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# European Media Legislation: Overview

*Milestones in European Media policies and legislation, 1990-2020*



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# 1 List of Acronyms

AI – Artificial Intelligence

AV – audiovisual

AVMSD – Audiovisual Media Services Directive

BEREC – Body of European Regulators for Electronic Communications

CJEU – Court of Justice of the European Union

CoE – Council of Europe

COM – European Commission

DBS – Direct broadcast satellite (same as DTH)

DG – Directorate-General of the European Commission

DTH – Direct to home (satellite reception, same as DBS)

DPA – Data Protection Authority

DRM – Digital Rights Management

DSL – Digital Subscriber Line (digital data transmission over copper telephone wire)

DSMD – Copyright in the Digital Single Market Directive (2019)

DTT – Digital terrestrial television

EAO – European Audiovisual Observatory

EC – European Communities / Community

ECD – Electronic Commerce Directive

ECF – European Cultural Foundation

ECFR – European Charter of Fundamental Rights

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EEA – European Economic Area

EEC – European Economic Community

EECC – European Electronic Communications Code

EFTA – European Free Trade Association

ERGA – European Regulators Group for Audiovisual Media Services

ESA – EFTA Surveillance Authority

GAFAM – the ‘Big Five’ technology corporations Google, Apple, Facebook, Amazon and Microsoft

GDPR – General Data Protection Regulation (2016)

IPTV – Internet Protocol television

IRC – Internet Relay Chat

M&A – Merger and Acquisition

MS – Member State

NRA – national regulatory authority

OTT – over the top (services provided over the open Internet)

PSB – Public Service Broadcasting

PSM – Public Service Media

REFIT – Regulatory Fitness

SME – small and midsize enterprise

TCE – Treaty of the European Community

TEU – Treaty of the European Union

TFEU – Treaty on the Functioning of the European Union

TWFD – Television Without Frontiers Directive

VLOP – very large online platform

VoD – video on demand

WIPO – World Intellectual Property Organization

## 2 Introduction

*“Competing nation states are not a union, even if they have a common market. Competing nation states in a union block both: European policy and state policy. What would be necessary now? The further development of a social union, a fiscal union – in other words, the creation of framework conditions that would turn a Europe of competing collectives into a Europe of sovereign citizens with equal rights. That was the idea, that was what the founders of the European unification project dreamed of – because they had their experiences. But all this is not feasible as long as national consciousness continues to be stoked against all historical experience and as long as nationalism is largely unrivalled as an offer of identification to citizens. So how can one promote the awareness that the people on this continent are European citizens?” (Menasse 2017: 391 f., own translation).*

Europe is created by interstate treaties, institutions and common laws. It also needs to be created in the minds and hearts of Europeans. But how does one promote a common awareness? In terms of democratic theory, the answer is clear: European democracy, like any national democracy, needs a public sphere that accompanies it – solid information and reporting on European political and cultural issues, diverse opinions from all corners of the continent and a participatory space for individual and collective opinion-forming that enables community and identification through participation. And this not only among the political class, but among the entire European population, as Thomas Kleist, former Director-General of Saarländischer Rundfunk, emphasises:

*“Because in a democratic society it is not enough if politicians and intellectuals are able to correctly assess the importance of a united Europe and its interrelations. In a democracy, this requires a broad consensus among the population. Therefore, I am firmly convinced that the European idea only has a realistic chance of realisation and practical implementation in the long term if we succeed in creating a genuine European communication space out of the political space ‘Europe’.” ([Media Policy 02.07.2018](#), own translation)*

The political space Europe was built on the ruins of the Second World War. Its first priority was economic reconstruction and peacekeeping. Winston Churchill in his speech at Zurich University on 19 September 1946, saw the partnership between France and Germany as the first step to a Council of Europe, to a United States of Europe (Churchill 1946).

Driven by the same desire to secure peace and human rights, yet unrelated to the project of building a European Union, is The Council of Europe (CoE). Established in 1949 by ten West European states<sup>1</sup>, it today comprises [47 European countries](#), including Russia, Turkey, Azerbaijan and a range of Eastern European countries which joined the Union after 2004. The CoE in 1950 adopted the [European Convention on Human Rights](#) (ECHR) and established the [European Court of Human Rights](#) (ECtHR). Here, individuals can bring

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<sup>1</sup> Belgium, Denmark, France, the Netherlands, Ireland, Luxembourg, Norway, Sweden, the United Kingdom and Italy.



complaints of human rights violations when all possibility of appeal has been exhausted in their country. The CoE has adopted more than 200 international conventions concerning human rights, including freedom of expression and the media. Ratifying nations commit to transposing them into national legislation, the CoE monitors adherence. It also monitors elections. The CoE's claim is: "We are the guardians of human rights, democracy and the rule of law."

What we know as the 'European Union' today, began with one military and three economic alliances: the European Coal and Steel Community (ECSC) adopted in 1952, the European Economic Community (EEC) and the European Atomic Energy Community (EAEC, also known as Euratom), both adopted in the [Treaty of Rome](#) (1957), as well as the military assistance pact Western European Union (WEU 1954). The Communities (still in the plural) laid the foundations for European integration: bodies such as the European Council, the European Parliament (EP 1952), the European Commission (three Commissions from 1952 were fused into one in 1967) and the European Court of Justice (CJEU 1952) – the main actors of the history unfolding in the present report – as well as the legal foundations such as the European Convention on Human Rights (1950) and the Common Market – the area without internal frontiers ensuring the free movement of citizens, goods, services and capital.

The path to a Common Market continued with the Common Agricultural Policy (CAP, 1957), whose subsidies long accounted for the largest share of total expenditure and are still the largest single item today, and the Customs Union (1968). In the 1980s, frustration grew among MS about the persisting hurdles to free trade among them. In 1986, MS concluded the [Single European Act](#) (SEA)<sup>2</sup>. In it, they declared that they aimed to create a "Single Market" in the Community by 1992, and introduced the "cooperation procedure" in legislation, which gave the EP a real say for the first time. The Single Market should establish the four free movements and was primarily promoted with the promise that it would bring down unemployment in Europe.

The path towards integration progressed with the European passport – started in 1981 by harmonising national passports and made standard in 2005 –, and the abolition of internal borders – achieved in the Schengen Agreement of 1985. The Maastricht Treaty of 1992, adopted by the then twelve Member States, marked the conclusion of establishing the area of the four free movements and turned the 'European Community' into the 'European Union'. It also laid the groundwork for the monetary union that followed with the introduction of the euro in 2002 and its safeguarding with the European Stability Mechanism developed from 2010. The mutual recognition of higher education degrees was launched with the Bologna Process adopted in 1999. Starting with the Digital Agenda for Europe (2010) and the Strategy for a Digital Single Market for Europe (2015), Europe's policies on the question of a European public sphere are today entirely dominated by the "Digital Single Market".

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<sup>2</sup> Prepared for by the [White Paper from the Commission to the European Council: Completing the Internal Market](#), (COM (85)310 final, 14.06.1985).

The European project and EU media policy is characterised by a number of structural dilemmas. The process of European integration depends on Member States (MS) yielding some of their sovereignty and conferring competences to the Union. The Treaties draw the lines of complementary and subsidiary competences. Within the area of Union competence, the inherent tension is institutionalised in the bicameral legislature in which the interests of the MS are expressed by the Council of the EU and those of the Union are expressed by the EP, whereas the executive, the European Commission, organises the law-making process and serves as the “Guardian of the Treaties”. Together with the Court of Justice of the EU these constitute the essential division of powers in the European democracy, while some MS lamented the costly bureaucratic procedures involved. The tension remains to this day between MS seeking deeper integration towards a “federal Europe” and those, exemplified by Margaret Thatcher’s UK, striving for a union of free trade while otherwise wishing to retain national control.

Another dilemma lies in the Janus-faced nature of media content as public merit good serving the democratic, social and cultural needs of society versus content as private market good serving the profit interest of its producers. Looking at the same object from two different perspectives shows very different “eigen-rationalities”<sup>3</sup>, as the German Federal Constitutional Court has called this, with conflicting demands. In EU media policies, this translates into a conflict of objectives of, on the one hand, strengthening media pluralism through strict anti-trust measures versus, on the other, trying to nurture European media heavyweights that can compete in the global market.

Digital media furthermore face in two directions: they are both media and telecommunications and computing technology and as such are regulated in two different policy fields with their respective objectives and instruments. Social media platforms argue that they are technology services not media providers and therefore should not be burdened with media rules. The Digital Services Act (DSA) currently under debate envisages a national coordinator as regulator for mid-sized platforms. In Germany it has been suggested that this should be either the Federal Network Agency in charge of telecommunications or the Media Authorities of the Länder in charge of commercial broadcasters.

The main dilemma of European media policy, however, arises from subsidiarity: Its constitutional framework stipulates that the EU does not have competences in the areas of media, culture and education. These are the prerogative of the Member States. Therefore, the corridor for active EU policy interventions into media is rather narrow and typically has to be justified either by the communication needs of the EU institutions themselves or by interests of the Single Market. The report will refer to these dilemmas, questioning to what extent they shape the media regulation as analysed in the selected milestones.

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<sup>3</sup> „Eigenrationalität“, eng.: „own specific rationale“, see e.g. German Federal Constitutional Court, Judgment on the composition of Broadcasting Councils of 25 March 2014 - [1 BvF 1/11](#).

## 2.1 EU constitutional framework

In the following, we give an overview over the main elements of the EU constitutional framework. It is within this framework that the shaping of a European media order takes place and the processes of the development of media regulation with respect to the selected milestones must be understood. This overview identifies the fundamental rights of the primary EU law which are the underlying principles of any media regulation and it points as well to the inherent problems of European integration, that inspire the question of Europeanisation of identities and culture, which is at the core of the EUMEPLAT project.

The constitutional basis of the EU is a set of treaties agreed by its member states, the [Treaties of the European Union](#) ([chronology](#)). They establish the various EU institutions together with their respective remit, procedures and objectives. They grant the EU competences within which it can act by means of legislation and funding. The two core treaties are the Treaty of Rome (1957) which established the [European Economic Community](#) and the [European Atomic Energy Community](#), and the [Maastricht Treaty](#) (1992) which established the European Union and the Single Market.

At the turn of the century, the need arose to review this constitutional framework, particularly in light of the accession of ten new Member States in 2004. For this purpose, two constitutional conventions have been called, the [European Convention of 1999–2000](#) that drafted the [Charter of Fundamental Rights of the European Union](#) which was proclaimed on 7 December 2000 (current as of 26.10.2012), and the [Convention on the Future of Europe](#) (2001–2003) which drafted a constitution for the European Union, that would consolidate and replace the existing European Union treaties with a single text, and produced the [Treaty establishing a Constitution for Europe](#).

In order to ratify the Treaty, eight member states announced referendums. In 2005, the EU Constitution was rejected by the people in referendums first in Spain, then in France and in the Netherlands. Just as after the first direct elections to the EP in 1979, this crisis reconfirmed the disconnect between the people of Europe and their political leaders. The leaders then decided to hold a “period of reflection”, including on how the EU communicates with its citizens and on the European public sphere in general.

The constitutional dilemma was solved by abandoning the idea of a unified constitution and amending the existing treaty framework. In the June 2007 European summit meeting, Member States agreed a mandate for negotiations on such amendments. This led to the [Lisbon Treaty](#) (2007) that contains most of the changes originally envisioned in the Constitutional Treaty. It was signed on 13 December 2007 and entered into force on 1 December 2009. As a consequence, the “European Economic Community” now came to be called the “European Union”.

The Lisbon Treaty primarily amends the Maastricht Treaty (1992), known in updated form as the [Treaty on European Union](#) (TEU, 2007, current as of 26.10.2012), and the Treaty

of Rome (1957), known in updated form as the [Treaty on the Functioning of the European Union](#) (TFEU, 2007, current as of 26.10.2012). It also gives legal force to the [Charter of Fundamental Rights of the EU](#) (2000, current as of 26.10.2012).

The constitutional basis of the EU enshrines fundamental rights such as the right to freedom of expression and information, the right to property and to do business, as well as the four fundamental freedoms of movement of goods, services, persons and capital. The Treaties constitute the primary Union law on which all of its legislation and policies are based.

The TEU frames the competences of the Union by the principles of conferral, subsidiarity and proportionality. The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties. Competences not conferred upon the Union in the Treaties remain with the Member States. Where the Union does not have exclusive competence, under the principle of subsidiarity, it can act only if and in so far as the objectives cannot be sufficiently achieved by the Member States but rather better at Union level. Under the principle of proportionality, the Union action shall not exceed what is necessary to achieve the objectives of the Treaties (Art. 5 TEU).

The TFEU details the institutions of the Union: The EP (Art. 223 ff. TFEU), the European Council (Art. 235 ff. TFEU), the Commission (Art. 244 ff. TFEU), the Court of Justice of the EU (Art. 251 ff. TFEU), the European Central Bank (Art. 282 ff. TFEU) and the Court of Auditors (Art. 285 ff. TFEU). It also outlines the areas where the Treaties confer exclusive competence on the Union such as the establishing of the competition rules necessary for the functioning of the internal market, monetary policy concerning the euro and common commercial policy (Art. 3 TFEU). A shared competence between the Union and the MS is established in areas such as internal market, economic and social cohesion, consumer protection and trans-European networks (Art. 4 TFEU). Finally, the Treaties confer on the Union competence to carry out actions to support, coordinate or supplement the actions of the MS in certain areas (Art. 6 TFEU). These include education (Art. 165 TFEU) and culture ("The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore." Art. 167 TFEU). The Union may support and supplement MS's action in the area of artistic and literary creation, including in the audiovisual sector (ibid.).

In the interest of competition, the TFEU is rather strict on state aid. It initially limited its permissible use to few exceptional cases. Another exception granted specifically to Public Service Broadcasting was introduced in the Treaty of Amsterdam of 1997 and added as Protocol No 29 to the TFEU (→ 3.3 Public Service Media).

Relevant to EU media regulation are furthermore the rules on trans-European networks. To help achieve the objectives of free movement and cohesion in the Internal Market,

*“the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures. Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks.” (Art. 170 TFEU).*

Technically standardised interoperable telecommunications infrastructures are thus a foundation of both the Single Market and the digital European public sphere.

## 2.2 EU Law-making: Actors and Processes

EU law is divided into primary legislation, i.e. the treaties which are the basis for all EU action, and secondary legislation, which includes regulations, directives and decisions. The three EU law-making bodies are the two legislators, the European Parliament and the Council of the European Union, and the European Commission which holds the right of legislative initiative.

The [European Parliament](#) (EP) under the 1957 Treaty of Rome had only an advisory role in the legislative process. The Commission proposed and the Council adopted legislation. Originally, Members of the EP (MEPs) were appointed by the Member States' national parliaments, meaning that all MEPs had a dual mandate. In 1979, citizens of the then nine Member States of the Union (France, Italy, Netherlands, Denmark, Luxembourg, West Germany, United Kingdom, Belgium, Ireland) in the first international election in history, elected 410 MEPs to the EP. The first directly elected EP elected the first woman as its President, Simone Veil, French Liberal who had served as Health Minister in several French governments. The [Single European Act](#) (1986) and the Treaties of [Maastricht](#) (1992), [Amsterdam](#) (1997), [Nice](#) (2001) and [Lisbon](#) (2007) successively extended Parliament's prerogatives. It can now co-legislate on equal footing with the Council ([EP, Legislative powers](#)). The number of MEPs rose over several steps of EU enlargement, including the accession of Greece in 1981 and Spain and Portugal in 1986 and the German unification in 1989. It reached its all-time high of 766 in 2013, in order to welcome 12 Croatian MEPs. The total number of seats was then reduced and again adjusted in view of the withdrawal of the UK. As of 2020, the number of MEPs is 705 (EP 2021). President of the EP since January 2022 is Roberta Metsola (EPP, MT).

The [Council of the European Union \(CoEU\)](#), aka the Council of Ministers represents the 27 Member States' executives. It is the second body to amend and approve EU law proposals. The CoEU is easily confused with two other councils. The [European Council \(EUCO\)](#) is not one of the EU's legislating institutions. It is a collegiate body consisting of the heads of state or government of the EU Member States, the European Council President and the President of the European Commission. The [Single European Act](#) of 1986 gave formal status to the European Council and its meetings which until then had been called “Summit Conferences”. The EUCO sets the EU's policy agenda, traditionally by adopting ‘conclusions’

during European Council meetings which identify issues of concern and actions to take. Its current President is Charles Michel. Finally, the [Council of Europe \(CoE\)](#) is not an EU body at all, but an international organisation in Strasbourg which comprises [47 countries](#) of Europe. It was founded in 1949 as a pioneer of a Europe of peace on the values of human rights, democracy and the rule of law. In 1950, it concluded the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#) that established the [European Court of Human Rights](#) (ECtHR). The CoE abolished the death penalty in Europe, strengthened freedom of expression, gender equality, children's rights, the rule of law and cultural diversity and remains the continent's leading human rights organisation. Its current Secretary General is Marija Pejčinović Burić.

The third EU co-lawmaker is the [European Commission](#) (COM) which holds the legislative initiative. Parliament and Council can call upon the COM to initiate the process and prepare the first draft of a legal act, but the formal power to decide upon initiating a legislative procedure lies with the COM. The Lisbon Treaty of 2007 introduced the [European Citizens' Initiative](#) (ECI). Since then, one million European citizens can also "invite" the COM to submit a proposal on a legal act of the Union that these citizens consider necessary (Arts. 10.3 and 11.4 TEU and Art. 24 TFEU). Current President of the EU's executive is Ursula von der Leyen.

EP, CoEU and COM are assisted in advisory functions by the [European Economic and Social Committee](#) and the [Committee of the Regions](#) (Art. 300 ff. TFEU). Other sources of legislation are international organisations to which the EU is member, including the World Trade Organisation (WTO) and United Nations agencies such as the World Intellectual Property Organisation (WIPO), the International Telecommunication Union (ITU) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). Once concluded, the [European Court of Justice](#) (CJEU, 1952), based in Luxembourg, ensures compliance of EU legal acts with the interpretation and application of the European Treaties.

EU legal acts come in different forms as to their applicability or transposition into MS' national law:

*"A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force." (Art. 288 TFEU)*

Since its beginnings, the European Community/Union has adopted more than one hundred thousand legislative acts. In the 2010s, the EU approved on average 80 directives, 1200 regulations and 700 decisions per year (Toshkov 2014). The legislative process formerly known as codecision, with the adoption of the Lisbon Treaty (2007) was renamed the [ordinary legislative procedure](#) defined in Article 294 TFEU. In it the Commission first conducts a review of a policy in a given field in the form of a Green Paper and sketches possible options for



action. A consultation on this document seeks the views of the European Parliament, the Member States and interested circles, first and foremost to ensure that future actions at the Community level and at national level are coherent with Community Law and other Community policies. Based on the replies, the Commission drafts a first version of the planned instrument and submits it to the EP and the Council (CoEU) as well as to the European Economic and Social Committee and the Committee of the Regions. The Commission guides and accompanies through the entire policy cycle – from policy design and preparation, to adoption through implementation (transposition, complementary non-regulatory actions) and application (including enforcement) to evaluation and revision.

The EP then adopts its position at first reading and communicates it to the Council. The Council can approve the EP's position or adopt its own dissenting position at first reading. The proposal can then go into the second reading in both chambers or it can move to a conciliation process, the trilogue, with members of EP, Council and COM trying to find compromises on the contentious issues. Its outcome has to be approved by both EP and Council for the act to be adopted.

There are also special legislative procedures by which both the Council or the EP can unanimously adopt a proposal after consulting or obtaining the consent of the majority of the other chamber, mostly on procedural issues and taxation but also concerning the specific measure to protect the environment (Art. 192.2 TFEU). Furthermore, the Commission can adopt [implementing and delegated acts](#) where an EU law grants it that power.

EU legislation involves public consultations held by the COM at different stages of a procedure. Lobbyists aka 'interest representatives' can be individuals, industry associations, groups or networks who organise meetings or communication campaigns, including wining and dining of MEPs, members of the Commission or the MS' governments, participate in consultations or prepare position papers with the objective of influencing the formulation or implementation of policy or the decision-making of Union institutions. Since the [Interinstitutional Agreement of 2021](#), these lobbyists have to observe the [Code of Conduct](#) and apply to the mandatory [transparency register](#).

Media as lobbyists are special in that they operate the channels to the public. The press regularly uses its editorial means to convey their interests, e.g. concerning the press publishers' ancillary copyright. This is also the case for public service media. The European Broadcasting Union (EBU) is an alliance representing over a hundred PSM organizations worldwide. It is not a body of or otherwise formally connected with the EU, but the EU partnered with the EBU e.g. on Eurikon and Europa-TV (see below) and it commissions programmes on Euronews and funds the subtitling of Arte TV programmes. The EBU acts as a lobbyist, voicing the views of the European PSM in consultations on spectrum policy, advertising, competition and other issues pertinent to them. The voice of the platform industry is [Dot Europe](#) (previously known as EDiMA or the European Digital Media Association). Civil society is represented by initiatives like the Bureau Européen des Unions de Consommateurs (BEUC), the European Digital Rights initiative (EDRi) or Communia, the association for the public domain. Together

with journalists specialised in EU matters they constitute the 'Brussels bubble' in which EU law-making takes place.

## 2.3 EU media legislation until 1990

This report analyses selected milestones of European media regulation from 1990 onwards. Some of these, particularly in the areas of audiovisual policies, copyright and media funding, have roots going back into the 1950s. Before we give an overview of the report, in this chapter we will summarise the main developments leading up to our period of interest.

Europe is not only an economic community but also a community of values. The European public sphere is closely linked to the formation of a collective identity of EU citizens. It is a critical condition for the EU policy process, and therefore a core question of European democracy (e.g. Pfetsch/Heft 2009).

The European Communities were founded by Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands. With the accession of Denmark, Great Britain and Ireland in 1973, they grew to nine members. At this time, the EEC ranked first in world trade. Alongside purely economic and military goals, social, cultural and political motives emerged. The aim now was to strengthen people's support for integration and to promote the emergence of a European identity. An important symbolic step was the [Copenhagen Declaration on European Identity](#) (1973). In it, the Europe of Nine committed itself to establishing a United Europe under the following premise:

*"The Nine European States might have been pushed towards disunity by their history and by selfishly defending misjudged interests. But they have overcome their past enmities and have decided that unity is a basic European necessity to ensure the survival of the civilization which they have in common.*

*The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights. All of these are fundamental elements of the European Identity. ...*

*The diversity of cultures within the framework of a common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a United Europe, all give the European Identity its originality and its own dynamism."* (EC 1973)

Much of the declaration is devoted to the European identity in relation to the world. "International developments and the growing concentration of power and responsibility in the hands of a very small number of great powers mean that Europe must unite and speak increasingly with one voice if it wants to make itself heard and play its proper rôle in the world."



The essential aim of the Union being to maintain peace, it acknowledges that “in present circumstances there is no alternative to the security provided by the nuclear weapons of the United States and by the presence of North American forces in Europe”. At the same time, “the Europeans should ensure that they have adequate means of defence at their disposal.” (ibid.)

The Declaration addresses one by one the relations with the other European countries, the countries in the Mediterranean, Africa and the Middle East, the USSR etc. all the way to China and the less favoured nations. It makes clear that “European unification is not directed against anyone, nor is it inspired by a desire for power. On the contrary, the Nine are convinced that their union will benefit the whole international community since it will constitute an element of equilibrium and a basis for cooperation with all countries, whatever their size, culture or social system.” (ibid.)

The Nine therefore define their collective identity both internally with respect to shared values and the rich diversity of their national cultures, and externally in acting as a single entity towards third countries which they believe will strengthen their own cohesion. European identity is thus defined as unity in diversity and dynamism. The nine Community members reaffirmed their intention of transforming the whole complex of their relations into a European Union before the end of the present decade. At that time, citizens only appeared in the European identity as “peoples”. The Nine express their conviction that their unification project “corresponds to the deepest aspirations of their peoples who should participate in its realization, particularly through their elected representatives.” (ibid.)

Neglecting Europe's citizens in the unification process took its revenge when they were called upon to directly elect their representatives in the European Parliament for the first time. In the 1970s, the integration process stagnated. The member states reacted to the oil crisis and the crisis of the international monetary order of Bretton Woods with national solutions. The European Communities fell into the so-called Eurosclerosis crisis which was further fuelled by then British Prime Minister Margaret Thatcher's demand for a British rebate, a special discount of two-thirds of the net contribution to the Community project, which was granted in 1984.

It was in this situation that the first European election took place in 1979. Until then, the EP had been formed by representatives of the national parliaments. Opinion polls showed growing disappointment. Compared to the focus on the Common Market and agriculture, the emergence of a European awareness had been neglected. Among its citizens Europe had taken on the negative connotation of an uncontrolled and often absurd bureaucratic machine far removed from the lives of the people. This was attributed among other causes to the inadequate and often negative reporting on the work of the European institutions in the media.

It was clear that broad support for integration or anything resembling a European identity had not yet been achieved. Now it was felt necessary to anchor the European project in the minds and hearts of the people.

The goal of one of the very first European agreements, the CoE's [European Cultural Convention](#) (1954), was getting to know each other by encouraging the study and promotion of each other's languages, history and culture and by developing its national contribution to the common cultural heritage of Europe. The Convention established two institutions: the Cultural Cooperation Council and the Culture Fund (Chyc 2021).

In the same year, institutionally unrelated to both CoE and European Community, the [European Cultural Foundation](#) (ECF) was set up in Geneva. Its founding figures included the Swiss philosopher Denis de Rougemont, the architect of the European Community Robert Schuman, and Prince Bernhard of the Netherlands, under whose presidency the foundation moved to Amsterdam in 1960. They all believed passionately in culture as a vital ingredient for Europe's post-war rebuilding and healing.

Television was the predominant mass medium of the time for shaping public opinion. That it would play an important role in European unification was clear early on. Also already in 1954, the Committee of Ministers of the CoE adopted the Resolution on the "Use of television as a medium for securing the support of the general public for the European idea" ([CoE 2016: 9](#)). The ministers welcomed efforts in Europe of developing television and wished them as brilliant a success as has just been achieved by EBU's Eurovision for the exchange of programmes among its member PSBs. They called for a comprehensive study on television. Specifically, they asked the EBU and the ITU to continue their study of the technical and financial aspects and the Bureau for the Protection of Industrial Property and of Literary and Artistic Works at Berne for recommendations for the removal of copyright obstacles to the exchange of TV programmes, while maintaining protection of authors' rights and related rights. As to the cultural problems, the ministers asked to establish a working party of the Committee of Cultural Experts.

To facilitate the exchange of television films across Europe, in order to foster both its cultural and economic unity, was the goal of the first post-war European media regulation and the beginning of European copyright law: the [European Agreement concerning Programme Exchanges by means of Television Films](#) (1958). Today's Union law-making procedures had, of course, not yet been established. It was a Treaty agreed by the Council of Europe and opened for signature by the member states. It was [signed](#) within the 1950s by Belgium, Denmark, France, Greece, Italy, Luxembourg, Norway, Sweden, Turkey and the UK and came into force in July 1961. The hurdle to exchanging TV programmes as freely as possible lay in the territoriality of copyright. This led to national legislations coming to different conclusions as regards the legal nature of TV films. International copyright law, i.e. the [Berne Convention for the Protection of Literary and Artistic Works](#) (1886, current as of 1979) to which all European States are member, did not envision a union of nation states but it does allow its signatories to enter into special agreements with each other. One such agreement is the Television Agreement of 1958.

It resolves the difficulties by stipulating that, in the absence of any contrary provision agreed between the maker and persons who contribute to the making of the television film, a

broadcasting organisation in one member state of the Agreement has the right to authorise in the other countries of the Agreement the broadcasting of its television films, thus bridging the territoriality of copyright. These provisions establish a presumption that the maker of a television film, i.e. a broadcasting organisation, just as the producer of a movie, has the status of an author and thus can negotiate licences. This was the first step towards creating a common EU copyright law.

The [European Agreement on the Protection of Television Broadcasts](#) (1960) enables television organisations in Parties to authorise or prohibit, throughout the territory of the Parties, the re-broadcasting, diffusion by wire, audiovisual recording and other means by which their broadcasts are utilised. This was not so much an issue among broadcasters as with regard to “alien elements”, i.e. cinemas and theatres that had begun to project TV broadcasts onto their screens and newspapers that were fixing and reproducing TV images. The Agreement applies only to television and not to sound broadcasting and, rather than protecting copyright proper, it protects related rights held specifically by broadcasters. The original version of the Convention allowed Parties to entirely exclude the protection against transmission by wire by means of a reservation. Later versions restricted that possibility. The Agreement has been amended by protocols in [1965](#), [1974](#), [1983](#) and [1989](#).

