES when they can cause a tipping effect –** the larger the subscriber-base of the dominant provider the more consumers will sign up in the future. High market shares can be reinforced not only because of the biggest provider's generally superior offer, but also because it is most likely to establish the equipment standard for the industry. Finally, **COUNTERVAILING BUYING POWER** affects markets with a highly concentrated acquisition side. If the vast majority of the offer is purchased by a single buyer, it can exercise a great degree of pressure on its suppliers to lower prices or improve unfair contractual terms.

A dominant position (market power) is established with reference to **market share** and other 'factors indicating dominance' including **barriers to entry**, **consumer preferences** and the **competitive strength of buyers**.

Article 102 TFEU might apply to a SME if it controls a highly specialised field – on a narrow product (assuming that the narrower the product market the larger its market share) but wide geographic market (only actions on a supra-national geographic market are likely to have EU effects). The same concept applies to bodies the primary purpose of which is not economic in nature such as sports federations. Such a situation is indeed rare but not totally impossible especially in the IPR environment where control over extremely popular content or key technology can lead to market power if the input is impossible to substitute/recreate (economic and legal barriers to entry) by alternative providers.

The concept of 'dominance' refers primarily to a single firm as opposed to multilateral practices governed by Article 101 TFEU. Nevertheless, Article 102 explicitly prohibits abuses of dominance held by one or more dominant undertakings **–** it is thus also applicable when market power is not attributable to a single company but is held cumulatively by a group of competitors. **COLLECTIVE DOMINANCE is typical for oligopolies** as their market structure is conducive of tacit collusion. Still, competitive oligopolies do exist! Collective dominance can form on oligopolists market **because they are characterised by:** their **high market transparency; uniform conduct** of their participants; **and the sustainability of that co-ordination over time.** The structure of oligopolies gives its participants the necessary tools to co-ordinate their market behaviour even without getting into direct contact with each other. Those holding a dominant position collectively would certainly be free of competitive constraints, and thus likely to continue their uniform conduct, if they had no reason to decrease it because it benefits them all.

A dominant position is usually held by a single company – that is why its actions are called unilateral. In some rare cases dominance can be held collectively.

It is often difficult to differentiate between collective dominance and concerted practices. In order for Article 102 TFEU to apply, at least two independent undertakings, united by strong economic links, have the same position *vis-a-vis* their competitors and customers and act as one (not

competing with each other). The links can be legal (contract) or structural (joint ownership). It is the responsibility of the authorities to prove that parallel behaviour (multiple undertakings behaving like one) cannot be explained by any other reason than the existence of collective dominance. In the AOL/Time Warner merger, joint dominance was *de facto* assumed to exist due to a joint advertising agreement.

6.3.2. Abuse

Similarly to the notion of dominance, **Article 102TFEU does not define the term ABUSE – its delineation has thus been left to the interpretative efforts of the European Courts.** Accordingly, abuse is:

> *Case 85/76 Hoffman La-Roche*
> 'behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where as the result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'.

The notion of abuse is a difficult concept to define in absolute terms. On the most basic level, **an abuse can only be committed by an entity holding market power –** dominance or monopoly. Dominance can thus not be abused if one does not hold it. Unlike Article 101, Article 102 TFEU does not speak of the object/effect of abuse since there are **no *per se* abuses –** what is abusive in one set of circumstances might be permissible in another. To illustrate, while price fixing is a hard core restriction prohibited by Article 101 TFEU in all circumstances irrespective of its actual effects, price fixing can have pro-competitive, neutral or restrictive effects if performed unilaterally.

Abuse affects the structure of the relevant market where the degree of competition is already weakened due to the presence of market power. Identical conduct of a dominant and non-dominant undertaking might therefore be viewed differently entirely because of the difference in their economic potential. A special responsibility not to impair genuine undistorted competition used to be attributed to dominant undertakings in the past. The test currently in use in order to establish whether an abuse took place is based on the existence of an economic justification for

the scrutinised practice. In consequence, **practices which are economically justifiable and proportionate are not seen as abusive**. Behaviour that would not be viable (cannot be sustained) by anyone other than a dominant undertaking is abusive.

Abuse can only be committed by a dominant company – establishing dominance is thus a pre-requisite of the finding of an abuse (like defining the relevant market is a pre-requisite of establishing dominance). However, there is **no joint abuse** – even if dominance is held jointly by multiple companies, each abuses it unilaterally.

Conduct pursued for legitimate commercial reasons does not constitute abuse (if it is objectively necessary eg for safety reasons or in the case of not paying bills). An **OBJECTIVE JUSTIFICATION** ('rule of reason' in the US) for the conduct of a dominant undertaking **exists if a non-dominant company would/could behave in the same manner to reach the same goals** (as long as the means are not anti-competitive *per se*). If there is an objective justification for the conduct of a dominant undertaking then that conduct is not an abuse. **The conduct of a dominant undertaking is legitimate**:

- **if it constitutes 'competition on the merits' –** the meeting competition defence – whereby it is not prohibited to be better/more efficient than other market players
- **in light of a specific public interest –** but it is only for public authorities to decide on this justification and not for the dominant undertaking itself
- **because it is necessary to produce efficiency gains**, in other words, if the conduct in questions will have a positive balance long term

Abuse can be exploitative and/or anti-competitive. **EXPLOITATIVE abuses are meant to generate 'unfair' profits for the dominant undertaking** by abusing the dependence of its contracting partners on that company. They take place most importantly when a monopolist/dominant undertaking sets prices at a level far higher than its marginal costs (monopoly price rather than competitive price) and by doing so extracts monopolistic profits from its customers. **ANTI-COMPETITIVE (restrictive) abuses impede competition**

by lowering the number of competitors. They cover **discriminatory** practices (eg undue discrimination of those that acquire competing products) as well as **exclusionary practices** (conduct intended to exclude a competitor from a market).

There are no *per se* abuses: depending on the circumstances a practice of a dominant entity is either objectively justified (not an abuse) **or abusive** (exploitative or anti-competitive).

Not unlike Article 101(1) TFEU which contains an exemplary list of anticompetitive multilateral practices which are caught by its prohibition, a list of that kind is also found in Article 102 TFEU. Although there are no *per se* abuses, **Article 102 TFEU specifies** that it applies, **in particular**, to:

(a) **PRICE EXPLOITATION** – direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions
(b) **LIMITING MARKETS & PRODUCTION** – limiting production, markets or technical development to the prejudice of consumers
(c) **DISCRIMINATION** – use of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
(d) **BUNDLING/TYING –** making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts
(e) not listed but of equal importance, **PREDATORY PRICING** – where the dominant undertaking charges too little in order to gain market share

Excessive pricing constitutes the ultimate tool of exploitation but an overcharging strategy is sustainable only if accompanied by entry barriers. Judging 'excessive' is usually done with reference to production cost or economic value. This approach is not applicable in the audiovisual environment – the potentially excessive price of copyrighted material has to be established on the basis of other factors such as a geographic price comparison. Abuse can also take the form of **predatory (too low) and discriminatory pricing**. Undercharging is used to erect entry barriers or

force smaller competitors out of the market. Although the former can be a very successful anti-competitive practice, the latter often fails since it is essential for the undercharging company to gain due to such restrictive practice enough competition-free time to recuperate its loss. The practice of providing free Internet access that stopped being free when a large enough consumer base was accumulated, constitutes a good example of predatory conduct in the EAS. Abusive price strategies are most usual for the transmission side of EAS. Margin squeeze is particularly relevant here whereby vertically integrated operators supplying essential input leverage their upstream position by overcharging their customers on the wholesale level (and/or dropping their retail prices) to squeeze downstream competitors' margins (eg *DT vs. Commission* case T-271/03).

The type of abusive practice which has proven most relevant to the EAS is **refusal to supply/to deal** (the legal basis of the so-called essential facilities doctrine). It is a practice characteristic for dominant companies as only they have the financial resources and the independence needed to conduct such a practice. Refusing to supply can be very anti-competitive since it is usually connected with discrimination where a parent company refuses to supply competitors of its own subsidiary. When the unjustifiable refusal is directed towards an established customer it might force them to exit the market. Refusing access to specific infrastructure can have especially strong anti-competitive effects or in cases of a discriminatory refusal, put some undertakings in a competitively disadvantageous position.

The essential facilities doctrine originated in the US – its introduction into ECL is attributable to the interpretative efforts of the European Courts. Refusing access to an essential facility constitutes a special case of an abuse of dominance by way of a refusal to deal/supply. **It concerns a situation where a dominant entity controls key input** (eg infrastructure, content**) necessary for others to compete downstream**. On this basis, the Commission can significantly limit the freedom of economic activity of a dominant undertaking and force them to deal with others. The use of the essential facilities doctrine constitutes **one of the most intrusive forms of EU intervention by way of ECL and thus it can only be justified by the need to protect the interests of consumers** – it is thus not a tool to protect particular competitors.

Considering the very intrusive nature of the use of the essential facilities doctrine, its application is limited to cases where **the Commission can actually prove: the essential** (indispensable/non-replicable) **character of the input**; the fact that the refusal **eliminates competition** from the requesting party (leveraging market power); and **lack of an objective justification** for

the refusal. Additionally, in access involving IPR protected commodities, the authority must also prove that the refusal **suppresses the emergence of a new product or eliminates innovation incentives.** Refusal to supply/deal was assessed in the EAS with respect to essential information (*RTE and ITP vs. Commission* joint cases C-421 & 242/91 P *Microsoft vs. Commission* case T-201/04).

The essential facilities doctrine is used by competition authorities such as the European Commission DGIV **to force dominant undertakings to deal/supply others with essential input** which the dominant undertakings control. On its basis, the **Commission can force access to both physical resources** (eg transmission masts) **and IPR protected commodities** (eg programming data).

According to Article 102(d) TFEU, **a dominant company or companies are not allowed to bundle/tie their products**. Bundling constitutes the combined sale of product A and product B. Tying takes place when product A (tying product) is always sold together with product B (tied product) but product B can be sold separately. Abuse can thus be in the form of an unjustifiable reservation by a dominant firm for itself or members of its group, of the right to the provision of additional goods/services. Such a situation arises if other companies could provide such goods/services within their normal activities on a neighbouring but separate market. Such behaviour constitutes an abuse in so far as it would eliminate competition from these potential competitors. Tying was among the forms of abuses established in the Microsoft case (*Microsoft vs. Commission* case T-201/04).

6.3.3. Abuse Prohibition and Sanctions

Article 102 TFEU does not prohibit dominance, it **PROHIBITS any ABUSE** by one or more undertakings of a dominant position held within the internal market or its substantial part, **in so far as it affects trade between MS.** The rationale behind the prohibition of multilateral coordination is based on the assumption that effective competition depends on the independence of individual firms. As a result, the freedom of individual companies to independently shape their own business decisions is quintessential for

competition. It is thus permissible for a single company to achieve market power though its own efforts and so ECL does not prohibit the holding of a dominant position or even monopoly. However, the existence of market power weakness competition potentially endangering consumer welfare. **The ECL considers the need to protect effective competition and thus consumer welfare as a goal superior to the freedom of economic activity of those undertakings that hold market power**. Without prohibiting the holding of dominance, Article 102 TFEU places considerable constraints on the freedom of economic activity of those that hold market power. It does not impose analogous constraints on non-dominant companies seeing as that would constitute a disproportionate restriction on their economic freedom.

