

The Implementation of the Audiovisual Media Services Directive by National Regulatory Authorities

National Responses to Regulatory Challenges

by **Jenny Metzdorf**,* PhD student at the Faculty of Law, Economics and Finance of the University of Luxembourg

Abstract: The Audiovisual Media Services Directive (AVMSD) which regulates broadcasting and on-demand audiovisual media services is at the nexus of current discussions about the convergence of media. The Green Paper of the Commission of April 2013 reflects the struggle of the European Union to come to terms with the phenomenon of convergence and highlights current legal uncertainties. The (theoretical) quest for an appropriate and future-oriented regulatory framework at the European level may be contrasted to the practice of national regulatory authorities. When faced with new media services and new business models, national regulators will inevitably have to make decisions and choices that take into account providers' interests to offer their services as well as viewers' interests

to receive information. This balancing act performed by national regulators may tip towards the former or latter depending on the national legal framework; social, political and economic considerations; as well as cultural perceptions. This paper thus examines how certain rules contained in the AVMSD are applied by national regulators. It focuses first on the definition of an on-demand audiovisual media service and its scope. Second, it analyses the measures adopted with a view to protection minors in on-demand services and third discusses national approaches towards the promotion of European works in on-demand services. It aims at underlining the significance of national regulatory authorities and the guidelines these adopt to clarify the rules of a key EU Directive of the "media law acquis".

Keywords: Audiovisual Media Services Directive, VOD Services, VOCCCD services

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A. Introduction

1 The Audiovisual Media Services Directive (AVMSD) has been the subject of an enormous body of research. As the key legal document defining the various pillars upon which the cross-border provision of audiovisual media services is built in the European Union (EU), its rules and approach have been investigated in-depth. When the Directive was initially adopted in 1989, it regulated certain aspects

of broadcasting envisioning a market of "television without frontiers".¹ In 2007, the Directive's scope was extended to on-demand audiovisual media (VOD) services.² It henceforth distinguished between linear (television broadcasting) and non-linear (VOD) services applying different sets of rules to each. The break-through which was expected of the Directive in light of convergence of media, however, has not been accomplished. Shortly after its adoption,

discussions rekindled as to its modification in view of the emergence of Connected TV which seamlessly weaves the Internet and broadcasting together on the television screen.³ So far, the Commission has clung to the AVMSD and its graduated approach to regulation as the market potential of Connected TV and similar services is gradually unfolding. The Commission's Green Paper of April 2013 which indeed asks crucial questions in fact reveals a high level of uncertainty with regards to the current rules and future approach to Connected TV and other hybrid services.⁴

- 2 In this state of flux, national regulatory authorities (NRAs) assume a pivotal role. Charged with the regulation of audiovisual media services, they ensure the application and implementation of the AVMSD on a daily basis. While their structure, composition and mandate are contingent on national legal frameworks, they generally act as intermediaries between the state and the industry. Where the national media laws transpose the Directive verbatim, the position of NRAs is enhanced. This is particularly true for rules couched in vague and general terms which have to be interpreted and applied in specific contexts and under specific circumstances at national level. NRAs thus enjoy a certain margin of discretion which is constrained mostly by the scope of the mandate granted by the state and the freedoms associated with the former. The establishment by the Commission of a European Regulators Group for Audiovisual Media Services in February 2014 demonstrates increasing awareness of the significance of NRAs and their contribution in shaping the future regulatory landscape.⁵ The Regulators Group constitutes, inter alia, a forum for "exchange of experience and good practice".⁶ This paper starts from similar premises employing a bottom up lens by examining the guidelines and codes adopted by NRAs as well as their practice.
- 3 To this effect, this paper sketches the most pressing challenges NRAs are currently facing in implementing the AVMSD at the grassroots. In its first section, it examines the criteria defining an (on-demand) audiovisual media service in order to determine the regulatory remit of NRAs. Interpretation and specification of the criteria is of enormous practical effect as it will identify the set of rules (and possibly laws) applicable to relevant providers. Secondly, this paper explores the measures taken by NRAs to protect minors from unsuitable content contained in non-linear services and thirdly, it details the activities of NRAs in respect of the promotion of European works in such services. Sections two and three illustrate the graduated approach to regulation which regulates television broadcasting more intensively than on-demand services. Succinctly, this paper endeavors to contribute to the debate about future regulatory responses to an ever more convergent media

environment and a possible revision of the AVMSD by pinpointing its most apparent deficiencies.

B. Criteria for VOD services

I. The definitions outlined in the AVMSD

- 4 Although a comprehensive (horizontal)⁷ reform of the TwFD in light of growing convergence of media was rejected in 2007 in favour of the maintenance of sector-specific regulation, the Directive's scope of application was slightly extended to cover television and "television-like"⁸ services subsumed under the term "audiovisual media service".⁹ In line with Art. 1 (1) (a) (i) AVMSD, an audiovisual media service is defined as:

"a service as defined by Articles 56 and 57 of the [TFEU] which is under the editorial responsibility¹⁰ 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".¹¹

- 5 Thus, audiovisual media services are further classified as television broadcasting (linear services), on-demand audiovisual media services (non-linear services) as defined in Art. 1 (1) (e) and (g) AVMSD respectively and audiovisual commercial communication as stipulated by Art. 1 (1) (a) (ii) in conjunction with Art. 1 (1) (h) AVMSD. While a VOD service may be viewed at the "moment chosen by the user and at his individual request"¹², broadcasts are transmitted simultaneously to the general public "on the basis of a [chronological] programme schedule"¹³. The differentiation between linear and non-linear services is crucial for the application of the graduated approach to regulation.¹⁴ Accordingly, VOD services are regulated more lightly whereas a tighter regime applies to television broadcasting. On top of the complexities of distinguishing linear from non-linear services, further difficulties emerge when delineating audiovisual media services from other kinds of services exempted from regulation, the boundaries of which are continually blurring.¹⁵ The preamble to the Directive clarifies that it does not apply to "any form of private correspondence", "games of chance (...), other forms of gambling (...) and search engines".¹⁶ It also exempts user generated content which is shared or exchanged "within communities of interest".¹⁷ Where "text-based services" (merely) accompany an audiovisual service, the Directive applies.¹⁸ However, recital 28 AVMSD indicates that "the scope of this Directive should not cover electronic versions of newspapers and magazines". Although the preamble to the AVMSD is, in principle, non-binding, it nevertheless serves as a valuable point of reference, particularly

for NRAs when implementing and applying the AVMSD “on the ground”.¹⁹

- 6 In several countries, recital 28 AVMSD has moved into the limelight of regulatory activities concerning VOD services.²⁰ The printed press increasingly offers its services online in order to meet competition from news blogs or other websites providing text-based material. The websites of newspapers or other magazines increasingly contain videos as a popular extra in addition to written articles which are their primary business. The pertinent question arising from this phenomenon is at what point a service offering mixed types of content should be subjected to the regulation applicable to VOD services. The question hinges on the criterion of principal purpose as prescribed by Art. 1 (1) (a) AVMSD. The regulators of Austria, Denmark, the Flemish Community of Belgium²¹, Slovakia²² and Sweden²³ have found that parts of websites of electronic versions of newspapers served the required purpose and were thus classified as stand-alone VOD services.²⁴ By contrast, websites of several British newspapers have been excluded as VOD services, although being the subject of intensive investigations by the competent regulatory agencies. Thus, the following section analyses in detail the decisions of the Austrian and British regulatory bodies in order to shed light on their assessment and motives.

II. Video section of online newspaper classified as VOD service in Austria

- 7 In September 2012, the Austrian regulator, the *Kommunikationsbehörde Austria* (KommAustria) qualified the video section of the regional newspaper “*Tiroler Tageszeitung*” (TT service) as an on-demand service, a determination which was upheld in December 2012 by the Austrian *Bundeskommunikationssenat* (Federal Communications Senate, BKS) which was the appeal instance for decisions issued by KommAustria at that time²⁵.²⁶ The website at issue (<http://www.tt.com>) contained the online version of the newspaper and its homepage brought the user to the news section by default. The content was arranged in sub-sections such as “Sports”, “Leisure”, “Video” or “Service” which were accessible via the main menu. In all categories, individual written items were accompanied by videos which served to complement the former. The video section was designed and branded in the same way as the website and also contained the same navigation tools. The videos were catalogued in chronological order and a separate section underneath presented the most popular videos. The whole catalogue was available via certain “categories”. The videos constituted editorial content, professionally made and typically lasted between 30 seconds and several minutes. Except for the title of the videos and a brief description of the most recent video, all material provided was audiovisual in character.
- 8 In its determination, KommAustria examined the cumulative criteria defining an audiovisual media service as stipulated by Sec. 2 No. 3 *Audiovisuelle Mediendienste-Gesetz* (AMD-G) which transposes Art. 1 (1) (a) AVMSD employing similar wording. More concretely, KommAustria enquired whether the service, if covered by the AMD-G, constituted an on-demand audiovisual media service in line with Sec. 2 No. 4 AMD-G which emulates Art. 1 (1) (g) AVMSD. If this were to be affirmed, the service provider would have been required to notify the service pursuant to Sec. 9 (1) AMD-G. The case centered around two criteria. First, KommAustria posited that the videos constituted programmes within the meaning of Sec. 2 No. 30 AMD-G which reflects Art. 1 (1) (b) AVMSD. It points out that the notion of programmes was not based on a minimum length.²⁷ Rather than prescribing a quantitative requirement, KommAustria referred to the comparability to the form and content of the contested service with such programmes ordinarily shown on TV. In line with recital 24 AVMSD, KommAustria argued that the videos featured on the TT service constituted self-contained items which targeted the same audience as television broadcasts and offered comparable content in comparable form.²⁸ Second, KommAustria investigated in the principal purpose of the video section. It found that this sub-section could be separated from the remainder of the service as it fulfilled an independent function and was not merely accessory to the text-based materials.²⁹ Hence, the video section was considered a user destination in its own right and was regarded by KommAustria as a stand-alone service. Interestingly, KommAustria responded to the provider’s submission that it primarily provided written content that a service provider could not evade the application of the AMD-G simply for that reason. Even if an insignificant part (in terms of quantity) of the overall offer encompassed audiovisual content, such could nonetheless be viewed as a separate audiovisual media service within the meaning of the AMD-G.³⁰ It was not decisive whether the audiovisual content was grouped in a sub-section of the website even if the domain used could be indicative of the independence of the service.³¹ In the appeal instance, the BKS confirmed the assessment undertaken by KommAustria in entirety. With regards to the comparability of the videos with programmes broadcast on TV, it emphasized that the videos covered concrete subject matters.³² Furthermore, the BKS qualified KommAustria’s position with respect to the principal purpose test. It stressed that the overall appearance of a service should be taken into account albeit excluding other services offered by the same provider.³³ In case of TT service, the video section did not, however, merely constitute a “side

effect”³⁴ but rather encompassed almost exclusively audiovisual content which was not of secondary or supplementary nature to the written content. The video section could thus have been consumed, used and offered independently of it being embedded in the TT service.³⁵ In sum, the Austrian regulatory bodies have asserted their authority over providers of websites of electronic versions of newspapers by classifying a sub-section of the entire offer as a non-linear service. They have thereby detailed two important criteria defining an audiovisual media service. Importantly, the case of TT service has reached the Court of Justice of the European Union (CJEU) which is asked to pronounce on two preliminary questions referred by the Austrian *Verwaltungsgerichtshof* (Administrative Court).³⁶ The questions concern firstly, the comparability with programmes broadcast on TV and secondly, whether a part of a service pertaining to an online newspaper can be insulated for the purposes of the AVMSD.³⁷