In 1961, the CoE conducted a [Survey of Council of Europe co-operation on television matters](#). It shows the range of activities from exchanges of information and educational courses, to recommendations for systematic research and agreements to overcome obstacles in copyright that hampered exchanges of school TV programmes. It also shows the focus of the attention at the time on utilising television in schools, particularly in teaching languages, and as a means of interesting the public in the European idea. Co-production of educational films was encouraged. The Press and Information Service of the European Communities was already cooperating with the largest networks in broadcasting events concerning the life of the Community and provided financial assistance for radio and television newsreel coverage and for the production of short films on Europe.

The [European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories](#) (1965) aimed at preventing the establishment of broadcasting stations which are operated on board ship, oil platforms or aircraft outside national territories and transmit broadcasts intended for reception within the territory of one of the Parties.

The [WIPO Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite](#) (21.05.1974) protects point-to-point broadcasts via satellites to a specific broadcasting organization against being ‘tapped’ by a third party and retransmitted without authorisation.

Broadcast transmission capacities multiplied with cable and satellite. Cable networks started to spread in the 1960s when also the first television satellites were used. Direct broadcast satellites (DBS) followed in the 1970s. In the 1980s this led to the beginning of the liberalisation of the broadcast market and the dual system of public service and commercial

broadcasting throughout Europe. Satellites were initially used to feed programmes into cable networks, followed by private direct-to-home (DTH or DBS) satellite reception. Satellites for the first time, made it possible to address broadcast signals to the entire European continent. Many European politicians initially saw the new commercial stations as a threat to diversity of opinion and national sovereignty that needed to be regulated.

At the [1977 World Administrative Radio Conference](#) (WARC 77) of the ITU, each European country had been allocated frequencies and orbital positions for one geostationary satellite with five channels. Even though the elliptical footprint of a satellite never maps onto the borders of a state, it was agreed to fix national borders as the compulsory limits for satellite transmissions. This was because of Eastern European fears about free movement of the media and concern among the Western countries about unlimited competition over advertising.

An exception to the national territory rule were the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) which applied for and were granted a common DBS reception area or “super beam”: two of the five channels allocated to each of them were to be used for transmissions to the Nordic area as a whole, for which a joint satellite project (Nordsat) was agreed. Common reception areas were also granted at WARC 77 to a group of North African countries and to two groups of Arab countries. It was also discussed but rejected for Europe.

As early as 1981, the Council of Europe advocated a common framework to regulate issues of cable and satellite broadcasting. The occasion was the declaration of several European states to put direct broadcasting satellites into operation. As a result, the Committee of Ministers adopted the [Recommendation on Principles of Television Advertising](#) (February 1984) and the [Recommendation on the Use of Satellite Capacity for Television and Sound Radio](#) (December 1984). Since some states, such as Denmark or the German Länder, disputed the Community's competence for broadcasting, they lobbied hard for the conclusion of a convention on transfrontier television (Holznagel 1996: 187 f.).

The media policy measures of the Council, the Parliament and the Commission were primarily directed towards two goals: on the one hand, television was to be used to create a European identity, and on the other hand, the European production and distribution of audiovisual works was to be promoted. This expresses the dual character of audiovisual works as a cultural good and as economic product: It was both about the public interest in the integrative and democratic function of the media, which the European Parliament emphasised, and about the unleashing of market forces, which the Commission made its business. The antithetical character of these two aspirations will be fundamental for any further efforts of media regulation in the EU.

The first call for the establishment of a European television company or a European television channel dates back to the 1980s. In February 1982, the Committee on Youth, Culture, Education, Information and Sport of the EP submitted to the Parliament a [Motion for a resolution on radio and television broadcasting in the European Community](#), drawn up by Rapporteur Wilhelm Hahn (EPP). It states that

*"information is a decisive, perhaps the most decisive factor in European unification. .... European unification will only be achieved if Europeans want it. Europeans will only want it if there is such a thing as a European identity. A European identity will only develop if Europeans are adequately informed. At present, information via the mass media is controlled at national level." (EP 1982: 8)*

The majority of journalists, however, did not think European because their task was defined nationally or regionally. Therefore, negative reporting on Europe predominates. "Therefore, if European unification is to be encouraged, Europe must penetrate the media." (EP 1982: 8). The new satellite technology was expected to revolutionise television and break down the boundaries of national TV networks.

The EBU, various PSBs and commercial players were waiting in the wings to take advantage of this revolution, the resolution stated. The European institutions should participate actively in these discussions immediately and coordinate the various proposals. The explanatory notes to the motion mention a project by Radio Luxembourg to launch a trilingual (French, German, Dutch) television satellite channel together with the German Newspaper Publishers Association in 1985. ARD, RAI and BBC had decided on stronger European cooperation and planned a radio programme called "Europe 81" to be broadcast once a month. Südwestfunk and Westdeutscher Rundfunk were already regularly broadcasting European programmes via radio and TV. ZDF had published the most detailed plan in March 1981: the fifth channel of the future German satellite was to be used for a European channel. ZDF wanted to invite the other European broadcasters to participate in the new channel. By exchanging and cooperating on programmes and by broadcasting the jointly produced programmes in addition to their own, a European television channel for all member states would thus be created.

The motion rejected the establishment of a new, independent European television company as too costly and legally difficult. The idea that the EU itself could set up a channel was also rejected. However, the motion pointed out that the EP already operated a television studio and could make its recordings available to European broadcasters via the EBU's Eurovision network.

Instead, it adopted the ZDF model of a joint television channel of the European PSM. Such a channel would not require any investment in a new company. The costs of setting up a European section within the existing broadcasters could be borne by each of them. The costs for central administration and editing was expected to be negligible. The authors also saw no legal or political problems, since it would only be a matter of closer cooperation between broadcasters who already work together within the framework of Eurovision.

For transmission, the authorities in the member states are asked to make the fifth channel of their national satellite available for the European channel. This channel "should be European in origin, transmission range, target audience and subject matter." It should offer a full programme including news, politics, education, culture, entertainment and sport and give

equal weight to all regions of the European Community and take into account “the essence of European culture, namely diversity in unity” (EP 1982: 6).

In its motion, the Committee called on the Parliament to ask the Commission to prepare the establishment of a European television channel, working together with the EBU. It also suggested that framework rules be drawn up for European broadcasting, regulating the protection of minors and advertising. The EP adopted the requested [Resolution on radio and television in the European Community](#) (p. 113 ff.) with minor amendments in March 1982.

The first experiment with European television took place in the same year. Under the name Eurikon, five PSB (IBA, RAI, ORF, NOS and ARD) carried out a five-week experimental transmission on a test satellite from Eutelsat. The aim was to test the new possibilities of reaching more than 300 million people across national and language borders and to address them with a European perspective through a multinational and multilingual editorial team (COM, [Interim Report on European Television](#), 1983).

From October 1985, regular operation followed under the name Europa-TV. Here, public service broadcasters in Italy, the Netherlands, Germany, Ireland and Portugal were involved, again with financial support from the European Commission. A multinational team put together a full programme which was broadcast several hours a day from Hilversum in the Netherlands and could be received by 4.5 million households throughout Europe via cable and in Portugal via terrestrial retransmission. It was broadcast on one picture channel and four sound channels in Dutch, English, German and Portuguese, with subtitles via teletext. Just one year later, the consortium reported financial problems and ceased operations.

The first experiments showed that European satellite TV was technically and editorially feasible. The failure is attributed on the one hand to the resistance of some national governments, which were not prepared to ensure Europe-wide distribution and adequate financing in the interest of the Union, and to rivalries among the broadcasting organisations. On the other hand, viewers who preferred national programmes to European offerings are cited (Theiler 1999). Nevertheless, 3sat, Arte and Euronews have their origins in the satellite experiments of the early 1980s.

The continuing identity crisis prompted the European Community in 1984 to have measures drawn up for [“A People’s Europe”](#). Under this title, the Adonnino Committee (chaired by the Italian Christian Democrat Pietro Adonnino) presented its final report a year later with numerous proposals to overcome the EC’s remoteness from its citizens and to strengthen the European identity internally and externally. The focus was on measures for the free movement of citizens, goods and services, most of which have since been implemented. These include the European passport, the abolition of internal borders, the mutual recognition of university degrees and a common currency.

Television also played a central and dual role as an economic and cultural asset in the Adonnino Report. As in the EP motion of 1982, the culture ministers of the member states are



asked, with reference to the Eurikon and Europa TV experiments, to consider, together with the national broadcasting authorities and the EBU, the creation of a multilingual, truly European television channel to help strengthen knowledge of European cooperation ([COM, 1985](#): 21 f.).

On the other hand, there was the problem of filling the transmission capacities multiplied by cable and satellite with content. In its 1983 Interim Report, the European Commission had forecast a demand for one million hours of programming per year by the end of the 1980s. At that time, however, the four leading film nations in Europe (Germany, France, Italy and the UK) together produced only 1,000 hours of fictional programming per year. Therefore, it said, it was easy to see that production would have to increase enormously. "In the absence of sufficient European production, the gap would be filled by non-European material." ([COM 1983](#): 9) The danger of an "invasion" (ibid.: 11) by foreign cultures especially the USA and especially via satellite channels was evoked. The [Adonnino Report](#) therefore recommended encouraging co-productions by film or television producers from at least two Member States and the distribution of audiovisual works in order to produce a competitive and truly European industry, as well as to give every citizen access to the largest possible number of programmes from the Community countries ([COM, 1985](#): 21 f.).

In parallel, the European Commission drafted the [Television without Frontiers. Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable](#) (1984). It first had to dispel the fact that the EC had no competence whatsoever in cultural policy. Just as the German Länder defend their exclusive competence in matters of culture, education and media against the federal government, the European member states continue to resist EU intervention in these fields to this day. In fact, the Green Paper states, the EC is responsible for all economic activities, including those concerning information, art, education, training and entertainment. Although the integrative effects of cross-border broadcasting are also referred to, the creation of a common audiovisual market was in the foreground.

These parallel efforts led to the Council's [European Convention on Transfrontier Television](#) (May 1989) and the [Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities](#) (89/552/EEC, October 1989), better known as the Television without Frontiers Directive. These were the first international treaties creating a legal framework for the free circulation of television programmes across borders in Europe. The Directive is also the first incarnation of what will later become the Audiovisual Media Services Directive and lead us from the pre-history into the EUMEPLAT research period (→ 3.1 The television directive).

Not the least, digitalisation started cast its shadow on media, notably from telecommunications and the new sources and devices for the reception of information which it interconnected. One of the first documents is [Towards a Dynamic European Economy. Green Paper on the Development of the Common Market for Telecommunications Services and Equipment](#). (COM (87)290 final, 30.06.1987). It addressed the convergence of

telecommunications and computing with the objective of developing a consistent communications system within the European Community that should not be hampered by national frontiers. The Green Paper called for a fundamental review of the speed of technological diversification (signal digitisation, optical cables, computer networks, cellular telephony, satellites, etc.), new sources of information (television, data bases and banks, knowledge banks, image banks, expert systems, etc.), the explosive growth in communications requirements (financial and commercial transactions, research networks, international tourism, cultural exchanges, world-wide interdependence etc.) and not the least the importance of scale effects through multinational participants.

## 2.4 Overview

In the following we will analyse major milestones in EU media legislation in the period from 1990 to today. We will look into the problems that posed themselves in each case, the objectives the European Community and then the Union pursued in devising its solutions and the norms and principles it applied. We will also look at the interactions between the MS's national laws and Union law, including the implementations of EU instruments, with a focus on the ten countries represented in the EUMEPLAT consortium.

The EU is delineated towards its outside by its external borders and internally by the competences reserved to the Member States (MS). Europe therefore very much emerges in the space in between and in what happens across borders, and in this way affects the common market. This includes cable and satellite television services across borders or access to on-demand media from outside one's home country in the Portability Regulation (2017/1128/EU).

European media law starts in the 1950s by addressing the media of the times, radio, television and cinema. The press did not bring about market-relevant cross border practices and therefore – like media in general, culture and education – remained the prerogative of the MS.

From the very beginnings, there was great hope that cross-border TV would allow Europeans to learn about each other and together grow a European identity. With satellites and cable the idea of a multi-language pan-European TV satellite channel emerged which would unify the continent.

The centrepiece of European audiovisual media legislation is – introduced by the Green Paper on Television without Frontiers in 1984 – the Directive by the same name of 1989, that on the other side of the digital revolution was transformed into the Audiovisual Media Services Directive (AVMSD) in 2007. The TV Directive focussed on rules on advertising and on the protection of public order and of personal rights (protection of minors and the right to reply). Copyright was also identified as requiring Community intervention from the start, but was



branched off from the TV Directive into a television-specific copyright instrument, the Cable and Satellite Directive (1993).

The market-focussed Europeanisation of media entailed rules on pluralism and level playing field – but not on content-related diversity. The neoliberal spirit of the 1980s, heralding liberalisation and privatisation, welcomed the opportunities but was also aware of the weaknesses of the European AV production and distribution industries which raised the fear that the new channels would be invaded by US-American content. The response was threefold: first, framework rules in the TV Directive, including a quota for European programmes mandated for all TV services in Europe, intended to create demand; secondly, funding programmes for the development of new AV technologies, such as the wide-screen and HDTV standards; and thirdly, a support programme for the European film industry called MEDIA (Mesures pour encourager le développement de l'industrie audiovisuelle) which was piloted in 1988, and came into force in 1991. Geopolitically, the continent also started to grow together after the Iron Curtain came down in 1990 and the EU's Eastern enlargement began.

1994 marked the shift from AV to digital. The Bangemann Report heralded the advent of the "Information Society". The technology was ISDN and ATM, the promise for media was 500 TV channels and entertainment databases. In 1995 a [G7 Conference on the Information Society](#) took place in Brussels. But not even here, like anywhere else in the European political and legal literature of that time, the word "Internet" can be found.

Only in 1996, the Internet started to appear in EU documents, and it did so in the form of Illegal and harmful content and threats to minors and human dignity. Clearly, it was the negative effects of the Internet that attracted the attention of the EU. And this is how it remained. Most of the EU platform regulation is reactive and defensive, including measures against child abuse material, terror propaganda, hate crimes, disinformation and copyright violations. All of it is highly contested.

1996 was a decisive year also because two legal innovations outside the EU set the course for a platform regulation to emerge out of its diffuse 'information society' origins. The first is the US [Communications Decency Act](#) of 1996 which became the model for the E-Commerce Directive of 2000. The second innovation was the [WIPO Internet Treaties 1996](#) which introduced a new exclusive right of the author and performer, the right of making protected works available to the public. The two Treaties, one on copyrights, the other on related rights on performances and phonograms, were transposed into the EU Directive on Copyright in the Information Society of 2001.

The eCommerce Directive (2000) and the InfoSoc Directive (2001) were the first pillars of European platform law. The making available right in copyright and the horizontal rules on exempting hosting providers from liability for their users making available their own works and those of others, both indicate another underlying novel dynamic: the user enters the arena of public expression. Where before, particularly copyright law only concerned professional authors and performers and their collective organisations and publishers, record labels,

broadcasters and other business entities, the Internet now allows individuals to express themselves publicly and globally. What “users” in contrast to professionals do, entered law in the form of “sharing”, as “video-sharing platforms” in the AVMSD 2018 and as “online content-sharing service providers” in the DSM Directive of 2019.

## Structure

Since “platformisation” is a central operative concept of EUMEPLAT, the following report will be organised into two parts: the first looks at the audiovisual media regulations that emerged from the analogue media environment of the 1960s; the second part addresses the digitalisation of media and portrays regulatory milestones that form a growing body of platform laws from the 2000s onwards. This paper is indebted to Dreyer et al. (2020). The law scholars classify the media-relevant European legislative acts into media-specific like the AVMSD and MEDIA, sector-specific like the e-Commerce Directive, telecommunications and copyright law, and thirdly general specifications with relevance for the media sector like the GDPR but also the state aid provision on PSB in the Amsterdam Protocol. Because of the EUMEPLAT focus on the transition from the AV to the platform world, and because we are social scientist, not lawyers, we have taken the liberty to organise the EU acts into two main sections, one before and one after digitalisation.

In the transition from the analogue to the digital period, the EU regulatory discourse shifted from TV for European “identity” to “sovereignty” of Europe – in respect to data, technology, infrastructure, innovation. Where in the TV age the dominant other was the USA, in the information society age it was the USA and Japan, in the platform age it is the USA, China and Taiwan. Today, the EU asserts its sovereignty by striving to build its own cloud, AI and chip infrastructure.

This is not an absolute break. The objectives of the TV age are carried over into the platform age. The TV instruments now came to address digital phenomena. For instance, the AVMSD in its 2007 version includes a European quota for video-on-demand platforms. The dual rationale remains the same: nurturing a European media industry which is able to compete internally in the liberalised Single Market as well as globally, and that at the same time adheres to European values and provides public value services essential for cohesion and democracy. Therefore, also the desire to create a European identity carries over. The ultimate goal is to ensure that new media platforms are making European culture more European.

The citizen-centrist approach that started after the first direct elections to the EP in 1979 with the [A People's Europe](#) Report (1985) also continues into the digital age. Yet, the EU is still limited in what it can do to actively nurture a vibrant and diverse European digital public sphere.

With US-American companies dominating the global platform market, we see a re-run of the “invasion” rhetoric of the 1980's commercial broadcasting in Europe. The negative effects of platformisation are attributed to foreign technological hegemony which is not

informed by European values: surveillance, misinformation, polarization of debates, toxic online discussions impacting a pluralism of opinions, exclusion of independent voices from web monopolies, spread of anti-EU disinformation, intransparent algorithmic control optimised to serve commercial monopolies, electronic pollution. This is countered by emphasising positive effects like European co-productions and cross-European success stories, the Creative Media Programme, virtuous grassroots phenomena and media narratives and practices able to bring people out of the information bubble (see Vaccari & Valeriani 2021), but most of all with the narrative of regaining European sovereignty.

Media law in Europe takes place in a multilevel system. In federal democracies like that of Germany, press and broadcast is in the competence of the federal states. But even here, issues such as broadband expansion, press subsidies or platform rules are the responsibility of the central government. "The larger states of Europe have all established forms of intermediate, regional, or 'meso' government. ... Regions gained some institutional recognition in the Maastricht Treaty, which established a Committee of the Regions as a consultative body but ambitions to entrench them as a 'third level' of European government have not succeeded. Regions are too heterogeneous to be reduced to the same institutional logic and do not even exist in some parts of Europe." (Keating in Beaumont 2002: 9f.). Above the national level, media law is made by the European Union and the Council of Europe.<sup>4</sup>

Regulatory 'Europeanisation' can be understood as the approximation and harmonisation of national laws among the Member States and a legal integration within the European Union. Within the framework of the EU Treaties, legislative competences are conferred by the Member States to the Union. The Treaty of Rome can be read to stipulate that convergence into a union must happen. What emerges over time is a corpus of Union law, an *acquis communautaire* based on the Treaties and comprising all secondary EU law and CJEU case law which is binding for all member states. Does this development, in fact, lead to a convergence of legal systems?

Our comparative analysis of media systems in Europe in the region and market reports has found no evidence of their convergence. Is this different for the European legal system? Are all the different legal traditions and cultures in the 27 MS, including civil-law and common-law traditions, increasingly merging into one?

National laws do impact international trends. Examples include [HADOPI](#) in France and the [Network Enforcement Act](#) (NetzDG) in Germany. These were cases of MS pushing forward to fill a gap in EU law with national advances. Often these have an exploratory character, leading to the HADOPI three-strikes approach being dropped entirely and the NetzDG having to be amended shortly after it was adopted. They are part of a collective long-term learning

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<sup>4</sup> For an overview of the CoE activities in this area s. [Recommendations and Declarations of the Committee of Ministers of the Council of Europe in the field of media and information society](#), Strasbourg, July 2015

exercise that not only law but society as a whole is undergoing on its way into the “Neuland”, the uncharted territory, as the former German Chancellor Angela Merkel famously – and rightly – has called the Internet. These national advances ultimately inform European lawmaking and beyond. This also serves to debunk the widespread perception that EU law is made ‘in Brussels’ with the MS on the receiving end. In fact, solutions are also tested in the MS and problems are signalled by them through the Council. In the case of HADOPI and NetzDG it is expected that they will indeed largely merge into the future DSA package and the ePrivacy Directive. European law also radiates outwards. The most prominent example is the GDPR, which has had an immense impact on the data protection debates in Asia, Latin America and even the USA (Peukert et al. 2020), leading to a degree of global approximation of laws regulating global platforms.

Among the ten EUMEPLAT partner countries, Turkey is outside the Union and therefore not transposing EU law. Turkey is member of the Council of Europe though, which it had joined in 1949, the year of its founding. But after Turkey had not complied with an ECtHR ruling that philanthropist Osman Kavala, who has been in jail without conviction for nearly four years, be released immediately, the CoE recently started proceedings against Turkey which could lead to its membership be suspended ([POMED 24.09.2021](#)). Belgium, Germany and Italy were founding members of the EEC in 1951. Greece joined in 1981, Portugal in 1986, Spain in 1986, and Sweden joined in 1995 what was at this time already the Union. The Eastern European countries followed, the Czech Republic in 2004 and Bulgaria in 2007.

Country comparisons of national legislations is standard procedure in the Commission’s Green Papers before it proposes a new instrument, and again looking at the achievements and shortcomings of national implementations of EU acts before a revision is proposed. Also, all the EU media acts contain requirements for ex post evaluations and reporting in both one-off reviews and regular reviews at designated intervals.

There is little research on transposition practices. E.g. Steunenbergh & Toshkov (2009) used four EU directives with deadlines for transposition in 2005 and compared their implementations in the 27 EU Member States. Their objective was to explore the various transposition patterns in the ‘old’ and ‘new’, Eastern European member states. Their sample includes one Directive on copyright (2001/84/EC on the resale right for the benefit of the author) and one on advertising (2003/33/EC on advertising and sponsorship of tobacco products). Alas, their study only yields information on transposition speed, and only reports results grouped into old and new MS.

A double comparative approach was pursued by MEDIADEM (2010) which provides portraits of the national media policies and regulatory practices in 14 European countries, including most of the ten project partners (with the exception of the Czech Republic, Portugal and Sweden). Its final chapter then first analyses the media policies of the European Union and the Council of Europe, then conducts a comparative evaluation of the effectiveness of these supranational organisations and their respective frameworks in supporting media freedom and independence (Casarosa 2010: 493 ff.).

There are different approaches in comparative law. The functional method of comparison is the main school (a prominent exponent is [Hein D. Kötz](#), Hamburg). It abstracts from the specific language of the acts under comparison and asks: What is the problem addressed? What are the objectives of the acts? What are the norms applied? This method can be used to compare entire legal systems, individual rules or legal institutes and different approaches to social or economic issues. It can also serve different purposes, e.g. the practical application of the law in cross-border cases or a legislative comparison for finding models for national reforms or for approximations of national laws in EU law.

An example is Dreyer et al. (2020) whose comparative analysis of EU media law asks for its internal structural coherence. Consistency, i.e. homogeneity and comprehensiveness, is the goal of the EU legal framework. However, Directives frequently use “vague legal terms, both in the definition of the material scope and in the individual situations, which through their vagueness can potentially lead to contrary effects during transposition, implementation and interpretation by the Member States. Exemption rules and opening clauses operate as a counter-vector to coherence across Member States.” (ibid.: 26). Regulations, which are directly applicable, theoretically ensure a higher degree of harmonisation. In media, these are so far only the GDPR and the P2B Regulation. Yet the authors find that even here, the level of harmonisation achieved is barely higher than that of directives:

*“In practice – through the (many) opening clauses, through deviating interpretation and practices in application by the national bodies competent for supervision or enforcement and under their potentially divergent regulatory cultures – it is possible for significantly different legislative frameworks, interpretations and enforcement measures to be formed in the Member States.” (ibid.)*

Their comparison is not between countries but between different media-relevant regulations in different areas of EU law. They analyse them in the dimensions of material and territorial scope of application, regulatory purpose(s), leeway for implementation, regulatory approaches, legal principles and governance structure (ibid.: 7 f.). They look at overarching concepts like that of “service” and find that it is defined differently in various legal acts (ibid.: 27 ff.). The same is true for “platforms” where different acts can lead to overlapping and conflicting goals and obligations on their providers. Furthermore, the legal assessment of platforms changes as they are evolving from passive transmission to more active forms of content selection and prioritisation. Likewise, they find the choice of the country of origin principle over that of the country of destination in different instruments not to be derived systematically (31 ff.). In conclusion, their analysis of immanent discrepancies in EU law lead Dreyer et al. to find the EU legal framework for media to be fragmented and not fully coherent (50).

There are fundamental differences in national cultures in particular as to criminal law and the right of expression (freedom of opinion and information vs. personality rights; for this reason, there are no coherent EU rules on hate speech). Not only is there no convergence but evidence for divergence, a re-nationalisation by right-wing populist governments criticising the encroachment by the EU. There is also a structural effect of the speed of rule-making: E.g.

Germany already has an instrument with restrictive rules, the NetzDG; when this comes up for EU law-making (e.g. in the DSA), there are MS which do not want any rule at all. The EU harmonises on the lowest common denominator, which would mean a weakening of the German domestic rule, leading in turn to its resistance.

When looking at the [transposition of the new copyright directive, the DSMD](#), one might observe two distinct strategies: France and the Netherlands did so by literally copying the language of the directive into national law (and omitting user protections in the process). Germany did so with a high degree of interpretation, even filling in gaps in the Directive. Is this indicative of distinct national legal cultures? Dreyer replies that this is a special case, because the German government had promised to avoid uploadfilters. In other cases, e.g. the AVMSD 2018, Germany also copied the provisions literally into the Interstate Media Treaty, even where it did not make much sense. Therefore, nothing can be learned from this singular observation about (essentialist) differences in national law cultures (Dreyer, orally).

Nevertheless, there are differences in regulatory cultures which are the vantage point of a second approach in comparative law, which is called “sensitive epistemology”. A prominent proponent of this school is Pierre Legrand (2002). Their critique of the functional legal comparison school is that it presumes similarities between different jurisdictions, and in searching for them it reduces its analytical framework to the identification of sameness, whereas “commonalities across legal ‘systems’ ... can exist solely at the most superficial level and are, therefore, devoid of epistemological value.” (ibid.: 225)

The sensitive epistemologists start from the assumption that “law acts as a site of ideological refraction of deeply embedded cultural dispositions” (ibid.: 243). A legal convergence can thus never fully transcend the manifestations of localism and historicity of law. Therefore, they call for a thorough cultural contextualisation. A meaningful comparison needs to understand how foreign legal communities think about the law (ibid.: 229). It requires an interdisciplinary investigation, including anthropological, sociological, philosophical, historical and psychological insights.

Both approaches to comparative law seem difficult to apply for our purposes in EUMEPLAT. A functional positivist study of the implementations of all or even only the major EU media acts in nine countries, diachronically e.g. through all five versions of the AVMSD, is clearly not feasible. A sensitive culturalist study, contextualising media legal topoi in the legal *mentalité* of the nine countries likewise raises the bar to a point beyond reach. We will therefore confine ourselves to the state of national transposition of the most recent directives and to differences in the use of opening clauses by different MS.



## 3 Audiovisual media regulation

Media regulation historically starts from print, both in copyright and press law. Press is outside the scope of EU legislative competence. The Treaty mandate for services does include audiovisual services. While in the strict sense, this refers only to industrial policy, media are inherently underlaid by human rights, in particular the freedom of expression and information (Art 10 ECHR), and the EU legislator regularly makes reference to the need for its protection. Harmonising national laws on and promotion of audiovisual media therefore constitutes the starting point of all EU media policy measures. “Since media services are also cultural assets, for which the EU has only (limited) supporting competences, the focus at the heart of European media policy is on guaranteeing an EU-wide internal market for audiovisual media and their providers in which an homogenous legal framework is established for the production and distribution of services and content and where fair competition prevails.” (Dreyer et al. 2020: 9).

Our milestones in this section start with the cornerstone of the EU media law framework, 3.1) the television directive (first Television without Frontiers Directive (1989), then Audiovisual Media Services Directive (AVMSD 2007). 3.2) Copyright law also started from the AV sector (with the Satellite and Cable Directive (SatCab, 1993), that turns into the Online SatCab Directive (2019)). 3.3) Public Service Media are clearly outside the EU’s competence but in an important step it permitted MS to fund their national PSM under an exception to the state aid rules (introduced in the Amsterdam Protocol (1997)). 3.4) The Green Paper on Television without Frontiers (1984) was also the beginning of the EU’s measure for funding the AV industry, from MEDIA (1991) to the current Creative Europe programme. 3.5) Being preoccupied with the Common Market, the EU, of course, developed its own body of competition law. Yet, even though a 1992 Green Paper analysed the need for special competition rules in order to safeguard pluralism of media and thus diversity of information and opinion in society, this issue has been too controversial to produce any regulation to date.