The **prohibition of dominant position abuse is unconditional. Traditionally, a public intervention in an abuse case has an *ex-post* character –** first an abuse must take place for the authority to intervene (as opposed to *ex-ante* intervention where public bodies take steps before a problem can/might occur). They are thus **fundamentally reactive** in nature and **penal** – their essence is to stop the infringement and penalise the offender. If an abuse is established, **ADMINISTRATIVE sanctions** follow: **a duty to bring the abuse to an end** which can include the imposition of positive obligations to force the offender to cease its abuse (conduct remedies) **and a fine** of up to 10% of group global turnover. The Microsoft case presents a clear example of a traditional approach to the enforcement of Article 102 TFEU. (*Microsoft vs. Commission* case T-201/04).While abuses are not outright invalid in terms of **CIVIL LAW** as is the case with restrictive multilateral practices; **an abusive practice** (infringement of Article 102 TFEU) **can be stopped by court injunction**. Injured parties are also free to use damage and other civil sanctions in the framework of private enforcement of ECL.

Seeing as the permissibility of each practice of a dominant undertaking depends on the circumstances of the case, **Article 102 TFEU does not offer a legal exception to its prohibition –** a given practice either constitutes abuse, and is thus prohibited, or does not constitute abuse and is thus not subject to the prohibition. There is also **no leniency** applicable to abuse cases. However, **Article 9 Reg 1/2003 allows the Commission to use commitment decision to not very severe abuses, instead of issuing a prohibition**. The use of commitments decisions in abuse cases is limited however to instances where it is believed that a fine is not necessary and where imposing conditions and obligations on the offender would eliminate the threat to competition established in the preliminary stage of the proceeding. The Polish ZAIKS

case represents a rare example of a commitments decision in an abuse case based on Article 9 Reg 1/2003 (as well as national competition law).

Abuses of dominance are prohibited unconditionally – there is neither an exemption procedure nor leniency – **the vast majority of abuse cases are reactive & penal** – commitments decisions are possible but very rare.

6.3.4. Examples of Abuse Cases in the EAS

Abuse cases are not common in the EAS. The two most famous so far are: *RTE and ITP vs. Commission* (joint cases C-421 & 242/91 P), generally known as *Magill,* and the CFI *Microsoft vs. Commission* judgment (case T-201/04).

The *Magill* case of 1995 is often considered the first of the set of ECJ judgments that 'introduced' the essential facilities doctrine into the realm of ECL. The ECJ upheld here an earlier CFI judgment and Commission decision which held RTE and ITP guilty of abusively refusing to licence their TV programming schedule to Magill. The latter wished to provide the Irish public with a comprehensive weekly TV guide for which there was unfulfilled demand. The broadcasting organisations in question published their own weekly guides which covered their schedule only and refused to provide Magill with the necessary scheduling info in order to protect their position on the TV listings market. The Courts found that **RTE and ITP had a dominant position on the relevant market for TV schedule information – they abused that position by refusing access to this information in order to leverage the dominance they held on the information market into a derivative market for TV schedule guides.**

The information in question was truly essential for Magill to operate; the refusal prevented the emergence of a new product; it was not justified by valid economic reasons; and effectively foreclosed the TV guides market. Moreover, without negating the need for IPR protection and the right of MS to grant it, the IPR-protected data in question was a mere by product of broadcasting. It did not therefore 'deserve' the kind of protection normally associated with copyrighted programming for instance, which takes effort

to create. In other words, even though scheduling information was seen as IPR by Irish law, it was 'non-merited' in the opinion of the Court. Opening access to it was thus a proportionate limitation of the right to property. The ECJ noted however the exceptional character of forcing access to IPR protected commodities. It stressed that restricting the independent usage of IPR on the basis of ECL must be limited to special circumstances only. **A mere refusal to licence a company's IPR is not enough to establish abuse within the meaning of Article 102 TFEU unless the refusal coincides with another abusive conduct**. In this case, the scrutinised broadcasters prevented the emergence of an objectively needed new product (full weekly TV guide) and reserved for themselves a complementary market. That fact that the information in question was unmerited was also of relevance here.

The CFI went even further in the Microsoft case granting access to fully 'merited' IPR protected information. The origin of the ECL Microsoft investigation lies in a complaint lodged as early as 1998 by Sun Microsystems. After an extensive investigation of the case, the Commission reached its decision in 2004 (Case COMP/C-3/37.792). The following CFI judgment which confirmed the findings and assessment of the Commission was ultimately delivered in 2007 (T-201/04). Microsoft was found to have abused its dominant position held on the client PC operating systems (Windows) market. It abused the market power held on the primary market by:

- **tying the sale of Windows with the sale of Microsoft Media Player –** by doing so, Microsoft would leverage its dominance in the market for client PC operating systems onto the market for media players (playback software) which at the time was still competitive
- **refusing to supply interface information to its competitors** (eg Sun Microsystems) – by doing so, Microsoft leveraged its dominance in the market for client PC operating systems onto the market for workgroup server operating systems

Tying constitutes a typical form of dominant position abuse whereby the purchase of the tying product (Windows) is conditional on the purchase of the tied product (Microsoft Media Player). By making it impossible to purchase the overwhelmingly popular Windows client PC operating system without the Media Player, Microsoft wanted to ensure that all PCs using Windows would also automatically have its own media player software (the Microsoft Media Player). The rationale of such behaviour was clear – many consumers will not seek an alternative media player if their PC has one installed already together with Windows. Attaching the Media Player to Windows would therefore reduce competition on the media player market effectively extending Microsoft's dominance into it. However, joint sales **can**

be considered abusive only if the scrutinised commodities are in fact two separate products and their combined sale would foreclose the market for the tied product. In this case, alternative media player software was both created and sold in parallel to Microsoft's Media Player suggesting that it constituted a separate product from Windows. This fact also indicated that the tied sales were indeed meant to foreclose the still competitive media player software market. Since Windows clearly dominated the tying market for client PC operating systems, Microsoft effectively precluded its customers from obtaining Windows without the Media Player.

Microsoft was also charged with the refusal to supply its interface information – a 'merited' IPR protected commodity. Its refusal restricted the interoperability between PCs using the Windows client operating system and non-Microsoft work group servers. It was in this context that most of the controversy surrounding this case arose. It was clear since the Magill case that the **refusal to licence IPR can be treated as abuse only in exceptional circumstances relating to:**

- **indispensability –** access to Microsoft's interface information was seen as 'essential' to ensure interoperability with Windows PCs
- **elimination of competition** – unlike the Magill case where the refusal was abusive because it eliminated all competition from the TV guide market, the CFI took a far harder stance here finding abuse where the refusal was liable to/likely to eliminate all **effective** competition on the market
- **prevention of the emergence of a new product** – the CFI's strict view of Microsoft's refusal was also reflected by the fact that it found abuse even though the refusal did not prevent a new product but rather, caused prejudice to consumers by limiting technical development; **an innovation incentive test could thus be applied instead** of the new product criterion established by earlier jurisprudence; 'the impact of the refusal to supply on the incentives of Microsoft's competitors to innovate and not on Microsoft's incentives to innovate' was decisive (CFI 659)
- **lack of an objective justification** for the behaviour that hampers progress to the prejudice of consumers

Microsoft was found to have violated EU competition law by leveraging its near monopoly in the market for PC operating systems onto the markets for work group server operating systems and for media players. Both the proceedings and decision that followed had a repressive & penal character: **Microsoft was obliged** to cease the infringement and **to pay a fine of €497 million** for abusing its market power in the EU. Since the abuse was ongoing, the Commission used Article 7 Reg 1/2003 to impose

on Microsoft **specific conduct remedies** (behavioural obligations) **in order to force the offender to cease the infringement** and prevent the violation of ECL from reappearing. Microsoft was given 120 days to disclose the necessary interface information; it was also ordered to offer within 90 days to PC manufacturers and end users an unbundled version of Windows (without the Windows Media Player).

Although both Magill and Microsoft illustrate that Article 102 TFEU can be used to force access to an essential facility even if it is protected by IPR, ECJ jurisprudence is clear on the fact that an intervention of that type is not always justified (*Oscar Bronner vs. Mediaprint* case C-7/97).

Neelie Kroes, EU Commissioner for Competition said that the **CFI Microsoft judgement 'sent a clear signal that super-dominant companies cannot abuse their position to hurt consumers and dampen innovation by excluding competitors in related markets'** (Speech/07/539).

6.4. EU Merger Control

The last part of this book will be devoted to the preventive control of concentrations. **The internal workings and competitiveness of the EAS have always been**, and will surely remain, **under the influence of EU merger control**. Its influence is far more sporadic and unpredictable however than the enforcement of Article 101 & 102 TFEU because it is entirely dependent on the 'will' of the market – unless a concentration is underway, the Commission cannot use the MR. **Market conditions determine therefore just how influential the MR is to the economy.** During its most intense phase of technological advancement, the EAS was subject to a number of merger bans in the mid 1990s followed by a number of widely publicised conditional approvals in the early years of the 21st century. Major concentrations in the EAS have not been as frequent in recent years.

Although the impact of the EU merger control system is not particularly pronounced at the moment with respect to the EAS, it cannot be overlooked. Leaving aside the rare instances of outright bans, it is essential for the business world to understand that **EU merger control is fundamentally**

NOT penal – it is not based on the finding of an infringement of ECL rules but on a forward looking assessment of the impact of an operation on future competitiveness. **Most merger decisions therefore take the form of a negotiated instrument** whereby the parties and the Commission try to jointly come to a solution satisfactory to both. Although sporadic and entirely case-related, merger remedies can have widespread market consequences because by affecting the key players, they also affect their business partners.

Incidentally, **EU merger control has some similarities and a number of key differences with its treatment of restrictive practices**. **What they have in common are their goals** (both meant to protect effective competition to the benefit of consumers), **decision types** used in their enforcement practice (clearances, conditional approvals, prohibitions, and interim measures) **and enforcement bodies as well as a large proportion of the underlying doctrine** (especially with respect to relevant markets and the notion of dominance).

What sets EU merger control firmly apart from its treatment of restrictive practices is most importantly:

- **its legal basis** – the MR for mergers (TFEU for restrictive practices);
- **different jurisdictional criteria** – turnover thresholds for concentrations (EU effects for restrictive practices);
- **exclusivity of EU jurisdiction with respect to large-scale mergers** which precludes the application of MS merger control rules (parallel application of Article 101 & 102 and MS competition law regimes);
- **the existence of a notification duty and the fact that merger proceedings cannot generally be initiated without a notification,** unless of course market players fail to notify a concentration with an EU dimension;
- **the pre-emptiveness of EU intervention in merger cases** whereby the operation at hand is assessed before it can take effect (restrictive practices are generally assessed *ex-post*) **resulting in a forward-looking assessment**, and finally;
- **its legal qualification** because unlike restrictive practices, **concentrations cannot be seen as an infringement (violation) of ECL.**

6.4.1. Rationale of EU Merger Control

It is necessary to consider first the rationale of EU merger control. It is essential to stress above all else that **concentrations are not anti-competitive *per se.* They are not an infringement of ECL but a fully justified business practice.** However, most result in a reduction in the number of market players, a fact that can have immense negative consequences for the internal competitiveness of the economy. This is especially true for

mergers between direct competitors since they reduce the number of entities acting on the very same market. Having said this, mergers between non-competitors can also impede competition, for instance where they foreclose key input such as copyrighted content, or narrow technology markets by creating a proprietary bottleneck. Despite these dangers, concentrations are very often beneficial or even indispensable for economic growth especially when they concern innovative fields or allow for significant efficiency gains which can be passed on to consumers. **The beneficial or anti-competitive nature of each and every merger can only be judged after their expected positive & negative effects are weighed against each other.**

Once a merger is completed its market effects are largely unstoppable. The internal competitiveness of future markets can thus only be protected if a concentration is assessed before it is implemented and its potential drawback limited to the necessary minimum. This is **the rationale of a PRE-EMPTIVE merger control system** that assesses the consequences of an operation before it takes place in order to prevent its negative consequences from occurring. Rather than react or penalise past misconduct, the pre-emptive nature of merger control **is** meant **to PREVENT HARM TO COMPETITION from occurring in any given case.** Its ultimate aim is **to ensure that consumers will not lose the benefits of existing competition** because of concentrations, which are not an ECL infringement but a completely justified business strategy. For this reason, EU merger control cannot be associated with the notion of 'fault' of the scrutinised undertaking be it by intent or effect. This is also why the ECL does not contain a general merger prohibition.