III. Detailed guidance on principal purpose by British regulator

- 9 Like the Austrian regulator, the British co-regulator³⁸, the Authority for Television On Demand (ATVOD)³⁹ has struggled with the legal evaluation of electronic versions of newspapers. In a series of cases which at first glance seem similar to the Austrian case discussed above, it determined that the video sections of several online versions of newspapers constituted on-demand services within the meaning of Sec. 368A Communications Act 2003 (CA 2003)⁴⁰ holding that the relevant providers had failed to notify their services.⁴¹ The first case decided on appeal by the Office for Communications (Ofcom) was “Sun Video”⁴² which constituted a landmark decision in which Ofcom gave detailed guidance on the interpretation of the principal purpose test^{43,44} Ofcom outlined eight (non-exhaustive and non-cumulative) characteristics from which it could be inferred that the principal purpose was indeed the provision of programmes within the meaning of Sec. 368A (1) (a) CA 2003. It was thus characteristic of an on-demand service to be provided on “its own homepage through which it is accessed” or on a sub-section where the audiovisual material is catalogued.⁴⁵ Furthermore, a service was considered of having the required purpose where the audiovisual content was “presented or styled (and marketed) as a television channel” or where there existed only a “limited number of access [or content] links between the relevant audiovisual material and other content”.⁴⁶ In addition, Ofcom suggested that the principal purpose implied that the audiovisual material was “of substantial duration and/or comprise[d] complete programmes rather than “bite-sized” clips or extracts from longer programmes” which could be “watched and understood fully on [their] own”.⁴⁷ Where a service comprises both audiovisual and written material, Ofcom suggested that the principal purpose test would be satisfied where “the balance of the material is more likely significantly to lean towards the audio visual” implying that the text-based part of the website is “brief and/or merely an introduction to, or summary of, the audio visual material” and is not the “primary means” of conveying information to the user.⁴⁸ Ofcom concluded on the basis of these characteristics that the video section of the website of the Sun did not constitute a non-linear service.⁴⁹ It criticized ATVOD for having focused on the video section while according insufficient attention to the “website as a whole”.⁵⁰ Still, Ofcom did not refuse the application of the rules concerning non-linear services to electronic versions of newspapers *per se*.⁵¹ An interesting case which could cross this threshold is currently pending before Ofcom. In a determination of August 2013, ATVOD considered that the video section of the Vice website (http://www.vice.com/en_uk) was a VOD service.⁵² The portal is comparable to an online version of a magazine. Its video section features the latest videos which are accompanied by an explanatory note as well as shows of over ten minutes in length. The website is also made available on YouTube where it appears to correspond largely to the video section. In contrast to its precedents, the case of Vice appears, to put it bluntly, ‘much more audiovisual’. Still, it remains to be seen whether Ofcom which so far has rejected all attempts of ATVOD to regulate sections of websites will follow ATVOD’s assessment.
- 10 When examined together, the practices of the Austrian and British regulatory bodies paint two opposing pictures regarding the classification of online newspapers as VOD services. Still, the reasons for the decisions and arguments brought forth by regulators are, to a certain extent, similar like the question whether the service constituted a stand-alone service and the rejection of the application of a purely quantitative approach to determining the primary character of a service. Nonetheless, certain differences can be identified with respect to the comparability of videos to programmes diffused on TV. While videos of relatively brief duration (maximum of several minutes) were considered TV-like in Austria, it appears as if such short videos would (taken by themselves) not be conclusive of a VOD service in the UK. Knowledge about such subtle but existing differences in practice of NRAs is crucial for service providers. Editors of newspapers who wish to make their offers available online will have to be aware of the consequences of the design and structure of their services. They will have to reckon with the potential involvement of the regulatory authorities for the media even if their activities would formally fall under press regulation.⁵³

- 11 If editor's chief objective is to provide an online version of their printed medium, they will have to devise their websites accordingly by making sure that video content is not excessive and truly embedded in text-based material. If they plan to group the audiovisual material in a separate video section, they will have to carefully consider whether notification of a VOD is necessary. The Austrian case currently pending before the CJEU might offer further indications in this respect. Regardless of the outcome of this case, should the application of the AVMSD or respectively the relevant national law be affirmed, operators will be obliged to abide by certain standards such as the prohibition of programmes containing incitement to hatred or the safeguarding of the protection of minors, a subject discussed below.

C. Protection of minors in VOD services

I. The standard according to the AVMSD

- 12 The protection of minors from unsuitable (e.g. offensive or sexually explicit) audiovisual content has been a constant policy concern which has been reflected in the Directive since its initial adoption in 1989. Art. 22 TwFD (now 27 AVMSD) was amended in 1997 and subsequently required broadcasters to identify programmes which were susceptible to having a damaging effect on children and adolescents and which were broadcast in unencoded form on free TV.⁵⁴ The extension of the scope of application of the Directive in 2007 was accompanied by the inclusion of a rule purporting to protect minors in on-demand audiovisual media services. Although Art. 12 AVMSD borrows from the wording of the provision protecting minors in broadcasts, the former is less restrictive than the latter illustrating the graduated approach to regulation. Thus, Art. 12 AVMSD prescribes that on-demand services 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 [them]". It follows that service providers are obliged to put in place the (technical) measures whereby access to seriously harmful material is denied to minors (typically under-18's, albeit depending on national context). In line with recital 60 AVMSD read in conjunction with the Recommendation of 2006 of the European Parliament and the Council⁵⁵, "personal identification numbers (PIN codes), filtering systems or labeling" could be employed to this effect. Art. 12 AVMSD lacks any indication as to the type of material covered by the rule. The vague formula of material which "might seriously impair" minors is nonetheless specified in Art. 27 AVMSD (applicable to television broadcasts) which could be consulted by analogy. Accordingly, programmes "that [among other] involve pornography or gratuitous violence" meet this test. In the absence of any clear correlation between Art. 12 and 27 (1) AVMSD, Member States remain entirely free to define the kind of content which is qualified as seriously detrimental to children.⁵⁶ The following section is devoted to the guidance and practice by the British regulatory bodies which seem to have assumed a pioneering role within the EU clamouring for the strengthening of the protection of minors on the Internet.

II. Application of the standard in the United Kingdom

- 13 In the United Kingdom, Art. 12 AVMSD is transposed by Sec. 368E (2) CA 2003. Sec. 368E (2) CA 2003 which reproduces *grosso modo* the text of the Directive but is more detailed by specifying the exact age (eighteen years) of persons addressed by the rule. Since the formulation contained in the national act transposing the Directive is equally imprecise, it falls to the NRAs to interpret its exact scale and scope. ATVOD as the competent co-regulator monitors the application and implementation of the statutory rules. In order to help the industry to conform to the requirements imposed on service providers, ATVOD has accumulated in its guidance the statutory rules which are supplemented by (non-binding) guidance on their meaning and enforcement.⁵⁷ Rule 11 sets out ATVOD's approach to the protection of minors. It highlights that ATVOD has pursued a precautionary approach which is backed by Government and Ofcom.⁵⁸ In spite of the lack of any conclusive evidence about the harm caused to minors by programmes containing sexually explicit material, ATVOD is satisfied that there is a sufficiently strong correlation justifying precautionary measures.⁵⁹ It follows that ATVOD has established a threshold of material it considers harmful.⁶⁰ This threshold is fixed by reference to the classification scheme of the British Board of Film Classification (BBFC), in particular its R18 category. The distribution of such works is restricted to "specifically licensed cinemas (...) and sex shops".⁶¹ According to ATVOD's Rule 11, this includes inter alia "highly sexualized portrayals of children", "pornographic content which is likely to encourage an interest in sexually abusive activity" (e.g. paedophilia, incest or non-consensual sex) or "involves an act which may cause lasting physical harm". In addition, any depiction of "sexual violence", "sadistic violence or torture" and "real injury, violence or death presented with insufficient contextual justification" is prone to being classified as harmful material.⁶² Briefly, the type of material covered by Rule 11 is summarized

bluntly as “hardcore pornography”.⁶³ Since such content is not completely banned, providers of non-linear services are obliged to limit access to persons of age. In this respect, ATVOD requires that an “effective Content Access Control System (“CAC System”)” is installed “which verifies that the user is aged 18 or over at the point of registration or access” of the service.⁶⁴ In practice, unsuitable content is concealed behind a “pay wall” which can be passed by payment methods which are restricted to persons of age (such as payment by credit card).⁶⁵ ATVOD considers permissible similar means which corroborate age on the basis of “an independent and reliable database, such as the electoral roll”.⁶⁶