### 3.1 The television directive

Television was the hot ‘new medium’ of the 1930s. While during that time, radio proved its power to inform or to disinform an entire nation, television use remained marginal until after the Second World War. Yet its potential of having even more impact than radio was apparent already. In retrospect, the hopes and emphasis the founding fathers and mothers of the EU put on television as means of unifying the continent is still astonishing, particularly when compared with the near total absence of statements and measures concerning the printed press.

The potential of a common media space became even more pronounced with the emergence of cable and satellite technology at the beginning of the 1980s. Satellites were

initially used to feed programmes into cable networks, followed by Direct Broadcast Satellites (DBS, also called direct-to-home (DTH)) whose signals consumers can receive directly with their own dish. This increased the available transmission capacities and led to calls for a liberalisation and deregulation of broadcasting from both press publishers and from small European countries.

Under the Common Market paradigm of the EEC Treaty, all restrictions on free movement of goods, services, persons and capital within the Community were to be abolished. In 1984, commercial broadcasters were still prohibited throughout the Community with the exception of the UK and the Netherlands where they were allowed under precise rules, using technical resources managed by the public authorities, and Italy where the Constitutional Court had recently permitted them. Yet the general trend was to end the monopoly of PSM and license commercial broadcasters.

At the same time there was concern that the additional transmission capacities had to be filled. Since European programme production capacity was by far not sufficient, it was feared that the new channels would be filled with non-European material, especially from the US.

It was in these circumstances that the central instrument of EU media policy, the Audiovisual Media Services Directive (AVMSD) was developed. It started as the Television without Frontiers Directive (1989) which was amended in 1997 to include teleshopping and in 2007 to include non-linear on-demand services. It became the AVMSD in 2010 to address the Internet by covering OTT services, which in turn was amended in 2018 to include video sharing services. The goal of the Directive is to approximate national legislation so as to abolish obstacles to trans-border flows of television services in the European common market and to create a common programme production and distribution market under conditions of fair competition.

### 3.1.1 Prehistory

As we have seen, the Council of Europe already in its 1954 Resolution had urged to study the technical, financial, cultural and copyright aspects of television (CoE 2015: 9). The [European Agreement concerning Programme Exchanges by means of Television Films](#) (1958) addressed copyright obstacles to pan-European distribution by stipulating that a broadcasting organisation is the author of TV films and from one source can authorise their broadcasting in the other countries of the Agreement, thus bridging the territoriality of copyright. The [European Agreement on the Protection of Television Broadcasts](#) (1960) widened the scope of utilisations of broadcasts that television organisations may authorise or prohibit.

In 1982, the EP adopted the [Resolution on radio and television in the European Community](#) (p. 113 ff.), asking the Commission to prepare the establishment of a European



television channel as well as framework rules for European broadcasting. In response, the Commission in 1983 issued its interim report on [Realities and tendencies in European television](#), an inventory of the current situation of TV in Europe and an outline of the options and challenges for the future.

Meanwhile, the CoE adopted two additional recommendations on principles, one on [Television Advertising](#) (February 1984) and one on the [Use of Satellite Capacity](#) (December 1984), all leading up to a more comprehensive agreement.

### **3.1.2 Television without Frontiers. Green Paper (1984)**

An EU lawmaking process begins with the Commission preparing an inventory of the issues at hand and leading up to several possible alternative policies. Such a Green Paper is not yet a draft of the intended legal instrument but submits for public discussion the Commission's ideas on the approximation of the relevant aspects of Member States' law to be achieved before formal proposals are sent to the legislature.

[Television without Frontiers. Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable](#) (COM(84) 300, 14.06.1984) starts by describing new developments in the audiovisual field, i.e. satellite and cable, their technical, cultural, social and economic aspects, their legal status in the then ten Member States of the Community<sup>5</sup> and in international legislation. The Paper first of all needs to establish the legal basis for action by the Community, i.e. a justification of the competence of the EU in the audiovisual field under the EEC Treaty. It does so by considering signals transmitted by radio to be services, the free movement of which in the common market is one of the core goals of the Community (EC 1984: 8). It concludes by discussing several alternative models and presenting "ingredients of a solution" (ibid: 328 ff.).

Television was seen as important in nurturing awareness of the rich variety of Europe's common cultural and historical heritage. "The dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas." (ibid.: 28). The Paper noted a range of new audio-visual techniques, including video cassettes and discs, sound cassettes and records, electronic data transmission by means of decentralized computers over international telecommunications networks, and DBS and cable. The Commission therefore expected that the work on media would have to be complemented by the formulation of a Community telecommunications policy (12).

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<sup>5</sup> Luxembourg, Italy, Netherlands, Belgium, United Kingdom, Ireland, France, Federal Republic of Germany, Denmark and Greece.

The majority of Europeans received TV and radio programmes only from the country in which they live. The only transborder broadcast was in Belgium, Luxembourg and the Netherlands. The Paper found 600,000 cable networks in Western Europe. However, half of them had fewer than 100 subscribers. Belgium had the highest density with ten cable television companies serving 75-80% of TV households (18). In Luxembourg, cable reached 90% of households, just under 65% in the Netherlands and 14%, in the UK. In Germany four cable pilot projects had been launched. Italy had undertaken first tentative attempts to introduce cable, while Greece had not yet started (19). Meanwhile several MS had announced plans to operate DBS (Germany and France, UK, Italy and Luxembourg) (16).

The Green Paper weighed positive and negative effects of broadcasts from other MS increasing with the number of available channels. Various cultural and social warnings were raised that the COM rejected. People would not be overwhelmed with information, nor would the “addictive fascination” of TV lead to an increase in consumption or to “personality disorders”. Watching foreign programmes, for most viewers, requires a greater intellectual effort. In Belgium and the Netherlands where up to sixteen foreign channels were available, long-term surveys showed that the average viewing time settled down at just over two hours per day (34 f.).

The greater effort is due to the language barriers which need to and can be overcome. The new transmission techniques with their increase in capacity offer the possibility to include several different language soundtracks on a television channel which the viewer can select. Videotext can also be used to transmit subtitles (53).

Warnings were also heard about a possible cultural domination of one country by another. The Commission found that in production of TV programmes, no individual MS was predominant. On the contrary “the proportion of films from other Member States is regrettably small (Annex 3)”. However, most of the foreign films shown in the Community came from one single non-member country – the USA.<sup>6</sup> “Programmes such as ‘Dallas’ are carried by almost every television channel in the Member States. The creation of a common market for television production is thus one essential step if the dominance of the big American media corporations is to be counterbalanced.” (33)

Concerns about a negative impact of competition to PSB by commercial broadcasters were not shared by the COM. “The co-existence of two types of television organization – the one financed from licence fees and the other financed on a commercial basis, both equally bound to provide a public service – has proved its worth in the United Kingdom over many years.” (36) Therefore, it saw no grounds for fears that commercial TV would lead to a drop in

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<sup>6</sup> The annex to the Green Paper gives the percentages of US films shown on TV in 1981 as 93.70% in the UK, 80.45% in France, 59.10% on the Flemish channel in Belgium, 54.29% in Germany and 30% on the French channel in Belgium (ibid.: 334).

the quality of programmes. It did cite an Opinion of the Political Affairs Committee adopted by the EP in 1982, stating:

*“This open information market must not mean that satellite broadcasts should be allowed to flood the Community in unlimited quantities as though they were a commercial product. ... Freedom of expression, however, cannot be the prerogative of the highest bidder and the Commission must therefore draw up a directive ensuring that commercial interests are channelled into a direction acceptable to the Community and made subject to certain conditions.” (ibid.: 3)*

In its economic assessment, the Commission found that broadcasting organizations are an economic force and provide a large number of jobs (39). It gives examples of the costs incurred by both the operators of cable and DBS services and the individual recipients. In order to finance the large initial infrastructure costs, some MS had introduced a special supplement to the licence fee, known as “Kabelgroschen” in Germany (45 ff.). The COM expected the main initial beneficiaries to be the telecommunications industry (the cable industries, communication engineering, information technologies, electronic components, aerospace and consumer electronics equipment) (52).

The Green Paper also gives examples of programme production costs per minute (46), but adds that cross-frontier broadcasting does not entail additional production costs. “Eurovision illustrates the potential this approach offers, with 833 programmes lasting 1,460 hours being fed into the Eurovision programme exchange in 1979. This compares with the 5,109 broadcasts lasting 8,710 hours in all actually produced by the broadcasting organizations belonging to Eurovision.” (46)

The licence fee is confined to the national territory and cannot be shared with foreign broadcasters of programmes received within the country. This leaves subscription fees, pay-TV, advertising and remuneration for rights paid by foreign cable companies as sources of revenue (42 f.).

As for advertising, the Commission found that of the total advertising spending in the Community, 12% went to television and 3% to radio (41 f.), compared with 55% accounted for by print (1979; 58)<sup>7</sup>. Broadcast advertising was forbidden in Denmark and Belgium. All other MS had restrictions on advertising time and, e.g. in France a limit of 25% of revenue. “These restrictions have led to artificial shortfalls in the supply of advertising time, with the result that there is substantial excess demand for advertising time in most Member States, and in particular in Germany and France. Accordingly, firms have been unable to spend the considerable resources they have available on their desired advertising objectives.” (49)

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<sup>7</sup> Competition between the media did not yet have a negative effect as the overall ad spending was growing. “The number of newspapers sold has risen further in the last ten years, though the number of publishing houses has declined somewhat. Seen overall, the number of periodicals sold has also risen, as has the production and sale of books. Sales in the sound-recording industry have made impressive progress. The number of licensed radio sets has also increased, though peak listening time has shifted from evening to daytime under the influence of TV.” (57)

Accordingly, both advertisers and broadcasting organizations were demanding that restrictions be eased.

Most MS had additional regulations requiring a clear separation of advertisements from the rest of the programme. In some, ads must not interrupt programmes or may be shown only at certain times of the day or were banned on Sundays and public holidays (234 ff.). Broadcast ads for tobacco were banned everywhere, except in Luxembourg and Greece (239). Ads for alcoholic drinks were sometimes restricted in the Community but not prohibited, except in France (243). These rules were based on voluntary codes of practice, semi-statutory arrangements under public oversight or on laws. (245)

As we can see, the legal situation in the ten MS was quite diverse. [Part Four of the Green Paper](#) details the national media regulations, “in order to obtain an overall picture of the Community’s ten broadcasting systems and to enable the laws to be compared, which must be done before they can be brought closer together (the subject of Part Six).” (63)

[Part Five of the Green Paper](#) looks at media through the lens of Community law, i.e. the EEC Treaty and its interpretation by the European Court of Justice. The right to freedom of expression, both under the European Convention and the Universal Declaration of Human Rights, is “regardless of frontiers” (24). The admissibility of beaming radio across frontiers has been recognized by the legal systems of the free democracies and may to some extent be regarded as international customary law (26).

The EEC Treaty aimed to create a common market, for which all restrictions on the freedom of movement of people, goods and capital as well as on the freedom to provide services within the Community are to be abolished (Art 3(c) [EEC](#)) and a system is to be instituted to ensure that competition is not distorted (Art 3(f)). The Treaty devotes a whole chapter to “Services” (Arts 59-66). It defines: “services shall be considered to be ‘services’ within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.” (Art 60 [EEC](#)).

The first question the Green Paper had to answer therefore is, whether television is a service. It pointed to an CJEU decision in the case of Mr. Sacchi, an Italian who operated a television relay company, who had argued that TV programmes are products and had challenged the monopoly of RAI. The CJEU ruled that “a television signal must, by reason of its nature, be regarded as provision of services. ... The transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services.” ([CJEU C-155/73, Sacchi, 1974](#)). In the Debauve case ([C-52/79, 1980](#)), the court extended the argument to cable television. The Green Paper added that the same is true for satellite transmission ([COM 1984](#): 106). As television programmes were normally remunerated by licence fee, tax and/or advertising in all MS, also this criterion of the EEC Treaty was fulfilled (ibid.: 106 ff.).

The Green Paper specifically addressed the provision of television services across borders. The Treaty provides that “restrictions on the freedom to provide services within the Community for nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended shall be progressively abolished.” (Art 59 EEC Treaty)

On advertising, the COM interpreted the diverse rules in the MS and CJEU case law (Debauve) to require harmonisation. This is most evident where broadcast advertising is banned entirely as in Belgium or where domestic ads are permitted but ads must be blacked out of foreign programmes which are relayed within the country as in Italy. This implied discrimination against non-nationals. Also the national rules on ad time and insertion into programmes can be a special barriers in the way of cross-border broadcasting. Problems multiply where a transmission is to be relayed in several Member States: “given the great variety of laws observable it appears practically impossible that a broadcast could at the same time satisfy the rules on advertising time in the State in which it is broadcast and in two or more others.” [155]

The need for harmonisation is driven by technical developments and by the general trend towards liberalisation. As long as foreign broadcasts can only be picked up over the air within a country, domestic broadcasting law is not applicable. But firms which domestically relay foreign programmes, either as wireless signals or by cable, are regarded as domestic broadcasters. The biggest uncertainty is caused by direct broadcasting by satellite across borders, the ground for which had been cleared in international law (256 f.).

A possible solution to the conflict of laws would be the country of origin principle which had originally been developed by the CJEU in 1978 to give effect to the free movement of goods. Here it would mean that broadcast advertising is subject solely to the law of the country of transmission. Advertising lawfully broadcast in the country of transmission would accordingly have to be tolerated in all EEC countries in which it is received. Yet, the Commission finds that this would not satisfy the Debauve ruling. “According to that decision, advertising frontiers are to be opened up only when advertising rules have been harmonized, that is to say when they offer equivalent protection everywhere.” (261) “In the light of the judgments given by the Court, liberalization through harmonization is therefore the task laid down by the Treaty as far as the law on broadcast advertising is concerned.” (260)

The responses of the stakeholders received by the Commission varied. The Consumers’ Unions found the only real protection, faced with trans-border broadcasting “which is both inevitable and desirable”, in harmonization of advertising regulations “at the highest level”. Advertisers tended to oppose this view, while broadcasting organisations held an intermediate view (260). The Commission itself had a declared policy of avoiding any perfectionism in the area of harmonization of laws. “The aim should therefore be to achieve only the absolutely necessary minimum of harmonized rules.” (262)

What approach should the required directive take on advertising? The Commission noted a trend in many MS is to establish a special code of practice for broadcast advertising and special monitoring arrangements to ensure its compliance and found it expedient to adopt this approach. The directive should, therefore, stipulate that MS must introduce a code of practice governing broadcast advertising and certain controls (283).

Based on the rules that are common to the existing codes in the MS, the Commission suggests three sets of rules: general standards (broadcast advertising must not infringe the law in the country where the broadcast originates; it must not offend against public morals or basic good taste or against religious, philosophical or political beliefs; it must not play on fear without justifiable reason, and it must not encourage behaviour prejudicial to health or safety), standards relating to children and young people (protecting them against advertising aimed specifically at them and when they participate in advertisements (284)) and standards relating to alcoholic beverages (285). As to ads for tobacco products, which were already almost totally banned in the MS, "it would be consistent with the consumer and health policies of the Community to make this prohibition general and binding on all Member States." (282)

As for control of compliance with the code, the Commission saw the need to make a distinction between original transmission and retransmission of advertising. "Monitoring prior to first transmission is feasible and already practised in many MS. It is relatively simple to apply and highly effective and should be made binding by the directive. If monitoring reveals that an advertisement infringes the code of practice, its transmission would be prohibited." (283) The practicalities should be left to the Member States. In the case of retransmission, especially at the same time as the original transmission (simul-cast), prior monitoring is impracticable. But once prior monitoring is established throughout the Community, the need for ex post controls should be reduced to programmes transmitted from third countries.

The minimum harmonization aimed at by the Commission would therefore consist of a code of practice at Community Level and rules for prior monitoring of advertisements to be broadcast for the first time in a MS. Cross-frontier advertising that met this standard would be permitted. Member States would be able to lay down wider-ranging or more detailed rules for national broadcasts.

Copyright, next to advertising, is the second area of concern to the Green Paper. Whereas the right to freedom of expression is regardless of frontiers, copyright is territorial. Copyright is based on international treaties and European law<sup>8</sup>. It creates the basis for an "economy of culture" by granting to authors an exclusive right to their works, i.e. the right to exclude anyone from unauthorized use. It also grants separate "related rights" on the work of performers, manufacturers of audio recordings and broadcasting companies. The right to use

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8 The Revised Berne Convention for the Protection of Literary and Artistic Works of 1886, the Rome Convention on the protection of performers, producers of phonograms and broadcasting organisations of 1961 and the European Agreement on the Protection of Television Broadcasts of 1960.



a work, i.e. to copy, distribute, perform, broadcast etc., can be granted in return for payment. The Commission points out that appropriate remuneration of authors and performers is also in the public interest. If they were not able to make a living in the common market, broadcast programmes in the Community would come from outside. "This would increase our cultural dependence." (301)

The scope of copyright is determined by the principle of territoriality. "The principle of territoriality states that the copyright protection conferred in each state is limited to the territory of that state and its prerequisites and effects are determined by the law of that state. ... This national restriction of rights applies even to the Member States; in the present state of development there is no uniform law of copyright for the common market." (301 f.)

The Commission saw this partitioning on a national basis of copyrights and rights of use in conflict with the objective of securing freedom to provide services across the internal frontiers of the Community. The act of transmission of the broadcast is regarded as decisive for the application of the principle of territoriality. If an authorised terrestrial transmission is received in a neighbouring country, this is not a broadcast but merely a reception, which is irrelevant for purposes of copyright. The situation is different if transmissions by wire or cable are made across the national frontier and distributed in the other country. Both the initial transmission and the dissemination of the signals form part of the act of broadcasting. Hence the question of copyright arises in both countries. The same applies when the broadcast is picked up – including by point-to-point satellite – and relayed in the other country, whether over the air or cable. The retransmission is a new act with copyright implications, occurring in the second country (303). In the case of direct broadcasting via satellite, the situation is unclear.

*"One widely held opinion is that the satellite must be regarded merely as an 'extended antenna' of the transmitter which transmits the radio signals to the satellite; the only relevant country for copyright purposes is thus the one in which that transmitter is situated. According to another view the transmission of the radio signals to the satellite cannot be regarded as a broadcast in the sense relevant for copyright, since it is aimed only at the satellite and not at the general public; a relevant broadcast takes place only from the satellite. On this view the principle of territoriality can have no application, since the satellite is in outer space, which is not subject to the jurisdiction of any state, and it is difficult to treat such a satellite according to the 'law of the flag' like a ship on the high seas. It has therefore been suggested that in such a case not only the law of the transmitting country but also the law of the receiving country should be applied, but this raises the question whether in a case where there are several receiving countries, broadcasting is to be deemed to have occurred in each of them or only in one of them."* (304)

The interaction between EEC Treaty and national copyright law had been the issue of the CJEU ruling in *Coditel v Ciné Vog* ([C-62/79, 1980](#)). The Belgian distribution company Ciné Vog Films had acquired from the production company La Boétie the exclusive right to show the film "Le Boucher" publicly in Belgium in cinemas and on TV for a period of seven years. Subsequently, La Boétie assigned the right to broadcast the film in Germany to the German broadcaster ARD. When it was broadcast there in January 1971, the Belgian cable television company Coditel picked it up terrestrially and distributed the film by cable to its subscribers. Ciné Vog sued Coditel which was found guilty of infringing the distributor's copyright. Coditel

appealed, arguing that the exclusive copyright was incompatible with the provision of the EEC Treaty on the freedom to provide services. The Belgian appeals court confirmed that, based on the Berne Convention, Coditel required authorisation by Ciné Vog. As to Article 59 of the Treaty, it decided to stay the proceedings and refer the question to the CJEU.

The CJEU distinguished between works made available to the public in material form (e.g. books or records) and by performances which may be infinitely repeated. For physical reproductions the principal had been established that once they have been placed on the market of a MS with the permission of the rights holder, they must be allowed to circulate freely within the common market, i.e. the exclusive distribution right has been exhausted. In contrast, for performances, i.e. services, the owner of the copyright in a film and his assignees legitimately calculate the fees for authorisation based on the number of TV performances and permit it only after the film has been exhibited in cinemas. Therefore, the CJEU decided that “the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns. ... Community law ... has no effect upon the application ... of copyright legislation.” (ibid.)

The Green Paper points out that the situation had changed since the Debaue and Coditel/Ciné Vog cases which had established that the distribution of foreign programmes through cable networks does raise questions of copyright. Whereas in 1980, the non-Belgian broadcasting organizations and the Belgian cable companies did not have proper legal relationships, in September 1983, the association of Belgian cable companies (Union Professionnelle de La Radio et de la Télédistribution, RTD) on the one hand and the holders of the copyright and performers’ rights (the Belgian collective rights management organisation SABAM and a number of national and international broadcasting organizations including ARD) on the other concluded an agreement on a fixed payment for the rights to distribute by cable the foreign programmes represented. This contractually granting of performing rights for remuneration settled the issue and is itself a service within the meaning of the EEC Treaty (114 f.). In this way, the exclusive right of the copyright owner who had consented to the initial broadcast, was transformed into the entitlement to receive fair remuneration from the cable company which made the simultaneous retransmission.

The Commission took inspiration from this solution found by the parties involved in order to discuss different options and then propose its “ingredients of a solution”. The problem was copyright as an obstacle to cross-border broadcasting, leading to a partitioning of the common market. The challenge was, how to reconcile copyright and the freedom of services.

For cross-border direct broadcasting by satellite (DBS), the Commission expected that it either does not imply copyright at all (the ‘extended antenna’ theory) or that it can develop within the framework of private contracts. This does raise issues, e.g. a possible conflict between contracts and statutory licences, but the Commission did not find them insurmountable. Therefore, its conclusion in this case: “It would only be necessary to legislate if the contractual approach fails.” (316)



Voluntary contractual solutions would be more difficult in case of retransmission by a secondary broadcaster over the air or cable. Acquiring all necessary rights from all holders would not be feasible, unless this is done through a collecting society. Ideally, all rights to retransmission would be concentrated with a single Community collecting society or with a central association of all the national collecting societies supported by all primary and secondary broadcasters. But such a concentration of power would not only raise concerns of competition law, it would also take decades to achieve (316 ff.).

Therefore, the Commission concludes “that there is no alternative to legislation” (318). One way would be to make the right to retransmission by cable subject to mandatory collective management. This would reduce the exclusive right to an entitlement to remuneration. Rightsholders would be paid but could not prevent retransmission. Yet this again would entail the time-consuming establishment of collecting societies that did not exist in some MS. The other option would be statutory licences ensuring “equitable remuneration” to rightsholders. The law would give criteria on which to calculate it and leave it to the parties to collectively negotiate the exact rate, subject to intervention by a copyright tribunal or arbitration body if negotiations fail (318 f., 331).

While the Treaty does not permit to interfere with property ownership (Art 222 EEC Treaty) – this, e.g. expropriation, remains the preserve of the MS –, it does allow for rules on the exercise of proprietary rights and on their scope and content (323 f.). And indeed, “following the ruling in Coditel, there is no other way in which the copyright restrictions on intra-Community broadcasting can be progressively abolished” (325). A statutory licence conferring entitlement to equitable remuneration would not place a disproportionate burden on the owner of the cable retransmission rights. (327)

Therefore, the contours of the copyright provisions in the planned Directive became visible. It should apply to both radio and television transmissions (330). It should address those cases in which a cable company in one MS wishes to transmit by cable, either in its home country or in another MS, a programme broadcast by an organisation in another MS. It need not cover transmissions broadcast from or for reception outside the Community, nor retransmission of national programmes inside a MS.

The directive should be limited to simultaneous cable transmission (simul-cast). Where programmes are recorded by a cable company for transmission at a later date or altered, other copyrights are implied (reproduction, modification e.g. by synchronisation or subtitling, moral rights) and the company can reasonably be expected to obtain the consent of the holder of the right (330).

*“All the above reasons provide justification for restricting the scope of the Directive to simultaneous cable transmission. After all, the purpose of the Directive is to enable the inhabitants of each Member State to receive the same transmissions as are broadcast at any given moment in other Member States. It should be as if each broadcaster were supplying the entire common market with its transmissions.” (330)*

The Green Paper finds the only major barrier to the liberalisation of broadcasting exchanges in preceding international law, i.e. in the European Convention on the Protection of Television Broadcasts of 1960. Because it protects not only related rights held specifically by broadcasters but protects them across the whole gamut of broadcast television, it gives broadcasters a commanding position. By not giving permission for cable retransmission, they can stop free broadcasting altogether even where there are no copyright barriers. The Commission concludes that the only way to eliminate this problem would be for the MS which are parties to it, to denounce the Convention (322 f.).

The Commission recommends a statutory licence as the most effective means of achieving liberalisation (330). The interests of authors and holders of related rights should be protected by granting a right to equitable remuneration. The Directive should lay down criteria for determining such remuneration. (331) The claim to remuneration pursuant to the Directive should, in order to facilitate settlement, be enforceable only through collecting societies. This would help to aggregate claims and would protect cable companies from a host of individual claimants.

*“The introduction throughout the Community of a right to remuneration for the cable re-transmission of radio and television programmes would enhance the chances that the owner of a right had of receiving equitable remuneration for each performance. In all the cases where it has not as yet been possible to conclude contractual agreements with cable companies, rapid enforcement of the right to remuneration could be expected if an arbitration procedure were introduced. Lastly, according to copyright experts, a central arbitration body with a highly qualified staff that kept under close review the growth of cable television in the Community, could be expected to consider as equitable a higher remuneration for the owners of rights than the owners themselves have been able to obtain in decentralized negotiations. (328)*

A third area of laws concerning broadcasting next to advertising and copyright in which the Green Papers finds a need for harmonisation, is public order and safety and the protection of personal rights. This refers to crimes like treason, sedition and incitement to racial hatred which the Commission found only marginally impinging on broadcasting. The bans on pornography have greater relevance in media, however, mostly for print media and video cassettes and only very rarely in broadcasting.

The Commission does find one area worth closer examination for harmonisation specific to the media, the law protecting children and young people against broadcasts which may be damaging to their moral and intellectual well-being. “A law protecting minors in relation to broadcasting with a European-wide minimum standard could prove to be a necessary corollary to liberalizing the provision of broadcasting services between Community countries.” (287 f.) It could serve to backup the advertising rules protecting minors.

The Green Paper therefore suggested to combine the various models from national legislation into a Community code of practice. The directive could provide that broadcasts which might seriously harm minors should not be permitted. Broadcasts of a less harmful kind, which might still impair the physical, mental or moral development of minors should be

permitted only late in the evening. Programmes meeting the minimum standard of protection could be freely broadcast in all MS. These should be left to deal with the practical implementation of the few rules in the directive (293).

As for personal rights such as laws on libel, defamation, protection of privacy and of the use of one's own likeness, the Commission found that in broadcasting, breaches usually arise as isolated cases, e.g. a radio commentary that may damage the reputation of a person, rather than a repeated or continuous denigration. "Legal remedy will not therefore consist of seeking an injunction but rehabilitation and compensation for damages. There is a correspondingly small danger that action for infringement of personal rights would impede the dissemination of programmes." (288) The Commission did find one common remedy peculiar to the media, i.e. the right to publication of a reply. However, these rules take a variety of forms in the MS, and they do not provide a right to reply or correction to foreigners. With the liberalisation of broadcasting in the Community, the Commission found it increasingly likely that citizens of other MS would demand such a right. "It would help to protect the interests of Community citizens if they could have recourse to uniform rules on the right of reply, applicable to all broadcasting organizations in the Community." (288)

Nevertheless, the Commission doubted whether at this stage harmonisation would be needed. It put the matter up for discussion and made a number of suggestions to its possible provisions concerning the beneficiary of the right, the obligations of the broadcaster as to the time and form of the reply to the offending statement it has to broadcast and the role of civil courts in settling disputes (299).

### **3.1.3 CoE, European Convention on Transfrontier Television (1989)**

The Council of Europe, as we have seen, had pioneered media regulation with the Agreement on Programme Exchanges in 1958 and on the Protection of Television Broadcasts in 1960, followed by a range of recommendations. In 1976 it established a committee of experts on media, that in 1981 became the Steering Committee on the Mass Media (CDMM) within the Human Rights Directorate (Karaca 2003: 14). In the early 1980s, the CDMM drew up a [Declaration on the freedom of expression and information](#) (adopted by the Committee of Ministers on 29 April 1982) which amounted to a European media charter. Based on the freedom of expression and information (Art 10 European Convention on Human Rights) the MS declared the resolve to work towards the absence of censorship, an open information policy in the public sector, a wide variety of independent and autonomous media and adequate facilities for the domestic and international transmission and dissemination of information, including new information and communication techniques.