Mergers should not be associated with 'fault' – they are not an infringement of ECL. The existence of a pre-emptive merger control systems means that they must gain prior approval to proceed in order to prevent harm to competition rather than that they are prohibited.

Merger control has never been part of the European Treaties. Mergers were assessed at first on the basis of Article 101 & 102 TFEU but not without opposition from legal formalists and those in favour of a very liberal economic approach that leaves concentration entirely outside the

scope of competition law. The arguable 'over-stretching' of Article 101 & 102 ceased with the introduction in 1989 of the *Council Regulation 4064/89 on the control of concentrations between undertakings* which was in use until 2004. A new *Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings*, generally called the *Merger Regulation* was among the key legislative changes introduced alongside the mass accession of 2004. The MR was accompanied by *Commission Regulation 802/2004* of 07/04/04 implementing the MR which has been amended since by *Commission Regulation 1033/2008* of 20/10/08. There can be no doubt, that the MR is one of the most important EU Regulations to have ever been issued that directly affect the EU economy in general, and the EAS in particular.

EU merger control is limited to large operations only. **The jurisdictional criterion used in the EU with respect to concentrations is entirely based on the size of the participating undertakings** and not on the effects of the operation. EU merger control concerns only concentrations with an EU dimension, in most cases, a combined world-wide turnover of all concerned parties exceeds €5 billion and the aggregate EU turnover of each of at least two parties exceeds €250 million. Unlike the parallel application of Article 101 & 102 TFEU and MS competition laws, **EU jurisdiction of mergers with an EU dimension is EXCLUSIVE.** Once it is found that the specified threshold criteria are fulfilled, **MS merger rules are no longer applicable to such an operation**. This of course does not preclude the applicability of external legal regimes.

All mergers with an EU dimension must be notified to the Commission, which remains the only public authority entitled to assess them in the EU. The economic advantages of this one-stop-shop approach are clear – precious resources are saved (both in monetary and temporal terms) and potential conflicts avoided. **Yet the fact that all a major mergers must be notified and cleared before they proceed puts the Commission into a position of great influence over market developments**.

The EU merger control system can be considered the most intrusive form of its intervention into the freedom of economic activity – **no major merger can be implemented anywhere in the world without it having to be approved by the European Commission first**.

The pre-emptive nature and extra-territorial jurisdiction of the MR make it essential for businesses to be able to accurately assess their operation. **It is essential** therefore **to provide the market with a maximum level of legal certainty with respect to the applicability of EU merger control rules**. For this reason, and despite the fact that the MR is already far more detailed than Article 101 & 102 TFEU, a number of important soft-laws have been issued over the years to accompany and clarify some of the most important aspects of the EU merger control system. The Commission issued in 2010 a codified document entitled *EU Competition Law – rules applicable to merger control* which lists 10 different soft laws applicable in the field of EU merger control:

- **2008 Commission Consolidated Jurisdictional Notice** under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings,
- **2005 Commission Notice on a simplified procedure** for treatment of certain concentrations under Council Regulation 139/2004
- **2005 Commission Notice on case referral** in respect of concentrations
- **1997 Commission Notice on the definition of the relevant market** for the purposes of Community competition law
- **2004 Guidelines on the assessment of horizontal mergers** under the Council Regulation on the control of concentrations between undertakings
- **2008 Guidelines on the assessment of non-horizontal mergers** under the Council Regulation on the control of concentrations between undertakings
- **2008 Commission Notice on remedies** acceptable under Council Regulation 139/2004 and under Commission Regulation 802/2004
- **2005 Commission Notice on restrictions directly related and necessary to concentrations**
- **2001 Commission Decision on the terms of reference of hearing officers** in certain competition proceedings
- **2005 Commission Notice on the rules for access to the Commission file** in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation 139/2004

6.4.2. Concentrative Practices & the Notification Duty

6.4.2.1. Concentrations

What is usually referred to as the EU merger control regimes covers in fact all **CONCENTRATIONS** defined as **a lasting change in the control exercised over an undertaking that results from**:

- **a MERGER of independent companies** when two or more previously independent undertakings merge;
- **an ACQUISITION OF CONTROL** when a person (or people) already controlling at least one undertaking acquires by any means direct or indirect control of the whole or parts of one (or more) of other undertakings;
  - **FULL-FUNCTION JOINT VENTURES** represent the most important qualified form of acquisition of control; full function joint ventures performs on a lasting basis all functions of a separate undertaking, have a separate management structure from that of their parent companies, and have at their disposal resources appropriate for their intended operations (co-operative joint ventures that are not full-function still fall within the scope of Article 101 TFEU)

A merger involves at least two independent companies and **results in a decrease in the number of market players** (where there were previously at least two, only one remains A+B = AB or A+B=C). When AOL merged with Time Warner – they both became part of AOL Time Warner with a 55%/45% stake in the new company. Changes within a capital group are not considered to constitute mergers and thus they are not subject to EU merger control even if they meet the threshold criteria. **Acquisition of control refers to the permanent change in DECISIVE influence** including the acquisition of stock or physical resources as well as taking control of the board of directors. Both friendly and hostile takeovers are covered although in the latter case the notification duty falls to the 'aggressor' only. The concept of **full function joint ventures concerns situations where an undertaking** performing on a lasting basis all functions of an autonomous economic entity **remains under the joint control of at least two independent bodies**. The MSG Media Services joint venture (*MSG Media Services* case IV/M.469) was created as a full function joint venture under the collective control of Bertelsmann, Kirch & Deutche Telecom. Each parent company was meant to have a third of the share capital & voting rights in MSG.

MSG was given a budget of 60 million DM and had enough assets and know-how to act on a distinct autonomous market.

The term EU merger control, also known as EU preventive control of concentrations, **covers:**
- **mergers** and
- **acquisitions of control incl. full-function joint ventures**

Unlike the aforementioned legal classification of concentrations falling under the EU MR, **the market divides them most commonly according to the relationship existing before the operation between their parties**. Similarly to multilateral practices, competition is mostly endangered by **HORIZONTAL** concentrations between competitors such as two different pay-TV providers acting in the same geographic market. Less dangerous for competition are **VERTICAL** operations between market players acting on different levels of the same production & distribution chain such as an owner of audiovisual content and an Internet access provider. Less dangerous still are **CONGLOMERATE** concentrations between companies acting within different, even if closely related, production and distribution chains such as the owner of transmission infrastructure and a software producer. All the above presumptions as to the potential dangers of the three different types of concentrations are rebuttable. This is so especially in converging fields such as the EAS where vertical or even cross-network concentration can be as detrimental to technological development and progress as horizontal mergers.

6.4.2.2. EU Notification Duty

If a concentration is underway involving large undertakings, it is their turnover thresholds (size) that determine whether the operation lies within ECL jurisdiction. As a result, only concentrations with an EU dimension are subject to EU merger control – those involving small undertakings remain completely outside of EU jurisdiction. An **intention to concentrate which has an EU dimension must be NOTIFIED to the Commission:**
- **prior to the implementation of the operation**

- **following the**
  - **conclusion of the agreement**
  - **the announcement of the public bid**
  - **the acquisition of a controlling interest**

It is essential to stress that **the Commission has the exclusive competence to decide on mergers with an EU dimension even if they mostly affect the economy of a single MS.** For instance, if two US TV operators were planning a merger (with an EU dimension) which would affect only their business in a single MS – the concentration would still be under EU jurisdiction and thus would need to be notified to the Commission. **As an exception** to the rule that the EU has sole jurisdiction to assess large mergers, concentrations where all parties derive $^{2}/_{3}$ of their EU turnover from one and the same MS are to be notified and assessed by the MS. In other words, **EU merger control is not applicable to concentrations between companies active mainly in a single MS even if they are objectively very large** (eg between two national energy companies).

It is clear that efficiency considerations speak in favour of a 'one-stop-shop' EU merger control system. This realisation does not negate however the appropriateness of the transfer of merger investigations to the bodies most directly interested by their outcomes. **The MR provides a post-notification referral system which allows the Commission to pass-on cases of primarily national interest to the interested NCA and in exceptional circumstances take over the assessment of minor mergers:**

- according to Article 9 MR, the evaluation of concentrations with an EU dimension but impacting a specific MS only can be transferred to the NCA of that MS (**the German Clause**); referrals of this type are limited to concentrations **that pose a serious threat to competition in a distinct market in that MS** (maximum national in scope); **or affects competition in a distinct market** in that MS which does not however constitute a substantial part of the EU
- according to Article 22 MR, the Commission can be transferred the assessment of concentrations without an EU dimension but with cross-border effects that threaten to significantly affect competition within the territory of the requesting MS (**the Dutch clause**); Article 22 is now primarily used to extend the benefit of a single point of investigation to smaller operations that affect multiple MS

Those subject to the EU notification duty (eg parties to a major merger) can use an analogous pre-notification referral system provided by Article 4(4) & (5) MR. However, no matter whether the request derives from NCA or the undertakings concerned, **the discretion as to whether to accept/refuse**

referrals lies with the Commission. The Dutch clause was used in the EAS when the Commission was asked to assess an already completed creation of the relatively small HMG joint venture which was said to have endangered competition on Dutch TV markets (*RTL/Veronica/Endemol* case M.553). The *Endemol* case is a very rare example of a ban on a concentration that has already been implemented.

Size does matter with respect to mergers as only those with a Community dimension are subject to EU merger control!

6.4.3. Substantive Test: SIEC

Concentrations with an EU dimension are appraised by the Commission as far as their '**compatibility with the internal market'** is concerned. Those deemed compatible must be cleared (approved) – concentrations deemed incompatible with the internal market, no matter what remedies are being proposed, must be prohibited. For a concentration to be deemed compatible with the internal market it must not only respect ECL but often also be in accordance with the basic freedoms. Most importantly in this context, mergers are assessed in according to a specific **SUBSTANTIVE TEST** which **allows the Commission to decide whether a given operation will endanger competition on future markets.** It is thus the purpose of the substantive test to prevent anticompetitive mergers from happening. The content of the substantive test applicable to mergers with an EU dimension underwent a significant change in 2004 since its introduction in 1989.

Unlike Article 102 TFEU which prohibits the abuse of market power but not its existence, **the original MR of 1989 allowed the Commission to stop mergers that would lead to the creation or strengthening of dominance which would in turn impede effective competition** (original substantive test of EU merger control). In order to stop a merger, the Commission had to first prove that the operation would result in the creation or strengthening of single or collective dominance and second, that this fact would result in an impediment to effective competition. The Commission struggled to stretch the test so as to cover oligopolies where dominance would not be created or strengthened because of a merger but the competitiveness of

which would nevertheless suffer through the reduction in the overall number of competitors. The infamous *AOL/Time Warner* merger (case IV/M.1845) can act as an example of the over-stretching of the substantive test provided by the original MR seeing as the operation would not create/strengthen dominance as it was – the Commission could establish dominance only by adding the market share of an external party (Bertelsmann) to that of AOL and Time Warner.

The **2004 MR** contains a different **substantive test**. On its basis, **a merger can now be prohibited only if it can SIGNIFICANTLY IMPEDE EFFECTIVE COMPETITION** (hereafter: SIEC) in the common market or its substantial part, in particular as a result of the creation or strengthening of dominance. While the old MR focused on dominance, mergers are now evaluated as to whether they are likely to have major negative effects on future competition making merger control of oligopolistic markets both likely and completely legal. **The creation or strengthening of dominance is now considered as one of the possible causes of SIEC,** rather than its only possible origin.