14 Throughout the past years, ATVOD has proven a robust regulator by rigorously enforcing Rule 11. In fact, it seems to have prioritized the protection of minors in on-demand services, a subject which is repeatedly discussed in its policy documents.⁶⁷ The number of violations detected by ATVOD between 2012 and 2014 underlines this impression. Between 2012 and 2014, it has found 30 UK providers in violation of Rule 11 and thus Sec. 368E (2) CA 2003.⁶⁸ The effect of its determinations is declaratory. ATVOD may, in cases of grave and repeated infringements refer the matter to Ofcom for imposition of sanctions pursuant to Sec. 368I CA 2003.⁶⁹ In January 2013, Ofcom imposed a total fine of £100.000 on the service provider Playboy TV UK/Benelux Limited for two of its services.⁷⁰ ATVOD had previously determined that its services “Demand Adult” and “Playboy TV.co.uk” violated Rule 11 by failing to install an effective CAC system.⁷¹ The two websites displayed a warning about the offensive character of the content offered next to two links reading “Enter. I am over 18” and “Exit if you are under 18”. Following the links brought the user to the respective homepages. The “Demand Adult” website even contained free access to stills of pornographic nature while access to the full video catalogues of both services was opened only upon payment (either pay per view or full subscription). The payment services (“Pay Wizard” and “CCBill.com”) allowed for debit card payment and transfers via regular bank accounts and thus could be used by underage persons. Hence, ATVOD concluded that the measures designed to restrict access to under-18’s could be “easily penetrated by minors and therefore could not be regarded as being effective in securing that such persons will not normally see or hear the relevant material”.⁷² Ofcom, in its decision, sanctioned the provider for failing to take corrective action (after being made aware of its negligence by ATVOD) during a prolonged period of roughly seven weeks.⁷³ The service provider had instead informed ATVOD of its “intention to remove the service from UK jurisdiction”.⁷⁴

15 The question of whether the service provider was established in the UK for the purpose of Sec. 368A in conjunction with Sec. 368R (5) CA 2003 (and

implicitly the AVMSD) was treated separately. While ATVOD regarded Playboy TV UK/Benelux Limited to control editorial decisions (in other words, to have “editorial responsibility”, one of the cumulative criterion defining an audiovisual media service)⁷⁵, Ofcom, by contrast, consented that the provider had relocated to Montreal, Canada and therefore was no longer (as at September 2012) subject to UK jurisdiction as a “genuine reorganisation [had occurred] including redundancies in the UK and the taking on of responsibilities by staff in Montreal”.⁷⁶ Although Ofcom ruled on the matter, ATVOD remains discernibly distrustful of providers establishing abroad (outside the EU) in order to evade stricter legal requirements applicable in the UK (in the EU). Such “tube sites” offer free hardcore pornographic material as honey pots (or “shop window”)⁷⁷ in order to attract user’s attention which is subsequently redirected to complementary paid services necessitating subscription. Interestingly, such websites are very popular with British users⁷⁸ but they have been anathema to ATVOD which does not have jurisdiction over them for their lack of establishment in the UK.

III. Further initiatives by the British co-regulator

16 Against this backdrop, ATVOD published a research report which found evidence of “significant underage access from the UK to adult websites”.⁷⁹ For this reason, it recommended that first, the CA 2003 be amended to specify that material rated R18 would be characterized as impairing minors, second, the AVMSD be modified accordingly to establish a uniform standard across the Union and third, further legislation be devised to allow the UK payments industry to prevent cash flows from the UK to tube sites making available pornographic content to minors.⁸⁰ ATVOD’s suggestions, while proactive and innovative, also raise a number of concerns regardless of the validity of the underlying objective of the protection of minors. Any specification of the type of content which is considered seriously harmful to children would have to rely on solid and more profound scientific evidence than the statistics included in ATVOD’s report.⁸¹ The metaphor of a “slippery slope”⁸² could also be conjured up in this respect whereby the explicit prohibition of hardcore pornographic content is viewed as a first step leading to the banning of less extreme forms of sexually explicit material in the future. Such a development would seriously impact on the fundamental right of the freedom of expression. In a similar vein, a modification of Art. 12 AVMSD as desired by ATVOD seems doomed to failure in view of considerable discrepancies in cultural and social perceptions among Member States which are reflected in the different national classification systems and rating

schemes concerning programmes broadcast on TV. In addition, any amendment referring to “hardcore pornography” (or the like) would still be contingent upon interpretation by NRAs and ultimately national (or the European) judiciaries.

- 17 Furthermore, ATVOD’s lobbying for new legislation to attack the business model of “tube sites” by cutting off monetary flows from the UK seems disputable as it would implicitly extend ATVOD’s reach beyond UK borders. In fact, ATVOD would pass on the task of regulating the protection of minors to the private sector, in particular to commercial actors like Visa, MasterCard or PayPal. For the purpose of the prevention of payments, it is unclear whether providers of such systems would have to enquire about the nature of the content delivered to the user as they typically only process the financial transaction lacking knowledge about the actual product or service purchased. It is furthermore unclear at what point of the transaction access to the (pornographic) service would be blocked, at the time of the request for payment (when it is verified that the credit card holder has sufficient credit to purchase a product or service) or at the time of the actual payment (when the total amount owed is deducted from the account). Moreover, it is unclear whether any UK citizen would be denied access to such websites, even those of age, despite the material being legal (albeit rated as R18). Whether legislation will eventually be adopted in the UK and to what extent will have to be critically observed. The protection of minors as an indispensable public interest concern would nonetheless have to be balanced with fundamental rights, above all, the freedom of expression (entailing the right to receive pornographic information) as well as the right to privacy. In brief, ATVOD’s practice and policy documents discussed above underline its active role in promoting the protection of minors in on-demand services. In interpreting the (broadly formulated) statutory rules, it has developed a standard through its practice which seems sufficiently detailed for service providers to foresee prosecution by ATVOD. It has thereby strengthened its own position and standing in the industry. Still, the transformation of its standards into binding legislation would have to be accompanied by an increase in transparency of the underlying motives and objectives pursued as well as an analysis of the necessity and proportionality of the measures in order to minimize interference with the interests of stakeholders, in particular fundamental rights. The example chosen above is exemplary of many NRAs struggle to adapt national media legislation to the realities of the ubiquity of the Internet⁸³ where long-established standards (like the protection of minors) for traditional modes of transmission have come under pressure.⁸⁴

D. Promotion of European works in VOCCCD services

I. The standard set out in the AVMSD

- 18 As with the protection of minors, the promotion of the production and distribution of European works on television has been a policy concern which was integrated in the original TWFD of 1989. It required that broadcasters dedicate a certain share of their programmes to European works and support the programmes of independent producers by financial or editorial means.⁸⁵ Unlike the protection of minors, an objective seemingly approved of by all Member States, the aims and in particular the means whereby the cultural objectives of plurality and diversity of content have been advanced under the Directive have polarized countries. Not only is the definition of European works⁸⁶ broad and prone to favouring national language films or those produced nationally rather than stimulating the cross-border circulation of multi-national works⁸⁷, the wording of the Directive is ambivalent and rather soft.⁸⁸ When its scope of application was extended, the imprecise language of the provisions applicable to broadcasting (Art. 16 and 17 AVMSD) was replicated in the provision concerning VOD services (Art. 13 AVMSD). Thus, Art. 13 (1) AVMSD encourages providers of on-demand services to “promote, where practicable and by appropriate means, the production of and access to European works”. The phrase “where practicable and by appropriate means” stems from the quota rules for broadcasting and expresses a “political compromise”.⁸⁹ In order to gain a majority for the inclusion of the dispositions in the Directive, they were formulated in such a way as to give service providers, especially smaller and less solvent providers some leeway with regards to their fulfilment.
- 19 Furthermore, Art. 13 (1) AVMSD indicates that promotion may refer to “the financial contribution made [...] to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes”. Recital 69 AVMSD is only marginally more specific by pointing to the “attractive presentation of European works in electronic programme guides” as a form of support envisaged by Art. 13 AVMSD. Still, the rationale of the TWFD and its television quotas was extended to the online environment. This has been criticized as the user bears ultimate control over the content consumed and selects the programmes which cater to his or her tastes (regardless of the fact that a catalogue comprises a majority of European works).⁹⁰

20 Not surprisingly, the Commission found in its first report on the application of Articles 13, 16 and 17 AVMSD of September 2012 that in spite of the success of the well-established quotas the proportions of which has been outdone in many Member States, the transposition and above all enforcement of Art. 13 AVMSD in national legal orders have been restrained and are more problematic.⁹¹ The Commission also noted fundamental discrepancies in conditions and developments of the market for VOD services⁹². Policy makers and national regulators appear hesitant, pursuing a “wait and see”⁹³ approach in order not to stifle innovation of a nascent industry and allow providers to build attractive online offers appealing to large parts of the public. Still, some countries which have traditionally hoisted the “quota flag” for TV have fervently advocated for efficient enforcement of comparable rules for non-linear services. While a conventional approach is applied in France⁹⁴, an innovative solution focusing on enhancing “prominence” has been sought by the regulatory body of the French Community of Belgium.⁹⁵ In addition, the Dutch approach to monitoring shall serve as an example underlining the pragmatism necessary for the enforcement of this provision.

II. Quota rule for VOD services in France

21 Art. 13 AVMSD is transposed by Art. 12 of the French *Décret relatif aux services de médias audiovisuels à la demande* (VOD Decree 2010)⁹⁶ which stipulates that providers reserve 60 percent for European works and 40 percent for French works from the total number of programmes included in the catalogue.⁹⁷ Interestingly, French works are considered European works for the purpose of the quotas. If one were to deduct the support for French works (assuming that all providers meet the target for French works and do not go beyond the threshold set for European works) from the overall goals, the support for European works appears rather insignificant or at least weak in comparison to the protection afforded to the national film industry. Yet, the definition of European works set out in Art. 1 (1) (n) AVMSD does not require a cross-border element (like co-productions) but is deliberately open to accommodate national productions *stricto sensu*. Above all, Art. 13 VOD Decree 2010 specifies that service providers are to permanently present a substantial proportion of the quota on their homepage. To this effect, the Decree explicitly indicates that the mentioning of the title of the work on the home page is not sufficient. Instead, providers are expected to advertise the relevant works (by banner ads, for example) and display trailers or samples. This rule aims at preventing the burying of European and French works in sub-sections of the

website by enhancing their visibility on the primary destination of users, providers’ homepages.