During the 1980s, the UK and other states saw the CoE with its focus on human rights and on culture as a forum where to negotiate an alternative instrument that did not follow a pure market approach and was less of an interference with the activities of states than what the Commission was proposing. The proposal calling for binding legal instruments was brought forward at the Vienna Council of Europe Mass Media conference of 1986 (Síthigh 2013: 26 f.).

The CoE thus started to work on an instrument on broadcasting in parallel to the European Commission – and finished first. The [European Convention on Transfrontier Television](#) (agreed and opened for ratification on 5 May 1989) is the first international treaty creating a legal framework for the free circulation of transfrontier television programmes in Europe. Whereas the European Community focussed solely on the common market and the barriers to the free movement of services, the CoE aimed “to achieve a greater unity between its members, for the purpose of safeguarding and realising the ideals and principles which are their common heritage” (preamble and standard formula in all CoE instruments). Its focus was on the dignity of every human being and the freedom of expression and information. It affirmed the principle of free flow of information and the importance of broadcasting for the development of culture and the free formation of opinions.

Just like the instrument the COM envisaged in its Green Paper, the purpose of the Convention is to facilitate the transfrontier transmission and the retransmission of television programme services among the Parties (Art 1). It covers much of the same issues, sometimes identical in wording, some in a different order. It adheres to the principles of country of origin and of technology neutrality by referring to transmissions and retransmission from within the jurisdiction of a Party, whether by cable, terrestrial transmitter or satellite, which can be received, directly or indirectly, in one or more other Parties (Art 3). While the freedom of reception and retransmission is to be ensured (Art 4), each transmitting Party shall ensure that all programme services transmitted by broadcasters within its jurisdiction comply with the terms of this Convention (Art 5). The unclear status of satellites is resolved by stipulating that the transmitting Party shall be the Party in which the satellite up-link is situated or, when the up-link is situated in a State which is not a Party to this Convention, the Party which grants the use of a frequency or a satellite capacity allocated to it (Art 5).

The provisions on the right of reply (Art 8), on advertising (Arts 11-16) and sponsorship (Arts 17, 18) largely overlap with those of the EEC’s Directive. So does the requirement that broadcasters must reserve “a majority proportion of their transmission time” for European works and that a cinematographic work must not be broadcast until two years after it was first shown in cinemas or one year if it was co-produced by the broadcaster (Art 10). Under the heading “cultural objectives”, this Article of the Convention additionally mentions that programmes shall not endanger the pluralism of the press.

Under the heading “responsibilities of the broadcaster”, the Convention provides that programmes shall respect the dignity of the human being, not be indecent or give undue prominence to violence or incite to racial hatred. Programmes likely to impair the development of minors shall not be scheduled “when, because of the time of transmission and reception,

they are likely to watch them". And, different from the Directive, it requires that the broadcaster shall ensure "that news fairly presents facts and events and encourages the free formation of opinions" (Art 7).

Also unique to the Convention is the Article on "access of the public to major events". It creates a category of "events of high public interest" for which the right of the public to information is declared to outweigh the exclusive copyright of the broadcaster. Parties therefore shall examine legal measures to avoid that the exercise of exclusive rights of a broadcaster for the transmission or retransmission of such an event deprives "a large part of the public in one or more other Parties of the opportunity to follow that event on television" (Art 9).

Different from the EEC, the CoE does not have an executive arm like the Commission. The Convention is based in "the spirit of co-operation and mutual assistance" of the Parties. For its implementation each Party shall designate one or more authorities (Art 19). For the purposes of this Convention, a Standing Committee shall be set up, in which each delegation has one vote. The EEC can be Party within the areas of its competence, but shall not exercise its right to vote in cases where the Member States concerned exercise theirs, and conversely (Art 20). The Standing Committee is responsible for making recommendations on the application of the Convention, suggesting any necessary modifications, securing a friendly settlement of any difficulty and making recommendations on States to be invited to accede to this Convention (Art 21). The Standing Committee examines any amendment proposed and submits the text adopted by a majority of its members to the Committee of Ministers for approval (Art 23).

In case of a violation of the Convention, receiving and transmitting Party shall endeavour to overcome the difficulty by mutual assistance, conciliation (Art 25) or arbitration (Art 26). If the alleged violation persists after the communication and is of "a manifest, serious and grave nature", the receiving Party may suspend provisionally the retransmission of the incriminated programme service within two weeks, in less serious cases after eight months (Art 24).

On possible conflicts between the Convention and the Directive, it states that "Parties which are members of the European Economic Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except insofar as there is no Community rule governing the particular subject concerned." (Art 27) Parties may apply stricter or more detailed rules domestically than the Convention (Art 28). They may also reserve the right to apply domestic legislation on advertisements for alcoholic beverages and restrict retransmission on its territory. "No other reservation may be made" (Art 32).

The Convention was signed – but never ratified – by Luxembourg, the Netherlands and Sweden in 1989 and the following year by Greece. It was signed in its first year and ratified in the same year or later by Austria, Italy, Liechtenstein, Norway, Poland, Portugal, San Marino, Spain, Switzerland and the UK. Bulgaria, the Czech Republic, Germany and Turkey signed

and ratified in the 1990s. Belgium did not sign it. The Convention was ratified and is in force in 33 of the 47 member states of the CoE (CoE, [signatures and ratifications of Treaty 132](#)). 12 of them declared the reservation on ads for alcoholic beverages (CoE, [Reservations and Declarations for Treaty No. 132](#)).

### 3.1.4 Television without Frontiers Directive (1989)

The 1984 Green Paper stimulated a broad discussion and a number of additional resolutions and reports. Notable is, drawn up by rapporteur Hahn on behalf of the EP Committee on Youth, Culture, Education, Information and Sport, the [Report on a framework for a European media policy based on the Commission's Green Paper](#) (5 July 1985).

The report welcomed that the Commission had considerably stepped up cooperation with the Council of Europe in broadcasting (10, 31). It called on the Commission to submit a proposal for a directive with rules governing advertising, the protection of minors and copyright (9). It noted however, that the proposals on copyright formed the most controversial section of the Green Paper (22). “The proposal to introduce statutory licensing has met with considerable opposition from the parties concerned on the ground of insufficient flexibility; it is also feared that, as a result, holders of copyright would not receive remuneration at a level commensurate with the value of their work.” (23)

Based on these reactions, the Commission presented its [Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities](#) (COM(86) 146, 30.04.1986). Remarkably, the Proposal contained an entire chapter on copyright (Arts 17-20).

This proposal was amended in further debates in the Council of the European Community and adopted four years later as the [Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities](#) (89/552/EEC, 03.10.1989). In the recitals it acknowledges the CoE Convention on Transfrontier Television which had been adopted five months earlier. The cooperation between the two European bodies, which since 1984 had invited observers to each other’s meetings, led to some approximation of the two instruments and in parts identical wordings. The Directive starts by stating that the Treaty provision on free movement of services “is also a specific manifestation in Community law of a more general principle, namely the freedom of expression as enshrined in Article 10 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms”.

As expected, the Television without Frontiers Directive (TWFD) confines itself to minimum rules that specifically pertain to television broadcasting. Its main objective remains



to promote markets of sufficient size for television productions in the MS to recoup investments, including by requiring a quota on European productions.

The Directive covers transmissions of television programmes by wire or over the air, including by satellite (Art 1). It enshrines the country of origin principle (Art 2). It allows MS to provisionally suspend retransmissions of television broadcasts from other MS in one single case, i.e. those “manifestly, seriously and gravely” infringing the rules on protection of minors (Art 22) and only after notifying the broadcaster and the Commission and after consultations with the transmitting State and the Commission (Art 2). MS remain free to require more detailed or stricter rules from television broadcasters under their jurisdiction (Art 3).

On the European quota, the Commission proposal had suggested that broadcasters reserve at least 30% of their programming time to Community works. This percentage should have been progressively increased to at least 60% three years after the TWFD comes into force. The final Directive provides that MS “shall ensure where practicable and by appropriate means, that broadcasters reserve for European works ... a majority proportion of their transmission time” (Art 4). This is the exact wording of the CoE Convention. The quota is to be achieved progressively, and MS must report every two years to the Commission on the application of this Article and Article 5. In addition, Article 5 states in otherwise identical wording, that broadcasters reserve “at least 10% of their transmission time” or alternately, “at least 10% of their programming budget, for “European works created by producers who are independent of broadcasters”.

The TV embargo on cinematographic works of two years, or one year in case of co-productions, is the same as in the Convention (Art 7). So are the rules on advertising and sponsorship, prohibiting broadcast ads for tobacco and prescription medicines and strictly regulating those for alcohol (Arts 10-21).

The dual protection of minors, in their own right (Art 22) and in advertising rules (Arts 15, 16), is again the same as in the Convention, so is largely the right of reply (Art 23). The beneficiary in both is “any natural or legal person, regardless of nationality”, and the Directive adds: “whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme” (ibid.).

The TWF Directive ends with the usual “final provisions” concerning exclusion of conflict of law (Art 24), transposition and reporting (“MS shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 3 October 1991. They shall forthwith inform the Commission thereof.” (Art 25)) and monitoring (“Not later than the end of the fifth year after the date of adoption of this Directive and every two years thereafter, the Commission shall submit to the European Parliament, the Council, and the Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting.” (Art 26))



Lacking in both the Convention and the Directive is any mention of copyright. The Commission's Green Paper had singled it out as one of the three core issues that the Directive should deal with and it had suggested extensive language in its Proposal. Yet, copyright was too controversial, resistance from rights holders too intense, that it was decided to keep it out of the Directive entirely. The hot potato copyright was moved to a separate instrument, what was to be the Satellite and Cable Directive of 1993 (→ 3.2.1 SatCab Directive).

After adoption, the Directive had to be transposed into the legislations of the MS within the following two years. Depending on national legal traditions, the rules were transposed into laws, Ministerial decrees or soft law codes concerning broadcasting, advertising and sponsoring and regulators. In Spain and Portugal, the Directive was transposed into two Acts, in Italy into seven and in Sweden into six separate Acts. In Belgium different versions were needed for the Flemish community and the bilingual Brussels-Capital region. In Germany, the federal Film Promotion Act, the Interstate Broadcasting Treaty (to be transposed into the media acts of the Länder) and a Code of Conduct of the German Advertising Council on the advertising of alcoholic beverages had to be adapted (COM, [transpositions](#)).

### 3.1.5 Television without Frontiers Directive (1997)

The Television without Frontiers Directive of 1989 was amended for the first time in 1997. This was preceded by the appearance of the Internet on the global stage and by two ground-breaking documents.

After the four freedoms of movement and therefore the Single Market had been achieved, the [Maastricht Treaty of 1992](#) concluded the transition from the Communities to the Union. It also added new provisions on culture to the existing Community instruments, providing for support, among others, for artistic and literary creation, including in the audiovisual sector (Art 128 Maastricht Treaty, Art 167 TFEU).

The other influential document was the [Bangemann Report Europe and the Global Information Society](#) (June 1994), authored by a High-Level Group headed by Martin Bangemann, then Commissioner for industrial policy, information technology and telecommunications. It evoked visions of a “new industrial revolution” based on ISDN and mobile phones where the AV industry turns into a multimedia industry. For citizens and consumers, the report predicted “higher quality of life and a wider choice of services and entertainment.” (5; the report is discussed below → 4.1 Liberalising telecommunications). The Commission responded to the Report with its Communication [Europe's way to the information society: an action plan](#) (COM(94) 347, 19 July 1994) which includes the need to review the 1989 Television without Frontiers Directive.

The revision was paved by new developments in media and Commission fact finding in the form of Papers and Communications. These include the [Green Paper Pluralism and](#)

[Media Concentration in the Internal Market – An Assessment of the Need for Community Action](#) (COM (92) 480, 23 December 1992, [Annexes](#)) that develops possible measures aiming to safeguard pluralism in view of mergers and acquisitions in the media sectors (→ 3.5.1 Green Paper).

The Commission [White Paper on Growth, Competitiveness, Employment – The challenges and ways forward into the 21st century](#) (COM (93) 700, 05.12.1993, [republished in March 1994](#)) found the new industrial revolution already well under way and the multimedia world dawning. The Commission predicted that “by the end of the century there will be ten times as many TV channels”. The information society, it stated, can provide answers to the new needs of European societies: communication networks within companies, teleworking, access to scientific and leisure databases, and preventive health care and home medicine for the elderly (13). The USA had taken the lead with 200 of its biggest companies already using “information highways”. The technology race, therefore, was seen as “a crucial aspect in the survival or decline of Europe” (ibid.).

That was the [Green Paper on Strategy Options to Strengthen the European Programme Industry in the Context of the Audiovisual Policy of the European Union](#) (COM (94) 96 final, 6 April 1994). It is one of the first occurrences of the term “convergence” that will become a mainstay for the relation between the old AV media and the new world of the digital in general and the Internet in particular. “Convergence” is used in various constellations. Here it meant the confluence of “the film industry, broadcasting services and the television programme industry, cable and telecommunications operators, the publishing industry and manufacturers of information and communications technology equipment.” The Commission’s diagnosis is rather somber. The European film industry was suffering from a partitioning of national markets and a decline in market share. The television industry was incapable of meeting exploding demand. At the same time, the AV industry is posited as “key component of this information society” and films and television programmes as “prime vectors of European culture and a living testimony to the traditions and identity of each country”. This Paper focuses on financial incentives at Union level like the MEDIA Programme (and will be further discussed → 3.4 Media funding).

About the Television without Frontiers Directive the Commission says in the Green Paper that it “believes that this *acquis communautaire* provides a sound framework for the cross-border development of the European programme industry and that it should be retained for the time being”. Its comprehensive review, however, should examine how incentives can be adapted to new digital types of service and how their effectiveness for the diversification of broadcasting can be improved.

The [Green Paper on the Legal Protection of Encrypted Services in the Internal Market. Consultation on the Need for Community Action](#) (COM(96) 76, 6 March 1996) dealt with pay TV services. The [Green Paper on Commercial Communications in the Internal Market](#) (COM (96) 192, 8 May 1996) addressed advertising.

Last but not least, the word and the thing “Internet” appears for the first time in EU documents. It does so, of course, mentioning its vast opportunities and its role as “essential enabler of the Information Society”. The first of the following documents proudly highlights that the World-Wide-Web is based on protocols developed in Europe. But its appearance is not a happy one. It is the dark side of the Internet that the Commission analysed as requiring Community intervention.

The Commission [Communication on Illegal and harmful content on the Internet](#) (COM(96) 487, 16 October 1996) sees a wide range of areas affected by “harmful or illegal contents”, from national and economic security via privacy and copyright to – subject of a separate Green Paper published on the same day – the protection of minors and the protection of human dignity (incitement to racial hatred or racial discrimination). The Commission finds all these potential harms together “statistically a limited phenomenon”, however, also “pressing issues of public, political, commercial and legal interest” and in “need for urgent action”. As regards to who should urgently take action, the Commission leaves no doubts: “What is illegal offline remains illegal online, and it is up to Member States to enforce these laws.” The chapter entitled “How does the Internet work?” makes it clear that the Internet in 1996 was WWW, Mail, Newsgroups and Internet Relay Chat (IRC), far away from today’s monopolistic platform environment. In fact, being decentralised is singled out as defining the nature of the Internet. As the Communication gives a good overview over the thinking on content regulation before platform regulation proper, we will return to it below (→ 4.2 Platform liability).

The second document mentioning the Internet is the [Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services](#) (COM (96) 483, 16.10.1996). Also for this subset of illegal content, the Commission sees the responsibility with the MS and with industry. It points to recent technological developments that can provide greater parental control, both in the television (v-chip) and on-line (PICS, Platform for Internet Content Selection) environments. Both are building on a content rating system. Since regulation would have to strike a difficult balance between freedom of speech and public interest considerations, the Commission prefers technological solutions and self-regulation. These “have the advantage of offering ‘bottom-up’ rather than ‘top down’ solutions that obviate the need for prior censorship and increase the potential effectiveness of self-regulation.” Its own role the Commission sees in facilitating administrative cooperation in the EU. This was followed by a [Commission Staff Working Paper](#) summarising the points of consensus and of divergence resulting from consultations on the Green Paper among EU institutions, Member States and interested parties (SEC (97) 1203 final, 13 June 1997).

All this fact and opinion finding about the rapidly changing, i.e. digitalising media environment and the shortcomings of the 1989 TV Directive informed its review. It resulted in amendments that were finally approved in the Conciliation Committee: [Directive 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](#) (97/36/EC, 30.06.1997). The Directive still emphasised

opportunities for growth but, after The Maastricht Treaty of 1992 had added new provisions on culture to the existing Community instruments, it now also highlighted “the specific nature, in particular the cultural and sociological impact, of audiovisual programmes” (Rec. 4).

Banning broadcasts to protect minors raises concerns about the public interest in free speech. Recent technological developments had opened the possibility of technical means for parental control (Recs 40-42 and the [Green Paper on the Protection of Minors](#) of October 1996). Mandating the use of technology is seen as a milder measure than prohibitions for reaching an objective. Yet these developments were too recent for the European lawmaker to decide. Therefore the Directive stipulates that the Commission shall within one year after publication of this Directive, in liaison with the competent MS authorities and with consultation of stakeholders, investigate, inter alia, “the requirement for new television sets to be equipped with a technical device enabling parents or guardians to filter out certain programmes; the setting up of appropriate rating systems, and encouraging family viewing policies and other educational and awareness measures” (Art 22b).

On supporting European audiovisual production, a recital was added that MS may define a public interest mission for certain broadcasting organizations, including the obligation to contribute substantially to investment in European production (Rec. 45). The quotas for European works were upheld with minor amendments (Art 6).<sup>9</sup> In addition, the rule that events of major importance for society must not be broadcast on an exclusive basis in such a way as to deprive a substantial proportion of the public (Art 3a), was imported from the parallel CoE Convention. This is the only provision relevant to copyright.

On advertising, the Directive now included teleshopping, adding it in the definitions (Art 1) and in most places where it only said “advertising” before. Whereas the previous Directive prohibited advertising for prescription medical products (which in the meantime has come under the provisions of [Directive 92/28/EEC](#)), this one adds teleshopping for such products to the prohibition (Art 14(2)). At the same time, it finds it appropriate to allow manufacturers and distributors of medical products to sponsor television programmes in order to promote the name or the image of the undertaking, but not to promote specific medicinal products or medical treatments (Art 17(3)).

On procedure, the 1997 TV Directive introduced a contact committee with representatives of MS’ competent authorities under the aegis of the Commission. This is to facilitate exchange of views and effective implementation of the Directive and provide opinions on its application to the Commission (Art 23a).

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<sup>9</sup> E.g. the reference to the GDR which no longer existed was dropped in Article 6. Article 7 was simplified: “Member States shall ensure that broadcasters under their jurisdiction do not broadcast cinematographic works outside periods agreed with the rights holders.”

### 3.1.6 CoE, European Convention on Transfrontier Television (1998)

The first amending protocol to the Council of Europe's 1989 Convention on Transfrontier Television ([ETS No. 171](#), 10 January 1998; [consolidated version](#)) came one year after the EU's review of its 1989 TV Directive and mostly echoed the amendments agreed there. It also featured an innovation in access to information.

Where the Directive declared in recital 44 that MS remain free to apply additional rules, inter alia, on safeguarding pluralism, the amended Convention has a separate Article on Media pluralism stating that the Parties "shall endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction, within the meaning of Article 3, endanger media pluralism" (Art 10bis). This connects to the preamble which affirms the importance of broadcasting "in conditions safeguarding pluralism and equality of opportunity among all democratic groups and political parties".

Access to events of high public interest was an invention of the original Convention that the Directive had adopted only in its 1997 revision. It also added procedural requirements as to a list of such events to be notified to and verified and published by the Commission. The new Convention took over these amendments, and what was a one-sentence provision in Article 9 grew to three longish paragraphs in Article 9bis. In addition, the responsibility of the Standing Committee was extended to include the drawing up of guidelines on Article 9bis, in order to avoid differences between the implementation of the provision of the Convention and that of the Directive, giving an opinion on and publishing once a year a consolidated list of the enlisted events and corresponding measures notified by Parties (Art 28).

The novelty of the amended Convention builds on the access to events: the new Article 9 – Access of the public to information. Where the original Article 9 regulated the exercise of exclusive copyrights of the broadcaster for the live or deferred transmissions of events (now Art 9bis), the new one requires Parties to introduce "the right to short reporting on events of high interest for the public to avoid the right of the public to information being undermined" by a broadcaster exercising exclusive rights (Art 9).

### 3.1.7 Audiovisual Media Services Directive (AVMSD 2007)

The next revision of the TV Directive was preceded by the confirmation of the important role of Public Service Broadcasting (PSB) in the Amsterdam Protocol in 1997 which was emphasised again in the EU Resolution of 1999 (→ 3.3 PSM). The horizontal platform rules had been set in the E-Commerce Directive of 2000 (→ 4.2.1 ECD). Eight MS had notified their

lists of events of major importance for society (Art 3a(1) TV Directive) and the [Commission in 2007](#) decided that these were compatible with Community law.

The perceived convergence of electronic communications services, information society services and broadcasting services was reflected in the [Green Paper on convergence of the telecommunications, media and information technology sectors and the implications for regulation towards an information society approach](#) (COM(97) 623, 03.12.1997). It states that the term “convergence” eludes precise definition, only to give one that is ‘commonly used’: “the ability of different network platforms to carry essentially similar kinds of services, or the coming together of consumer devices such as the telephone, television and personal computer” (ibid.: 1). This development was also reflected with respect to regulation in the [Communication on the Future of European Regulatory Audiovisual Policy](#) (COM(2003) 784, 15.12.2003) and on the telecommunications side of convergence in the [Framework Directive for electronic communications networks and services](#) (2002/21/EC, 07.03.2002). The different measures converged on a comprehensive strategy to foster growth and jobs and encourage the production of European content and the uptake of ICT in the Commission initiative “[i2010: European Information Society](#)” (COM(2005) 229, 01.06.2005).

The strongest impulse for amending the TV Directive came from changing media reality: Video on-demand services emerged. Vimeo was founded in 2004, Youtube in 2005, both in the US. Dailymotion was launched in 2005 in Paris and grew into one of the leading video portals on the Internet. Yahoo and PCCW attempted to acquire it in 2013, but the French government vetoed the deals in order to keep Dailymotion in Europe. In 2015, it was bought by the French media conglomerate Vivendi.

The rapid success of video platforms led to a range of them being established across Europe. In Germany, they included Clipfish by RTL, MyVideo by the brothers Samwer and Sevenload, all founded in 2006 and shuttered from 2013 to 2017.

Youtube was acquired by Google in 2006, when already 65,000 new videos were uploaded to it and 100 million clips watched every day. With the new potent owner, it was not before long that copyright violation claims started to arrive.

Against the backdrop of the breathtaking success of video platforms and the evidence of convergence, in December 2005 the [Commission proposal](#) was issued to Council and Parliament for what would become the [Directive 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](#) (2007/65/EC, 11.12.2007). The structural change through ICT called for the adaptation of the regulatory framework “to ensure optimal conditions of competitiveness and legal certainty for Europe’s information technologies and its media industries and services, as well as respect for cultural and linguistic diversity” (Rec. 1). The adaptation was considered so fundamental that it required a name change:



*“The Commission has committed itself to creating a consistent internal market framework for information society services and media services by modernising the legal framework for audiovisual services, starting with a Commission proposal in 2005 to modernise the Television without Frontiers Directive and transform it into a Directive on Audiovisual Media Services.” (Rec. 10)*

In the sense of a single convergent definition of both linear and on-demand services, the Directive declares “audiovisual media services” as “mass media in their function to inform, entertain and educate the general public”. This was to include AV advertising, but exclude services providing AV “content generated by private users for the purposes of sharing and exchange within communities of interest” as well as private correspondence (Recs. 16, 18).

The text finds legal uncertainty and a non-level playing-field particularly in the area of “on-demand audiovisual media services”. It emphasises that in regulating them, the basic principles of the TV Directive, “namely the country of origin principle and common minimum standards, have proved their worth and should therefore be retained” (Rec. 7). The fact that on-demand services give users choice and control, justifies imposing lighter regulation, subjecting them only to the basic rules provided for in this Directive (Rec. 42). On the other hand, on-demand media services have the potential to replace broadcasting. Therefore, the rules on promoting European works apply which could take the form of financial contributions to the production of and acquisition of rights in such works, “a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides” (Rec. 48). They are defined as a service provided “for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider” (Art 1g). The rules on provisional derogation from the requirement to ensure freedom of reception get additions for on-demand services, allowing for measures that serve the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons, as well as the protection of public health, public security and consumers (Art 2a).

The new AVMSD includes a new form of commercial communication: “product placement” which it calls a reality in cinematographic and television works but regulated differently in MS (Rec. 61). “Product placement shall be prohibited”, but shall be admissible “in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes” but not in children's programmes (Art 3g).

Finally, the new Directive adopts the provisions on short news reports invented in the 1998 CoE TV Convention. They stipulate that any broadcaster established in the Community shall either have access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by another broadcaster or shall be allowed to freely choose short extracts from the transmitting broadcaster's signal for the purpose of short news reports (Art 3k).



The revision of the Directive prompted the Council of Europe to update its parallel Convention on Transfrontier Television as well. The 1997 amendments to the TV Directive were reflected in the 1998 amending protocol to the Council of Europe's 1989 Convention on Transfrontier Television which also added an innovation in access to short news. Starting in 2009, the Standing Committee on Transfrontier Television drafted a second amending protocol to the Convention. Including on-demand services was seen as part of a wider agenda for media and Internet regulation, including media-like content, Internet traffic and access to critical infrastructure. However, just as the draft was ready to enter the final stage of approval, an objection from the European Commission put the process on hold and ultimately led to the abandonment of the protocol (Sithigh 2013: 7).

This letter from the Commission to the EU Member States of 23 October 2009 argued that the Convention deals with matters under Community competence and covered by the Directive. "Therefore, in accordance with the case law of the European Court of Justice, Member States may not conclude alone international agreements which cover matters falling under Community competence." (ibid.)

This raised questions among MS why the Commission had not made similar objections to the 1998 amendments to the Convention, and why, in this case, it had raised its objections at such a late stage. There were warnings of a legal vacuum or of conflicts between the amended Directive and unamended Convention. A letter by the new Commissioner for information society and media, Neelie Kroes, on 10 December 2010 confirmed that EU Member States may not become party to the Convention on matters for which the Union thus has acquired exclusive competence to enter into international agreements. Kroes added that also

*"the EU does not intend to become a party to the Convention, as this would constrain the speed and scope of any future policy response in the areas covered. Furthermore, the Union's audiovisual acquis is already relevant to almost all Parties to the Convention given that the Union has legal relations with almost all Convention Signatories, which ensures or will ensure the application of the acquis. The added value to the EU of such a convention in terms of the wider geographical scope would therefore be rather limited."* (cited from ibid.: 10)

Therefore, the Committee of Ministers of the Council of Europe in February 2011 decided to discontinue work on transfrontier television (ibid.: 11).

Sithigh discusses different ways to describe the relation between CoE and EU. One scholar called it a 'shared competences' for external affairs. Others found that international law is being Europeanised as a result of a triangular relationship between international, EU and national law. This accounts for disputes such as the legal action before the CJEU brought by the Commission against the Council, arguing against the Council's shared-competence

approach to a proposed Council of Europe instrument on intellectual property rights in broadcast signals<sup>10</sup>.

Síthigh himself calls the relation a “beneficial deliberative competition”, which in the field of broadcasting has led to equal emphasis on issues of internal market and human rights, where the Convention is a way to export EU standards beyond the borders of the MS (ibid.: 14). Yet, the events over the revision of the Convention had damaged this beneficial competition. The Commission’s view prevailed that the CoE has no role to play in television and on-demand services.

Given the productive interactions in the fields of data protection and conditional access, Síthigh asks for possible future policies in media law that the CoE might pursue without interfering with the exclusive competence of the EU. He finds evidence of activities in the area of Internet governance such as net neutrality, of media pluralism, cultural policy and of matters concerning Article 10 ECHR, such as the values of public service broadcasting and unbiased news. CoE instruments in these areas could increase the possibility of an EU instrument being agreed in due course. The death of the TV Convention, he concludes, might herald a new regulatory era, that is still a competition, but a less deliberative one (ibid.: 22).

### **3.1.8 Audiovisual Media Services Directive (AVMSD 2010)**

The Directives of 1997 and 2007 contained only the amendments to the original 1989 Television without Frontiers Directive, including its name change in 2007. To know what a specific provision currently looks like, one has to read the three texts side-by-side. The Commission therefore found that, “in the interests of clarity and rationality”, it is time to codify the Directive. I.e. it prepared a consolidated text and renumbered the articles. The [Audiovisual Media Services Directive](#) (AVMSD, 2010/13/EU, 10.03.2010) does not contain any changes in substance.