Merger Regulation Article 2:

1. Concentrations within the scope of this Regulation shall be appraised ... the Commission shall take into account:
   (a) the need to maintain and develop effective competition ... in view of ... the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the Community;
   (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.
2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.
3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

According to Article 2(3) MR**, the Commission can stop only mergers which will result in a 'SIGNIFICANT' impediment** of effective competition

in the internal market or its substantial part. This provision presents an analogous quantitative criterion to the *de minimis* rule applicable to Article 101 TFEU cases and to the rule of reason used for Article 102 TFEU. A merger can thus be prohibited only if its negative effects are significant (major) and only if they are of EU importance (effective competition in the internal market or its substantial part such as an entire MS). The Commission cannot stop a merger on a market already void of competition if the operation does not actually worsen its situation. **The degree of the 'IMPEDIMENT' depends on the overall market structure, on the size of the merging parties and on the operation's positive effects on consumer welfare and economic progress.**

A merger can be prohibited only if it significantly impedes effective competition (SIEC); the creation or strengthening of a dominant position is the most likely cause of SIEC.

Although the focus of the MR is no longer set on dominance, its creation or strengthening is still the most likely cause of SIEC. **The assessment of market power in merger cases is similar to that in Article 102 TFEU proceedings.** They do **differ however with respect to:**

- **the time perspective of their assessment:** abuse rules concern market power held at the time of the investigation (retroactive examination); in merger cases, the evaluation of dominance is prospective_based on present and possible future market conditions
- **their immediate consequences:** finding dominance in Article 102 TFEU cases has a subsidiary role – it is not the position but its abuse that is central to this provision; establishing dominance in merger cases has immediate legal consequences for the scrutinised undertakings because the creation of dominance in itself is assumed to fulfil SIEC; if a merger is likely to create market power, then it is likely to be prohibited without the need to consider potential abuse; and finally
- **the applicable legal assumptions:** according to the MR, dominance is unlikely to be created if the combined market share is below 25%; no such quantitative indicators exist for Article 102 TFEU

The notion of 'dominance' is at least as important to mergers as to abuse cases – arguably even more so because the creation of dominance constitutes a sufficient reason to ban a concentration while the existence of dominance is in itself not prohibited by Article 102 TFEU.

The MR does not contain any specific rules clarifying what would constitute SIEC in general, leaving the decision to a case-by-case analysis. Considered in this context are factors such as:

- respective market share (it is assumed that SIEC is not fulfilled < 25%);
- market concentration levels (based on the so-called Herfindahl-Hirschman Index);
- countervailing buying power and other relevant issues including expected market entry, verifiable efficiencies (must benefit consumers, be merger specific eg in technology development), consumer preferences and their consumption patterns as well as technological trends.

All of these factors combined allow the Commission to formulate a **market forecast which acts as the basis for the assessment of the permissibility of a merger.**

Concentrations can have **two kinds of anticompetitive effects that would result in significant impediment of effective competition:**

- **non-coordinated (unilateral effects)** occur when the concentration lowers the level of competition;
- **coordinated effects** occur when the concentration lowers the effectiveness of competition, that is, when competitive pressures lessen after the operation

Unilateral (non-coordinated) effects concern a situation where a merger creates or strengthens market power. Considered here are: **dominance** (high market shares and other factors indicating dominance) **and market concentration levels** (measured on the basis of the Herfindahl-Hirschman Index). Whenever possible, economic data is used to make the most objective forecast possible concerning the unilateral effects of a concentration. The level of competition on particular markets is generally established on the basis of the **Herfindahl-Hirschman Index** (hereafter: **HHI**) calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers ($HHI = s_1^2 + s_2^2 + s_3^2 + ...$). Depending on

the level of competition found on a given market, the HHI extends from 0 (nearly perfect competition) to 10,000 (monopoly with 1 x 100%). A merger will not be permitted if it results in a one-off increase in 150 points HHI or if it results in high/very high concentration levels. Overall, a HHI:

- < 1,000 = low concentration level
- 1,000–1,800 = medium
- 1,800–2,400 = high
- > 2,400 = very high concentration

A significant impediment of effective competition can also occur by way of **coordinated effects** if the merger lowers the effectiveness of competition. **In horizontal mergers**, SIEC would be fulfilled if the concentration gave the market **the ability to coordinate market behaviour & the conditions of competition** by increasing transparency (possible to monitor the behaviour of others) with effective deterrence (it does not 'pay' to behave differently) and no threat from external sources (actions of outsiders/consumers don't pressure the coordination). In **non-horizontal mergers,** coordinated effects result primarily is market **foreclosure**.

One final point must be made concerning the exceptional possibility of approving a merger with significant anticompetitive effects even such as the elimination of all competition from a given relevant market. According to the *Guidelines on the assessment of horizontal mergers,* **an otherwise unacceptable merger is deemed to be compatible with EU merger control rules if one of the merging parties is a failing firm** (firm on the brink of bankruptcy). A concentration with an EU dimension can be approved therefore by the Commission if the expected deterioration of competition after the concentration is not actually caused by it but by the fact that the failing firm would in the near future be forced out of the market. The use of the failing firm defence to clear a merger is limited to situations where there is no less anticompetitive alternative purchaser for the near-bankrupt company, in other words, if no one better (for competition) wants to buy the failing firm. A concentration of this type is only permissible if without it, the assets of the failing firm would exit the market.

The **failing firm defence** makes it possible to approve an otherwise unacceptable merger if this is the preferred solution in comparison to the failing firm's market exit and the loss of its resources.

6.4.4. Examples of EU Merger Control in the EAS

Among the key factors taken in account in merger cases taking place in technology-driven sectors such as the EAS are future innovation incentives (potential competition). The two most interesting examples of EU merger decisions that tackled this issue is the *AOL/Time Warner* conditional approval of 2000 (case IV/M.1845) and the three consecutive merger prohibitions concerning German TV-technology markets (*MSG Media Services* case IV/M.469 followed by *Bertelsmann/Kirch/Premiere* case IV/M.993 & *Deutche Telecom/Beta Research* case IV/M.1027). The 2008 *News Corp/Premiere* conditional approval (Case COMP/M.5121) is also worth noting because it concerns markets affected by the earlier prohibitions.

In April 2000, the Commission received a notification of a proposed merger with an EU dimension between the US Internet giant AOL, and Time Warner, a major American film studio, music label, and cable TV-operator. Despite its largely vertical character, the Commission believed that the concentration raised serious doubts as to its compatibility with the 1989 MR and opened a full merger investigation in June 2000. At the same time, a parallel investigation was opened into a merger between Time Warner and EMI Group plc, a major European music label (*Time Warner/EMI* case IV/M.1852). The *Time Warner/EMI* concentration was ultimately abandoned by the parties in order for the Commission to clear the ***AOL/Time Warner*** **merger which received a conditional approval** in October 2000 (a full half a year after the initial notification).

The business of the two merging entities was largely complementary – AOL was primarily a consumer service provider in the Internet environment – Time Warner was a content producer and TV-operator. The merger on its own would have been unlikely to create any significant unilateral effects. Dominance would not be created or strengthened by it since there was little overlap between the businesses of the two parties (concentration levels would not increase). As such, the original substantive test would not have been fulfilled and the Commission should have had no reason, or indeed right, to stop it.

The European Commission was nonetheless concerned about the merger's potentially foreclosing effects ('coordinated' effect under SIEC) on technology-sensitive fields such as Internet downloading and streaming. **The merger** made it possible for the parties to accumulate a critical mass of popular content (mostly music) coupled with an integrated on-line distribution system (AOL had the largest consumer base in the world) and superior know-how. It **would allow the new entity to foreclose its content**

to other service providers to the detriment of competition and consumer welfare. By using proprietary formatting technology, AOL Time Warner could **charge supra-competitive prices** for content carriage (exploitative abuse). It could **discriminate against external content** (favour its own and Bertelsmann's content – worsening the distribution terms used for others). Ultimately, it could even **completely foreclose future markets by dictating the technical standards for on-line music delivery** (anticompetitive abuse). Incidentally, the Commission's fears were by no means unfounded seeing as the parties stated themselves that one of the goals of the deal was to 'to ensure mass adoption of digital download delivery standards'.

The concerns of the Commission were however firmly based on the assumption that the new entity would have enough market power to be able and likely to abuse it in the aforementioned ways. Yet the concentration would neither create nor strengthen dominance. Despite the fact that this was a two sided operation, the Commission based its findings largely on the structural and contractual links existing at that time of the operation between AOL and Bertelsmann, a large European media company with a notable presence in music (BMG) and other content markets (CLT-UFA, Pearson). The Commission established dominance, and therefore fulfilled the original substantive test, by adding Bertelsmann's market share in music rights to that of the merging parties. Combined with AOL's overwhelming Internet strength, the merger was expected to foreclose on-line distribution. In order to prevent AOL Time Warner from imposing its technology as the industry standard, **extensive conditions and obligations were imposed on the parties including the obligation to** cut AOL's structural links with Bertelsmann in AOL Europe as well as loosen their contractual links. The operation was also cleared on the condition that AOL Time Warner would not use proprietary technology to format Bertelsmann's music. Finally, the simultaneous merger between Time Warner/EMI had to be abandoned because it would let AOL Time Warner control even more music – a key factor speaking against the operation.

Few mergers have ever been prohibited by the European Commission. This rarity is attributable at least in part to the fact that merger decisions are a 'negotiated instrument' of ECL intervention – remedies are used to balance the interests of the parties with the concerns of the Commission. A merger is stopped only when it proves impossible to formulate remedies that would permit the parties to achieve their aims and the Commission to safeguard competition. Indeed, prohibitions are rare even in such cases because the notifying undertakings often abandon their operations rather than incur a ban, as illustrated by Time Warner/EMI case. Overall, less

than 20 prohibitions were issued between 1989-2004 (under the first MR) and far less still since the introduction of the current MR.

Surprisingly perhaps, the **EAS was subject to as many as 5 merger prohibitions in the mid 1990s:** *MSG Media Service* in 1994 (IV/M.469); *NSD* and *RTL/Veronica/Endemol* in 1995 (IV/M.490 & IV/M.553); *Bertelsmann/ Kirch/ Premiere* and *Deutche Telecom/Beta Research* in 1996 (M.993 & M.1027). Their impact on the EAS was certainly direct when it comes to its market structure. **Their sporadic nature and one-off effects meant however that they do not shape market practices as much as conditional decisions do**. Prohibition can thus not normally be used to formulate useful generalisations about the impact that can be exercised via Europe's merger control rules on the internal workings of the EAS – aside of course from the fact that a merger with unequivocally anticompetitive effects will not be allowed to proceed. Merger prohibitions do however constitute the 'ultimate' tool available to the Commission allowing it to safeguard competition on future markets and thus they cannot be overlooked even though they are rare.

The market impact and rationale of merger prohibitions is well illustrated by the first ban to ever affect the EAS. In 1994, The Commission prohibited the creation of a full function joint venture for the development of technical pay-TV services *MSG Media Services* (case IV/M.469). The operation involved Bertelsmann and Kirch (key German pay-TV providers), and Deutsche Telekom, the incumbent transmission infrastructure holder. The aim of MSG was the provision of technical, business and administrative services necessary for the handling of pay-TV (conditional access technology, subscriber customer management; and provision of the necessary technical infrastructure for the supply of such services). **The parties claimed that by pulling together** all of their resources and know-how, **the joint venture would result in** a faster arrival of better services to the benefit of consumers (notable, but **short term consumer benefits**).

MSG was explicitly designed to take control of an EMERGING MARKET for technical and administrative services for pay-TV in Germany. Despite this fact, holding a monopoly on a new market does not equal dominance as far as ECL is concerned, unless the newly created market power proves permanent. The creation of MSG was prohibited by the Commission because all those that could became each others' potential competitors participated in the joint venture – the two main buyers of the services provided by MSG and the incumbent telecoms operator that had the technological resources to offer them. **The creation of MSG would thus result in a** permanent monopolisation of the technical services for the pay-TV market – it would

put a stop to independent innovation and investment incentives causing **long term harm to competition**.