22 In its report about the application of the Decree published in November 2013 drafted on the basis of consultations of stakeholders, the French regulatory authority, the *Conseil Supérieur de l’Audiovisuel* (CSA, hereinafter French CSA) identified difficulties providers encountered in the practical application of the quota rules. The responses by the French CSA are worthwhile with a view to the immediate application and enforcement of the rules in practice as well as potential amendments to the legislative framework.⁹⁸ Thus, the French CSA clarified that the quota applied on an annual basis allowing providers to derogate (even if minimally) from the strict proportions and front page presentations.⁹⁹ Above all, the French CSA acknowledged the restrictiveness of Art. 13 VOD Decree exclusively focusing on the homepage of providers which, in fact, constitutes only one access point for users. Hence, it proposed the recognition of separate sections or buttons dedicated to European and French works, search tools by origin of productions and promotional activities of providers.¹⁰⁰ The Commission, in its staff working document accompanying the report on the application of Art. 13, 16 and 17 AVMSD also referred to these criteria when enumerating “performance indicators” which Member States could take into account when interpreting and specifying the obligations for providers pursuant to Art. 13 AVMSD.¹⁰¹ Interestingly, the French CSA highlighted the increasing significance of recommendation tools. On the basis of personal data, an algorithm is programmed which recommends audiovisual productions to individual users according to their personal preferences and interests and/or previous behaviour and consumption patterns. The French CSA thus advocated their use for the purpose of promoting European and French works in case of websites offering the possibility to personalize the homepage.¹⁰² Yet, French providers seemed little enthused about the integration of a ‘European or French factor’ into their algorithms arguing that the biasing of the algorithm/software would infringe on their editorial freedom and the neutrality of the recommendation tool.¹⁰³ Such instruments also raise more general questions about the collection of personal data and their use and any tracking of user behaviour should be made transparent (by asking the user to consent). The fact that the French CSA proposed to restrain the ‘European and French recommendation tools’ to personalized homepages (and negated them for standardized homepages) which are in any case based on user’s data (voluntarily or so it is assumed) given to the provider, does not solve the data protection issue. Finally, the French CSA rejected the introduction of exemptions for “non-generalist” services.¹⁰⁴ Arguing that a general exception would undermine the quota scheme, the French CSA nonetheless conceded that a VOD could

target only a segment of the public and could cater specifically to that segment. It agreed to propose a relaxation of the quota obligations in compensation for provider's commitment to offer additional services to the European and French works diffused such as the sub-titling or funding for the promotion and their production or the participation in events and shows.¹⁰⁵ Such derogations would presumably have to be negotiated on case-by-case basis. The French CSA's outright refusal to recommend to the French government the formulation of an exception clause to Art. 12 VOD Decree demonstrates the high value the quota rules have had in France and the regulator, as the guardian of the rules, is unwilling to sacrifice them in view of less generalist service providers. This picture is confirmed when globally assessing the legislative and executive framework in France. The VOD Decree has extended the well-established scheme for broadcasting to VOD services. Some reflections about the nature of non-linear services are nonetheless expressed in Art. 13 VOD Decree which are, however, limited to the homepages of providers. In order to guarantee the application of the rules in practice, the French regulator made some compromises in its report allowing for other ways and "places" (like sub-pages) to promote European and French works and exceptions to the quota obligations to be negotiated on individual basis.

III. Prominence as the decisive criterion in the French Community of Belgium

23 In contrast to the rather rigid legal order in France, the regulatory authority of the French Community of Belgium, the *Conseil Supérieur de l'Audiovisuel* (CSA, hereinafter Belgian CSA)¹⁰⁶ has actively shaped the interpretation of the disposition contained in the *Decret coordonné sur les Services de Médias Audiovisuels* (hereinafter AVMS Decree) allowing for a flexible and innovative approach. In the French Community, Art. 13 AVMSD is transposed by Art. 46 AVMS Decree. Art. 46 AVMS Decree is more specific than the Directive by indicating that the list of European and Belgian (produced in the French Community of Belgium) works included in the catalogues should be attractively presented. The French Community thus used the leeway accorded by the Directive selecting "prominence" as the primary means of promotion while refraining from establishing a quota scheme or soliciting investments from VOD providers. The proposal of the AVMS Decree of January 2009 strongly criticized the transfer of the quota regime from linear to non-linear services for its devastating effect on the development of new services and innovative business models.¹⁰⁷ Instead, it advocated for all kinds of promotional techniques including advertisements

screened on provider's homepages or during TV commercials, the creation of special categories and the reference to such works in magazines, feature articles or communications send to its users.¹⁰⁸ Against this background, the Belgian CSA published a recommendation in June 2010 on the interpretation of Art. 46 AVMS Decree going beyond what was provided in the preparatory documents of the AVMS Decree.¹⁰⁹ Hence, the regulator emphasized that the provider can influence the conditions of access to European and Belgian works by the interface of the website. Thus, access by buttons entitled "European films" or "films of the French Community" facilitates according to the Belgian CSA the visibility of such works. In this respect, the regulator pointed out that the works should be included in multiple categories to allow users to find them coincidentally and avoid collating such programmes in one place of the website.¹¹⁰ Thus, a substantial amount of these works should be presented in categories like "new releases", "last chance", "great classics" or "favourites" which frequently guide users through the vast amount of content available.¹¹¹ In addition, the Belgian CSA proposed to include the works in categories for which discounts were offered as long as the films were not devalued.¹¹² With respect to provider's advertising activities, the Belgian CSA suggested to refer to European or Belgian works, events, production teams or actors in all commercial communications available including magazines, special editions or channels or programmes devoted to self-promotion.¹¹³

24 These guidelines¹¹⁴ are very detailed and set out precise requirements for providers. The structuring of the catalogue in parallel to other promotional activities advocated by the CSA in its recommendation appear reasonable for their low level of intrusiveness with provider's editorial freedom.¹¹⁵ In addition, the costs of promotion remain bearable even if such measures are not entirely gratuitous as providers might find themselves investing in advertising spots for European works which they would otherwise not have promoted. In similar vein, the promotion of European or Belgian works "is not detrimental to viewer numbers"¹¹⁶ but instead enhances the attractiveness of the overall offer. Since catalogues may comprise an infinite number of programmes (figuratively speaking), providers do not have to make any trade-offs like broadcasters would have to do when determining the slot when a programme is scheduled for transmission. In 2011 and 2012, the Belgian CSA conducted three evaluations of the implementation of its recommendation thereby maintaining close contact with the providers established in the French Community (Belgacom, VOO and Universciné).¹¹⁷ It found in its opinion of June 2012 that the interface of the websites was not necessarily controlled by providers, some of which relied on recommendation tools based on pre-determined algorithms or other mechanisms like

alphabetical listings of programmes.¹¹⁸ The Belgian CSA underlined the importance of recommendation tools without, however going so far as the French CSA in demanding that the systems should account for European or national works.¹¹⁹ It concluded that European and Belgian works were accessed from video platforms to an “acceptable” proportion.¹²⁰ Yet, the Belgian CSA seemed to struggle with the establishment of a firm causal link between the measures taken to increase visibility and the consumption of the promoted works inferring that further qualitative studies were necessary to that effect.¹²¹

IV. Reporting form as guidance in the Netherlands

25 Finally, the supervision of Art. 13 AVMSD as implemented in national legal orders encompasses a reporting obligation pursuant to Art. 13 (2) AVMSD. In order to monitor the progress and effectiveness of the rules, Member States are to provide reports to the Commission which in turn allows the latter to assess the EU-wide application of Art. 13 AVMSD in line with its third paragraph. The Directive does not lay down concrete reporting methods and thus leaves Member States a margin of discretion as long as the general aim is abided by. The Commission in its first report on the application of Art. 13, 16 and 17 AVMSD stressed that “effective monitoring” was crucial for the success of the rules and called on Member States to establish monitoring systems which verified providers’ reports.¹²² The question is how to construct an effective reporting mechanism as the systematic and permanent oversight of provider’s catalogues is virtually impossible and unnecessary for the implementation of the provisions contained in the Directive. From the perspective of service providers, burdensome and costly collections of data and their quantification and evaluation could be a factor influencing business decisions and could, potentially, deter providers from locating in a specific country. It seems that a relationship of trust which facilitates cooperation is beneficial for the cultural objective sought here. The reporting method selected by a Member State (or its regulatory body) may equally reflect market conditions like the number of VOD providers subject to its regulatory remit and the precise tools employed for ensuring compliance with Art. 13 (1) AVMSD.¹²³

26 In this respect, the Dutch regulator, the *Commissariaat voor de Media* (CvdM) devised a form at the beginning of 2013 (CvdM reporting form). The CvdM reporting form includes instructions to service providers specifying the obligations imposed by Art. 3.29 *Mediawet* 2008 (Media Act)¹²⁴ which corresponds to Art. 13 (1) AVMSD almost to the letter.¹²⁵ Accordingly, service providers pick a representative day and

report on the amount of European works as well as the investments (such as production or licensing costs) made in such programmes.¹²⁶ Above all, a third section of the reporting form is devoted to the “findability”¹²⁷ of European works asking whether the user can search for European works (whether the origin of productions is indicated), whether tools have been developed which recommend relevant works, whether a specific section devoted to European productions has been created or whether any other instruments are used to reinforce the visibility of and access to European works.¹²⁸ These indicators are broadly reminiscent of those set out in the Recommendation of the Belgian CSA and are considered to be “easy to apply in practice and likely to provide good insight in the actual performance of media service providers”.¹²⁹ The drafting of a reporting form by the CvdM appears to be a pragmatic solution which results in a higher degree of uniformity of responses by service providers and thus facilitates the comparability of the data provided. It avoids “high administrative burdens or time-consuming exercises”¹³⁰ for both parties, the service providers as well as NRAs. To this end, the reporting form seems to constitute a useful and proportionate method. In order to meet the Commission’s request for verification, providers could supply screen shots of their catalogue or disclose parts of their finances as far as confidentiality is guaranteed. Still, rigid reporting regimes appear problematic where the effectiveness of promotional measures is questionable and the market is volatile and evolving. In sum, the discussion above demonstrates how the NRAs of France, Belgium and the Netherlands have impacted on the implementation of Art. 13 AVMSD, each at different ‘stages’: while the French CSA clarified certain aspects of the detailed legislative framework in a report on the application of the legislative instrument, the Belgian CSA issued specific guidance on the wide notion of prominence and the Dutch CvdM outlined indicators in its reporting form for providers. They thus helped to form the national legal frameworks and enhance legal certainty for providers.