### **3.1.9 Audiovisual Media Services Directive (AVMSD 2018)**

The evolution of EU legal acts is closely monitored throughout their policy cycle, from their original design to adoption and implementation and to application, evaluation and, where needed, revision. Have the declared objectives been achieved? E.g. have the provisions on

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<sup>10</sup> [Case C-114/12](#), 4 September 2014.

European works in the AVMSD actually increased their production and cross-border distribution and consumption?

The central instrument is built into the Directive: the Commission has to report on its application every three years (Art 33 AVMSD). The [Single Market Scoreboard](#) tracks the performance of the Member States concerning transposition and infringements of governance tools in key Single Market policy areas. The [Consumer Markets Scoreboard](#) does the same from the perspective of consumers, covering compliance, enforcement and complaints as well as the integration of the EU retail market and the uptake of e-commerce. The [REFIT Scoreboard](#) goes back to the [Commission Communication on Better Regulation for Better Results – an EU Agenda](#) (COM(2015) 215, 19.05.2015). The [regulatory fitness and performance programme](#) (REFIT) aims to ensure that EU laws deliver their intended benefits for individuals and businesses, while making EU laws simpler, more targeted and easier to comply with.

One such document reports on monitoring how EU law is applied across the entire range of industries in the Union: [Commission Staff Working Document, Situation in the Different Sectors, accompanying document to the 27th Annual Commission Report on Monitoring the Application of EU Law \(2009\)](#) (SEC(2010) 1143, 01.10.2010). In the section on “Information society and media”, it deplores “a sizeable volume of incorrect implementation issues”, particularly concerning the independence and effectiveness of national regulatory authorities (NRA) in certain MS (ibid.: 242).

In the audiovisual sector, the Document points out, the main instrument is the AVMSD, which combines the country of origin principle with a minimum harmonisation of the laws applicable to all AV media services (linear and on-demand). The Directive is accompanied by a number of non-binding measures<sup>11</sup> (ibid.: 251). The Report’s main issue here was that by the end of the transposition period for the AVMSD 2007 in December 2009 only three Member States had notified the Commission of full implementation (ibid.: 252). The Commission announced an interpretative communication to provide more legal certainty on new terms and concepts of the AVMSD.

The Commission evaluated the application of the current AV regulatory framework in force as satisfactory. However, there was a high number of complaints with regard to alleged hate speech and pornographic content transmitted during daytime and without encryption via satellite broadcasts. Commercial communications also continued to be of concern. In 2009, of the five cases the Commission had to decide, two were about excessive advertising. In another case concerning the incorrect application of the quantitative rules on TV advertising in Spain, the CJEU was seized. In a separate case, the CJEU ruled that the Spanish measure on

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<sup>11</sup> These include the Recommendation on the protection of minors and human dignity (2006, see above) and the [EU Recommendation on Film Heritage](#) (16.11.2005) which suggests to make it compulsory for the beneficiaries of EU film funding to deposit their works in at least one national archive.

European works was compatible with the Directive and did not constitute State aid ([C-222/07](#), 05.03.2009).

The events of major importance for society were another area of conflict. Belgium and the UK had put the entire final tournament of the FIFA World Cup and UEFA European Championship on their lists which the Commission had approved. FIFA and UEFA then launched complaints against these decisions. In a separate case, Infront WM AG, formerly KirchMedia WM AG, which had acquired the exclusive rights to broadcast the 2002 and 2006 FIFA World Cup finals sued and won against the Commission before the Court of Justice ([Case T-33/01, Infront WM AG /Commission](#), 15 December 2005).

The Document also referred to the most recent Commission Report mandated every three years in Article 33 of the Directive: the [Seventh Report on the application of the Television without Frontiers Directive](#) (26.06.2009) for the period 2007 – 2008. That found more than 4,000 broadcast services established in the MS, of which 352 were terrestrial channels and 600 on-demand services, and at least 650 channels targeted the market of a MS other than their country of establishment (ibid.: 3).

The country of origin principle had given rise to a sanction procedure by the Belgian regulator CSA (Conseil Supérieur de l'Audiovisuel) against the broadcasters TVi and CLT-UFA. Those held licences both in Belgium and Luxembourg. Since the TWFD states that only one MS may be competent regarding a broadcaster, it was decided that TVi and CLT-UFA fall under Luxembourg's jurisdiction (ibid.: 4).

As for European works, the EU-wide average broadcasting time increased and stood at 65.05% in 2006 which the Commission found satisfactory. The average share of independent producers' works stood at 37.59% (ibid.: 6).

The rules against incitement to hatred were invoked by the Turkish broadcast regulator against the Kurdish broadcaster ROJ TV. The claim was rejected by the Danish authorities, while Germany banned ROJ TV in Germany because of its support of the terror-listed PKK. Germany also banned Al Manar TV. The French authority requested the satellite operator Eutelsat to stop the broadcast to France of the Palestinian broadcaster Al-Aqsa TV (ibid.: 9). The rules on advertising led to infringement procedures against Italy and Spain.

Italy had failed to transpose these rules into national law in several instances. The procedure also regarded insertion rules and the maximum duration of advertising. The Spanish authorities differed from the Commission on its interpretation of the notion of "spot advertisement" which is essential for the calculation of the hourly advertising limits. After a formal notice and a reasoned opinion, the Commission decided to bring the case before the Court of Justice (ibid.: 8)

Commercial communication was the subject matter of the [EP Resolution on the impact of advertising on consumer behaviour](#) (2010/2052(INI)), 15.12.2010). It first recounts the EU

law on advertising: the [Directive concerning unfair business-to-consumer commercial practices in the internal market](#) (UCPD, 2005/29/EC, 11.05.2005), the [Directive concerning misleading and comparative advertising](#) (MCAD, 2006/114/EC, 12.12.2006) and, in the area of AV media, the AVMSD. Parliament calls on those Member States that have not yet implemented the AVMSD to do so immediately.

As to the Unfair Commercial Practices Directive (UCPD), it finds that five years after its adoption, differences in its interpretation and implementation at national level have precluded the desired level of harmonisation. These difficulties especially concern the new, more pervasive forms of advertising. The CJEU had ruled in several cases against national measures for going beyond the provisions of the UCPD. Parliament therefore called on the Commission to update, clarify and strengthen its guidelines on the implementation of the UCPD. It warned particularly against intrusive advertising that uses personalised and behavioural targetting. This is “supposedly tailored to Internet users’ interests, [but] constitutes a serious attack on the protection of privacy when it involves tracking individuals (through cookies, profiling and geolocation) and has not first been freely and explicitly consented to by the consumer” (ibid.).

The provisions on **European works** entail regular reporting obligations of MS to the Commission and of the Commission to Parliament and Council. In addition, Article 13 calls for an independent study. One such report is the Commission Staff Working Document, [Promotion of European Works in EU Scheduled and On-Demand Audiovisual Media Services 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](#) (SWD/2012/0269, 24.09.2012). This was based on the independent [Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services / Appendix](#) commissioned to Attentional Ltd (SMART2010/0002, 13.12.2011). Both report separately on the requirements on on-demand AV media services in Article 13 and on broadcasters in Articles 16 and 17, detailing the situation in all MS.

Article 13 imposes lighter obligations on on-demand than on linear services. These have to, “where practicable and by appropriate means”, promote the production of and access to European works. Not all the national reports provided information because there were no on-demand services or the MS was late in transposing the AVMSD 2007. Of the MS that had transposed the Directive, only six indicated that they had implemented concrete measures (COM 2012, part I: 5). Because reports were not representative enough, the Commission found itself unable to draw reliable conclusions on the application of Article 13. The information it did receive indicates quite a high share of European works in catalogues of on-demand platforms. In 2010, it ranged from 36.4% in Portugal to 100% in Austria (ibid.: 6). The difference of works in catalogue and works consumed did not reveal a clear trend. Five MS reported financial contributions to European productions and six indicated the use of some prominence tools. A majority of services were applying geo-restrictions. Germany had not set out

obligations on Article 13 because it interpreted the words “where practicable and by appropriate means” to mean that this is not a binding norm and its implementation gives MS a margin of discretion (ibid.: 17).

As for Article 16, the Report found the average proportion of European works broadcast in 2010 to be 64.3% (COM 2012, part II: 9). Over the period 2007-2010 this proportion rose by 1.7 percentage points, with 12 MS registering an increase in their percentages and the other 15 posted a decrease. The average proportion of European works created by independent producers (Art 17) was 33.8% in 2010. The period 2007-2010 showed a net decrease (-1.5 percentage points). “However, the proportion of independent works broadcast at EU level remained well above the percentage set out in Article 17” (ibid.). Also, the proportion of recent European works by independent producers dropped in 2007-2010 by 1.2 percentage points, and stood at 61.8% in 2010, which the Commission found “still satisfactory” (ibid.).

The independent study by Attentional distinguished between prescriptive transpositions (e.g. specifying minimum proportions, defining “qualifying hours”) and flexible ones (transcribed the term “where applicable” into their legislation) (Attentional 2011: 26, 50). It also distinguished between transmission hours and viewer hours, finding that qualifying works covered by Articles 16 and 17 represent an even higher proportion of total viewing than when looking at transmission hours (ibid.: 132). Public channels offer between 70 and 95% of European works. Some private players also attain such high rates, most are around 50-60% and some fall below 50% (ibid.: 143).

The Attentional study highlights a structural issue of the quota that the Commission report omits: Domestic productions qualify as European works. “Across our sample, non-domestic European works make up 8.1% of the total qualifying transmission hours in 2010, compared to 7% of total qualifying viewer hours” (ibid.: 144). These numbers drop even further when looking at primetime. Non-domestic European programmes are significantly more prominent on the television schedules of publicly funded channels than on advertising funded and pay channels, and more on those of small countries and new Member States (ibid.: 144 f.).

As to non-linear services and the obligations under Article 13 AVMSD, both reports distinguish between freely accessible catch-up services of broadcasters and VoD services, which are often with conditional access and operated by telecoms or players from the IT, manufacturing, production or rights business. The majority of on-demand services are VoD rather than catch-up, but the latter still account for around half of usage<sup>12</sup> (ibid.: 10).

The study found that in the catalogues of its sample of non-linear services, on average 65.1% of total non-linear hours and 68.4% of total titles were European works. Among these, catch-up services had 96.2% of total hours (99.0% of titles) of European works, compared to

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12 And nearly half of viewer hours of AV content being watched on the Internet is pornography (ibid.: 183).



45.1% of total hours (48.7% of titles) on VoD services. European works are significantly more prominent in the catalogues of broadcasters than of independents and telcos, and more in those of public services than private services (165 f.).

The study confirmed that the proportions of European, independent and recent works were ahead of the statutory minima. This was true for linear services, but also on non-linear services the share of European works was typically higher than 40%, even though Article 13 had not yet been fully implemented everywhere, and some providers complained about the difficulty of gaining access to European works, whose rights are largely controlled by broadcasters. Despite these positive findings, the Study's conclusions are rather sobering as far as Europeanisation is concerned.

*These high volumes of European works are mostly national works, so there is very limited circulation, or joint development of European works. 'Non-domestic works' are works produced in one Member State and shown in another. Our study confirms that their presence on European broadcasters remains stubbornly low. Thus current measures are making little contribution to any transition to a 'common programme production and distribution market'." (ibid.: 212)*

The study's explanation is a very strong preference for 'national' works in the home language, which is deeply rooted culturally and economically. And can thrive economically independently of political measures:

*"We believe that the appetite for European works is due to the local taste of national mass audiences and we have not found any correlations between the modes of regulatory implementation and the levels of European works. This suggests that the proportion of European content, that is, specifically national content on major channels, is sustained by the fact that people want to view it, not by the fact that there are rules that say it should be there. ...*

*From a cultural viewpoint, if we define culture purely in terms of 'cultural and linguistic diversity', then one of the main cultural objectives of the Directive is being achieved. But that leaves culture with a limited European dimension. Indeed, national works barely pass intra-European frontiers, while European co-production remains limited. This means that, as measured by the proportion of non-domestic works, the European audiovisual culture remains as fragmented as ever." (ibid.: 213 f.)*

These are severe accusations. A policy that is intended as promoting Europeanisation, in practice seems to promote national cultural production and consumption. After 25 years of TV directive, the market remains fragmented. Its provisions, that is the conclusion of the Attentional study, are not able to grow the circulation of European works. Both the fundamental economic and cultural objectives of measures promoting cross-border production and distribution – the competitiveness of the Single Market and the European awareness and identity – the EU has failed to meet.

A final step needs to be mentioned before we can discuss the revised AVMSD. Europe had developed from the Common Market to the Single Market, which was completed in 1992 and now entered a new phase. Its central policy was formulated in the Commission Communication [A Digital Single Market Strategy for Europe](#) (COM(2015) 192, 06.05.2015). The document ends with an ambitious list of EU law to be amended, including the AVMSD.



In preparation of the revision of the AVMSD, an Ex-post REFIT evaluation of its current version was conducted in 2016 to evaluate its performance and to examine whether it remains fit-for-purpose, delivers on its objectives at reasonable costs, is relevant, coherent and has EU added value: Commission Staff Working Document, [Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities](#) (Executive Summary) (SWD(2016) 170, 25.05.2016). Since robust economic data either did not exist, or were confidential, the REFIT was based on public consultations, structured dialogues, external studies and monitoring reports. It found that, while the Directive's objectives are still valid, some of its rules were outdated. Lighter or no rules on video-on-demand and video-sharing platforms left consumer rights inadequately protected. In contrast to the 2011 Attentional study, the REFIT found that the Directive did enhance cultural diversity by supporting the promotion, visibility and distribution of European works in the EU, but saw scope for enhancing it in on-demand services. As to media freedom and pluralism, the evaluation found that the Directive's rules had been only partly effective, because differences in independence and effectiveness of national regulators impacted them negatively. The REFIT thus in particular marked national regulators and an effective monitoring system as points to consider in the revision.

As usual, the revision of the AVMSD started with the Commission's [Proposal for amending Directive 2010/13/EU](#) (COM(2016) 287, 25.5.2016). This was followed by [various opinions, reports and resolutions](#) by committees and other EU bodies on the proposal. It led to the [Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services \(Audiovisual Media Services Directive\) in view](#) (2018/1808/EU, 14.11.2018)

Since the last substantive amendments in 2007, the convergence of television and Internet services or more specific the empowerment of the users caused by the Internet continued and was one of the reasons requiring an update to the legal framework. Where the AVMSD before only addressed linear and on-demand services, it now introduced "video-sharing platform services". These are defined as "providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility" but for which it determines the organisation, "including by automatic means or algorithms in particular by displaying, tagging and sequencing" (Art 1(1)(aa)). "User-generated video" is furthermore defined as "a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user" (Art 1(1)(ba)). The text here treats a fine line between defaming users for only "generating" videos that then can be uploaded by anyone and granting them that they "create" AV works to which copyright law gives them full exclusive rights.

Both new terms get interspersed throughout the Directive. Video-sharing platforms get their own lengthy articles. They start with rules of establishment for determining jurisdiction (Art 28a(1-4)) and the Internal Market rule on the freedom to provide cross-border information society services and its permissible derogations, which are included from the E-Commerce Directive (2000/31/EC → 4.2.1 ECD), including the limited liability and the prohibition of general monitoring obligations (Art 28a(5)).

Sharing platforms also inherit a newly introduced extension to the already quite complex rules on establishment of linear and on-demand AV media in general. These require service providers to inform the competent national regulatory authorities about any changes that may affect the determination of jurisdiction (Art 2(5a)). MS have to maintain a list of the media service providers under their jurisdiction and indicate on which of the criteria set out in paragraphs 2 to 5 their jurisdiction is based. They have to send these lists to the Commission which collects them in a database and makes it publicly available (Art 2(5b)). In case of disagreement among MS as to jurisdiction over a service, they shall inform the Commission. That may request an opinion from the newly created European Regulators Group for Audiovisual Media Services (ERGA) and has to inform the Contact Committee (Art 2(5c)). The same rules also apply to video-sharing platform providers (Art 28a(6-7)).

Also the rules for AV media services in general on minors, incitement, criminal offences and on advertising are duplicated for video-sharing platforms, without reference to editorial activity and “taking into account the limited control exercised by those video-sharing platforms over those audiovisual commercial communications” (Art 28b(1-2)). MS shall ensure that all video-sharing platform providers under their jurisdiction apply practicable and proportionate measures. The approach to these measures on user uploads was initiated in the E-Commerce Directive and also applied in the Copyright Directive that was negotiated in parallel to the AVMSD. It stipulates that these measures must not lead to any ex-ante control measures or upload-filtering of content.

At the heart of this approach is the mandate that platforms include and apply the legal requirements in paragraph 1 in their terms and conditions. They have to provide their users with means to declare that their uploads contain advertising, to report or flag allegedly infringing content, to rate content and to send complaints for which the platforms operates procedures to handle and resolve. The rating serves the age verification and the parental control systems that platforms can be made to provide (Art 28b(3)). Among the “hard” rules are that personal data of minors shall not be processed for commercial purposes, that MS shall ensure that out-of-court redress mechanisms are available for the settlement of disputes between users and video-sharing platform providers over content decisions and that users have recourse to a court (Art 28b(7-8)).

Yet the general spirit of the AVMSD has been all along that of minimum harmonised “hard” rules to let the market do its magic. This was strengthened by another novelty in the 2018 amendments, the introduction of co- and self-regulation. “Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct.” Such

codes shall be broadly accepted by stakeholders, unambiguous about their objectives and provide for independent monitoring and effective enforcement. In addition to national codes, MS and Commission shall facilitate the development of Union codes (Art 4a). This goes back to the [Commission Communication on Better Regulation for Better Results – an EU Agenda](#) (COM(2015) 215, 19.05.2015), in which the Commission stressed that, when considering policy solutions, it would consider both regulatory and non-regulatory means, modelled on the Community of practice and the Principles for Better Self- and Co-regulation.

The AVMSD 2018 points out that in the fields coordinated by the Directive, a number of codes of conduct have been set up successfully and in line with these principles. They are considered proven instruments for consumer protection and achieving general public interest objectives. Recital 14 explains that

*“self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations and associations to adopt common guidelines amongst themselves and for themselves. They are responsible for developing, monitoring and enforcing compliance with those guidelines.” (ibid.: Rec. 14)*

It emphasises however, that self-regulation can only complement legislative, judicial and administrative mechanisms. “It should not constitute a substitute for the obligations of the national legislator”. A legislative backstop was considered necessary in most cases, leading to the second model:

*“Co-regulation provides, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. In co-regulation, the regulatory role is shared between stakeholders and the government or the national regulatory authorities or bodies. The role of the relevant public authorities includes recognition of the co-regulatory scheme, auditing of its processes and funding of the scheme. Co-regulation should allow for the possibility of state intervention in the event of its objectives not being met.” (ibid.)*

Co-regulation and self-regulatory codes of conduct are to be encouraged for the implementation of a range of provisions of AVMSD 2018: protection of minors, advertising for alcoholic beverages, ads for nutritionally harmful products (containing fat, trans-fatty acids, salt or sodium and sugars) and for gambling and for exchanging experiences and best practices.

Since the Amsterdam Protocol (1997), there is a growing emphasis on the importance of Public Service Media. This is reflected by the new AVMSD allowing MS to take measures to ensure the appropriate prominence of audiovisual media services of general interest (Art 7a). Recital 25 explains that “content of general interest” is “under defined general interest objectives such as media pluralism, freedom of speech and cultural diversity.” Furthermore, for the sake of the integrity of programmes, MS shall ensure that services “are not, without the explicit consent of those providers, overlaid for commercial purposes or modified (Art 7b), i.e. shortened, altered or interrupted, as Recital 26 explains.

The rules on European works became more concrete. Where before they said that on-demand audiovisual media services “promote, where practicable and by appropriate means, the production of and access to European works” (Art 13), they now require them to “secure at least a 30% share of European works in their catalogues and ensure prominence of those works” (Art 13 new). This involves, as recital 35 explains, labelling content as European works in metadata, prominently displaying them in a dedicated section of the service, allowing users to search for them and running campaigns on European works.

If MS require media providers to contribute financially to the production of European works, they may include providers targeting audiences in their territory but established in other MS to contribute based only on the revenues earned in the targeted MS (Art 13(2-3)). In order to allow for the market entry of new players, these obligations shall not apply to media providers with a low turnover or a low audience (Art 13(6)). MS shall report to the Commission on the implementation of these rules, which will study them, report and issue guidelines on European works (Art 13(4-5), (7)).

While Article 13 applies to linear and on-demand AV providers, Article 28a paragraph 5 stipulates that it applies to video-sharing platform providers as well. Sharing platforms therefore also must have at least 30% share of European works in their catalogues and contribute financially to their production.

The prohibition of incitement to violence on AV media is complemented by prohibiting public provocation to commit a terrorist offence as set out in Article 5 of the [Counter-Terrorism Directive](#) (2017/541/EU, 15.03.2017) (Art 6).

The rules for protection of minors outside advertising were moved from Article 27 to Article 6a and extended. In addition to selecting the time of the broadcast, measures now may include age verification tools or other technical measures. Providers have to provide information to viewers about content that is potentially harmful to minors. “The most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures.” Also new is that personal data of minors shall not be processed for commercial purposes and that, for the implementation of this paragraph, Member States shall encourage the use of co-regulation (Art 6a).

These provisions for AV media services in general essentially get duplicated for video-sharing platform providers where they protect minors and the general public from harmful programmes and ads, but user-created videos as well. The criminal offences to be protected against here not only include incitement to terrorism but also those in the [Directive on combating the sexual abuse and sexual exploitation of children](#) (2011/93/EU, 13.12.2011) and in the [Framework Decision on combating racism and xenophobia](#) (2008/913/JHA, 28.11.2008) (Art 28b).

The provision on inclusion before was a single sentence stating that MS “shall encourage media service providers under their jurisdiction to ensure that their services are

gradually made accessible to people with a visual or hearing disability” (Art 7). This gained a sense of urgency, now calling on MS to “ensure, without undue delay, that services ... are made continuously and progressively more accessible”. Providers now should develop accessibility action plans and have to report to national authorities about the measures taken, which MS then have to report to the Commission. Furthermore, MS have to designate a single, easily accessible online point of contact for information and complaints regarding accessibility, and they must ensure that emergency information through audiovisual media services, is provided in a manner which is accessible (Art 7 new).

The implementation monitoring by the Commission, as we have seen, gave evidence of problems concerning the independence of national regulatory authorities (NRA). Where the AVMSD before mentioned NRA only in the context of the Contact Committee, it now devotes a lengthy article to them. MS have to designate one or more national regulatory authorities or bodies and they have to ensure that these are “legally distinct from the government and functionally independent of their respective governments and of any other public or private body”. Their competences and powers have to be clearly defined in law. They have to exercise their powers impartially and transparently and in accordance with the objectives of this Directive and they shall not seek or take instructions from any other body. Finally, NRA shall have adequate financial and human resources to carry out their functions effectively and to contribute to the work of ERGA and there must be appeal mechanisms against the decisions they take (Art 30).

For coordination of national NRA, there was only the Contact Committee before. The European Regulators Group for Audiovisual Media Services (ERGA) was established by Commission Decision of 3 February 2014. The Commission found that it had provided positive contributions and valuable advice on implementation and therefore called for its establishment in the AVMSD (Recs. 56, 57), which happened in Article 30b. That stipulates that ERGA is composed of representatives of national regulatory authorities or bodies in the field of audiovisual media service. Its task is to give technical expertise and opinions to the Commission, ensure a consistent implementation of the Directive and exchange experience and best practices (Art. 30b). ERGA can specifically be called for an opinion when MS disagree on jurisdiction over a service (Art 2(5c), Art 28a(7)), where a MS provisionally derogates from freedom of reception (Art 3(2)) and where more detailed or stricter rules are applied to a service in another MS (Art 4(4)(c)).

To help Member States with the implementation of the new AVMSD rules, the Commission adopted two sets of non-binding guidelines: The [Guidelines on Video sharing platforms](#) give quantitative and qualitative criteria for determining whether a platform falls under the definition in Article 1(1)(aa) of the AVMSD. The [Guidelines on European Works](#) help with calculating the share of European works in on-demand catalogues and of the exemptions for low audience and low turnover.

Member States had until 19 September 2020 to transpose the new AVMSD into their national laws. At the end of 2021, nine MS had not transposed it yet, including Czechia, Italy

and Spain (European Audiovisual Observatory: [Revised AVMSD Tracking Table](#)). The Commission had sent letters of [formal notice](#) to the defaulting MS in November 2020, and [reasoned opinions](#), the second stage of an infringement procedure, in September 2021.

### 3.1.10 Summary

The first TV Directive in 1989 was written at a time of enthusiasm about the potential to unify Europe by means of a common satellite channel. Abolishing frontiers by means of television would help Europeans to get to know each other and Europe's diversity of cultures. The Council of Europe had pioneered media regulation in the late 1950s. It adopted the European Convention on Transfrontier Television 1989 just a little prior to the Community's first TV Directive. The CoE focussed on fundamental rights rather than on creating a common market. Based on the right to information, it established provisions for access of the public to major events and in a second step on short news reporting which override copyright and were adopted in the EU's Directive. While the CoE Convention was amended in 1998 to keep it synchronised with the 1997 update to the Directive, the following revision of the Convention had to be aborted because the Commission argued that it would deal with matter on which there is already a Directive. The primacy of Community law did not allow the EU or its members to conclude separate international agreements.

The EU's approach from the beginning was to strive for minimum harmonisation for the sake of the market. It decidedly does not deal with questions of content diversity, e.g. by mandating broadcasting councils which represent the diversity of society. It rather focusses on a limited set of specific issues that had risen to the Community level. These primarily concern advertising and public morals, rules against hatred and for a right to reply, the protection of minors and public health with respect to tobacco and alcohol. Particularly the advertising rules were accompanied by a code of practice. A central element to serve European diversity and integration are the required quotas on European works that first broadcasters and then also VoD services have to fulfil.

The 1990s brought the first wave of digitalisation of both TV practice and EU TV law, e.g. with new technical means for protecting minors that parents can deploy. The 2000s saw the beginning of the platform age with on-demand services to which in the 2010s user upload platforms followed, leading to the introduction of video-sharing services into the 2018 TV Directive.

The quota on European works was evaluated as successful by the Commission, yet the majority of those are domestic works. Therefore, the hope to foster trans-border European programme co-productions and exchanges has not materialised. The rules against incitement of hatred have been invoked against Kurdish and Palestinian stations, demonstrating the potential to abuse them to diminish free speech. Issues concerning the independence and effectiveness of national regulators persist. They led to stronger rules and the creation of the European Regulators Group for AV Media Services (ERGA) in the 2018 AVMSD.



Copyright was identified as important issue of EU relevance at the very beginning of the TV Directive's evolution, but they were moved out of this Directive and into its own instrument which will be discussed in the following section.

## 3.2 Copyright in cross-border broadcasting

Copyright, as we have seen, was an issue of European media policy from its beginning. A [CoE Resolution](#) in 1954 had already called for the removal of copyright obstacles to the exchange of TV programmes. The [European Agreement concerning Programme Exchanges](#) of 1958 then laid the groundwork by declaring the maker of a television film to be its author and allowing broadcasting organisations to authorise the broadcasting of its television films in another MS, thus bridging the territoriality of copyright. The [European Agreement on the Protection of Television Broadcasts](#) (1960) widened the scope of utilisations of broadcasts that television organisations may authorise or prohibit.

The 1984 Commission Green Paper [Television without Frontiers](#) had singled out copyright as one of the three core issues that the Directive of the same name should deal with. Its basic principle of territoriality was seen to lead to partitioning of copyrights on a national basis, and therefore a fragmentation of the common market, – an effect that the AVMSD aims to overcome by means of the country of origin principle.

In its Green Paper, the Commission had noted that after the CJEU decisions in the *Debauve and Coditel/Ciné Vog* cases, actors in the AV sector had found voluntary contractual solutions: holders of copyrights and related rights organised in a collecting society and broadcasting organizations on the one hand and cable companies on the other concluded agreements on a fixed payment for the rights to retransmit TV programmes by cable. The Commission however saw the limitations of this voluntary model, as all relevant rights would have to be represented by collecting societies or ideally by a single pan-European society. Even if that could be approximated, there would always be holders who do not agree and therefore could prevent the retransmission of a programme.

The Commission therefore concluded in its Green Paper that voluntary solutions are no alternative to legislation. A legislative solution in turn could take one of two forms: A statutory licences strips the rights holders from their exclusive rights while ensuring them an equitable remuneration through collecting societies. The less severe measure is compulsory collective management, which leaves the exclusive rights intact but mandates that they cannot be exercised individually but only collectively. Rightsholders again would be entitled to remuneration and could not prevent retransmission.