The parties offered extensive behavioural remedies that were meant to prevent discrimination and market foreclosure (eg use of a decoder base with a common interface and a transparent & reasonable price policy). Deutsche Telekom also promised that it would open up its networks for further digital transmission. However, the **proposed remedies were deemed insufficient** – partly, because they were subject to reservations that were difficult to enforce but **mostly, because they were merely commitments not to abuse the market power that MSG would hold on the technical services market onto the downstream pay-TV market.**

In other words, the parties promised only that MSG would not abuse its dominance to the detriment of Bertelsmann/Kirch's competitors in the market for pay-TV. What the Commission wanted was a structural solution such as, for instance, for Deutsche Telekom to not be a part of the operation. Staying outside the operation would counterbalance the two pay-TV providers – Deutsche Telekom would act as a strong potential competitor. Seeing as this was not an agreeable solution for the parties, the Commission prohibited the merger altogether. Incidentally, an extremely similar concentration was notified to the Commission a mere two years later in the form of two joint operations first between Bertelsmann and Kirch *(Bertelsmann/ Kirch/Premiere)* and then Deutsche Telekom and Beta Research (which would be at this point already controlled jointly by Bertelsmann and Kirch) (*Deutsche Telekom/Beta Research).* Unsurprisingly, the concentration was once more prohibited since it would foreclose the emerging German digital TV-services market to any potential new entrants.

The last EU merger investigation to affect the EAS directly was concluded in 2008 on the basis of the new MR and surprisingly perhaps, considering how little economic bearing it has on its own, it yet again concerned the German technical services for pay-TV market. The Commission assessed here the **acquisition of control by News Corp**, a global media conglomerate active in all aspects of TV production and distribution including technical services for pay-TV and the creation and distribution of on-line programming, **of Premiere**, a pay-TV provider active in Germany and Austria that reaches its final customers (households, bars, hotels, etc.) via its satellite platform and via cable and IP-TV (the latter only in Germany), as part of different channel packages.

As a result of the concentration, Premiere was to exchange its current conditional access technology for that belonging to News Corp. According to the Commission, this would strengthen its dominance in the pay-TV

market primarily because the management of smartcards that accompany conditional access technology allows its provider to foreclose other pay-TV operators. Access to technology markets was thus once again recognised as a potential bottleneck for downstream pay-TV. Unlike the earlier cases however, substitutable technologies and alternative providers did exist at all levels of the production & distribution chain. Ensuring that competing pay-TV providers would not be precluded from the market through the use of proprietary technology was deemed sufficient to approve the operation. In the end, the *News Corp/Premiere* merger (case IV/M.5121) received a conditional clearance because the commitments offered by News Corp preserved the pre-merger level of third-party access to Premiere's satellite platform. As a result, effective competition would not be significantly impeded by the concentration.

Revision Questions

1. Why is ECL so important for the EAS?
2. What types of market practices in the EAS are covered by ECL?
3. What kind of operation would have an effect on audiovisual trade in the EU?
4. Who enforces ECL in the audiovisual field?
5. How would you define a relevant market in the EAS?
6. What kind of hard-core restrictions can you name that could be of direct relevance to the EAS?
7. Where would you look to find guidance in a self assessment of multilateral practices?
8. What kind of abuses was Microsoft fined for?
9. When would a merger be prohibited in the EAS?

APPENDICES

LIST OF KEY INTERNET SOURCES

European Treaties: TFEU & TEU
http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML
Secondary Law
http://europa.eu/about-eu/basic-information/decision-making/legal-acts/index_en.htm
Court of Justice of the EU
http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm
Free Movement – Internal Market
http://ec.europa.eu/internal_market/top_layer/index_1_en.htm
Audiovisual Media Service Directive
http://ec.europa.eu/avpolicy/reg/avms/index_en.htm
Information Society and Media Directorate General
http://ec.europa.eu/dgs/information_society/index_en.htm
European Audiovisual Policy
http://ec.europa.eu/avpolicy/index_en.htm
Fundamental Rights Chapter
http://fra.europa.eu/fraWebsite/your_rights/eu-charter/eu-charter_en.htm
Minors & Video Games
http://ec.europa.eu/avpolicy/reg/minors/video/index_en.htm
European Games Developer Federation
http://www.egdf.eu/
Major Events in Particular Member States
http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events_list/index_en.htm
European Works
http://ec.europa.eu/avpolicy/reg/tvwf/implementation/promotion/index_en.htm
MEDIA 2007 programme
http://ec.europa.eu/culture/media/programme/overview/2007/index_en.htm
Europanea
www.europeana.eu
Culture
http://ec.europa.eu/culture/index_en.htm
7th Research Framework Programme
http://cordis.europa.eu/fp7/home_en.html

ICT
http://cordis.europa.eu/fp7/ict/
ICT PSP
http://ec.europa.eu/information_society/activities/ict_psp/index_en.htm
DigiCult
http://cordis.europa.eu/fp7/ict/telearn-digicult/home_en.html
GAMES@LARGE
http://www.gamesatlarge.eu/
I3DPOST: intelligent 3D content extraction and manipulation for film and games
http://www.i3dpost.eu/
Public Service Broadcasting
http://ec.europa.eu/avpolicy/reg/psb/index_en.htm
State Aid
http://ec.europa.eu/competition/state_aid/overview/index_en.html
Services of General Economic Interest
http://ec.europa.eu/competition/state_aid/legislation/sgei.html
2009 PSB Communication
*http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC1027(01):E*N
:*NOT*
State aid Cases in the EAS
http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf
ECL – Restrictive Practices : Article 101 & 102 TFEU
http://ec.europa.eu/competition/antitrust/overview_en.html
ECL – Regulation 1/2003
http://ec.europa.eu/competition/antitrust/legislation/regulations.html
ECL – Mergers
http://ec.europa.eu/competition/mergers/legislation/legislation.html
ECL in the EAS
http://ec.europa.eu/competition/sectors/media/overview_en.html
ECL Cases in the EAS
http://ec.europa.eu/competition/sectors/media/cases.html

TITLE VII COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 1 RULES ON COMPETITION
SECTION 1 RULES APPLYING TO UNDERTAKINGS

Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   – any agreement or category of agreements between undertakings,
   – any decision or category of decisions by associations of undertakings,
   – any concerted practice or category of concerted practices,

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 103 (ex Article 83 TEC)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.
2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
   (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;
   (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
   (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;
   (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;
   (e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

Article 104 (ex Article 84 TEC)

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105 (ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate

cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.
2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.
3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

Article 106 (ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

SECTION 2 AIDS GRANTED BY STATES

Article 107 (ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
2. The following shall be compatible with the internal market:
   (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
   (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
   (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point. 3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108 (ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.
2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

PROTOCOL (No 26) ON SERVICES OF GENERAL INTEREST

THE HIGH CONTRACTING PARTIES,
WISHING to emphasise the importance of services of general interest,
HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

PROTOCOL (No 27) ON THE INTERNAL MARKET AND COMPETITION

THE HIGH CONTRACTING PARTIES,
CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,
HAVE AGREED that:

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

PROTOCOL (No 29) ON THE SYSTEM OF PUBLIC BROADCASTING IN THE MEMBER STATES

THE HIGH CONTRACTING PARTIES,
CONSIDERING that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism,
HAVE AGREED UPON the following interpretive provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.

THE EUROPEAN PARLIAMENT THE COUNCIL
Brussels, 26 January 2010

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EU,
Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1) and 62 thereof,
Having regard to the proposal from the European Commission,
Acting in accordance with the ordinary legislative procedure1,
1 Position of the European Parliament of 20 October 2009 (not yet published in the Official Journal) and Council Decision of ….
Whereas:

(1) Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) has been substantially amended several times. In the interests of clarity and rationality the said Directive should be codified.

(2) Audiovisual media services provided across frontiers by means of various technologies are one of the ways of pursuing the objectives of the Union. Certain measures are necessary to permit and ensure the transition from national markets to a common programme production and distribution market, and to guarantee conditions of fair competition without prejudice to the public interest role to be discharged by the audiovisual media services.

(3) The Council of Europe has adopted the European Convention on Transfrontier Television.

(4) In the light of new technologies in the transmission of audiovisual media services, a regulatory framework concerning the pursuit of broadcasting activities should take account of the impact of structural change, the spread of information and communication technologies (ICT) and technological developments on business

models, especially the financing of commercial broadcasting, and should ensure optimal conditions of competitiveness and legal certainty for Europe's information technologies and its media industries and services, as well as respect for cultural and linguistic diversity.

(5) Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services.

(6) Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action under other provisions of that Treaty, in particular in order to respect and to promote the diversity of its cultures.

(7) In its resolutions of 1 December 20051 and 4 April 20062 on the Doha Round and on the WTO Ministerial Conferences, the European Parliament called for basic public services, such as audiovisual services, to be excluded from liberalisation under the General Agreement on Trade in Services (GATS) negotiations. In its resolution of 27 April 20063, the European Parliament supported the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in particular that "cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value". Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions4 approved the Unesco Convention on behalf of the Community. The Convention entered into force on 18 March 2007. This Directive respects the principles of that Convention.

(8) It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.

(9) This Directive is without prejudice to existing or future Union acts of harmonisation, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions and competition.

(10) Traditional audiovisual media services — such as television — and emerging on-demand audiovisual media services offer significant employment opportunities in the Union, particularly in small and medium-sized enterprises, and stimulate economic growth and investment. Bearing in mind the importance of a level playing-field and a true European market for audiovisual media services, the basic principles of the internal market, such as free competition and equal treatment, should be respected in order to ensure transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry.

(11) It is necessary, in order to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to

all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services).

(12) On 15 December 2003 the Commission adopted a Communication on the future of European regulatory audiovisual policy, in which it stressed that regulatory policy in that sector has to safeguard certain public interests, such as cultural diversity, the right to information, media pluralism, the protection of minors and consumer protection, and to enhance public awareness and media literacy, now and in the future.

(13) The Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting1, reaffirmed that the fulfilment of the mission of public service broadcasting requires that it continue to benefit from technological progress. The co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.

(14) The Commission has adopted the initiative "i2010: European Information Society" to foster growth and jobs in the information society and media industries. This is a comprehensive strategy designed to encourage the production of European content, the development of the digital economy and the uptake of ICT, against the background of the convergence of information society services and media services, networks and devices, by modernising and deploying all EU policy instruments: regulatory instruments, research and partnerships with industry. The Commission has committed itself to creating a consistent internal market framework for information society services and media services by modernising the legal framework for audiovisual services. The goal of the i2010 initiative will in principle be achieved by allowing industries to grow with only the necessary regulation, as well as allowing small start-up businesses, which are the wealth and job creators of the future, to flourish, innovate and create employment in a free market.

(15) The European Parliament adopted on 4 September 20031, 22 April 20042 and 6 September 20053 resolutions which in principle supported the general approach of basic rules for all audiovisual media services and additional rules for television broadcasting.

(16) This Directive enhances compliance with fundamental rights and is fully in line with the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Article 11 thereof. In this regard, this Directive should not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.

(17) This Directive should not affect the obligations on Member States arising from the application of 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. Accordingly, draft national measures applicable to on-demand audiovisual media services of a stricter or more detailed nature than those which

are required to simply transpose Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities2 should be subject to the procedural obligations established under Article 8 of Directive 98/34/EC.

(18) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) according to its Article 1(3) is without prejudice to measures taken at Union or national level to pursue general interest objectives, in particular relating to content regulation and audiovisual policy.

(19) This Directive does not affect the responsibility of the Member States and their authorities with regard to the organisation — including the systems of licensing, administrative authorisation or taxation —, the financing and the content of programmes. The independence of cultural developments in the Member States and the preservation of cultural diversity in the Union therefore remain unaffected.

(20) No provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of audiovisual media service.

(21) For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.