E. Conclusion

27 This paper sheds light on the implementation of certain aspects of the AVMSD by NRAs. It focuses on the rules concerning non-linear services, application of which currently represents the most challenging issues in a rapidly transforming and converging media landscape. As recital 69 AVMSD emphasizes “on-demand audiovisual media services have the potential to partially replace television broadcasting”. The market for VOD is evolving dynamically offering novel ways of communication and distribution of information.¹³¹ To this end, VOD

services bear not only huge economic potential but are also beneficial to cultural and social goals thereby bolstering the freedom of expression and the right to receive information, a fundamental right which stands in the centre of media law. The analysis of the AVMSD as implemented by NRAs, in spite of its many technicalities and particularities, constitutes an important factor which should be integrated more forcefully in the discussions about the future regulatory framework for audiovisual media as it pinpoints the weaknesses of the Directive and suggests possible ways forward. It is clear that national solutions may not be transferable to the European level in copy/paste style and would require the support by a majority of Member States implying similar perspectives and perceptions about a certain aspect.

28 Yet, divergences of regulatory practice exist. These may be attributed to, among others, the vagueness of the provisions set out in the AVMSD. To some extent, Directives are characterized by the construction of broad concepts which may be flexibly applied in all Member States. As instruments of Secondary Union law, they lay down the rules of the game (by establishing minimum standards for instance) while Member States fill out the details. It is, however, little constructive if the players of the game do not know whether they play football or hockey. In other words, the scope of a Directive should be based on solid footing. The first section of this paper demonstrates that the application of the AVMSD has become instable in light of converging media such as the printed press and the audiovisual industry. Several NRAs found that the national media laws (and thus implicitly the AVMSD) applied to a specific section of online versions of newspapers. Recital 28 AVMSD which uncompromisingly exempts online newspapers from the scope of the Directive will have to be revisited if the AVMSD is opened for revision. In the second section this paper draws attention to the implementation of the rule concerning the protection of minors in VOD services. NRAs are confronted with business models geared to selling sexualized content which if a certain threshold is passed is classified by NRAs as harmful to minors. This section raises not only questions as to the kind of content considered unsuitable but also wider questions of jurisdiction and how this concept should be construed to account for a globalized society and the Internet age.¹³² Due to the imprecise language of the provision set out in the AVMSD, NRAs enjoy a considerable margin of discretion provided that the national legislature has refrained from specifying the law. The same holds true for the implementation of the rule purporting to promote European works in non-linear services as examined in the third section of this paper. It indicates that the rationale and logic underlying the quota regime for TV broadcasting has necessitated an adaption with regards to VOD services. The examples referred to above reveal

just a glimpse of the diverse activities of the NRAs of EU Member States. They hint at the importance of certain standards (like the protection of minors or the support for European works) for certain Member States and thus supposedly reflect the attitudes and public opinions of their peoples.

29 Today, the phenomenon of Connected TV merging previously separate media which are differently regulated constitutes a major challenge which will have to be tackled in the future. This topic is multi-faceted and not restricted to the AVMSD as the only relevant legal instrument. Indeed, it affects standards like consumer protection (such as the protection of minors) or cultural values (like the promotion of European works) set out in the AVMSD but it is also linked to data protection (confer behavioural advertising and profiling) and telecommunications law (confer infrastructure and interoperability). It has become evident that the current tiers of rules prescribed by the AVMSD are insufficient to deal with converging services. As a response to market developments, NRAs which operate under the present legal framework have shaped the audiovisual sector by regulation rather than waiting for new legislation which would be accompanied by lengthy negotiations at European level. They have thus ensured legal certainty and contributed to the flowering of audiovisual media services within the European Union.

* The author is a PhD student at the Faculty of Law, Economics and Finance of the University of Luxembourg. She has worked on a research project supervised by Associate Prof. Dr. Mark D. Cole examining the national legal acts adopted to transpose the AVMSD into national legal orders; see www.medialaw.lu. The author would like to express her gratitude to Dr. Tarlach McGonagle, Institute for Information Law (IViR) of the University of Amsterdam, and to her colleagues Dr. Lawrence Siry and Bernd Justin Jütte of the University of Luxembourg for their valuable assistance in drafting this paper.

- 1 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ of 17 October 1989, L 298, p. 23 as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJ of 30 July 1997, L 202, p. 60.
- 2 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 activities (Text with EEA relevance), OJ of 18 December 2007, L 332, p. 27 as codified by Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, OJ of 15 April 2010, L 95, p. 1; See also Corrigendum to Directive 2010/13/EU, OJ of 6 October 2010, L 263, p. 15. All references

- to provisions and recitals in this paper are made according to the numbering of the codified version of the Directive of 2010.
- 3 See for instance the Minutes of the 35th Meeting of the Contact Committee established by the Audiovisual Media Services Directive, Doc CC AVMSD(2011)6, 23 November 2011.
 - 4 European Commission, “Green Paper, Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”, COM(2013) 231 final, Brussels, 24 April 2013, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF> (accessed 18 July 2014).
 - 5 European Commission, Commission Decision of 3.2.2014 on Establishing the European Regulators Group for Audiovisual Media Services, C(2014) 462 final, 3 February 2014.
 - 6 *Ibid.*, Art. 2 (c).
 - 7 In 1997, shortly after the first revision of the TwFD, the Commission proposed a horizontal approach to all kinds of services to react to the phenomenon of convergence; See European Commission, “Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation, Towards an information society approach”, COM(97)623, Brussels, 3 December 1997.
 - 8 Recital 24 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (hereinafter referred to as ‘AVMSD’) (Text with EEA relevance) OJ L 95, 15.4.2010, p. 1–24.
 - 9 See generally on the scope of application of the AVMSD: Cole, Mark, D., “The European Legal Framework for on-Demand Services: What Directive for Which Services?”, in *The Regulation of on-Demand Audiovisual Services: Chaos or Coherence?*, ed. Nikoltchev, Susanne, IRIS Special (Strasbourg: European Audiovisual Observatory, 2011), pp. 35–45; Blázquez Cabrera, Francisco, “On-Demand Services: Made in the Likeness of TV?”, in *What Is an on-Demand Service?*, ed. Nikoltchev, Susanne, IRIS Plus 4/2013 (Strasbourg: European Audiovisual Observatory, 2013), pp. 7–27; Schulz, Wolfgang, “Medienkonvergenz Light - Zur Neuen Europäischen Richtlinie Über Audiovisuelle Mediendienste”, *Europäische Zeitschrift für Wirtschaftsrecht*, 2008, pp. 107–111; Valcke, Peggy, Stevens, David, Werkers, Evi and Lievens, Eva., “Audiovisual Media Services in the EU, Next Generation Approach or Old Wine in New Barrels?”, *Communications & Strategies* 7, no. 3 (2008): pp. 103–118; Van Eijk, Nico, “Scope of Application of the Modernised Directive”, in *Regulating the New Media Landscape. A Directive for Audiovisual Media Services without Frontiers*, Schriftenreihe des Instituts für Europäisches Medienrecht (EMR) 36 (Baden-Baden: Nomos, 2008), pp. 21–24.
 - 10 The criterion of editorial responsibility defined in Art. 1 (1) (c) AVMSD is similarly ambivalently worded. This uncertainty may have repercussions on the territorial scope of application of the Directive; See Craufurd Smith, Rachel, “Determining Regulatory Competence for Audiovisual Media Services in the European Union”, *Journal of Media Law*, 2011, 3, 2, p. 265–270.
 - 11 See also recitals 21–29 AVMSD which specify certain concepts and give indications on the scope of the Directive.
 - 12 Art. 1 (1) (g) AVMSD.
 - 13 Art. 1 (1) (e) AVMSD.
 - 14 See generally on the graduated approach to regulation Valcke, Peggy and Stevens, David, “Graduated Regulation of ‘Regulatable’ Content and the European Audiovisual Media Services Directive, One Small Step for the Industry and One Giant Leap for the Legislator?”, *Telematics and Informatics* 24 (2007): pp. 285–302.
 - 15 Valcke, Peggy and Ausloos, Jef, “What If Television Becomes Just an App?” Re-Conceptualising the Legal Notion of Audiovisual Media Service in the Light of Media Convergence”, *ICRI Research Paper* 17, 20 December 2013, p. 6.
 - 16 Recital 22 AVMSD.
 - 17 Recital 21 AVMSD.
 - 18 Recital 23 AVMSD.
 - 19 The Court of Justice of the European Union also frequently turns to the recitals of the AVMSD to deduce the intention of the Union legislature and clarify particular issues. On the notion of surreptitious advertising; See Case C-52/10 Eleftheri tileorasi AE «ALTER CHANNEL» and Konstantinos Giannikos v Ypourgos Typou kai Meson Mazikis Enimerosis and Ethniko Symvoulío Radiotileorasis, 9 June 2011, E.C.R. 2011, I-04973, paras. 25, 26. On the interpretation of the right to short news reports as stipulated in Art. 15 AVMSD; See Case C-283/11 Sky Österreich GmbH v Österreichischer Rundfunk, 22 January 2013, n.y.r., paras. 51, 62.
 - 20 See also Blázquez Cabrera, Francisco, “On-Demand Services: Made in the Likeness of TV?”, 2013, *op.cit.*, pp. 20–22.
 - 21 De Bueger, Geneviève, “Supervising On-demand Audiovisual Media Services: Best practices and Methodology”, Comparative Background Document, 38th EPRA Meeting (EPRA, 2013), p. 6.
 - 22 Polak, Juraj, “Tvsm considered on-demand audiovisual media service”, *IRIS Merlin Newsletter* 9, 2012, p. 38, available at <http://merlin.obs.coe.int/iris/2012/9/article38.en.html> (accessed 26 June 2014).
 - 23 The Swedish Broadcasting Commission issued four individual decisions in October 2012; See Granskningsnämnden för radio och tvs beslut i Dnr 12/00777-00780 av den 29 oktober 2012, available at <http://www.radioochtv.se/CaseDecisions/206404.pdf>, <http://www.radioochtv.se/CaseDecisions/206405.pdf>, <http://www.radioochtv.se/CaseDecisions/206406.pdf> (accessed 26 June 2014); See also Ullberg, Erik and Plogell, Michael, “Radio and Televisions Act applies to newspapers’ Web TV services”, *IRIS Merlin Newsletter* 1, 2013, p. 35, available at <http://merlin.obs.coe.int/iris/2013/1/article35.en.html> (accessed 26 June 2014).
 - 24 Machet, Emmanuelle, “New Media & Regulation: Towards a Paradigm Shift? New Services and Scope: ‘What’s In, What’s out Revisted’”, Comparative Background Document, 35th EPRA Meeting (EPRA, 2012), pp. 14, 15, 17; Valcke, Peggy and Ausloos, Jef, “What If Television Becomes Just an App?” Re-Conceptualising the Legal Notion of Audiovisual Media Service in the Light of Media Convergence”, 2013, *op.cit.*, para. 2.4.1, p. 13.
 - 25 Since 31st December 2013, the BKS no longer acts as the appeal instance for decisions of the KommAustria (as foreseen in Sec. 36 (2) KommAustria Gesetz (KommAustria Law). This function has been transferred to the Bundesverwaltungsgericht (Federal Administrative Court) by an amendment adopted in May 2013 which modified Sec. 36 KommAustria Law.
 - 26 Kommunikationsbehörde Austria, Bescheid, KOA 1.950/12-048, Vienna, 9 October 2012, available at https://www.rtr.at/de/m/KOA195012048/KOA_1.950-12-048.pdf (accessed 26 June 2014). Bundeskommunikationssenat, Bescheid GZ. 611.191/0005-BKS/2012, Vienna, 13 December 2012, available at <http://www.bundeskanzleramt.at/DocView.axd?CobId=49930> (accessed 26 June 2014); See also Matzneller, Peter, “Video section of newspaper website is notifiable on-demand service”, *IRIS Merlin Newsletter* 3, 2013, p. 9, available at <http://merlin.obs.coe.int/iris/2013/3/article9.en.html> (accessed 25 June 2014).
 - 27 Kommunikationsbehörde Austria, Bescheid, KOA 1.950/12-048, *op.cit.*, para. 4.4.1, p. 10.
 - 28 *Ibid.*
 - 29 *Ibid.*, para. 4.4.2, p. 11.
 - 30 *Ibid.*
 - 31 *Ibid.*