In its Green Paper, the Commission had recommended a statutory licence as the most effective means of achieving liberalisation. Despite strong opposition from broadcasters and other rightsholders, it suggested extensive language to that effect in its [Proposal for the](#)



[Television without Frontiers Directive](#) (COM(86) 146, 30.04.1986). The chapter on copyright (V, Arts 17-20) favoured contractual agreements between right-owners and cable operators but as a legislative backstop foresaw a statutory licence. A cable operator can notify a MS that a retransmission of a broadcast from another MS has been prevented by the invocation of copyright or related rights. That MS shall then ensure, within a period of two years, that the retransmission is made possible by the application of a statutory licence. The licence shall secure an equitable remuneration for the rightsholders that may only be claimed by collecting societies. The Proposal gave four criteria for determining the amount, including the usual level of contractual licence fees for comparable cable transmissions and the number of subscribers of a cable network. If parties do not reach an amicable agreement, the amount was to be determined by the competent authority: a court, an administrative authority or an arbitration body.

As we have seen, the proposal was too controversial, so that ultimately it was kept out of the TWFD, leaving the copyright issues unresolved. The only provisions in the TV Directive which are relevant to copyright are those imported from the CoE Convention concerning “events of high public interest”. For this category of broadcasts, the right of the public to information is declared to outweigh the exclusive copyright of the broadcaster. It had been created in the original 1989 TV Convention and extended in its 1998 amendments to the right of access to these events for the purpose of short news reporting. These were then incorporated into the TV Directive in 1997 and 2007 respectively.

In the early 1990s, the European copyright acquire, if you can call it that, aside from two computer-specific IP Directives, consisted only of the [Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property](#) (92/100/EEC, 19.11.1992).

### **3.2.1 Satellite and Cable Directive (SatCab, 1993)**

The objective of this new Directive is the same as that of the TWFD: to secure the freedom to provide TV and radio services across the internal borders of the Union – “as if each broadcaster were supplying the entire common market with its transmissions.” (COM, 1984: 330). The [Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission](#) (93/83/EEC, 27.09.1993) is the first broadcast-specific copyright instrument. As the title indicates, it deals with two distinct forms of communication to the public: that of broadcasts via satellite and that of retransmissions of broadcasts via cable, for which it creates two separate regimes.

Starting point is the TWFD and the observation that the achievement of its objectives of cross-border broadcasting is still obstructed by differences in national copyright rules and

legal uncertainty (Rec. 5), like the jurisdiction over the rights in a satellite transmission (Rec. 7). Also new technologies were expected to have an impact on both the quality and the quantity of the exploitation of works and other subject matter (Rec. 22). “Directive 89/552/EEC must, therefore, be supplemented with reference to copyright” (Rec. 12).

The primary rights of performers, phonogram producers and broadcasting organizations<sup>13</sup> are referred from Article 4 of the Rental Directive 92/100/EEC. Within this framework, the SatCab Directive creates a new exclusive right to satellite communications. The central concept in the Directive is that of the right of “communication to the public”. The [Berne Convention](#) defines this right and does so “incompletely and imperfectly through a tangle of occasionally redundant or self-contradictory provisions” (Ginsburg 2004). In different places it speaks about communication to the public by broadcasting, by wire, by other wireless diffusion, by rebroadcasting of the broadcast or by loudspeaker. On broadcasts, it distinguishes a primary right to authorise the broadcasting of a work, the secondary right to authorise communication of the broadcast to the public by an organisation other than the original one – i.e. the cable retransmission right –, and a third exclusive right to authorise the public communication of the broadcast by loudspeaker or on a television screen (Art 11<sup>bis</sup> Berne Convention).

In addition, the SatCab Directive creates the novel concept of an exclusive right to authorise the “communication to the public by satellite” as a particular form of exploitation (Rec. 19), which is a specification of “other wireless diffusion”:

*“Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.” (Art 2)*

The legal uncertainty regarding the rights to be acquired “should be overcome by defining the notion of communication to the public by satellite at a Community level” and should specify where the act of communication takes place, as Recital 14 explains, meaning it becomes an autonomous concept of Union law. The Directive then subjects the new right to the country of origin principle, expressed by an ‘injection right’:

*“For the purpose of this Directive, ‘communication to the public by satellite’ means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.” (Art 1(2)(a))*

The act is then declared to occur solely in the MS, where the signal is injected into the chain of communication (Art 1(2)(b)). This should allow to decide under which jurisdiction a given

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<sup>13</sup> The rights to fixation, reproduction, broadcasting and communication to the public as well as the limitations to these rights, including for educational and private use and for short excerpts in connection with the reporting of current events (Arts 6, 7, 8 and 10 of Directive 92/100/EEC).

provider operates and therefore which national legislation on copyright and related rights applies. It should also prevent forum shopping in order to avoid obligations.<sup>14</sup>

As for the satellite right, the Directive seems compromise-hampered for a clear position on collective management. On the one hand, the principle of contractual freedom rules supreme. (This principle, “on which this Directive is based will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned.” (Rec. 16))

Article 3 provides that authorization of the satellite broadcast right may be acquired only by agreement, while being mute on whether these should be individual or collective agreements. On the other hand, it certainly does not preclude collective management as it goes on to even extend it to non-members<sup>15</sup>. Extended collective licencing, that is often attributed to the Nordic Countries, was applied in EU law already in 1993. Where the Directive is very clear is that MS may not subject the protection of copyrights and related rights to a statutory licence system, as this would create distortions of competition (Rec. 21). MS that did have statutory licences were required to phase them out until the end of 1997 (Art 8(2)).

One might think that transmission of programmes via satellite and via cable would raise similar copyright issues, yet the solution the SatCab Directive finds for cable retransmission is quite different. It does not have to introduce it as a new right, as any communication to the public by wire is already protected as such under Article 11<sup>bis</sup> of the Berne Convention. The cable operator must, therefore, obtain the authorization from every holder of rights in each part of the programme retransmitted (Rec. 27).

Authorisation is to be obtained again by contract, but here the Directive expressly mentions individual or collective contractual agreements (Art 8(1)). When it goes on, it leaves no doubt by requiring that the right to authorise may be exercised only through a collecting society. (Art 9(1)). The reason given is not one of principle but of pragmatism:

*“In order to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorization right to the extent that this is required by the special features of cable retransmission; whereas the authorization right as such remains intact and only the exercise of*

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14 “Whereas this harmonization should not allow a broadcasting organization to take advantage of differences in levels of protection by relocating activities, to the detriment of audiovisual productions” (Rec. 24).

15 “A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that :

— the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and

— the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively.” (Art 3(2))

*this right is regulated to some extent, so that the right to authorize a cable retransmission can still be assigned.” (Rec. 28).*

The smooth operation would be hindered by cable companies being confronted with a host of individual claimants. Claims should instead be aggregated in collecting societies. What the special features of cable compared to satellite transmission are remains unclear. Again, the Directive extends this provision to non-members:

*“Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. ... A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society.” (Art 9(2))*

As an afterthought, the mandatory collective management is backed up by another assumption: “when a rightholder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.” (Art 9 (3))

While this rule applies to all rightsholders, there is one exception: “Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission” (Art 10). Broadcasters can therefore exercise their rights individually.

Since the new rules interfered with prior contracts still in force, the Directive foresaw transition periods. For the application of the country-of-origin principle the Directive grants a period of five years for existing contracts to be adapted (Rec. 18). A transition is particularly pertinent for international co-production agreements. These have regularly provided that the rights in the co-production are exercised separately and independently by each co-producer, by dividing the exploitation rights between them along territorial lines, and they have naturally not yet addressed the new right of communication to the public by satellite (Rec. 19). For co-production contracts concluded before the end of the transposition period, where the satellite communication of the co-production would prejudice the exclusivity, in particular the language exclusivity, of one of the co-producers or his assignees in a given territory, the Directive requires the prior consent of that rightsholder to the authorisation (Art 7(3)).

Finally, for ex post monitoring, the SatCab Directive stipulates that the Commission shall report on its application to Parliament, Council and Economic and Social Committee not later than 1 January 2000 (Art 14(3)).

### 3.2.2 Online SatCab Directive (2019)

The SatCab Directive of 1993 should have been transposed before 1 January 1995. However, Belgium was the only Member State to meet that deadline. The majority of implementations took place between 1995 and 1998. Ireland and Luxembourg were the last MS, bringing the relevant national measures into force only in 2001. Accordingly, also the Commission's one-off review was delayed by two years: [Commission Report on the application of Council Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission](#) (COM(2002) 430, 26.07.2002).

The SatCab Directive provides that satellite broadcasts only require a licence in a single country of origin. This should have nurtured a pan-European audiovisual market without internal frontiers for rightsholders, operators and viewers alike, where all satellite broadcasts are available in all Member States (or at least in all MS in the footprint of a given satellite).

Yet, this is not what happened. The report notes a growing number of TV channels which are encrypted and accessible by subscription only. Producers sell their programmes to broadcasting organisations only on condition that satellite transmissions are encrypted so as to ensure that there is no 'spill-over' beyond national borders. "This encryption enables producers to negotiate the sale of the same programmes with broadcasting organisations in other Member States." (ibid.: 7) Furthermore, "the provisions of Article 7 of the Directive governing the transition between the old national systems for the protection of copyright and related rights and the application of the country-of-origin principle for satellite broadcasting have still not yet been transposed, the maximum period allowed being five years." (ibid.: 4) Also, the possibility of extended collective management was made use of only in the MS where it had already been established (ibid.). The result is, as Hugenholtz (2005) remarks, that

*"market fragmentation along territorial borders persists, no longer on the basis of national copyrights, but through a combination of encryption technology and territorial licensing. Surprisingly, the Directive does not actually prohibit territorial licensing, it simply does away with the underlying territorial copyrights. But interested parties have remained free to persist in these age-old practices."* (Hugenholtz 2005: 2).

These practices are deeply engrained, particularly in the film industry, as we have seen already in the *Coditel v Ciné Vog* case ([C-62/79, 1980](#)).

*"Film distributors have always cherished the principle that national markets within the European Union have their own dynamics, depending largely on national cultural characteristics and audience preferences. Consequently, movies are being released at varying times, and television broadcasts occur in 'windows' that differ per country. Preservation of this so-called 'media chronology' appears to be an almost sacred principle of the film industry."* (ibid.)

To prevent this partitioning of the common market along national media chronologies was the main objective of the SatCab Directive.

Also, most broadcasters in Europe do not seem to be interested in pan-European satellite broadcasting. As the 2011 study by Attentional on the AVMSD later confirmed, there is a strong audience preference for 'national' works in the home language and very limited circulation of non-domestic European works. Accordingly, there was little incentive for broadcasters to pay significantly more for pan-European rights if their market and, in case of PSB, their legal mandate, is national.

Hugenholtz notes a disconnect between the Commission's wish to create a genuine European AV market and the realities of that market. He cites a statement by FIAPF, a film producers' trade organisation, that it is not the rightsholders refusal to licence for multiple territories that prevents pan-European broadcasting. It is rather "the conclusion drawn by leading broadcasting organisations that pan-European services only make economic sense in very narrow segments of the TV market. It is baffling to think that an issue that seems of concern to no one in the industry itself, should thus be selected as a high priority by the Commission." (FIAPF 2002 cited from *ibid.*: 2 f.) Hugenholtz sees these segments only in channels specialised in news and sports, as well as a few PSB wishing to reach out to Europe.

As for cable retransmission, the Commission Report notes that the provisions of the Directive have been correctly transposed in all MS and generally produced satisfactory results. One issues however surfaced in Germany, whose copyright law ensures authors a right to an equitable remuneration even where their rights have been transferred to the maximum degree possible. This makes negotiations of rates for cable retransmission more difficult in Germany than in the other MS (COM 2002: 5). Hugenholtz qualifies that apparent success story by pointing out that collective management of cable rights was already occurring on a large scale in many European countries before the Directive was adopted (Hugenholtz 2005: 3)<sup>16</sup>. He finds the Commission's previous enthusiasm for collective management waning in favour of contractual solutions.

Finally, the Report found that since 1993 digitalisation has brought about new transmission methods, like retransmission by microwave channel, by satellite and via the Internet. Also, in the meantime the Copyright in the Information Society Directive (2001/29/EC) has created a horizontal framework clarifying the rights for the various forms of retransmission.

In conclusion, the Commission asserted that the copyright issues, which diminish the attainment of the TWFD's objective of ensuring the freedom of cross-border reception and transmission, were not resolved. Citizens continued to encounter difficulties in trying to access

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16 "Thanks to cooperative efforts of collecting societies and major right holders, systems of voluntary collective licensing on a European scale have emerged in recent years. A good example is the 'IFPI Simulcast Agreement', which permits collecting societies representing phonographic rights to offer 'one-stop' licenses for the simulcasting of broadcast programs with an almost global reach. Thus, broadcasting organisations engaging in simulcasting no longer need to seek multiple licenses from a multiplicity of national collecting societies. Importantly, the Simulcast Agreement was granted an exemption from the EC Treaty's competition rules by the European Commission in 2002." (*ibid.*: 6)



satellite channels transmitted from other MS. It therefore announced a study on new developments and the need to adapt mechanisms for the protection of copyright and related rights. “The methods of managing rights to cable retransmission and mediation will thus be assessed in the general context of the evolution of the media in the information society, before considering whether or not to revise Directive 93/83/EEC.” (COM 2002: 16). Hugenholtz predicted that there will be no future for the SatCab Directive: “More likely, it will slowly fade away, as contractual practice, technological measures, media convergence and the ‘horizontal’ rules of European copyright law gradually supersede it.” (Hugenholtz 2005: 8).

His prediction was proven wrong. Another 14 years later, the SatCab Directive was in fact amended. This was preceded by the [Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market](#) (COM(2011) 427, 13.07.2011). The Paper was in the context of the [Europe 2020 Strategy for smart, sustainable and inclusive growth](#) (COM(2010) 2020, 03.03.2010), the [Digital Agenda for Europe](#) (COM (2010) 245, 19.05.2010), the Commission Communication [A Single Market for Intellectual Property Rights](#) (COM(2011) 287, 24.05.2011), which suggested a unitary European Copyright Code allowing authors or producers to register their works and obtain a single title that would be valid throughout the EU, and of the [Single Market Act](#) (COM/2011/0206, 13 April 2011). Within that changing regulatory environment, the Green Paper reflects on the effect of technological developments on the distribution of, and access to, audiovisual and cinematographic works. These include distribution via DSL, IPTV, DTT, mobile networks, over-the-top (OTT) and social media and reception on devices like connected TVs, mobile phone, tablets and games consoles.

While the AVMSD and the SatCab Directive provided a well-established framework for the cross-border transmission and reception of broadcasting services, the Paper noted that “there is currently no legal instrument specifically addressing the clearing of copyright and related rights for cross-border on-line audiovisual media services.” (COM 2011: 6)

The Paper asserted some success: The EU had become one of the largest producers of films in the world: 1,168 feature films were produced in the EU in 2009, compared to 677 produced in the US (ibid.: 10). However, the market remained deeply fragmented, consisting of SMEs which can only raise a fraction of the budgets of Hollywood studios. More than 500 on-demand audiovisual services were available in Europe in 2008 (ibid.: 6). The hoped-for multi-territory satellite broadcast services had not emerged, and broadcasters refrained from clearing rights for pan-European use with few exceptions (for cinema, children's programmes, sports, travel etc.).

The Commission therefore admitted that more than fifteen years after the application of the SatCab Directive, its objectives had not been fulfilled (ibid.: 13). It announced that it will work on a European framework for online copyright licensing of multi-territorial and pan-European services, particularly for one-stop-shop collective licencing of rights for music incorporated in the audiovisual work. Another option contemplated was to extend the country of origin principle that underpins acts of broadcasting by satellite “to the delivery of

programming online, in particular for the delivery of services made available on demand that are ancillary to broadcast activities (e.g. catch up TV).” (12). This Green Paper, rather than clarifying matters and suggesting options, posed a large number of questions to stakeholders.

Ancillary online services were indeed the central element of the amendments to the SatCab Directive in the [Directive laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC](#), (2019/789/EEC, 17.04.2019).

Catch-up services of PSB in Germany, called “Mediathek”, were launched in 2001 by ZDF and 2008 by ARD. At that time, national broadcast laws prohibited PSB to publish online anything but essentially simulcasts and on-demand ‘catch-up’ copies of broadcasts, initially for a period of only seven days (→ 3.3 PSM).

The revised SatCab Directive introduced the concept of an “online service ancillary to broadcasts”, defined as “an online service consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of television or radio programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation, as well as of any material which is ancillary to such broadcast” (Art 2(1)).

While the 1993 SatCab Directive only addressed ‘cable retransmission’, the 2019 amendments left this concept intact and added to it a generalised concept of ‘retransmission’. This means any simultaneous, unaltered and unabridged cross-border retransmission other than cable retransmission, where the initial transmission is not by online transmission, carried out by a party other than the initial broadcaster (Art 2(2)). This includes Internet rebroadcasters like Zattoo.com and Joyn.de which provide a ‘managed environment’, i.e. “a secure retransmission to authorised users” (Art 2(3)). The generalised retransmission is then subjected to the same extended collective management as cable retransmission (Art 4) and to the same exception for broadcaster with respect to their own transmissions (Art 5).

The objective of the Directive is still to facilitate the clearance of rights for the entire Union, in this case for online use. The EU’s ideal was collectively managed multi-territorial licensing. This had in the meantime been achieved for music rights in the [Directive 2014/26/EU on collective management and multi-territorial licensing of rights in musical works for online use in the internal market](#). The Online SatCab Directive attempted to achieve the same for the content on ancillary online services by applying the country of origin principle. This was however prevented by massive protests particularly from the film industry. In the final trilogue negotiations on the Directive, it was therefore agreed to severely limit the scope of the new provision.

Article 3 provides that the acts of communicating (simulcasting) and of making available (on-demand) to the public of protected subject matter when providing to the public radio and TV programmes “which are: (i) news and current affairs programmes or (ii) fully financed own

productions of the broadcasting organisation, in an ancillary online service” of a broadcaster shall “be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment.” This expressly excludes sports events (Art 3(1)) and does not exclude the contractual freedom of rightsholders and broadcasters to agree to limit the exploitation (Art 3(3)).

The effect of the country of origin principle is therefore that a broadcaster has to acquire online rights only for its country of establishment, “while, de facto, the ancillary online service can be provided across borders to other Member States”, in which case the setting of the amount of the payment for the rights must take all aspects into account, including duration, audience and language of the use (Rec. 12).

The Directive emphasises that it should not result in any obligation for broadcasters to provide such online service at all or to other MS (Rec. 11). The effect is that, where a broadcaster does offer a catch-up platform, it does not have to geo-block access from other MS to news and current affairs programmes and to its own productions on that platform. ‘Own productions’ expressly excludes programmes commissioned to independent producers and co-productions. Also excluded are own productions that a broadcaster has licenced to third parties, including to other broadcasting organisations (Rec. 10). In other words, a PSB may not allow another PSB to include its news on the catch-up platform of that other PSB.

The final provisions call for a review report by June 2025 (Art 10). The legislator expected the transposition to be particularly complex and therefore saw this as one of the justified cases, in which MS must not only notify the Commission on their transposition but include explanatory documents on the relationship between the components of the Directive and the corresponding parts of national transposition instruments (Rec. 27).

The transposition deadline was June 2021. At the end of 2021, [15 of the 27 MS](#) had not yet complied, including Belgium, Bulgaria, Greece and Portugal.

### 3.2.3 Summary

Mass media require mass clearance of rights. Just as radio nearly a century earlier, cable and in particular satellite transmission, because of their special technical features, called for collective management. The political incentive was the will to create a borderless European market for media services in which ‘each broadcaster would be supplying the entire common market with its transmissions.’ For policy makers this required respecting the freedom of contract and interpreting the Berne right of ‘communicating to the public’. For cable, the 1993 SatCab Directive created the assumption that a rightsholder who authorised the initial broadcast is deemed to have agreed to exercise his secondary cable retransmission right only through a collecting society. For satellite, it created a new right to satellite transmission out of the Berne provision on ‘other wireless diffusion’ and provided that it may only be exercised by collective management, in both cases with an extended effect.

The objective was to overcome the territoriality of copyright by allowing a broadcaster to acquire a license only in his country of establishment but nonetheless supply the entire Union. The Commission had even contemplated a single European Copyright Code that was discussed again in the work on the DSMD, without success. But even the SatCab Directive's model failed to create the unified European broadcast space, because encryption technology allowed producers to continue selling their programmes to broadcasters in individual territories and perpetuate the 'almost sacred principle of the film industry' of the media chronology. Not the least, audience preferences did not make it worthwhile for broadcasters to pay the extra price for supplying the entire union.

When the Internet allowed for simulcasts and on demand 'catch-up' services, the 2019 Online SatCab Directive again attempted an extended collective management-based one-stop-shop licensing for the retransmission of broadcasts. Again, there was massive resistance from the film industry. In the end, it was only possible to carve out a country of origin assumption for news and current affairs programmes and fully financed own productions of the broadcaster.

### 3.3 Public Service Media: Amsterdam Protocol (1997)

It is not as if non-market public services had not been considered in the making of Europe. However, the Treaties, in the interest of competition, have consistently been very strict on state aid, i.e. on allowing Member States to use tax money to achieve public interest goals.

*"Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."* (Art 92 [Treaty of Rome](#) (1957), Art 87 Treaty of the European Community (TEC, [1997/2002](#)), Art 107 [Treaty on the Functioning of the European Union](#) (2007/2012))

While this provision remained unchanged from 1957 until today, it did allow for some exceptions from the beginning and gained some more over time. Social aid to individual consumers and aid in cases of natural disasters "shall be compatible" with the internal market (Art 107(2)), while aid to areas of abnormally low standard of living and to promote culture and heritage conservation "may be considered to be compatible" (Art 107(3)).

Triggered by the [conclusions of the Cannes meeting](#) of the European Heads of State in June 1995, the Commission felt it was time to bring what in European parlance is called "services of general interest" out from their shadowy existence. In its [Opinion on reinforcing political union and preparing for enlargement](#) in February 1996 it declared access to such

services to be at the heart of the European societies.<sup>17</sup> This was followed by the [Communication on Services of general interest](#) (96/C 281/03, 26.09.1996). It distinguishes between “services of general interest” and “services of general economic interest”, both of which are subject to specific public service obligations, the latter covering such things as transport networks, energy and communications, also called essential services to which everyone should have universal access. These services are “are at the heart of the European model of society” and “part of the set of values shared by all our countries that helps define Europe” (ibid.: pts. 1 and 2).

The Commission noted differences in approaching them among MS and sectors, owing to different traditions, terminological confusion about public sector and public service and change in global markets and technologies. These affect sectors traditionally operated as monopolies, such as telecommunications, television and transport (ibid: pt. 13). The Commission then boldly proclaims that “market forces produce a better allocation of resources and greater effectiveness in the supply of services”, but grants that they sometimes have their limits (ibid.: pt. 15). Free competition and general interest objectives require “a very tricky balancing act” (ibid.: pt. 19).

As to the quality of broadcasting, the Communication finds Europe's showing often very good (ibid.: pt. 23). Its general interest dimension is “linked to moral and democratic values, such as pluralism, information ethics and protection of the individual” (ibid.: pt. 51). The legal framework of broadcasting is provided by the TWFD and by competition rules preventing the development of oligopolistic and monopolistic market structures (ibid.: pts. 52 and 52). Finally, the Commission declared that it is planning to promote European general interest services (ibid.: pt. 59). For this purpose it suggested to include the promotion of these services – “commensurate with the place they occupy among the shared values on which the European societies are founded” – in Article 3 of the Treaty and therefore within the remit of the Community (ibid.: pts. 72-74).

The Council of Europe in parallel adopted its [Recommendation No. R \(96\) 10 of the Committee of Ministers to member states on the guarantee of the independence of public service broadcasting](#) (11.09.1996). The CoE's focus throughout is on the independence of the media, including PSB, which is essential for the functioning of a democratic society and should be respected, especially by governments. In the light of political, economic and technological challenges, it recommends MS to include in their domestic law or in instruments governing PSB, provisions guaranteeing their editorial independence and institutional autonomy in accordance with the guidelines it attached. These guidelines detail rules on the PSB

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17 “Promoting the European social model: 8. Europe is built on a set of values shared by all its societies, and combines the characteristics of democracy – human rights and institutions based on the rule of law – with those of an open economy underpinned by market forces, internal solidarity and cohesion. These values include the access for all members of society to universal services or to services of general benefit, thus contributing to solidarity and equal treatment.” (COM 1996: I.1.8)

organisation, its management, supervisory bodies, staff, funding, programming and new technologies that PSB should be able to exploit. These new technologies, i.e. the Internet, was addressed in the follow-up [Recommendation on measures to promote the democratic and social contribution of digital broadcasting](#) (Rec(2003)9, 28.05.2003).

Results of the 1996 EU Communication were delivered one year later, in the amendments to the Treaties in the [Treaty of Amsterdam](#) (1997). They introduced the provision that both Community and MS shall take care that services of general economic interest “operate on the basis of principles and conditions which enable them to fulfil their missions” (Art 7d, Art 16 of the consolidated TEC).<sup>18</sup>

The Amsterdam Treaty also resolved the uncertainty of the status of the public broadcast fee, not as a proper exception to the prohibition of state aid, but in the form of a [Protocol on the System of Public Broadcasting in the Member States](#) that was then annexed to the TFEU as Protocol No 29:

*“Considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, [the contracting parties have agreed to the following interpretive provisions:]*

*The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.” (Protocol No 29 [TFEU](#))*

Public service broadcasting remains outside the competence of the Union, but it permits MS to fund it through state aid, i.e. the broadcast fee, to the degree that it fulfils its remit “as conferred, defined and organised” by the MS. The remit thus has to be conferred in the form of a sovereign, i.e. legal, mandate. And PSB must not affect the market too much.

Market actors indeed complained that their chances were diminished by PSB and demanded that its remit be limited to public service information in the narrow sense. In particular, the new opportunities offered by the Internet should be left to the market to exploit. The Member States addressed this issue in their [Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting](#) (OJ C 30, 5.2.1999). Referring to the Amsterdam Protocol, they emphasised again that PSB serves the common good and “has a vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity.” They stressed that ‘new media’ reinforce “the importance of the comprehensive

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<sup>18</sup> The [Treaty of Lisbon](#) (2007) in a Protocol on services of general economic interest added “interpretative provisions”, recognising their essential role and the discretion of national, regional and local authorities in providing, commissioning and organising them, whereas non-economic services of general interest are declare not to be affect in any way by the Treaties (which was annexed to the [TFEU](#) as Protocol No 26).



mission of public service broadcasters". To fulfil their mission, PSB "must continue to benefit from technological progress" (ibid.: pt. 3), bring to the public the benefits of the new AV services and the new technologies (ibid.: pt. 5) and develop and diversify its activities in the digital age (ibid.: pt. 6). Furthermore, PSB's "special obligation" requires them to give broad public access to various channels and services (ibid.: pt. 4) and "address society as a whole" and therefore "to seek to reach wide audiences" (ibid.: pt. 7).

The [Commission Communication on Services of General Interest in Europe](#) (COM(2000) 580, 20.09.2000) has a final section on radio and television. It points to the need for a coexistence of the public/private dual system of broadcasting that developed since the 1980s. The sector is liberalised at Community level, yet because of the central role of broadcast media in democratic societies they have been subject to specific regulation in the general interest. PSB is in the competence of MS. The Commission's role is to ensure that its public funding is "proportional to the public service remit as defined by the Member State concerned, i.e. in particular that any State-granted compensation does not exceed the net extra costs of the particular task assigned to the public service broadcaster in question."

The Communication then notes that the public funding of PSB has been the "subject of a number of complaints to the Commission by private commercial broadcasters, notably about the presence of public service broadcasters on the advertising market." The Commission has no objection to a dual funding of PSB including advertising, neither to PSB making use of the digital revolution, as long as markets are not affected excessively and the means continue to be proportionate to the objectives to be achieved. It announced its intention to conclude its analysis of the pending complaints in the coming months.

The Commission picked up the issue in its [Communication on the application of State aid rules to public service broadcasting](#) (2001/C 320/04, 15.11.2001). The majority of the complaints the Commission had received alleged infringements of Article 87 of the EC Treaty in relation to the funding of PSB. In this Communication it sets out the principles it will follow in applying Articles 87 and 86(2) of the EC Treaty as well as Article 16 on services of general economic interest, which was newly introduced by the Amsterdam Treaty, in light of the Amsterdam Protocol and of CJEU case law.

The Court had clarified that a service has to fulfil three conditions in order to benefit from a derogation from Article 87: 1.) it has to be clearly defined by the MS, 2.) the undertaking providing the service must be explicitly entrusted by the MS and 3.) the State aid must be proportionate, i.e. applying the competition rules of the Treaty would obstruct the performance of the service, and the exemption does not affect trade and competition to an extent that would be contrary to the interests of the Community (ibid.: pt. 29).