(22) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.

(23) For the purposes of this Directive, the term "audiovisual" should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive, which should not affect the freedom of the Member States to regulate such services at national level in accordance with the Treaty on the Functioning of the European Union.

(24) It is characteristic of on-demand audiovisual media services that they are "television-like", i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of "programme" should be interpreted in a dynamic way taking into account developments in television broadcasting.

(25) The concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the concept of "effective control", when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

(26) For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.

(27) Television broadcasting currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is an on-demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.

(28) The scope of this Directive should not cover electronic versions of newspapers and magazines.

(29) All the characteristics of an audiovisual media service set out in its definition and explained in Recitals 20 to 27 should be present at the same time.

(30) In the context of television broadcasting, the concept of simultaneous viewing should also cover quasi-simultaneous viewing because of the variations in the

short time lag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process.

(31) A wide definition of audiovisual commercial communication should be laid down in this Directive, which should not however include public service announcements and charity appeals broadcast free of charge.

(32) For the purposes of this Directive, "European works" should be defined without prejudice to the possibility of Member States laying down a more detailed definition as regards media service providers under their jurisdiction, in compliance with Union law and account being taken of the objectives of this Directive.

(33) The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.

(34) In order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the Union, only one Member State should have jurisdiction over an audiovisual media service provider and pluralism of information should be a fundamental principle of the Union.

(35) The fixing of a series of practical criteria is designed to determine by an exhaustive procedure that only one Member State has jurisdiction over a media service provider in connection with the provision of the services which this Directive addresses. Nevertheless, taking into account the case-law of the Court of Justice of the European Union and so as to avoid cases where there is a vacuum of jurisdiction, it is appropriate to refer to the criterion of establishment within the meaning of Article 49 to 55 of the Treaty on the Functioning of the European Union as the final criterion determining the jurisdiction of a Member State.

(36) The requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Union law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States. However, the receiving Member State may, exceptionally and under specific conditions, provisionally suspend the retransmission of televised broadcasts.

(37) Restrictions on the free provision of on-demand audiovisual media services should only be possible in accordance with conditions and procedures replicating those already established by Articles 3(4), (5) and (6) of Directive 2000/31/EC.

(38) Technological developments, especially with regard to digital satellite programmes, mean that subsidiary criteria should be adapted in order to ensure suitable regulation and its effective implementation and to give players genuine power over the content of an audiovisual media service.

(39) As this Directive concerns services offered to the general public in the Union, it should apply only to audiovisual media services that can be received directly or indirectly by the public in one or more Member States with standard consumer

equipment. The definition of "standard consumer equipment" should be left to the competent national authorities.

(40) Articles 49 to 55 of the Treaty on the Functioning of the European Union lay down the fundamental right to freedom of establishment. Therefore, media service providers should in general be free to choose the Member States in which they establish themselves. The Court of Justice has also emphasised that "the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established"1.

(41) Member States should be able to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with general principles of Union law. In order to deal with situations where a broadcaster under the jurisdiction of one Member State provides a television broadcast which is wholly or mostly directed towards the territory of another Member State, a requirement for Member States to cooperate with one another and, in cases of circumvention, the codification of the case-law of the Court of Justice, combined with a more efficient procedure, would be an appropriate solution that takes account of Member State concerns without calling into question the proper application of the country of origin principle. The concept of rules of general public interest has been developed by the Court of Justice in its case-law in relation to Articles 43 and 49 of the EC Treaty (now Articles 49 and 56 of the Treaty on the Functioning of the European Union) and includes, inter alia, rules on the protection of consumers, the protection of minors and cultural policy. The Member State requesting cooperation should ensure that the specific national rules in question are objectively necessary, applied in a non-discriminatory manner and proportionate.

(42) A Member State, when assessing on a case-by-case basis whether a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, may refer to indicators such as the origin of the television advertising and/or subscription revenues, the main language of the service or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received.

(43) Under this Directive, notwithstanding the application of the country of origin principle, Member States may still take measures that restrict freedom of movement of television broadcasting, but only under the conditions and following the procedure laid down in this Directive. However, the Court of Justice has consistently held that any restriction on the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively1.

(44) In its Communication to the European Parliament and to the Council on Better Regulation for Growth and Jobs in the European Union, the Commission stressed that a careful analysis of the appropriate regulatory approach is necessary, in particular, in order to establish whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered. Furthermore, experience has shown that both co-regulation

and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves. Thus self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves.

Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive. However, while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator. Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met. Without prejudice to formal obligations of the Member States regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co-regulation and/or self-regulatory regimes nor disrupt or jeopardise current co-regulation or self-regulatory initiatives which are already in place within Member States and which are working effectively.

(45) Because of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services. It is therefore important for Member States to ensure that users have easy and direct access at any time to information about the media service provider. It is for each Member State to decide the practical details as to how this objective can be achieved without prejudice to any other relevant provisions of Union law.

(46) The right of persons with a disability and of the elderly to participate and be integrated in the social and cultural life of the Union is inextricably linked to the provision of accessible audiovisual media services. The means to achieve accessibility should include, but need not be limited to, sign language, subtitling, audio-description and easily understandable menu navigation.

(47) "Media literacy" refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They are better able to protect themselves and their families from harmful or offensive material. Therefore the development of media literacy in all sections of society should be promoted and its progress followed closely. The Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to

the competitiveness of the European audiovisual and on-line information services industry1 already contains a series of possible measures for promoting media literacy such as, for example, continuing education of teachers and trainers, specific Internet training aimed at children from a very early age, including sessions open to parents, or organisation of national campaigns aimed at citizens, involving all communications media, to provide information on using the Internet responsibly.

(48) Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.

(49) It is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic Games, the football World Cup and the European football championship. To this end, Member States retain the right to take measures compatible with Union law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events.

(50) It is necessary to make arrangements within a Union framework, in order to avoid potential legal uncertainty and market distortions and to reconcile the free circulation of television services with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest.

(51) In particular, it is appropriate to lay down provisions concerning the exercise by broadcasters of exclusive broadcasting rights that they may have purchased to events considered to be of major importance for society in a Member State other than that having jurisdiction over the broadcasters. In order to avoid speculative rights purchases with a view to circumvention of national measures, it is necessary to apply those provisions to contracts entered into after the publication of Directive 97/36/EC and concerning events which take place after the date of implementation. When contracts that predate the publication of that Directive are renewed, they are considered to be new contracts.

(52) Events of major importance for society should, for the purposes of this Directive, meet certain criteria, that is to say be outstanding events which are of interest to the general public in the Union or in a given Member State or in an important component part of a given Member State and are organised in advance by an event organiser who is legally entitled to sell the rights pertaining to those events.

(53) For the purposes of this Directive, “free television” means broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without payment in addition to the modes of funding of broadcasting that are widely prevailing in each Member State (such as licence fee and/or the basic tier subscription fee to a cable network).

(54) Member States are free to take whatever measures they deem appropriate with regard to audiovisual media services which come from third countries and which

do not satisfy the conditions laid down in Article 2, provided they comply with Union law and the international obligations of the Union.

(55) In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the Union are fully and properly protected, those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in a timely manner before the event of high interest to the public takes place to give others sufficient time to exercise such a right. A broadcaster should be able to exercise this right through an intermediary acting specifically on its behalf on a case-by-case basis. Such short extracts may be used for EU-wide broadcasts by any channel including dedicated sports channels and should not exceed 90 seconds. The right of access to short extracts should apply on a trans-frontier basis only where it is necessary. Therefore a broadcaster should first seek access from a broadcaster established in the same Member State having exclusive rights to the event of high interest to the public.

The concept of general news programmes should not cover the compilation of short extracts into programmes serving entertainment purposes. The country of origin principle should apply to both the access to, and the transmission of, the short extracts. In a trans-frontier case, this means that the different laws should be applied sequentially. Firstly, for access to the short extracts the law of the Member State where the broadcaster supplying the initial signal (i.e. giving access) is established should apply. This is usually the Member State in which the event concerned takes place. Where a Member State has established an equivalent system of access to the event concerned, the law of that Member State should apply in any case. Secondly, for transmission of the short extracts, the law of the Member State where the broadcaster transmitting the short extracts is established should apply.

(56) The requirements of this Directive regarding access to events of high interest to the public for the purpose of short news reports should be without prejudice to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society1 and the relevant international conventions in the field of copyright and neighbouring rights. Member States should facilitate access to events of high interest to the public by granting access to the broadcaster's signal within the meaning of this Directive. However, they may choose other equivalent means within the meaning of this Directive. Such means include, inter alia, granting access to the venue of these events prior to granting access to the signal. Broadcasters should not be prevented from concluding more detailed contracts.

(57) It should be ensured that the practice of media service providers of providing their live television broadcast news programmes in the on-demand mode after live transmission is possible without having to tailor the individual programme by omitting the short extracts. This possibility should be restricted to the on-demand supply of the identical television broadcast programme by the same media service

provider, so it may not be used to create new on-demand business models based on short extracts.

(58) On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive.

(59) The availability of harmful content in audiovisual media services is a concern for legislators, the media industry and parents. There will also be new challenges, especially in connection with new platforms and new products. Rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications, are therefore necessary.

(60) Measures taken to protect the physical, mental and moral development of minors and human dignity should be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union. The aim of those measures, such as the use of personal identification numbers (PIN codes), filtering systems or labelling, should thus be to ensure an adequate level of protection of the physical, mental and moral development of minors and human dignity, especially with regard to on-demand audiovisual media services. The Recommendation on the protection of minors and human dignity and on the right of reply already recognised the importance of filtering systems and labelling and included a number of possible measures for the benefit of minors, such as systematically supplying users with an effective, updatable and easy-to-use filtering system when they subscribe to an access provider or equipping the access to services specifically intended for children with automatic filtering systems.

(61) Media service providers under the jurisdiction of the Member States should in any case be subject to a ban on the dissemination of child pornography in accordance with the provisions of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography1.

(62) None of the provisions of this Directive that concern the protection of the physical, mental and moral development of minors and human dignity necessarily requires that the measures taken to protect those interests should be implemented through the prior verification of audiovisual media services by public bodies.

(63) Coordination is needed to make it easier for persons and industries producing programmes having a cultural objective to take up and pursue their activities.

(64) Minimum requirements in respect of all public or private Union television broadcasts for European audio-visual productions have been a means of promoting production, independent production and distribution in the abovementioned industries and are complementary to other instruments which are already or will be proposed to favour the same objective.

(65) It is therefore necessary to promote markets of sufficient size for television productions in the Member States to recover necessary investments not only by

establishing common rules opening up national markets but also by envisaging for European productions, where practicable and by appropriate means, a majority proportion in television broadcasts of all Member States. In order to allow the monitoring of the application of those rules and the pursuit of the objectives, Member States should provide the Commission with a report on the application of the proportions reserved for European works and independent productions in this Directive. For the calculation of such proportions, account should be taken of the specific situation of Greece and Portugal. The Commission should inform the other Member States of these reports accompanied, where appropriate, by an opinion taking account of, in particular, progress achieved in relation to previous years, the share of first broadcasts in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audio-visual production capacity or restricted language area.

(66) It is important to seek appropriate instruments and procedures in accordance with Union law in order to promote the implementation of the objectives of this Directive with a view to adopting suitable measures to encourage the activity and development of European audio-visual production and distribution, particularly in countries with a low production capacity or a restricted language area.

(67) The proportions of European works must be achieved taking economic realities into account. Therefore, a progressive system for achieving this objective is required.

(68) A commitment, where practicable, to a certain proportion of broadcasts for independent productions, created by producers who are independent of broadcasters, will stimulate new sources of television production, especially the creation of small and medium-sized enterprises. It will offer new opportunities and marketing outlets to creative talents, to cultural professions and to employees in the cultural field.