- 32 Bundeskommunikationssenat, Bescheid GZ. 611.191/0005-BKS/2012, Vienna, 13 December 2012, para. 8, p. 4.
- 33 *Ibid.*, paras. 9, 10, p. 5, 6.
- 34 *Ibid.*, para. 10, p. 5.
- 35 *Ibid.*
- 36 See pending case C-347/14 New Media Online.
- 37 See the order of the Austrian Administrative Court of 26.06.2014, available at https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vwgh&Dokumentnummer=JWT_2013030012_20140626X00.
- 38 In March 2010, the Office for Communications (Ofcom), as the UK's independent regulator for the communications industry designated ATVOD, previously a self-regulatory body, as the competent co-regulator in charge of the regulation of certain aspects of the provision of on-demand audiovisual media services; See the original designation of March 2010: Ofcom, "Designation pursuant to Section 368B of the Communications Act 2003 of Functions to the Association for Television On-Demand in Relation to the Regulation of On-Demand Programme Services", 2010, <http://atvod.co.uk/uploads/files/designation1803101.pdf> (accessed 25 June 2014); See the amended designation of September 2012 Ofcom, "The Amended Designation Dated 14 September 2012, Designation pursuant to Section 368B of the Communications Act 2003 of Functions to the Association for Television On-Demand in Relation to the Regulation of on-Demand Programme Services", 2012, <http://atvod.co.uk/uploads/files/amended-designation140912.pdf> (accessed 25 June 2014).
- 39 For a concise overview of ATVOD's regulatory tasks see Mac Sithigh, Daithi, "Convergence, The Impact of Broadcast Regulation on Telecommunications", in *Telecommunications Law and Regulation*, ed. Walden, Ian, fourth edition, (Oxford: Oxford University Press), 2012, paras. 14.5 et seq., pp. 680–687.
- 40 In the UK, the AVMSD was primarily transposed by means of the Audiovisual Media Services Regulation of 2009 which inserted, among others, Sec. 368A CA 2003 in the CA 2003. For an overview of the legal acts adopted to transpose the AVMSD in the UK; See http://www.en.uni.lu/recherche/fdef/droit_des_medias/audiovisual_media_services_directive/national_execution_measures/united_kingdom (accessed 25 June 2014).
- 41 ATVOD Notice of Determination that the provider of the service "Sun Video" has contravened Section 368BA of the Communications Act 2003, 11 February 2011; Notice of Determination that the provider of the service "News of the World Video" has contravened Section 368BA of the Communications Act 2003, 11 February 2011; Notice of Determination that the provider of the service "Sunday Times Video Library" has contravened Section 368BA of the Communications Act 2003, 11 February 2011; Notice of Determination that the provider of the service "Guardian Video" has contravened Section 368BA of the Communications Act 2003, 28 June 2011; Notice of Determination that the provider of the service "Financial Times Video" has contravened Section 368BA of the Communications Act 2003, 30.6.2011. ATVOD's determinations are available at <http://www.atvod.co.uk/complaints/determinations/2011-determinations> (accessed 25 June 2014).
- 42 Ofcom, "Appeal by News Group Newspaper Limited against a notice of determination by ATVOD that the provider of the service "Sun Video" has contravened Section 368BA of the Communications Act 2003", 21 December 2011; See http://www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf (accessed 25 June 2014).
- 43 The Ofcom guidance was subsequently "codified" in ATVOD's guidance on "Who needs to notify" as updated in February 2014, paras. 3.10-3.13, pp. 9, 10; See http://www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed_4.0_Feb_2014.pdf (accessed 25 June 2014).
- 44 Lowde, Shaun and Wells, Orlando, "ATVOD Determined to Do Better", *Computer and Telecommunications Law Review* 18, no. 4 (2012), pp. 102–104; Metzdorf, Jenny, "Regulierung der Elektronischen Presse in Großbritannien? Ein Anwendungsbeispiel zum Erwägungsgrund 28 der AVMD-RL", in *IT Und Internet - Mit Recht Gestalten*, ed. Taeger, Jürgen, Tagungsband Herbstakademie 2012 (Oldenburg: Oldenburger Verlag für Wirtschaft, Informatik und Recht, 2012), pp. 497–516; Pimlott, Nick and Lewis, David, "Regulation of Video on Demand Services Following the 'Sun Video' Appeal", *Entertainment Law Review* 23, no. 3 (2012), pp. 65–68; Valcke, Peggy and Ausloos, Jef, "What If Television Becomes Just an App? Re-Conceptualising the Legal Notion of Audiovisual Media Service in the Light of Media Convergence", 2013, *op.cit.*, para. 2.4.2, p. 15.
- 45 Ofcom, Appeal by News Group Newspaper Limited against a notice of determination by ATVOD, 21 December 2011, paras. 90 a., b., p. 27.
- 46 *Ibid.*, paras. 90 c., e., f. p. 28.
- 47 *Ibid.*, para. 90 d., p. 28.
- 48 *Ibid.*, para. 90 g., pp. 28, 29.
- 49 In general, Ofcom may (i) uphold ATVOD's determination, (ii) quash ATVOD's determination and remit it back for reconsideration or (iii) substitute its decision for ATVOD's assessment. Proof of the importance of the case Sun Video is reinforced by Ofcom's substituting its decision for that of ATVOD's.
- 50 Ofcom, Appeal by News Group Newspaper Limited against a notice of determination by ATVOD, 21 December 2011, paras. 91, 96, 97, pp. 29, 30.
- 51 *Ibid.*, para. 186, para. 47.
- 52 ATVOD, Summary of determination that the provider of "Vice (Video)" is in breach of ATVOD's Rules 1 & 4 and thereby has contravened Section 368BA and Section 368D (3) (ZA) of the Communications Act 2003, 14 August 2013.
- 53 See on the increasingly "complex [national] regulatory landscape[s]", Craufurd Smith, Rachael, "Determining Regulatory Competence for Audiovisual Media Services in the European Union", 2011, *op.cit.*, p. 284.
- 54 The specific provisions of Art. 12 and 27 AVMSD are supplemented by other rules protecting minors in view of advertising and commercial communications. Above all, Art. 9 (1) (g) AVMSD requires that commercial messages do not harm minors and do not directly exhort minors to buy the products and services advertised; See also Art. 10 (1) (b) AVMSD, Art. 11 (1) (3) (b) AVMSD, Art. 22 (a) AVMSD.
- 55 Recommendation 2006/952/EC 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 industry, OJ of 27 December 2006, L 378, p. 72, paras. II 1, 2.
- 56 Harrison, Jackie and Woods, Lorna, "European Broadcasting Law and Policy", *Cambridge University Press*, Cambridge 2007, pp. 235, 236; Lievens, Eva, "Protecting Children in the Digital Era, The Use of Alternative Regulatory Instruments", *Martinus Nijhoff Publishers*, Leiden, 2010, p.44-47, 350.
- 57 ATVOD, "Rules & Guidance, Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS)", Edition 2.1, 26 February 2014, http://atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.1_February_2014.pdf (accessed 25 June 2014).
- 58 Ofcom, "Sexually Explicit Material and Video On Demand Services, A Report to DCMS by Ofcom", 4 August 2011, <http://stakeholders.ofcom.org.uk/binaries/internet/>