The remainder of the Communication then spells out what the conditions of definition, entrustment and proportionality mean for PSB. The definition of the public service remit must be so precise that the Commission can assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable. When the Commission receives complaints about

a certain PSB activity, the remit should leave no doubt as to whether this activity is intended by the MS to be included in the remit or not (ibid.: pts. 32, 37). In case of PSB, the definition may be wide, entrusting a broadcaster with “providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience” (ibid.: pt. 33). It may include online information services, to the extent that they are addressing the same democratic, social and cultural needs of society (ibid.: pt. 34). The Commission makes it clear that it is not its task to decide on the nature or the quality of a certain programme but to check for manifest error in the definition, for which it gives one example: e-commerce. At this point it recalls that the definition of the remit must not be confused with its financing mechanism. Whilst public service broadcasters may perform commercial activities such as the sale of advertising space, such activities cannot be viewed as part of the public service remit (ibid.: pt. 36).

Whether the public service is actually supplied as entrusted is for the national authority to monitor, not the Commission, which must be able to rely on appropriate supervision by the Member States (ibid.: pt. 41).

The proportionality test again requires a precise definition of the PSB remit and a clear separation between public service and non-public service activities, with separate accounts and the usual national rules on transparency and accountability when using public funds. The Commission has to be able to verify whether a given compensation is justified by and limited to the net costs of the public service remit or whether it constitutes overcompensation or cross-subsidisation which would disproportionately affect competition in the common market. “Whenever the same resources – personnel, equipment, fixed installation etc. – are used to perform public service and non-public service tasks, their costs should be allocated on the basis of the difference in the firm’s total costs with and without non-public service activities” (ibid.: pt. 55). Finally, the Commission emphasises that the actual competitive structure and other characteristics of each of the markets are quite different from each other. Therefore, an assessment can only be made on a case by case basis (ibid.: pts. 44-62).

Since 1999, the Commission, or more precisely the Directorate-General for Competition (DG COMP), has taken [40 decisions on State aid to public service broadcasting](#) (as of 01.07.2019)<sup>19</sup>. These concerned a range of issues but most importantly new digital special interest programmes and Internet activities. Germany was first with Kinderkanal/Phoenix, followed by the UK with the BBC 24 hours news channel, both decided in 1999. Germany was up again in third place with a case started in 1999 and decided in 2002 over [ZDF Mediapark](#) (C(2002)932fin, 03.04.2002), and in place 20 in a case launched in 2005 and decided in 2007 which was consequential for the procedure for mandating online offers across Europe.

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<sup>19</sup> Searching for “broadcasting” in the “Case Title or Company Name” field in the Commission’s [Competition Policy database](#) shows many of these “SA” (State Aid) cases, and additionally a few “AT” (Antitrust / Cartels) and “M” (Merger) cases.

Meanwhile in the UK, the BBC Charter, which took effect in January 2007, introduced the “Public Value Test” (PVT). As the [Guidance on the conduct of the PVT](#) explains, the test must be applied before a decision is taken to make any significant change to the BBC's public services. The then oversight bodies, the BBC Trust and Ofcom, were to scrutinise the proposal prior to approval. A PVT consisted of two elements, a Public Value Assessment conducted by the Trust and a Market Impact Assessment conducted by Ofcom. While the BBC's public purpose did play a role, it was quite clear that here, just as everywhere else in Europe, the PVT was motivated by massive lobbying by commercial media providers concerned about competition in the digital realm. “Only if we see evidence that the new public value is likely to outweigh any potentially damaging impact on the market will we allow the proposal to go to consultation,” explained the BBC Trust. The UK has conducted five [Public Value Tests](#) from 2007, the last one in 2015.

The EU State aid investigation that led to the [Commission Decision on Financing of public service broadcasters in Germany \(ARD/ZDF\)](#) (C(2007) 1761 final, 24.04.2007), started with complaints against Germany received by the Commission between 2002 and 2004 from commercial broadcasters and publishers. These concerned alleged subsidisation of the commercial production companies of the PSBs, unfair competition in sports rights and online services which were allegedly not covered by the public service remit (ibid.: pts. 67 ff.).

DG COMP in its first assessment found that the unlimited State guarantee (“Bestandsgarantie”) and the licence fee funding of PSB as well as potentially the tax treatment of PSB's commercial activities would constitute State aid. It expressed concerns about the absence of a sufficiently clear definition and adequate entrustment of the public service remit, in particular as regards new media activities and additional digital channels. It had doubts about effective control of the PSB's fulfilment of their public service obligations and about safeguards ensuring that PSB's commercial activities respect of market principles. Finally, DG COMP questioned the PSB's acquisition and (non-)use of extensive sports rights packages. On 3 March 2005, it informed Germany about its assessment and asked for its submissions (ibid.: pt. 74).

In reply, Germany argued that the licence fee financing does not constitute State aid because the fee is paid by the holders of radio and TV sets directly to the PSB and is neither controlled by nor imputable to the State. Furthermore, Germany contested that the funding would exceed what is necessary to fulfil the PSB's remit, since it satisfied the conditions established by the CJEU. In its 2003 [Altmark judgement](#) (C-280/00) the CJEU had defined the four cumulative criteria under which public service compensation does not constitute State aid: 1.) There was a clear definition of public service obligations imposed on PSB. 2.) The parameters for calculating the compensation must be established in advance in an objective

and transparent manner, which Germany saw fulfilled in the KEF procedure.<sup>20</sup> 3.) The compensation must not exceed what is necessary to cover the costs of discharging the public service obligations, which Germany also saw fulfilled and stressed that commercial subsidiaries of PSB do not benefit from the fee. 4.) The level of compensation must be determined on the basis of an analysis of the costs which a typical, well run undertaking would have incurred, which Germany saw ensured by the KEF procedure but also challenged, arguing that the Commission could not simply rely on the hypothetical costs of private broadcasters since they did not bear the same public service obligations (ibid.: pt. 83).

After additional information submitted by complainants and several exchanges between DG COMP and Germany, Minister-Presidents Beck and Stoiber, as representatives of the broadcasting legislator, made commitments to Commissioner Kroes (ibid.: pt. 322). Measures would be implemented in the Interstate Broadcasting Treaty within two years. This finally led to the termination of the proceedings, of which the Commission informed the Federal Government by this [Decision of April 2007](#).

At the centre of the conflict were the Internet activities of PSB. DG COMP reaffirmed that they may be covered by the remit, provided that they serve the same

democratic, social and cultural needs of society (ibid.: pt 229). Germany announced that it will establish a three-stage evaluation procedure for all new or modified digital offers of PSB. This shall clarify for each offer that it 1.) is covered by the public service remit and therefore serves the democratic, social and cultural needs of society, 2.) contributes in a qualitative way to “editorial competition” and that 3.) the PSB specify the financial impact of such offers (ibid.: pt. 328). This three-step test was adopted almost verbatim in 2008 in the [12th Amendment to the Interstate Broadcasting Treaty](#) (§ 11f(4)). Media law scholar Wolfgang Schulz had previously advised the Länder in the state aid proceedings. Now he proposed the implementation of the three-step test. He succinctly defines the test as serving to “reconcile two principles in times of convergent confusion: the state-free organisation of broadcasting and the binding of this very broadcasting to the needs of society.” (Schulz 2008: 5).

When the Treaty was adopted in December 2008, it had been renamed into “Treaty on Broadcasting and Telemedia”, to mark the inclusion of public service Internet activities into broadcast law. The general remit (“to educate, inform, advise and entertain”, § 11) is supplemented by one for telemedia (§ 11d), according to which initially only programmes and programme-accompanying materials may be made available on demand and only up to seven days after their broadcast. A longer or unlimited online ‘dwell time’ as well as new or non-programme-related telemedia offerings must pass the three-step test (§ 11f(4)). Third parties must be given the opportunity to comment on the planned offer. The market impact test (step

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20 The independent Commission for the Determination of the Financial Needs of the Broadcasting Institutions ([Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten \(KEF\)](#)) checks the financial demand notified by PSB based on transparent and objective parameters and advises the legislator on its decision.

2) shall be carried out by an external consultant (§ 11f(5)). Not permitted in telemedia are non-broadcast-related press-like offerings, advertising, purchased feature films and television series, local reporting as well as a whole range of offerings (classified ad portals, swap meets, event calendars, etc.), which are appended to the Treaty in a negative list. Additional requirements and safeguards include statutes and guidelines in which the broadcasters have to concretise their online remit (§ 11e(1)), reports in which every two years they give a public account of the fulfilment of their remit (§ 11e(2)), and the Broadcasting Councils which represent most directly the voices of society, have often been criticised, but according to Schulz, so far are without alternative (Schulz 2008: 22 f.).

The new three-step test is an ex ante examination of a planned online offer. It is based on much hypotheticals and on forecasts about the expected public value of a future offer and its effects on journalistic competition. Nevertheless, Schulz expected it to produce clear and comprehensible goals and principles and a criterion-guided quality discourse with evaluations that help to ensure that broadcasting is tied to the needs of society. He saw it as an opportunity that should not be wasted (ibid.: 43 ff.). Above all, its implementation would give PSB “for the first time a genuine online mandate ... in accordance with the development guarantee” (ibid.: 27).

On the European level there was much activity during those years resulting in little substantive change. In 2004, the Commission issued its [White Paper on services of general interest](#), on which the European Parliament gave its [Opinion](#) in 2006. In 2005, the Commission adopted a new [Decision](#) and [Framework on State aid in the form of public service compensation](#). In 2007, the Commission adopted the [Communication accompanying the Communication on “A single market for 21st century Europe on Services of general interest, including social services of general interest: a new European Commitment”](#), in which it presented its views on the role and approach of the EU with regard to services of general interest. In 2005, UNESCO adopted the [Convention on the Protection and Promotion of the Diversity of Cultural Expressions](#), which the Council of the European Union approved in its [Decision](#) (2006/515/EC, 18.5.2006). The Convention states that each Party may adopt measures aimed at enhancing diversity of the media, including through public service broadcasting.

Meanwhile, the CoE adopted two Recommendations, one [on media pluralism and diversity of media content](#) (CM/Rec(2007)2), and one [on the remit of public service media in the information society](#) (CM/Rec(2007)3, both 31.01.2007), both recommending that PSM shall be allowed to develop in order to make their content accessible in the digital environment, provide interactive services and respond to the challenges of the information society. Also in 2007, the first digital version of the TV Directive was passed. The following year, the European Parliament in its [Resolution on concentration and pluralism in the media in the European Union](#) (2007/2253(INI), 25.09.2008) as well recommended that PSM and community media be allowed to fulfil their function in a dynamic, digital environment.

The Commission had announced in its [2005 State Aid Action Plan](#) that it would revisit its 2001 Communication on the application of State aid rules to PSB. “Notably with the development of new digital technologies and of Internet-based services, new issues have arisen regarding the scope of public service activities”. The review started with a public consultation from January to March 2008 and it resulted in the [Commission Communication on the application of State aid rules to public service broadcasting](#) (2009/C 257/01, 27.10.2009). “The present Communication consolidates the Commission's case practice in the field of State aid in a future-orientated manner based on the comments received in the public consultation. It clarifies the principles followed by the Commission in the application of Articles 87 and 86(2) of the EC Treaty to the broadcasting sector, taking into account recent market and legal developments.” (ibid.: pt. 9). These includes the Commission's own [decisions](#) based the principles in its 2001 Communication, the CJEU rulings, most notably the 2003 [Altmark judgement](#) (C-280/00), as well as the public value tests and the three-step tests that had been conducted in UK and Germany.

The consolidation did not involve much change in substance. The Communication now extended its examples for “manifest error” to include advertising, sponsoring, teleshopping and merchandising (ibid.: pt. 47).

Regarding pay services, the Commission noted that a number of MS had so far opted for not allowing PSM to offer them. The Commission considered that requiring payment in addition to the licence fee “may negatively affect the universality of such service to society as it limits its provision to a part of the population that is capable and willing to pay for the service.” This in turn may deprive the underlying public funding of its legitimacy. At the same time, the Commission did not want to preclude that broadcasting services with a pay element might qualify as ‘services of general economic interest’, provided that they are clearly not commercial. “However, a special vigilance is necessary.” (ibid.: pts. 53 f.).

Vigilance the Commission obviously found necessary with respect to PSM's Internet offers in general, as those “may in some cases have a greater cross-border reach than traditional television services, thereby potentially affecting intra-Community trade to a greater extent, and may impact on private initiatives and innovation.” (ibid.: pt. 56).

The greatest danger arises from PSM's commercial subsidiaries. Here the amended Communication specifies that the separation of accounts for public service and non-public service activities is necessary but not sufficient. It calls for respect for the ‘arm's length principle’ between the two and suggests that MS follow the best practice of functional or structural separation of commercial activities (ibid.: pt. 86). As worst practices of distorting competition, the Commission points to PSM using their public funding to overbid private competitors for premium, e.g. sports, rights, thereby crowding out competitors (ibid.: pt. 102). Conversely, PSM might undercut prices of advertising or offer other non-public service activities below cost so as to reduce the revenue of competitors (ibid.: pt. 104).



The central element of the revised Communication was the introduction at Union level of a version of the British Public Value Test and the German Three-Step Test that came to be referred to as the 'Amsterdam Test':

*"In order to determine whether such new broadcasting services meet the democratic, social and cultural needs of the society, Member States should consider, inter alia, their distinctive features such as in terms of objectives, content, design, target audience and reach (including, for pay services, the impact on universality and the adequacy of the price level with regard to fair access by citizens); the impact of the services on the balanced and varied overall offer of the public broadcaster; as well as their public service value added in view of the already existing offers.*

*In order to consider the potential effects of the services in question on the market and to avoid undue distortions of competition, Member States shall assess the distortive impact, if any, of a new service on commercial offers by comparing the situation in the presence and in the absence of the planned new service. In the assessment, Member States should consider, inter alia, the existence of similar or substitutable offers in the market, potential for commercial exploitation, market structure, market position of the public service broadcaster, level of private competition, potential crowding-out of private initiatives, potential effect on neighbouring markets, potential effect on other Member State markets, e.g. in terms of cross-border audience.*

*For example, the closer the new service is to existing commercial offers, the more likely it is to drive viewers away from commercial operators and the more it will distort competition. The greater the potential for commercial exploitation of the new service, the more important this effect will be. The stronger the position of the public service broadcaster on the viewers and advertising markets, the more likely it is that the new service will have a distortive effect on competition. If the new service is to offer a greater extent of premium content where such content is only available to a limited extent, it is appropriate to assess the impact of the increase on this neighbouring market." (ibid.: pts. 60 f.)*

The needs-of-society test and the proportionality test are there but the focus is clearly on negative effects on the market. The Amsterdam Test is not binding. As we shall see, it was never implemented in all MS and, with the exception of Germany, soon faded away.

In hindsight it seems astonishing how many documents it took from all European institutions to argue the obvious: The media landscape is becoming digital and if PSM are not to become irrelevant they have to go digital as well. The effort needed is evidence of the immense lobbying by commercial media to prohibit exactly that. The main focus of the policy documents was therefore on safeguards that PSM would not harm commercial interests. Whether the PSM services actually serve the needs of society is tested comparatively weakly if at all. Conversely, commercial media providers seem to have expended more time and energy into lobbying for prohibiting online activities by PSM that are meaningful for society than into developing lucrative business models for themselves.

Under the title "Exporting the Public Value Test", a pan-European anthology draws an ambivalent conclusion after the first years of experience with the test procedure for online offerings (Donders/Moe 2011). Some authors see the test as a contribution to the clarification and review of the broadcasting mandate hoped for by Schulz. Others doubt the usefulness of ex ante tests on the expected value and impact of planned online offerings and plead for regular ex post reviews instead. Yet others question its very preconditions. Public value tests

do not serve to positively define the mission of public broadcasting, but to protect private competition from it.

*"The argument is that the European demand for an ex ante test of new media services was anything but a rational answer to challenging evolutions in the media sector. On the contrary, it was a panic reaction to deal with aggressive private sector lobbying against a new media remit of public broadcasters and member states' reluctance to adequately redefine the public broadcasters' role in the digital age." (Donders in Donders/Moe 2011: 30)*

The anthology finds it even difficult to identify all PVT across Europe, noting that "from various studies carried out to date it appears that some form of ex ante scrutiny has been put in place by eight EU member states (Austria, Denmark, Finland, Germany, Ireland, Netherlands, Sweden and the UK), one EEA state (Norway) and one devolved regional government (Flanders)" (Biggam in: Donders/Moe 2011: 46).

Donders recounts that after its April 2007 decision on the German PSM, the Commission "insisted on the introduction of an ex ante evaluation in Flanders (the Northern part of Belgium), Ireland, Austria and the Netherlands. All these countries – albeit some after serious conflicts with the European Commission – eventually had to agree to a test." The Commission also – "in spite of furious criticism from some member states, public broadcasters and a number of scholars" – consolidated the ex ante evaluation for online media services in soft law, i.e. in the second Broadcasting Communication of July 2009 (Donders in: Donders/Moe 2011: 33).

As to the Mediterranean media systems, Raats and Pauwels write that the idealized conception of 'public service' is "established, incarnated and defended in the Northern and Western European countries (Scandinavian countries, the UK, Netherlands, Belgium), rather than in the countries of the South (Portugal, Greece, etc.)" (Raats & Pauwels in: Donders/Moe 2011: 19). The European Commission did investigate the reformed financing mechanisms for France Télévisions and Spanish RTVE, but clearly, writes Brevini, it

*"focused more on the lawfulness and transparency of the new funding system than on the remit of the two institutions. It could be argued that this reasoning is in line with traditional European Commission decision-making on Southern public broadcasters, aiming to secure more accountability, efficiency and sustainability. In other words, and, in this, differing from decisions involving other EU member states, the European Commission did not explicitly demand the introduction of an ex ante test in its decisions on France and Spain." (Brevini in: Donders/Moe 2011: 177 f.).*

Italy had introduced, in law if not in practice, an ex post public value indicator and got away with it (ibid.: 180).

In Germany at the time of the anthology, a total of 41 three-step tests had been carried on services of ARD, ZDF and Deutschlandradio. With four exceptions, they were directed at existing offerings (Woldt 2011: 67). The costs of the externally tendered market surveys (2. step) amounted to up to almost half a million euros each, for example, in the case of the ZDF

telemedia concept (Dörr in Donders/Moe 2011: 76). Kikaninchen.de, an offer for pre-school children jointly operated by ARD and ZDF, had an annual budget of 320,000€ while its market test cost around 300,000€ (Katsirea in Donders/Moe 2011: 63).

Unlike in the UK, each of the tested programmes had been approved without exception, but sometimes with conditions. For example, the ZDF Television Council linked its approval of the ZDF telemedia concept to demands for more information, the restriction of viewing time and the removal of consumer information.

The most dramatic consequences resulted from the ban on 'press-like' services, which was also introduced in the [12<sup>th</sup> Interstate Broadcasting Treaty](#) (§ 11d(2)(3)) but never made it to the European level. Due to this German provision, lobbied for by the mighty Springer Group, ZDF alone had to 'depublish' more than 100,000. articles and 4,000 videos. This corresponded to more than eighty per cent of its online content (Dörr in Donders/Moe 2011: 79).

The second step of the test, which focuses expert opinions on market effects of a non-market offer, has proven to be inadequate. The instruments used come from antitrust law (hypothetical monopolist test, purchasing decisions, willingness to pay, substitution effects) and are made to fit by hook or by crook. Due to the lack of price signals, the criterion 'quality' is used, which, however, cannot be simulated continuously and percentage-wise (Woldt 2011: 71). Due to the online advertising ban for PSM, a 'market equivalent value' has to be constructed to arrive at a hypothetical Cost per Mille (CPM) price, that attempts to makes something comparable that is not (ibid.: 73).

Without exception, the market tests in Germany led to the same result: thanks to breadth and diversity, quality and depth, PSM online services indisputably make a significant contribution to 'journalistic competition'. They have a significant but small share in an expanding market (the outstanding highs were 4.7% for Tagesschau.de and 7% for Kika.de). So there is no question of 'market clogging' or 'distortion of competition'. The user surveys show high satisfaction and appreciation. The 'market exit simulations' show that users would usually switch to other PSM telemedia, "that the public service telemedia offer has its own profile which has no equivalent in the commercial sector," (ibid.: 77) and that this is thus perceived as categorically different.

However, in Germany the tests on new or modified PSM online services continue to this day. More than [50 three-step-tests](#) have been conducted so far. The [22<sup>nd</sup> Interstate Broadcasting Treaty](#), in force since May 2019, partially revised the framework conditions for PSM telemedia. Some of the changes require that the PSM stations adopt them in their telemedia concepts. For this reason, all online concepts have to be revised. The required three-step tests started at the end of 2021. About two dozen additional tests, [17 in the ARD](#) network alone, will further cement Germany's unchallengeable championship in three-step tests.

The European Parliament, in its [Resolution on public service broadcasting in the digital era: the future of the dual system](#) (2010/2028(INI), 25.11.2010), reaffirmed its commitment to

the dual broadcasting system, but it also pointed “to the enormous costs of (existing) ex ante tests”, and stressed its support for proportionate evaluations (ibid.: pt. 16). Meanwhile, the Commission has taken 40 [decisions on State aid to public service broadcasting](#) from 1999 until July 2019.

To sum up, we can state that European regulation on public service media is stuck between the awareness what this organisational form of media can and must contribute to society and the orientation to competition law, which is heavily used by commercial competitors to lobby against public service media. It is an example for the dilemma mentioned in the beginning of the Janus-faced nature of media content as public merit good serving the democratic, social and cultural needs of society versus content as private market good serving the profit interest of its producers.

### 3.4 Media funding: MEDIA

Media are commercial market goods, but they are also cultural goods with a value far beyond the market. Just like media regulation, media funding takes place in a multilevel system. While press funding is exclusively national,<sup>21</sup> audiovisual funding is offered by various institutions at regional, national and European level. The latter includes both the Council of Europe and the European Community, but also other actors like the ECF.

The conviction that culture is a vital ingredient for Europe’s post-war rebuilding and healing, motivated some passionate Europeans to set up the [European Cultural Foundation \(ECF\)](#) in Geneva in 1954. Among them were the Swiss philosopher Denis de Rougemont, the architect of the European Community Robert Schuman and Prince Bernhard of the Netherlands, under whose presidency the foundation moved to Amsterdam in 1960 and is still today being funded by proceeds from the Dutch lottery.

Rougemont wrote in 1954 about the necessity to awaken a ‘common sentiment of the European’:

*“Unless there is a fairly rapid and general awareness of the danger that all our countries are running together, but also of the immense resources that Europe would still have at its disposal on the sole condition of uniting – all the treaties and acts that can be concluded will be insufficient, will come too late, or will remain a dead letter. If, on the contrary, a sense of common destiny is awakened among Europeans, most of the obstacles that exist today will seem easier to overcome, or even vanish inasmuch as they consist of prejudice, partisan blindness, unfounded mistrust and, above all, ignorance of the real situation.”* ([ECF: about](#))

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21 See EUMEPLAT report “5. North-Western European Media systems”, p. 57 ff.

The notion that in particular audiovisual culture can create a common understanding and a European identity was widely shared and informed Europe's media policy during the following decades. The ECF, which is not an organ of the EU, has focused on programmes and grants enabling mobility and the exchange of ideas, education through culture and capacity-building. Together with the European Commission, the ECF started [ERASMUS](#), the European Action Programme for the Mobility of University Students, which was run by the ECF until 1995, when the European Commission decided to take responsibility for the programme's administration. Together with the Council of Europe the ECF initiated the European broadcasting '[Prix Europa](#)', the annual prize honouring the best European radio, television and Internet programmes. In 2020 the ECF launched the [Culture of Solidarity Fund](#) as a rapid response tool to support cross-border cultural initiatives of solidarity in times of uncertainty and lockdown.

The **Council of Europe** adopted the [European Cultural Convention](#) in 1954 and committed its members to encouraging the study and promotion of each other's languages, history and culture. The Cultural Experts had appended a long list of projects to it which could not be carried out owing to lack of funds. The Convention was therefore connected with the idea of a cultural fund from the beginning, as expressed in [Recommendation 74 \(1955\)](#) on its establishment. A [Recommendation in 1958](#) proposed to open negotiations with the ECF and to create National Committees which would raise contributions for the Cultural Fund. Finally, in [Resolution \(58\) 13](#), 16.06.1958, the Committee of Ministers decided to set up a Council of Europe Cultural Fund as from 1st January 1959. Its budget consisted of fixed governmental contributions totalling 35 million French francs for each of the first three years, as well as voluntary contributions by Member Governments and contributions from non-governmental sources. The Fund is a distinct administrative entity of the Council of Europe. In 1962, the Council for Cultural Cooperation (CCC) was charged with its coordination.

The CoE's Cultural Fund, as the [Annual Report 1963](#) shows, started predominantly as a programme of educational cooperation (ibid.: 7). Its focus in the area of film and TV was on educational films and audiovisual teaching. It included a catalogue of films on nature conservation, the production of teaching films on biology and on cultural subjects to be treated from a European and historical viewpoint as well as the exchange and a census of films produced by member countries (ibid.: 53).

The CoE continued to support media culture, including through its [Resolution on European Cultural Identity](#) (R (85) 6, 25.04.1985), its [Recommendation on the Promotion of Audiovisual Production in Europe](#) (R (86) 3, 14.02.1986) and its [Resolution setting up a European support fund for the co-production and distribution of creative cinematographic and audiovisual works \("Eurimages"\)](#) (Res(88)15, 26.10.1988). [Eurimages](#) is the Council of Europe's cinema support fund. It was created by the 1988 Resolution and launched in 1989 with a budget of 21 million euro and in late 2021 included 39 of the 47 member states of the CoE, including all EUMEPLAT partners. Its budget is derived from the contributions of the member states as well as returns on the loans granted. Eurimages aims to promote the

European film industry by encouraging the production and distribution of films and fostering cooperation between professionals. It has four support schemes: feature film co-production, the promotion of co-production, theatrical distribution, exhibition and digitisation. It promotes independent filmmaking through a number of cooperation agreements with various festivals and film markets and has also adopted a strategy to promote gender equality in the film industry. Eurimages has a clear cultural aim and is complementary to the EU's MEDIA programme.

Last but not least, the CoE in December 1992 established the [European Audiovisual Observatory](#) (EAO) as a European public law institution. It includes 39 member states and the EU represented by the European Commission. The EAO serves to promote the flow of information within the audiovisual industry as well as an overview of the market and its transparency. To this end, it operates a number of databases including [MAVISE](#) on audiovisual services and their jurisdiction in Europe, [Lumière VOD](#) on the content of 450 VoD catalogues (02/2022), [Lumière](#) on ticket sales to films released in Europe since 1996 and [IRIS Merlin](#) on legal information covering all audiovisual media, key areas, key players and legal developments since 1995.

The starting point for the **European Community's** engagement with media, as we have seen, was the [Green Paper Television without Frontiers](#) (1984). That had found that cross-border consumption of European films was 'regrettably small', while most of the foreign films shown in the Community came from the USA. "The creation of a common market for television production is thus one essential step if the dominance of the big American media corporations is to be counterbalanced." (ibid.: 33). This involved media regulation in order to create a level playing field in the TV Directive (TWFD / AVMSD), including a quota for European programmes mandated for all TV services in Europe.

As a further consequence of the 1984 Green Paper, in 1985 the EP proposed the creation of a production fund for European film. However, this initiative failed due to the objections by Denmark, which denied the Community's competence in the field of culture, and by Germany and Britain which saw the fund as State aid and problematic intervention in the market. Yet the Council of Ministers was convinced that something needed to be done to overcome the structural deficits in the European film landscape and suggested to concentrate on the pre- and post-production phase, i.e. project development, film distribution, screening and training of specialised personnel. In 1986, the Council asked the EU Commission to develop a solution. The Commission then surveyed the situation of filmmakers. After an extensive consultation involving over 3,000 experts, it launched nine pilot projects in 1988, including support for dubbing and subtitling, animated film and new audiovisual technologies, to test the programmes for their practicality. These pilots were well received by the professionals. The result was the MEDIA (Mesures pour encourager le développement de l'industrie audiovisuelle) funding programme that came into force in 1991 (Koblitz 2007: 19 ff):

This initial phase of MEDIA 95 (1991–1995) was based on the [Council Decision concerning the implementation of an action programme to promote the development of](#)



[the European audiovisual industry \(MEDIA\) \(1991 to 1995\)](#) (90/685/EEC, 21.12.1990). The Decision proclaims it “necessary to promote the European audiovisual programme-making industry as part of the operation of the single market”, to help create a favourable environment, to stimulate the competitive supply capacity of European audiovisual products and to step up intra-European exchanges of films and audiovisual programmes. It provides for a budget of ECU 84 million for the first two years and stipulates that recipients of funding must provide at least 50% of the total cost (Art 6).