(69) On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. It is important to re-examine regularly the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports provided for under this Directive, Member States should also take into account, in particular, the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services, and the actual consumption of European works offered by such services.

(70) When implementing Article 16, Member States should encourage broadcasters to include an adequate share of co-produced European works or of European works of non-domestic origin.

(71) When defining "producers who are independent of broadcasters" as referred to in Article 17, Member States should take appropriate account notably of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights.

(72) Channels broadcasting entirely in a language other than those of the Member States should not be covered by Articles 16 and 17 of this Directive. Nevertheless, where such a language or languages represent a substantial part but not all of the channel's transmission time, Articles 16 and 17 should not apply to that part of transmission time.

(73) National support schemes for the development of European production may be applied in so far as they comply with Union law.

(74) The objective of supporting audiovisual production in Europe can be pursued within the Member States in the framework of the organisation of their audiovisual media services, inter alia through the definition of a public interest mission for certain media service providers, including the obligation to contribute substantially to investment in European production.

(75) Media service providers, programme makers, producers, authors and other experts should be encouraged to develop more detailed concepts and strategies aimed at developing European audiovisual fiction films that are addressed to an international audience.

(76) It is important to ensure that cinematographic works are transmitted within periods agreed between right holders and media service providers.

(77) The question of specific time scales for each type of showing of cinematographic works is primarily a matter to be settled by means of agreements between the interested parties or professionals concerned.

(78) In order to allow for an active policy in favour of a specific language, Member States remain free to lay down more detailed or stricter rules in particular on the basis of language criteria, as long as those rules are in conformity with Union law, and in particular are not applicable to the retransmission of broadcasts originating in other Member States.

(79) The availability of on-demand audiovisual media services increases consumer choice. Detailed rules governing audiovisual commercial communication for on-demand audiovisual media services thus appear neither to be justified nor to make sense from a technical point of view. Nevertheless, all audiovisual commercial communication should respect not only the identification rules but also a basic tier of qualitative rules in order to meet clear public policy objectives.

(80) As has been recognised by the Commission in its interpretative communication on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive, the development of new advertising techniques and marketing innovations has created new effective opportunities for audiovisual commercial communications in traditional broadcasting services, potentially enabling them to compete better on a level playing-field with on-demand innovations.

(81) Commercial and technological developments give users increased choice and responsibility in their use of audiovisual media services. In order to remain

proportionate with the goals of general interest, regulation should allow a certain degree of flexibility with regard to television broadcasting. The principle of separation should be limited to television advertising and teleshopping, and product placement should be allowed under certain circumstances, unless a Member State decides otherwise. However, where product placement is surreptitious, it should be prohibited. The principle of separation should not prevent the use of new advertising techniques.

(82) Apart from the practices that are covered by this Directive, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market1 applies to unfair commercial practices, such as misleading and aggressive practices occurring in audiovisual media services. In addition, Directive 2003/33/EC of the European Parliament and of 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 products2, which prohibits advertising and sponsorship for cigarettes and other tobacco products in printed media, information society services and radio broadcasting, should be without prejudice to this Directive, in view of the special characteristics of audiovisual media services. Article 88(1) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use3, which prohibits advertising to the general public of certain medicinal products, applies, as provided in paragraph 5 of that Article and without prejudice to Article 21 of this Directive. Furthermore, this Directive should be without prejudice to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.

(83) In order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.

(84) Member States, with due regard to Union law and in relation to broadcasts intended solely for the national territory which may not be received, directly or indirectly, in one or more Member States, should be able to lay down different conditions for the insertion of advertising and different limits for the volume of advertising in order to facilitate these particular broadcasts.

(85) Given the increased possibilities for viewers to avoid advertising through the use of new technologies such as digital personal video recorders and increased choice of channels, detailed regulation with regard to the insertion of spot advertising with the aim of protecting viewers is not justified. While the hourly amount of admissible advertising should not be increased, this Directive should give flexibility to broadcasters with regard to its insertion where this does not unduly impair the integrity of programmes.

(86) This Directive is intended to safeguard the specific character of European television, where advertising is preferably inserted between programmes, and therefore limits possible interruptions to cinematographic works and films made for television as well as interruptions to some categories of programmes that need specific protection.

(87) A limit of 20 % of television advertising spots and teleshopping spots per clock hour, also applying during "prime time", should be laid down . The concept of a television advertising spot should be understood as television advertising in the sense of point (i) of Article 1(1) having a duration of not more than 12 minutes.

(88) It is necessary to prohibit all audiovisual commercial communication promoting cigarettes and other tobacco products including indirect forms of audiovisual commercial communication which, whilst not directly mentioning the tobacco product, seek to circumvent the ban on audiovisual commercial communication for cigarettes and other tobacco products by using brand names, symbols or other distinctive features of tobacco products or of undertakings whose known or main activities include the production or sale of such products.

(89) It is also necessary to prohibit all audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls and to lay down strict criteria relating to the television advertising of alcoholic products.

(90) Surreptitious audiovisual commercial communication is a practice prohibited by this Directive because of its negative effect on consumers. The prohibition of surreptitious audiovisual commercial communication should not cover legitimate product placement within the framework of this Directive, where the viewer is adequately informed of the existence of product placement. This can be done by signalling the fact that product placement is taking place in a given programme, for example by means of a neutral logo.

(91) Product placement is a reality in cinematographic works and in audiovisual works made for television. In order to ensure a level playing-field, and thus enhance the competitiveness of the European media industry, rules for product placement are necessary. The definition of product placement laid down in this Directive should cover any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration. The provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value. Product placement should be subject to the same qualitative rules and restrictions applying to audiovisual commercial communication. The decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product is built into the action of a programme, which is why the definition in point (m) of Article 1(1) contains the word "within". In contrast, sponsor references may be shown during a programme but are not part of the plot.

(92) Product placement should, in principle, be prohibited. However, derogations are ppropriate for some kinds of programme, on the basis of a positive list. A Member State should be able to opt out of these derogations, totally or partially, for example by permitting product placement only in programmes which have not been produced exclusively in that Member State.

(93) Furthermore, sponsorship and product placement should be prohibited where they influence the content of programmes in such a way as to affect the responsibility and the editorial independence of the media service provider. This is the case with regard to thematic placement.

(94) In accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.

(95) Close cooperation between competent regulatory bodies of the Member States and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States and between their regulatory bodies is particularly important with regard to the impact which broadcasters established in one Member State might have on another Member State. Where licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective bodies take place before such licences are granted. This cooperation should cover all fields coordinated by this Directive.

(96) It is necessary to make clear that self-promotional activities are a particular form of advertising in which the broadcaster promotes its own products, services, programmes or channels. In particular, trailers consisting of extracts from programmes should be treated as programmes.

(97) Daily transmission time allotted to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from these, or to public service announcements and charity appeals broadcast free of charge, should not be included in the maximum amounts of daily or hourly transmission time that may be allotted to advertising and teleshopping.

(98) In order to avoid distortions of competition, this derogation should be limited to announcements concerning products that fulfil the dual condition of being both ancillary to and directly derived from the programmes concerned. The term “ancillary” refers to products intended specifically to allow the viewing public to benefit fully from, or to interact with, these programmes.

(99) In view of the development of teleshopping, an economically important activity for operators as a whole and a genuine outlet for goods and services within the Union, it is essential to ensure a high level of consumer protection by putting in place appropriate standards regulating the form and content of such broadcasts.

(100) It is important for the competent national authorities, in monitoring the implementation of the relevant provisions, to be able to distinguish, as regards channels not exclusively devoted to teleshopping, between transmission time devoted to teleshopping spots, advertising spots and other forms of advertising on the one hand and, on the other, transmission time devoted to teleshopping windows. It is therefore necessary and sufficient that each window be clearly identified by optical and acoustic means at least at the beginning and the end of the window.

(101) This Directive should apply to channels exclusively devoted to teleshopping or self-promotion, without conventional programme elements such as news, sports, films, documentaries and drama, solely for the purposes of this Directive and without prejudice to the inclusion of such channels in the scope of other Union instruments.

(102) Although television broadcasters are normally bound to ensure that programmes present facts and events fairly, it is nevertheless important that they should be subject to specific obligations with respect to the right of reply or equivalent remedies so that any person whose legitimate interests have been damaged by an assertion made in the course of a broadcast television programme may effectively exercise such right or remedy.

(103) The right of reply is an appropriate legal remedy for television broadcasting and could also be applied in the on-line environment. The Recommendation on the protection of minors and human dignity and on the right of reply already includes appropriate guidelines for the implementation of measures in national law or practice so as to ensure sufficiently the right of reply or equivalent remedies in relation to on-line media.

(104) Since the objectives of this Directive, namely the creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(105) This Directive is without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
Definitions

Article 1

1. For the purposes of this Directive, the following definitions shall apply:
   (a) "audiovisual media service" means:
      (i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;
      (ii) audiovisual commercial communication;
   (b) "programme" means 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 the form and content of which are 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;
   (c) "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;
   (d) "media service provider" means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;
   (e) "television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;
   (f) "broadcaster" means a media service provider of television broadcasts;
   (g) "on-demand audiovisual media service" (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

(h) "audiovisual commercial communication" means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or
are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement;

(i) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

(j) "surreptitious audiovisual commercial communication" means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration;

(k) "sponsorship" means any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting their name, trade mark, image, activities or products;

(l) "teleshopping" means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment;

(m) "product placement" means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration;

(n) "European works" means the following:
  (i) works originating in Member States;
  (ii) works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 3;
  (iii) works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.

2. The application of the provisions of points (n)(ii) and (iii) of paragraph 1 shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned.

3. The works referred to in points (n)(i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the States referred to in those provisions provided that they comply with one of the following three conditions:
   (i) they are made by one or more producers established in one or more of those States;
   (ii) the production of the works is supervised and actually controlled by one or more producers established in one or more of those States;
   (iii) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.
4. Works that are not European works within the meaning of point (n) of paragraph 1 but that are produced within the framework of bilateral co-production agreements concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Union supply a majority share of the total cost of production and that the production is not controlled by one or more producers established outside the territory of the Member States.

CHAPTER II
General provisions

Article 2

1. Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.
2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are any of the following:
   (a) those established in that Member State in accordance with paragraph 3;
   (b) those to whom paragraph 4 applies.
3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:
   (a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;
   (b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office.

If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;

(c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State.

4. Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:
   (a) they use a satellite up-link situated in that Member State;
   (b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.
5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the media service provider is established within the meaning of Articles 49 to 55 of the Treaty on the Functioning of the European Union.
6. This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.

Article 3

1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.
2. In respect of television broadcasting, Member States may provisionally derogate from paragraph 1 if the following conditions are fulfilled:
   (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 27(1) or (2) and/or Article 6;
   (b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in point (a) on at least two prior occasions;
   (c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again;
   (d) consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in point (c), and the alleged infringement persists. The Commission shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Union law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.

3. Paragraph 2 shall be without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned.
4. In respect of on-demand audiovisual media services, Member States may take measures to derogate from paragraph 1 in respect of a given service if the following conditions are fulfilled:
   (a) the measures are:
      (i) necessary for one of the following reasons:
         – public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons;
         – the protection of public health;
         – public security, including the safeguarding of national security and defence;
         – the protection of consumers, including investors;
      (ii) taken against an on-demand audiovisual media service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;
      (iii) proportionate to those objectives;
   (b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:
      (i) asked the Member State under whose jurisdiction the media service provider falls to take measures and the latter did not take such measures, or they were inadequate;
      (ii) notified the Commission and the Member State under whose jurisdiction the media service provider falls of its intention to take such measures.
5. Member States may, in urgent cases, derogate from the conditions laid down in point (b) of paragraph 4. Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State under whose jurisdiction the media service provider falls, indicating the reasons for which the Member State considers that there is urgency.
6. Without prejudice to the Member State's possibility of proceeding with the measures referred to in paragraphs 4 and 5, the Commission shall examine the compatibility of the notified measures with Union law in the shortest possible time. Where it comes to the conclusion that the measures are incompatible with Union law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

Article 4

1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.