- explicit-material-vod.pdf (accessed 25 June 2014); See also Government's response in form of a letter from Ed Vaizey, Department for Culture, Media and Sport to Ed Richards of 3 August 2011, available at <http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/publications/EVletter-to-ed-richards-3aug2011pdf.pdf> (accessed 25 June 2014).
- 59 In several policy documents, ATVOD outlined its precautionary approach: ATVOD, "House of Lords Select Committee on Communications, Media Convergence and Its Public Policy Impact, The Submissions of the Authority for Television On Demand", 20 September 2012, p. 6, http://www.atvod.co.uk/uploads/files/Media_Convergence_call_for_evidence_ATVOD_submission_FINAL.pdf (accessed 26 June 2014); ATVOD, "The Culture, Media & Sports Inquiry into Online Safety, Submission from the Authority for Television On Demand", 3 October, 2013, paras. 2.2, 2.3, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcmuems/729/729vw64.htm> (accessed 26 June 2014); ATVOD, "For Adults Only? Underage Access to Online Porn", 28 March 2014, pp. 7, 9.
- 60 This threshold is without prejudice to the material which is considered illegal under Sec. 1 of the Obscene Publications Act (OPA) of 1959 & 1964 and is thus prohibited under Sec. 2 OPA unless justified by the "defense of public good" laid down in Sec. 4 OPA.
- 61 BBFC, "BBFC Guidelines, Age Ratings You Trust", 2014, http://bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202014_0.pdf (accessed 26 June 2014).
- 62 ATVOD, "Rules & Guidance, Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services" (ODPS), Edition 2.1, *op.cit.*, Rule 11, pp. 12, 13.
- 63 ATVOD, "For Adults Only? Underage Access to Online Porn", p. 9; See also ATVOD, "UKCCIS Parental Controls Consultation, The Submission of the Authority for Television On Demand", 18 September 2012, pp. 6, 7, http://www.atvod.co.uk/uploads/files/Parental_controls_consultation_-_ATVOD_response_FINAL.pdf (accessed 26 June 2014).
- 64 ATVOD, "Rules & Guidance, Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services" (ODPS), Edition 2.1, *op.cit.*, Rule 11, p. 13.
- 65 In similar vein, the German Federal Supreme Court (*Bundesgerichtshof*) ruled in September 2007 that an age verification system based on the number included in the identity card (*Personalausweis*) or passport in addition to the indication of the postal code of the city where the document was issued did not constitute an "effective barrier" in order to guarantee that underage persons could not access the content; See BGH vom 18.9.2007 – I ZR 102/05 – ueber18.de – OLG Düsseldorf, *Zeitschrift für Urheber- und Medienrecht* 2008, pp. 511-516.
- 66 ATVOD, "Rules & Guidance, Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services" (ODPS), Edition 2.1, *op.cit.*, Rule 11, p. 13.
- 67 With regards to the protection of children from inappropriate content, several UK regulators across different media launched the initiative ParentPort in 2011. It aims at facilitating the detection of inappropriate content and education of parents; See <http://www.parentport.org.uk/> for more information (accessed 26 June 2014).
- 68 ATVOD, For Adults Only? Underage Access to Online Porn, p. 9.
- 69 See also Ofcom, "Procedures for the Consideration of Statutory Sanctions Arising in the Context of On-Demand Programme Services", 1 October 2013, <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/sanctions-procedures.pdf> (accessed 26 June 2014).
- 70 Ofcom, "Sanction: Decision by Ofcom Imposed on Playboy TV/Benelux Limited for the provision of the on-demand programme service "Demand Adult" from 31 May 2012 to 24 July 2012", 83(12), 16 January 2013; Ofcom, "Sanction: Decision by Ofcom Imposed on Playboy TV/Benelux Limited for the provision of the on-demand programme service "Playboy tv.co.uk" from 31 May 2012 to 24 July 2012", 84(12), 16 January 2013. For all determinations of ATVOD and subsequent appeals to Ofcom discussed below; See ATVOD's website <http://www.atvod.co.uk/complaints/determinations> (accessed 26 June 2014).
- 71 ATVOD, "Determination that the provider of the on demand programme service "playboytv.co.uk" was in breach of rule 11", 2 July 2012; ATVOD, "Determination that the provider of the on demand programme service "Demand Adult" was in breach of rule 11", 2 July 2012.
- 72 ATVOD, "Determination that the provider of the on demand programme service "playboytv.co.uk" was in breach of rule 11", 2 July 2012, pp. 6, 7; ATVOD, "Determination that the provider of the on demand programme service "Demand Adult" was in breach of rule 11", 2 July 2012, p. 6.
- 73 The exact time period when the service provider contravened Rule 11 and thereby Sec. 368E (2) CA 2003 was from 31 May to 24 July 2012 as indicated by the sanction decision of Ofcom.
- 74 ATVOD, "Determination that the provider of the on demand programme service "playboytv.co.uk" was in breach of rule 11", 2 July 2012, pp. 6; ATVOD, "Determination that the provider of the on demand programme service "Demand Adult" was in breach of rule 11", 2 July 2012, p. 7.
- 75 See ATVOD's determinations of September 2012: Notice of Determination that Playboy TV UK/Benelux Limited is the provider of the service "Demand Adult", 17 September 2012; Notice of Determination that Playboy TV UK/Benelux Limited is the provider of the service "Playboytv.co.uk", 17 September 2012.
- 76 Ofcom, "Ofcom Decision, Appeal by Playboy TV UK/Benelux Limited against a notice of determination by ATVOD that it was the provider of the service "Demand Adult" as at 14 September 2012", 23 September 2013, para. 34, p. 8; Ofcom, "Ofcom Decision, Appeal by Playboy TV UK/Benelux Limited against a notice of determination by ATVOD that it was the provider of the service "Playboy TV" as at 14 September 2012", 23 September 2013, para. 33, p. 8.
- 77 ATVOD, The Culture, Media & Sports Inquiry into Online Safety, para. 1.8.
- 78 The research commissioned by ATVOD found that "the eight most visited adult sites were all free tube sites, as were 15 of the top 16.", ATVOD, For Adults Only? Underage Access to Online Porn, p. 19.
- 79 ATVOD, For Adults Only? Underage Access to Online Porn, p. 21.
- 80 ATVOD, For Adults Only? Underage Access to Online Porn, p. 24.
- 81 ATVOD, For Adults Only? Underage Access to Online Porn, pp. 13-17. The surveys conducted by Nielsen Netview by order of ATVOD are based on an assessment of consumption using a computer or laptop and exclude the use of tablets, smartphones and other devices. ATVOD therefore relies on research conducted by Ofcom which shows that minors of particular age groups increasingly use mobile phones or tablets to go online in order to conclude that its figures are underestimated; See also Ofcom, "Children and Parents: Media Use and Attitudes Report", 3 October 2013, p. 44, <http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/october-2013/research07Oct2013.pdf> (accessed 26 June 2014).

- 82 Siry, Lawrence, "Knowing It When It Is Seen, The Polemic of the Regulation of Sexualized Speech in the United States and Europe", soon to be published, p. 324.
- 83 For an overview of NRAs activities concerning the protection of minors see Machet, Emmanuelle, "The Protection of Minors in a Connected Environment", Comparative Background Document, 37th EPRA Meeting, 2013, pp. 7–9.
- 84 In Germany, for instance, the reform of the relevant laws for the protection of minors failed in December 2010 when the Parliament of one of the German Länder rejected the 14th amendment to the Interstate Treaty for the Protection of Minors. So far, the reform has been on hold but has received new impetus by an online consultation which is currently taking place on the future of the Interstate Treaty and the system of regulated self-regulation concerning the classification of content and youth protection programmes as well as parental control systems. The consultation is organized by the Landesmedienanstalten (LMA, media authorities of the German Länder) under <https://www.jugendmedienschutz.sachsen.de/sachsen/de/home> (accessed 26 June 2014); See also the Discussion Paper of the LMA available at <https://www.jugendmedienschutz.sachsen.de/ecm-politik/sachsen/de/home/file/fileId/952> (accessed 26 June 2014).
- 85 Art. 4 and 5 TWFD of 1989.
- 86 Art. 1 (1) (n) AVMSD; See on the lack of a quality criterion in the definition of European works Harrison, Jackie and Woods, Lorna, "European Broadcasting Law and Policy", 2007, *op.cit.*, p. 254-259.
- 87 In its Weber report of 2005, the European Parliament recommended the precision of the definition of "European works" and an introduction of a definition of "independent producer". It further advocated the development of "European co-productions and joint marketing strategies" which implies its dissatisfaction with the construction of the definitions in the TWFD; See European Parliament, "on the application of Articles 4 and 5 of Directive 89/552/EEC (the "TV without Frontiers" Directive), as amended by Directive 97/36/EC, for the period 2001-2002", (2004/2236(INI)), 21 June 2005, Explanatory Statement, para. 1, p. 12.
- 88 Burri-Nenova, Mira, "The New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity," *Common Market Law Review* 14 (2007); 1707; Craufurd Smith, Rachel, "From Heritage Conservation to European Identity: Article 151 EC and the Multi-Faceted Nature of Community Cultural Policy," *European Law Review* 32, no. 1 (2007): 48–69; Katsirea, Irini, "Why the European Broadcasting Quota Should Be Abolished", *European Law Review* 28, no. 2 (2003): 190–209; McGonagle, Tarlach "The Quota Quandary: An Assessment of Articles 4-6 of the Television without Frontiers Directive," in *The European Union and the Culture Industries, Regulation and the Public Interest*, ed. David Ward, United Kingdom, Ashgate Publishing, 2008, 187–212.
- 89 Castendyk, Oliver, "Article 4 TWFD (Promotion of European Works)", in *European Media Law*, ed. Castendyk, Oliver, Dommering, Egbert and Scheuer, Alexander (The Netherlands: Kluwer Law International, 2008), para. 63, p. 452.
- 90 Burri-Nenova, Mira, "Cultural Diversity and the EC Audiovisual Media Services Directive: Beyond the Handsome Rhetoric", NCCR Trade Regulation Working Paper No. 2009/09, 30 March 2009, pp. 12–17, available at SSRN: <http://ssrn.com/abstract=1370439> or <http://dx.doi.org/10.2139/ssrn.1370439>.
- 91 This may partly be explained by the fact that the Commission examined the application of Art. 13 AVMSD in the years 2009 and 2010, a period immediately following the deadline for transposition. In fact, transposition of the Directive was delayed in several Member States (such as Luxembourg, Portugal, Poland or Slovenia). In addition, measures to promote European works in VOD services were introduced for the first time in many Member States so that the industry needed some time to adapt and conform to the new requirements; See European Commission, "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010, Promotion of European works in EU scheduled and on-demand audiovisual media services", COM(2012) 522 final, Brussels, 24 September 2012, para. 1.1.1, p. 3; para. 1.1.3, p. 5; para. 3, p. 11; See also the European Parliament's resolution of 11 September 2012 on the online distribution of audiovisual works in the European Union (P7_TA(2012)0324) which calls on Member States to effectively implement Art. 13 AVMSD, para. 34. On the application of Art. 16 AVMSD see para. 2.2, p. 9.
- 92 European Commission, "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010, Promotion of European works in EU scheduled and on-demand audiovisual media services", COM(2012) 522 final, Brussels, 24 September 2012, para. 1.1.1, p. 3.
- 93 Entraygues, Alexandre, "French Solutions", in *Video on Demand and the Promotion of European Works*, ed. Nikoltchev, Susanne, IRIS Special (Strasbourg: European Audiovisual Observatory, 2013), p. 25.
- 94 Interestingly, a French Decree of December 2010 provides for a circumvention rule in case of a VOD provider established outside of France but directing its service wholly or principally to the French public. The French regulator could, on the basis of Art. 4 of this Decree take action against service providers allegedly failing to comply with the rules on promotion of European works. "Décret n° 2010-1593 du 17 décembre 2010 relatif aux services de télévision et de médias audiovisuels à la demande relevant de la compétence d'un autre Etat membre de l'Union européenne ou partie à l'accord sur l'Espace économique européen ou à la convention européenne sur la télévision transfrontière du 5 mai 1989", JORF n°0294 du 19 décembre 2010, p. 22368, texte n° 29, NOR: MCCE1019062D; See also Craufurd Smith, Rachael, "Determining Regulatory Competence for Audiovisual Media Services in the European Union", 2011, *op.cit.*, p. 281.
- 95 The analysis below focuses on the aspect of promotion and thus omits any assessment of financial contributions prescribed by the respective national laws.
- 96 Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande, JORF n°0264 du 14 novembre 2010, p. 20315, texte n° 58, NOR: MCCE1019142D. Hereinafter 'French VOD Decree of 2010'.
- 97 The obligation is triggered when the catalogue of a service provider comprises 20 audiovisual works of more (confer Art. 11 French VOD Decree of 2010) and gradual compliance with the quotas is permissible pursuant to Art. 12 of the French VOD Decree of 2010.
- 98 Conseil supérieur de l'audiovisuel, "Rapport au Gouvernement sur l'application du décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande (SMAD)", November 2013, available at <http://csa.fr/Services-interactifs/Services-de-medias-audiovisuels-a-la-demande-SMAD/Rapport-au-Gouvernement-sur-l-application-du-decret-n-2010-1379-du-12-novembre-2010-relatif-aux-services-de-medias-audiovisuels-a-la-demande-SMAD> (accessed 26 June 2014). Hereinafter 'CSA Report of November 2013'.
- 99 The French CSA noted in its report that the calculation should take into account the number of days when the title was featured in the catalogue on an annual basis; See CSA Report of November 2013, para. 3. b), p. 34; para. 6. a), p. 44.
- 100 *Ibid*, para. 6. b), p. 45.