2. In cases where a Member State:
   (a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and
   (b) assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory, it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules of general public interest in question. The Member State having jurisdiction shall inform the first Member State of the results obtained following this request within two months. Either Member State may invite the contact committee established under Article 29 to examine the case.
3. The first Member State may adopt appropriate measures against the broadcaster concerned where it assesses that:
   (a) the results achieved through the application of paragraph 2 are not satisfactory; and
   (b) the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established in the first Member State. Such measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.
4. A Member State may take measures pursuant to paragraph 3 only if the following conditions are met:
   (a) it has notified the Commission and the Member State in which the broadcaster is established of its intention to take such measures while substantiating the grounds on which it bases its assessment; and
   (b) the Commission has decided that the measures are compatible with Union law, and in particular that assessments made by the Member State taking those measures under paragraphs 2 and 3 are correctly founded.
5. The Commission shall decide within three months following the notification provided for in point (a) of paragraph 4. If the Commission decides that the measures are incompatible with Union law, the Member State in question shall refrain from taking the proposed measures.
6. Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive.
7. Member States shall encourage co-regulation and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.
8. Directive 2000/31/EC shall apply unless otherwise provided for in this Directive. In the event of a conflict between a provision of Directive 2000/31/EC and a provision

of this Directive, the provisions of this Directive shall prevail, unless otherwise provided for in this Directive.

CHAPTER III
Provisions applicable to all audiovisual media services

Article 5

Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:
(a) the name of the media service provider;
(b) the geographical address at which the media service provider is established;
(c) the details of the media service provider, including its electronic mail address or website, which allow it to be contacted rapidly in a direct and effective manner;
(d) where applicable, the competent regulatory or supervisory bodies.

Article 6

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

Article 7

Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.

Article 8

Member States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders.

Article 9

1. Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:
   (a) audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication shall be prohibited;
   (b) audiovisual commercial communications shall not use subliminal techniques;
   (c) audiovisual commercial communications shall not:
      (i) prejudice respect for human dignity;
      (ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
      (iii) encourage behaviour prejudicial to health or safety;
      (iv) encourage behaviour grossly prejudicial to the protection of the environment;

(d) all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited;
(e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;
(f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;
(g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

2. Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

Article 10

1. Audiovisual media services or programmes that are sponsored shall meet the following requirements:
   (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
   (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
   (c) viewers shall be clearly informed of the existence of a sponsorship agreement. Sponsored programmes shall be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or at the end of the programmes.
2. Audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.
3. The sponsorship of audiovisual media services or programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking, but shall not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.

4. News and current affairs programmes shall not be sponsored. Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.

Article 11

1. Paragraphs 2, 3 and 4 shall apply only to programmes produced after 19 December 2009.
2. Product placement shall be prohibited.
3. By way of derogation from paragraph 2, product placement shall be admissible in the following cases unless a Member State decides otherwise:
   (a) in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes;
   (b) where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme. The derogation provided for in point (a) shall not apply to children's programmes.

   Programmes that contain product placement shall meet at least all of the following requirements:
   (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
   (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
   (c) they shall not give undue prominence to the product in question;
   (d) viewers shall be clearly informed of the existence of product placement. Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

   By way of exception, Member States may choose to waive the requirements set out in point (d) provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.
4. In any event programmes shall not contain product placement of:
   (a) tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products;
   (b) specific medicinal products or medical treatments available only on prescription in the Member State under whose jurisdiction the media service provider falls.

CHAPTER IV
Provisions applicable only to on-demand audiovisual media services

Article 12

Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services.

Article 13

1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.
2. Member States shall report to the Commission no later than 19 December 2011 and every four years thereafter on the implementation of paragraph 1.
3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.

CHAPTER V
Provisions concerning exclusive rights and short news reports in television broadcasting

Article 14

1. Each Member State may take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due time. In so doing the Member State concerned shall also determine whether these events should be available by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.
2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of three months from

the notification, the Commission shall verify that such measures are compatible with Union law and communicate them to the other Member States. It shall seek the opinion of the contact committee established pursuant to Article 29. It shall forthwith publish the measures taken in the Official Journal of the European Union and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means within the framework of their legislation, that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters after 18 December 2007 in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with paragraphs 1 and 2 by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.

Article 15

1. Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.
2. If another broadcaster established in the same Member State as the broadcaster seeking access has acquired exclusive rights to the event of high interest to the public, access shall be sought from that broadcaster.
3. Member States shall ensure that such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal with, unless impossible for reasons of practicality, at least the identification of their source.
4. As an alternative to paragraph 3, Member States may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.
5. Short extracts shall be used solely for general news programmes and may be used in on-demand audiovisual media services only if the same programme is offered on a deferred basis by the same media service provider.
6. Without prejudice to paragraphs 1 to 5, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the provision of such short extracts are defined, in particular, with respect to any compensation arrangements, the maximum length of short extracts and time-limits regarding their transmission. Where compensation is provided for, it shall not exceed the additional costs directly incurred in providing access.

CHAPTER VI
Promotion of distribution and production of television programmes

Article 16

1. Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.
2. Where the proportion laid down in paragraph 1 cannot be attained, it must not be lower than the average for 1988 in the Member State concerned. However, in respect of Greece and Portugal, the year 1988 shall be replaced by the year 1990.
3. Member States shall provide the Commission every two years, starting from 3 October 1991, with a report on the application of this Article and Article 17. That report shall in particular include a statistical statement on the achievement of the proportion referred to in this Article and Article 17 for each of the television programmes falling within the jurisdiction of the Member State concerned, the reasons, in each case, for the failure to attain that proportion and the measures adopted or envisaged in order to achieve it.

   The Commission shall inform the other Member States and the European Parliament of the reports, which shall be accompanied, where appropriate, by an opinion. The Commission shall ensure the application of this Article and Article 17 in accordance with the provisions of the Treaty on the Functioning of the European Union. The Commission may take account in its opinion, in particular, of progress achieved in relation to previous years, the share of first broadcast works in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audiovisual production capacity or restricted language area.

Article 17

Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria. It must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production.

Article 18

This Chapter shall not apply to television broadcasts that are intended for local audiences and do not form part of a national network.

CHAPTER VII
Television advertising and teleshopping

Article 19

1. Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.
2. Isolated advertising and teleshopping spots, other than in transmissions of sports events, shall remain the exception.

Article 20

1. Member States shall ensure, where television advertising or teleshopping is inserted during programmes, that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme concerned, and the rights of the right holders are not prejudiced.
2. The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping shall be inserted during religious services.

Article 21

Teleshopping for medicinal products which are subject to a marketing authorisation within the meaning of Directive 2001/83/EC, as well as teleshopping for medical treatment, shall be prohibited.

Article 22

Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria:

(a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;
(b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;
(c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;
(d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
(e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;

(f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.

Article 23

1. The proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20 %.
2. Paragraph 1 shall not apply to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, sponsorship announcements and product placements.

Article 24

Teleshopping windows shall be clearly identified as such by optical and acoustic means and shall be of a minimum uninterrupted duration of 15 minutes.

Article 25

This Directive shall apply mutatis mutandis to television channels exclusively devoted to advertising and teleshopping as well as to television channels exclusively devoted to self-promotion. However, Chapter VI as well as Articles 20 and 23 shall not apply to these channels.

Article 26

Without prejudice to Article 4, Member States may, with due regard for Union law, lay down conditions other than those laid down in Article 20(2) and Article 23 in respect of television broadcasts intended solely for the national territory which cannot be received directly or indirectly by the public in one or more other Member States.

CHAPTER VIII
Protection of minors in television broadcasting

Article 27

1. Member States shall 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 or gratuitous violence.
2. The measures provided for in paragraph 1 shall also extend 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 technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.
3. In addition, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.

CHAPTER IX
Right of reply in television broadcasting

Article 28

1. Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.
2. A right of reply or equivalent remedies shall exist in relation to all broadcasters under the jurisdiction of a Member State.
3. Member States shall adopt the measures needed to establish the right of reply or the equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons resident or established in other Member States.
4. An application for exercise of the right of reply or the equivalent remedies may be rejected if such a reply is not justified according to the conditions laid down in paragraph 1, would involve a punishable act, would render the broadcaster liable to civil-law proceedings or would transgress standards of public decency.
5. Provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

CHAPTER X
Contact committee

Article 29

1. A contact committee is established under the aegis of the Commission. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and meet either on his initiative or at the request of the delegation of a Member State.
2. The tasks of the contact committee shall be:
   (a) to facilitate effective implementation of this Directive through regular consultation on any practical problems arising from its application, and particularly from the application of Article 2, as well as on any other matters on which exchanges of views are deemed useful;
   (b) to deliver own-initiative opinions or opinions requested by the Commission on the application by the Member States of this Directive;

(c) to be the forum for an exchange of views on what matters should be dealt with in the reports which Member States must submit pursuant to Article 16(3) and on their methodology;
(d) to discuss the outcome of regular consultations which the Commission holds with representatives of broadcasting organisations, producers, consumers, manufacturers, service providers and trade unions and the creative community;
(e) to facilitate the exchange of information between the Member States and the Commission on the situation and the development of regulatory activities regarding audiovisual media services, taking account of the Union's audiovisual policy, as well as relevant developments in the technical field;
(f) to examine any development arising in the sector on which an exchange of views appears useful.

CHAPTER XI
Cooperation between regulatory bodies of the Member States

Article 30

Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies.

CHAPTER XII
Final provisions

Article 31

In fields which this Directive does not coordinate, it shall not affect the rights and obligations of Member States resulting from existing conventions dealing with telecommunications or broadcasting.

Article 32

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 33

Not later than 19 December 2011, and every three years thereafter, the Commission shall submit to the European Parliament, to the Council and to the European Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of audiovisual media services, in particular in the light of recent technological developments, the competitiveness of the sector and levels of media literacy in all Member States.

That report shall also assess the issue of television advertising accompanying or included in children's programmes, and in particular whether the quantitative and

qualitative rules contained in this Directive have afforded the level of protection required.

Article 34

Directive 89/552/EEC, as amended by the Directives listed in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B. References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 35

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 36

This Directive is addressed to the Member States.

Ewelina D. Sage

received her undergraduate degrees in law and European science from the University of Warsaw. In 2005 she was awarded a Doctorate by the University of Oxford Faculty of Law. She teaches European audiovisual and competition policy. She is the CARS International Co-ordinator and a YARS Editorial Board member. She has advised a number of major Polish media & telecoms operators, and her publications focus on competition policy and telecoms regulation in the digital media.

From the book reviews:

“This book’s key advantage lies in the comprehensive take on its subject matter not limited to solutions based on the audiovisual media services directive but covering also the impact exercised by direct intervention (support programmes) and competition protection. [...] The subject matter of the book is extremely current due to the implementation process of the modified European audiovisual policy [...]. The book will fill the gap in the Polish professional literature in the field of audiovisual media. Among the book’s addressees are audiovisual media companies, those engaged in market regulation [... and a] wide range of those dealing with audiovisual and media policy.”

Prof. Dr. Stanisław Piątek
University of Warsaw
Faculty of Management

“Ms Sage’s book takes on the unenviable task of chartering uncharted waters [...] the author uniquely mixes areas of the EU’s core competences. The book [...] should prove itself of interest for a wide audience [...]. New readers and students are likely to particularly appreciate several elements that facilitate navigating through the EU maze. Ms Sage takes particular interest [...] in summarising key individual decisions and judgements – instruments which play an important role in developing the audiovisual sector and making it part of the internal market [...] the author timely flags important issues of principle, arising from [...] the Premier League case [...]”

Dr. Krzusztof Kuik
DG Competititon
Media Unit, EC

ISBN 978-83-61276-77-7