- 101 European Commission, “Commission Staff Working Document, Promotion of European Works in EU scheduled and on-demand audiovisual media services, Part I on the application of Article 13 of Directive 2010/13/EU for the period 2009-2010, Accompanying the document First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010 (COM(2012) 522 final)”, Brussels, 24 September 2012, SWD(2012) 269 final, para. 1.3.
- 102 CSA Report of November 2013, para. 6. b), p. 46.
- 103 *Ibid.*
- 104 *Ibid.*, para. 6. c), p. 47.
- 105 *Ibid.*
- 106 On the organization, tasks and sanctioning powers of the Belgian CSA see Valcke, Peggy and Lievens, Eva, *Media Law in Belgium* (The Netherlands: Kluwer Law International, 2011), paras. 278 et seq., pp. 144–149.
- 107 Parlement de la Communauté Française (Belgique), “Projet de décret modifiant le décret du 27 février 2003 sur la radiodiffusion et le décret du 9 janvier 2003 relatif à la transparence, à l’autonomie et au contrôle des organismes publics, des sociétés de bâtiments scolaires et des sociétés de gestion patrimoniale qui dépendent de la communauté française”, Projet de décret 634 (2008-2009), N°1, 22 December 2008, Art. 63, pp. 23, 24, available at <http://www.pfwb.be/le-travail-du-parlement/doc-et-pub/documents-parlementaires-et-decrets/documents/001274595> (accessed 26 June 2014). Hereinafter ‘Draft AVMS Decree’.
- 108 Draft AVMS Decree, Art. 63, p. 24.
- 109 Collège d’autorisation et de contrôle, “Recommandation relative à la mise en valeur des oeuvres européennes et de la Communauté française de Belgique dans les services de vidéo à la demande”, 24 June 2010, available at <http://www.csa.be/documents/1313> (accessed 26 June 2014). Hereinafter ‘CSA Recommendation of 2010’.
- 110 CSA Recommendation of 2010, para. 4, p. 8. The Recommendation even referred to “ghettoisation” (or marginalization) and user prejudices regarding works of European or national origin.
- 111 *Ibid.*
- 112 *Ibid.*
- 113 *Ibid.*
- 114 Interestingly, the Belgian CSA outlined “other parameters” which could impact on the prominence of European and Belgian works. In this context, it called on providers to carefully consider the date they would enter the relevant programme in their catalogues with a view to avoiding direct competition with American blockbusters. It acknowledged that such dates habitually depended on the windows within which the distribution rights of a film could be exploited. Still, the duration of the inclusion of the work in the catalogue as well as the simultaneous offer of competing works (whether European/Belgian or not) were factors likely to influence the visibility of European and Belgian productions; See CSA Recommendation of 2010, para. 6, pp. 9, 10.
- 115 Furnémont, Jean-Francois, “New Issues and Challenges for Audiovisual Policy-Makers, Films Institutions and Audiovisual Regulators: The Example of the French Community of Belgium”, in *Video on Demand and the Promotion of European Works*, ed. Nikoltchev, Susanne, IRIS Special (Strasbourg: European Audiovisual Observatory, 2013), p. 39.
- 116 *Ibid.*
- 117 The opinions of the Belgian CSA evaluating the measures taken to promote European and Belgian works are available at <http://csa.be/documents/1779> (accessed 26 June 2014); See in particular Collège d’autorisation et de contrôle, “Avis n° 11/2012, Evaluation du dispositif de mise en valeur des oeuvres européennes et de la Fédération WallonieBruxelles dans les services de vidéo à la demande – article 46 du décret SMA”, 28 June 2012, available at http://www.csa.be/system/documents_files/1779/original/CAC_20120628_avis_evaluation_recommandation_VOD.pdf?1341305335 (accessed 18 July 2014).
- 118 Collège d’autorisation et de contrôle, “Avis n° 11/2012, Evaluation du dispositif de mise en valeur des oeuvres européennes et de la Fédération WallonieBruxelles dans les services de vidéo à la demande – article 46 du décret SMA”, 28 June 2012, para. 4.5, p. 11.
- 119 *Ibid.*, para. 6.1, p. 19.
- 120 *Ibid.*, para. 7, p. 23.
- 121 *Ibid.*, paras. 6.2 and 6.3, pp. 20 and 21; para. 7, p. 23.
- 122 European Commission, “Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010, Promotion of European works in EU scheduled and on-demand audiovisual media services”, COM(2012) 522 final, Brussels, 24 September 2012, para. 1.1. b), p. 6.
- 123 In Belgium and France, for instance, providers of VOD services are obliged to submit a report annually in line with Art. 40 Belgian Decree AVMS and Art. 21 French VOD Decree 2010 respectively. To verify the data supplied by service providers, the French CSA carries out random spot checks while the Belgian CSA for the purpose of its final report of 2012 appeared to compile data within a specific reference period; See European Commission, “Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010, Promotion of European works in EU scheduled and on-demand audiovisual media services”, COM(2012) 522 final, Brussels, 24 September 2012, para. 1.1. b), p. 6; See also Entraygues, Alexandre, “French Solutions”, in *Video on Demand and the Promotion of European Works*, ed. Nikoltchev, Susanne, IRIS Special (Strasbourg: European Audiovisual Observatory, 2013), p. 29; Collège d’autorisation et de contrôle, “Avis n° 11/2012, Evaluation du dispositif de mise en valeur des oeuvres européennes et de la Fédération WallonieBruxelles dans les services de vidéo à la demande – article 46 du décret SMA”, 28 June 2012, para. 5.1, p. 12.
- 124 Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet.
- 125 Commissariaat voor de Media, “Rapportageformulier/Vragenlijst ten behoeve van rapportage Europese quota cmoa”, available at <http://www.cvdm.nl/praktisch/commercielemediadienst-op-aanvraag-aanmelden/> (accessed 26 June 2014). Hereinafter ‘CvdM Reporting form’.
- 126 CvdM Reporting form, paras. I – N dedicated to the share of European works in the catalogue and paras. O-T concerning financial contributions.
- 127 The term “findability” is distilled from the European Parliament’s resolution of 4 July 2013 on connected TV, paras. L, M and 1. The expression adequately captures the vast amount of content available on connected TV devices and raises the question of prioritization of content (how and by whom?) and the creation of user-friendly and transparent tools whereby content is structured and can thus be found more easily by users.
- 128 CvdM Reporting form, paras. U-X.
- 129 Betzel, Marcel, “The Dutch Approach”, in *Video on Demand and the Promotion of European Works*, ed. Nikoltchev, Susanne, IRIS Special (Strasbourg: European Audiovisual Observatory, 2013), p. 35.
- 130 *Ibid.*

- 131 The Commission's Green Paper of 2013 highlights that consumption of audiovisual content is increasingly moving online. European Commission, "Green Paper, Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", COM(2013) 231 final, Brussels, 24 April 2013, *op.cit.*, para. 2, p. 4.
- 132 See Hörnle, Julia, "The Jurisdictional Challenge of the Internet", in *Law and the Internet*, eds. Edwards, Lilian and Waelde, Charlotte, third edition (Oxford and Portland, Oregon: Hart Publishing, 2009), pp. 121–58; Schmitz, Sandra and Siry, Lawrence, „Internationale Gerichtliche Zuständigkeit Bei Persönlichkeitsverletzungen Im Internet“, in *Die Welt Im Netz - Folgen Für Wirtschaft Und Gesellschaft, Tagungsband Der Herbstakademie 2011* (Oldenburg: Oldenburger Verlag für Wirtschaft, Informatik und Recht, 2011), pp. 83–100.