The [Green Paper on Strategy Options to Strengthen the European Programme Industry in the Context of the Audiovisual Policy of the European Union](#) (COM (94) 96 final, 6 April 1994) was mentioned already as one of the first occurrences of the “digital revolution” in the policy literature on television broadcasting. The Paper refers to the first evaluation of MEDIA after the first two years of implementation which found that the programme is working effectively as a catalyst and has promisingly established new industry structures through cross-border cooperation. Based on those findings, the Commission identified four sets of priority objectives for its future: “training (geared to the market and the new technologies), pre-production and project development, distribution and marketing and finally stimulation of private investment” (ibid.: 29 f.).

The EP responded with a [Resolution on the Green Paper on the European programme industry](#) (A4-0140/95, 25.09.1995). It saw it justified to hope that the European programme industry and cinema will become “more viable and their products more marketable, largely through the Media II programme” (ibid.: pt. L). However, Parliament noted that the pan-European market was not so far being exploited and “deplores the lack of funding granted by the Council to develop a true European audiovisual policy” (ibid.: pt. 1). It also deplored the continuation of the practice of complex “chronologies” in cinema exploitation and emphasised the importance “to facilitate coordinated and simultaneous exploitation of European films in European cinemas and other media in all countries, as only simultaneous exploitation strategies can reach a broad public, and the Media II programme must make a decisive contribution to this” (ibid.: pt. 9).

The following phase was MEDIA II (1996 – 2000), based on the [Council Decision on the implementation of a programme encouraging the development and distribution of European audiovisual works \(MEDIA II — Development and distribution\) \(1996 to 2000\)](#) (95/563/EC, 10.07.1995). After the fall of the Iron Curtain, it emphasises the need to continue the process of opening up the MEDIA programme to participation by the associated countries of Central and Eastern Europe (CCEE) (ibid.: pt. 23). The objectives came to include the active support of linguistic and cultural diversity of audiovisual and cinema works (Art 2(2)). The total budget now was ECU 265 million (Art 3). Where the previous Decision provided for an Advisory Committee consisting of representatives of MS to assist the Commission in managing the programme, this one requires that the Commission must submit drafts of essentially all measures it takes to the Committee for its opinion, including calls for proposals and allocations of more than ECU 300,000 per year as regards development and more than ECU 500,000 per

year as regards distribution (Art 5). In addition, this phase also introduced a separate vocational training programme as provided by the [Council Decision on the implementation of a training programme for professionals in the European audiovisual programme industry \(MEDIA II — Training\)](#) (95/564/EC of 22.12.1995).

The [Commission Communication on Principles and guidelines for the Community's audiovisual policy in the digital age](#) (COM/1999/657, 14.12.1999) begins with digital technologies which are bringing about major changes in the audiovisual sector. The Commission's intended strategy over the next five years includes support mechanisms, primarily the proposal for a new MEDIA Plus programme, which takes account of the challenges and opportunities created by the digital age.

MEDIA Plus (2001 – 2005) with a total budget of 483 million Euro was introduced by the [Council Decision on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works \(MEDIA Plus — Development, Distribution and Promotion\) \(2001 to 2005\)](#) (2000/821/EC of 20.12.2000)<sup>22</sup> which was again accompanied by a separate [Decision on a training programme for professionals in the European audiovisual programme industry](#) (163/2001/EC, 19.01.2001)<sup>23</sup> over the same period. In the MEDIA Plus Decision, the Commission points to a Report of the High-Level Group on Audiovisual Policy from October 1998 on the Digital Age which recognised the need to strengthen support measures for the cinematographic and audiovisual industry, in particular by endowing the MEDIA programme with resources commensurate with the size and strategic importance of the industry (ibid.: pt. 3). The Commission predicted that in the next few years the digital revolution will make European audiovisual works more easily accessible and widely available outside their country of origin (ibid.: pt. 20), the same prediction that was made after satellites had appeared. The new objectives included enhancing the European audiovisual heritage, in particular by digitisation and networking (Art 1(2)(d)) and encouraging the creation of catalogues of European works in digital format intended for exploitation on new media (Art 3(e)).

The subsequent programme was MEDIA 2007 (2007 – 2013), based on the [Decision concerning the implementation of a programme of support for the European audiovisual sector \(MEDIA 2007\)](#) (1718/2006/EC, 15.11.2006). The focus continuous to be support for activities up- and downstream of audiovisual production, now complemented by digitisation. “Support for digital services and European catalogues is one of the programme's priorities in order to overcome the fragmentation of the European audiovisual market” (ibid.: pt. 8 and Art 1(4)(d)). The Community now consisted of 25 MS, making cooperation strategically important. Therefore, EU-wide networks at all MEDIA programme levels — training, development,

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22 Amended by [Regulation \(EC\) No 885/2004](#) of 26.04.2004, opening MEDIA Plus to the participation of Turkey and those EFTA countries which are members of the EEA Agreement, on the basis of supplementary appropriations, in accordance with the procedures to be agreed with those countries.

23 Likewise amended by [Regulation \(EC\) No 885/2004](#) of 26.04.2004 (see previous footnote).

distribution and promotion – required greater support, in particular cooperation with players from the MS which joined the Union after April 2004 (ibid.: pt. 17). Also, cooperation between MEDIA and Eurimages needed to be strengthened (ibid.: pt. 20). The total budget now amounted to 755 million Euro (Art 2). Support for training had been incorporated into the MEDIA Decision proper (Art 3). Digitisation efforts now included encouraging cinemas to exploit the possibilities of digital distribution (Art 5(a)). Three years later, an audiovisual cooperation programme with professionals from third countries, MEDIA Mundus, was established by [Decision 1041/2009/EC](#), 21.10.2009.

In 2014, The EU's cultural and media funding programmes were merged into the [Creative Europe](#) programme, of which [MEDIA](#) has since become a component. Creative Europe in turn came to be managed by the [European Education and Culture Executive Agency](#) (EACEA), established in 2006, which is also responsible for EU funding in the fields of education, training, youth, sport and volunteering, including [Erasmus+](#), the exchange programme for pupils, trainees and students, and [Citizens, Equality, Rights and Values](#) (CERV), designed to strengthen active European citizenship and democratic participation at EU level.

The follow-up to MEDIA 2007 was the Creative Europe MEDIA Programme (2014 – 2020), again decided on the basis of regular monitoring and external evaluations and public consultations on its future and brought about by the [Regulation establishing the Creative Europe Programme \(2014 to 2020\) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC](#) (1295/2013/EU, 20.12.2013).

In the meantime, the 2005 UNESCO Convention to which the Union is a party had entered into force in March 2007. This led the Commission to underline “that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must not, therefore, be treated as solely having commercial value.” (ibid.: pt. 5) This was also in line with the framework Communication on the [European Agenda for Culture](#) (COM(2007) 242, 10.05.2007). Action at Union level was required because of challenges for the cultural and creative sectors: the “digital shift and globalisation, market fragmentation relating to linguistic diversity, difficulties in accessing finance, complex administrative procedures and a shortage of comparable data” (ibid.: pt. 10). The Commission saw particularly SMEs and micro, small and medium-sized organisations better served by bringing together the MEDIA, Culture and MEDIA Mundus programmes into a single Creative Europe Programme (ibid.: pt. 19).

In the 2013 Regulation, the financial envelope for the entire period and the three sub-programmes amounted to EUR 1,462.724 million (Art 24). Whereas before the EU contribution was limited to 50% of the costs of a supported project, this was raised to a maximum of 80% of the costs of the operations (Art 22). The European audiovisual works to be supported now came to include “interactive works such as video games and multimedia with enhanced cross-border circulation potential” (Art 10(b)). The EU had joined the CoE’s European Audiovisual

Observatory (EAO) under MEDIA 2007 and now became an active member, contributing data and market analyses (Art 11).

Measures to protect the financial interests of the Union had been mentioned in the Annex in MEDIA 2007. They now moved into the Regulation itself, allowing the Commission, the Court of Auditors and the European Anti-Fraud Office (OLAF) to audit and investigate all grant beneficiaries, contractors and subcontractors (Art 25).

The so far last iteration is the Creative Europe Programme (2021 to 2027): [Regulation establishing the Creative Europe Programme \(2021 to 2027\) and repealing Regulation \(EU\) No 1295/2013](#) (2021/818/EU, 20.05.2021). In the meantime, a [New European Agenda for Culture](#) (COM(2018) 267, 22.05.2018) had been adopted, intended to promote the intrinsic value of culture and to harness its power for social cohesion and well-being, for jobs and growth and for international cultural relations (ibid.: pt. 4). The objectives of Creative Europe include to ensure that the cultural and creative sectors fully benefit from the Union's Digital Single Market (ibid.: pt. 7). However, the Commission notes a further intensification of competition in global audiovisual markets by the deepening digital shift, highlighting the growing position of global platforms in the distribution of content. "Therefore, there is a need to step up support for the European industry." (ibid.: pt. 9).

Union intervention in the audiovisual sector alongside the Digital Single Market policies is declared to be needed in particular in the modernisation of the copyright framework (referring to the SatCab Directive (2019/789), the DSMD (2019/790) and the AVMSD (2010/13/EU, 2018/1808)). "Those Directives also aim to achieve a well-functioning market place for creators and right holders, especially for press publications and online platforms, and to ensure fair remuneration of authors and performers." Again, the Commission points to "the stronger position of global platforms of distribution in comparison to national broadcasters that traditionally invest in the production of European works" (ibid.: pt. 16). For the first time, the Regulation mentions the news media sector which needs a free, diverse and pluralistic media environment. The Programme should therefore encourage "crossovers and cross-cutting activities supporting the news media sector". It should also provide "support for new media professionals and enhance the development of critical thinking among citizens by means of promoting media literacy" (ibid.: pt. 22).

The Regulation also addresses new societal issues such as the mainstreaming of gender and of non-discrimination objectives (ibid.: pt. 26), climate change (ibid.: pt 36) and the structural challenges of Europe's cultural and creative sectors, which have been exacerbated by the Covid-19 pandemic (ibid.: pt. 44).

The financial envelope for the entire seven-year period is EUR 1,842,000,000, of which the largest share of at least 58% is reserved for the media strand (Art 8). The priorities of the Media Sub-programme remain essentially unchanged, including the stimulation of cross-border cooperation, enhancement of circulation of European audiovisual works within the

Union and internationally in the new digital environment and the development in particular of young audiences (Art 6).

In order to support applicants, the Commission in its Funding and Tender Opportunities Portal maintains a gateway to the [Creative Europe Programme](#). It also provides the [Creative Europe MEDIA Database](#) containing information on films created within the funding framework. Meanwhile, the Commission has taken 238 [decisions on State aid for films and other audiovisual works](#) (as of 29.11.2021).

The creative and the media sectors were among those most affected by the Covid-19 pandemic. Therefore, the Commission, within its Digital Decade programme, adopted an [Action Plan to Support Recovery and Transformation of the Media and Audiovisual Sectors](#) (COM(2020) 784 final, 03.12.2020). The priority is on funding, investment and loans for media companies with a focus on the news sector. Awareness of the dominance of few digital platforms is expressed by providing support for “research and innovation for advanced methods of search, discovery and aggregation, in order to facilitate the creation of independent alternative news aggregation services capable of offering a diverse set of accessible information sources” (ibid.). The establishment of a shared European media data space is announced, intended to benefit a wide range of “European publishers, broadcasters, radios, advertising companies, media SMEs, technology providers, content and tech start-ups, content creators, producers, distributors” (ibid.). Citizens are addressed in the actions for critical media literacy, yet not to empower them to become active media providers but only as consumers to make informed choices “from the richness of information and entertainment provided by the media sector” (ibid.).

To sum up, the funding programme MEDIA and its changing instruments are intended to be an answer to the traditional weakness of European markets in comparison to the overwhelming US-American film industry. It had been set up to strengthen the merit side of audio-visual media in a highly competitive environment and their contribution to European culture and values.

### 3.5 Media competition law

The central project of the Union is the Single Market. Since the time of Adam Smith, the worst enemies of a free and fair market are the monopoly and the cartel. Therefore the Community at the outset is given the objective of establishing “a system ensuring that competition in the common market is not distorted” (Art 3(f) [Treaty of Rome](#) (1957)) which turns into the exclusive competence of the Union in “the establishing of the competition rules necessary for the functioning of the internal market” (Art 3(b) [TFEU](#) (2007/2012)). More specifically, the prohibition of agreements between market actors to restrict competition (e.g. a cartel between competitors to fix prices and share markets) and of the abuse of a dominant position in a market (Arts 85 and 86 [Treaty of Rome](#), Arts 101 and 102 [TFEU](#)) have been part

of the fabric of the EU since the beginning. Given this central role, there is surprisingly little to be found in secondary Community law on this matter, particularly in the field of media.

A first legal act in the Community's competition policy was the [EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty](#) (06.02.1962) covering 'vertical restraints', i.e. agreements between producers and distributors which can lead to partitioning of the market and exclusion of new entrants. The Regulation gave the Commission exclusive competence to grant exemptions under Article 85(3) and set up a system of notification to the Commission for relevant agreements. As the [Green Paper on vertical restraints in EC competition policy](#) (COM/96/0721, 22.01.1997) recounted, this resulted in a mass of notifications in excess of 30,000 in the early 1960's, on which the Commission was able to adopt only around 20 formal decisions and around 150 informal comfort letters a year. Therefore the [Regulation on application of Article 85 \(3\) of the Treaty to certain categories of agreements and concerted practices](#) (19/65/EEC, 02.03.1965) empowered the Commission to adopt "block exemptions" for certain categories of agreements which generally fulfil the conditions of Article 85(3). These include exclusive distribution, where a producer agrees to appoint only one distributor in a territory (Regulation 1983/83), exclusive purchasing including special provisions for beer and petrol, where the distributor agrees to purchase the goods in question only from one producer (Regulation 1984/83) and franchising, where a franchisee is allocated an exclusive territory in which to exploit the know-how and intellectual property rights of the franchiser and sell the product or service in a standardised format (Regulation 4087/88).

The second major piece of competition legislation was the 1989 **Merger Control Regulation** ([Council Regulation on the control of concentrations between undertakings](#) (4064/89/EEC, 21.12.1989<sup>24</sup>). It starts from case law of the Court of Justice which had shown that, while Articles 85 and 86 are applicable to certain concentrations, they "are not, however, sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty." A new and sole legal instrument was therefore needed to permit effective monitoring of all concentrations with effect on the Community. The Regulation makes it clear that pluralism is primarily the responsibility of the MS and "this Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State." Whether a concentration reaches a Community dimension is determined by the geographical area of activity of the undertakings concerned and by quantitative thresholds of their aggregate turnover globally and throughout the Community (Art 1). Mergers and acquisitions with a Community dimension shall be notified beforehand to the Commission (Art 4) which examines it and can suspend the concentration if it finds it incompatible with the common market (Arts 6 and 7).

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24 The lawmaking process had been initiated by Directorate-General for Competition with a [Proposal for a Regulation on 18.07.1973](#), see [Procedure](#) for history.



The Commission is given power to undertake all necessary investigations (Art 13) and to impose fines on companies if they do not comply (Art 14). The Regulation stipulates that the Commission shall have sole competence to take decisions on any concentration that has a Community dimension (Art 21(1)) and that Member State shall not apply their national legislation on competition to these cases (Art 21(2)). It does permit MS to take appropriate measures “to protect legitimate interests other than those taken into consideration by this Regulation” and gives as examples for such interests: public security, prudential rules and plurality of the media (Art 21(3)).

The Regulation thus may apply to mergers of media companies, but the objective to safeguard the plurality of the media is left to MS. Furthermore, it is mute on issues of abuse of a dominant market position. The Council of Europe had already addressed the issue of press concentrations in its [Resolution \(74\) 43](#) of 16.12.1974. The main concern was the decreasing number of newspapers with their own complete editorial units and the concentration of their control in the same hands. The CoE recommended MS to examine public aid to the press, e.g. in the form of a press fund, while at the same time avoiding any encouragement to press concentration.

### 3.5.1 Green Paper on Pluralism and Media Concentration in the Internal Market (1992)

The European Parliament had urged the Commission for several years to propose regulatory measures to restrict concentration (including in its Resolutions of 15 February 1990 and 16 September 1992). In response to these calls the Commission issued its **Green Paper on Pluralism and Media Concentration in the Internal Market – An Assessment of the Need for Community Action** (COM (92) 480, 23 December 1992, [Annexes](#)). It starts by pointing out that “protection of pluralism as such is primarily a matter for the Member States” (ibid.: 7). National mechanisms could be applied also to situations with a Community dimension. Should a broadcaster established in another MS circumvent legislation on pluralism, the Member State of reception could restrict the free movement of such broadcasts. Similarly, where a merger declared to be compatible with the common market under the Merger Control Regulation is harmful to pluralism, the MS would still be able to take appropriate measures. However, the Commission did find that laws on media ownership which had been introduced since the mid-1980s and were developing in divergent ways may lead to “interference within the area without frontiers consisting of the Community” (ibid.: 8)

In its analysis of the concept of pluralism, the Commission found that it does not constitute a human or basic right but it is referred to in the rulings of the European Court of Human Rights (ECtHR) and of the supreme courts of certain countries, in particular France, Germany and Italy, which treat it as a constitutional principle. However, there is no common understanding but a variety of uses of the word ‘pluralism’ (ibid.: 14). From the rulings, the

Commission did identify two common features: 1.) The concept of pluralism serves to limit the scope of the principle of freedom of expression. It allows “to refuse a broadcasting licence or permission for the takeover of a newspaper, a monolithic corporate structure, a holding in a media company, etc.” (ibid.: 15). The ECtHR takes the view that pluralism is an exception to the principle of freedom of expression, designed to protect the ‘rights of others’ (Article 10(2) of the European Convention on Human Rights) (ibid.: 16). 2.) The purpose of such limitation is to guarantee diversity of information for the public. If the application of the principle of freedom of expression would result in preventing another beneficiary of that freedom from using it, thus diminishing diversity, it may be necessary to limit that application. “Such is the case, for instance, where there is a shortage of means of broadcasting or where access to them is limited” (ibid.: 17).

Pluralism is thus inherently linked to diversity of information. Diversity can be achieved by internal or external pluralism. Internal pluralism refers to the organisation of a company or of editorial content. External pluralism refers to the relations between companies and might require anti-concentration measures or increasing the number of broadcasting licences (ibid.: 18).

The Commission explains that mergers in the media industry do not have, in themselves, a positive or a negative effect on pluralism. Depending on the general environment, a merger may prevent a media operator from disappearing and thereby decreasing diversity. In other cases, it may lead to the disappearance of titles or channels, creating a negative effect on the choice of information sources (ibid.: 18 f.).

Diversity of Information, the Paper goes on to explain, can be assessed 1.) according to the editorial content of the broadcasts or the press, which is the most significant but also the most difficult to assess, 2.) according to the number of channels or titles, which is easy to assess but not very significant, and 3.) according to the number of media controllers or owners, whose autonomy and structural independence constitutes a minimum condition of the diversity of choice offered to the public, but is also difficult to assess as it cannot simply be assumed that the majority shareholder is the controller with decisive influence (ibid.: 19 f.). This gets more complicated across media. The Paper states that the majority of individuals in Europe (except in Spain, Portugal and Greece) consumed three types of media every day – radio, television and the press. This might ensure diversity if the three are from different sources, but not if they are all controlled by the same entity (ibid.: 20). Therefore, it suggests that, in order to assess the diversity of information available to the public, it is necessary to look at both monomedia and multimedia concentration.

The Commission then analyses in detail the national measures on media concentration (ibid.: 37ff.) and assess the possible need for Community action (ibid.: 58 ff.). It presents for public discussion three options: 1.) do nothing, 2.) take action to enhance transparency or 3.) harmonise national laws on media ownership by a Directive or by a Regulation, which might be complemented by an independent committee (ibid.: 9, 113 ff.). The Commission makes it

clear that this is complex and sensitive matter and that it has not committed itself to any of these options.

The Green Paper was discussed at a hearing attended by about thirty European media trade associations on 26 and 27 April 1993. No general view emerged as to the three options. Most of the associations showed little enthusiasm for the idea of an independent European body, and there were objections to increased transparency without harmonisation (COM, [press release](#), 12.05.1993).

The European Parliament in its Resolution on the Commission Green Paper favoured harmonizing national laws on media concentration by means of a Directive and enabling the Commission to intervene in the event of concentration which endangers pluralism on a European scale. It stressed the need to monitor the audiovisual media, multimedia groups and the print media, and to ensure absolute transparency of ownership in these sectors. It also recommended that the Community Directive be complemented by a further Council of Europe convention and called for an action programme to promote pluralism and diversity of opinion, including a European media code ([OJ C 44, 14.02.1994](#)).

Nearly two years after its Green Paper, the Commission took stock of the responses received in the wide-ranging consultation process. The [Follow-up to the Consultation Process Relating to the Green Paper on Pluralism and Media Concentration](#) (COM (94) 353 final, 05.10.1994) places this review at a turning point in the history of the media sector in Europe, marked by the Bangemann Report on the emerging “Information Society”. That report, like the Green Paper itself, highlighted the detrimental effects of the disparities between national rules on media ownership on the Internal Market.

In the consultations, the European Parliament and the Economic and Social Committee favoured the third option. The Member States stressed the lack of any difficulties which might have justified the second option, and individual media operators and their associations were divided (*ibid.*: 5). The consultations had revealed that the lack of legal certainty stemming from the current regulatory patchwork was a disincentive to investing in European media. These national laws on media ownership the Commission found indeed to be evolving in some Member States in light of new information technologies and globalization. Such national legislative activity, uncoordinated at Union level, was expected to accentuate the damaging effects on the Internal Market of the disparities between national rules, i.e. the fragmentation of the market (*ibid.*: 40). The Commission announced that it would be launching a second round of consultations on the subject of pluralism and media concentration. This second round had the same results as the first one: a lack of consensus on harmonising media ownership policy at the EU level (Papathanassopoulos 2015: 67).

In 1993, the Merger Regulation, in particular the turnover thresholds under Article 1, had to be reviewed. This resulted in a new Implementing Regulation ([Commission Regulation on the notifications, time limits and hearings provided for in the Merger Control Regulation](#) (3384/94/EC, 21.12.1994)), a strong recommendation by the Commission to reduce

thresholds, but also to first gain further experience of the operation of the Merger Regulation and therefore to postpone a possible revision until 1996.

In that year, the [Green Paper on the Review of the Merger Regulation](#) (COM (96) 19 final, 31.01.1996) declared that the Regulation had been “heralded as a success” (ibid.: 2). It recounted that since it entered into force in 1990, 376 concentrations had been notified and the Commission had adopted 357 final decisions. The majority was found compatible with the common market or outside the scope of the Regulation. In four cases the Commission prohibited the concentration. 24 other transactions were substantially altered so as to take account of the Commission's competition concerns (ibid.: 7). The Paper noted that a considerable number of mergers likely to affect market structure in more than one Member State fall below the thresholds, leaving companies faced with 13 different national merger control systems instead of the “one-stop shop” of the Commission. At the same time, trans-national M&A activity had intensified because of the recent economic upturn and increasing market integration in the Community. Like the 1993 review, the Green Paper recommended reducing the thresholds for the aggregate worldwide turnover from 5 to 2 billion ECU and for the aggregate Community-wide turnover of each of at least two of the undertakings concerned from 250 to 100 million ECU. This would bring the bulk of cases with significant cross-border effects within the Regulation and largely solve the problem of multiple notifications to several national authorities (ibid.: 20).

The European Parliament in its [Resolution on Community merger control: the Commission's Green Paper on the review of the merger regulation](#) (COM(96) 0019, 13.11.1996) adopted the Commission's arguments, advocating a significant reduction of the thresholds and inclusion of any joint venture performing on a lasting basis all the functions of an autonomous economic entity under the Merger Regulation. It did point out that a number of Member States were sceptical about the reduction of the thresholds.

It seems that those MS kept the upper hand. When the Merger Regulation was eventually amended in 2004 ([Council Regulation on the control of concentrations between undertakings](#) (139/2004/EEC, 20.01.2004)), there were no substantial changes. The values of the turnover thresholds remained the same, only the currency changed from ECU to EUR.<sup>25</sup>

The 1992 Green Paper on Media Pluralism had produced no consensus on EU media pluralism legislation and a lot of controversy. It seems to have fallen in between two contrary trends. On the one hand, virtually all EU MS had restrictions on media ownership, implying agreement on the need for special rules beyond general competition law in order to safeguard pluralism of media and thus diversity of information and opinion in society. “A tradition of restricting how much of the media any single owner may control has been fairly well established across most European countries” (Doyle 1997). On the other hand, deregulation

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25 The ECU, a basket of EU currencies, was replaced by the euro at a rate of 1 : 1 on 1 January 1999.

of broadcasting since the early 1990s had led to increasing concentrations across media and territories. There had been European conglomerates (e.g. News International, Bertelsmann, Hachette and Fininvest) before. In the new dual system of public and commercial broadcasting and the growing influx of US-American content, MS became less willing to restrict domestic media ownership, hoping to promote economies of scale. At the same time, pressure against limiting concentrations grew, particularly by press publishers.

Safeguarding pluralism and promoting competition therefore appeared as conflicting aims. The European Parliament sided with pluralism and diversity and called for action to address the growing number of media concentrations. The Council of Europe as well consistently argued that pluralism needs to be protected as essential to the principle of freedom of speech. E.g. in its [Recommendation on measures to promote media transparency](#) (R (94) 13, 22.11.1994), the CoE stated that media pluralism and diversity are essential for the functioning of a democratic society.

On the other hand, industry and many MS questioned the Union's mandate for safeguarding pluralism and saw it limited to securing the proper functioning of the Internal Market. The 1992 Green Paper had indeed proposed that only market concerns would justify EU intervention in media ownership, not pluralism. The conflict also ran through the Commission. In 1993 DG XV Internal Market took over the portfolio from DG III Industry, attempting to accommodate Parliament's concern about pluralism within the logic of the Internal Market, while DG III and DG XIII Telecommunications and Information Market, both under Commissioner Bangemann who had commissioned the report on the Information Society, strongly promoted liberalisation (Harcourt 1997: 25 ff.).

In September 1996, the Commission (i.e. DG XV) proposed the draft of a Media Pluralism Directive (Harcourt 1997: 21 f.). It suggested a 30 per cent upper limit on monomedia ownership for radio and television broadcasters and for total media ownership including newspapers of 10 per cent of the market in which a supplier is operating. These market shares would be based on audience measures. MS would be allowed to exclude PSB from these limits. "From a point of view of achieving equality of pluralism for all European media consumers, the Commission's approach seems highly effective. The problem is that it seems to disregard the fact that different market sizes – whether national or sub-national – can support different levels of diversity of ownership." (Doyle 1997).

MS, in particular UK and Germany, responded by calling for a more flexible approach to the ceilings. The Commission presented a revised draft in March 1997 which changed the title and thereby the focus from "Concentrations and Pluralism" to "Media Ownership in the Internal Market". Secondly, it introduced a 'flexibility clause'. This would allow MS to exclude any broadcaster from the unchanged upper limits, provided that the broadcaster in question is not simultaneously infringing these upper thresholds in more than one member state and that 'appropriate measures' are used to secure pluralism, e.g. 'windows for independent programme suppliers' or a 'representative programming committee' (ibid.). According to Doyle this would have allowed MS "to maintain whatever upper restrictions on ownership are

affordable – either economically or politically – in their own territories”, thus defeating the aim of harmonising rules across the EU.

Yet, this back-tracking did not raise support for the Directive, but opened another round of lobbying against it. The European Publishers Council argued that a pan-European media ownership initiative was unnecessary and would only hinder the development of European media companies. Ress and Bröhmer (1998) conclude in their study on behalf of the German Association of Newspaper Publishers (BDZV) that the second Draft Proposal “has no legal basis in the TEC whatsoever and that the European Community therefore has no power to enact the proposed directive” (ibid.: 96). Its main impetus was not the regulation of fundamental market freedoms but safeguarding information pluralism which, as a prerequisite of the democratic system, is the prerogative of the MS. Also, the Commission, they wrote, had failed to establish a concrete need for action, and the draft allegedly was not limited to mergers with Community-wide significance.

Whether it was these arguments that the two law scholars developed for the press publishers or additional ones, the resistance to EU media pluralism legislation was and still is so strong that no directive has been adopted to this day.

*“The quest to curb the development of excessive national and transnational media empires has persistently re-surfaced on the European policy agenda throughout the 1990s, disappearing each time amidst a welter of controversy. As the decade draws on, newly emerging patterns of cross-sectoral domination in the European communications and media industries – accommodated by regulatory change in several Member States – seem to provide an ever more compelling case for action at the EU level. But many influential industrial voices are firmly opposed to ‘interference’ from Europe in the design of media and cross-media ownership regulations.” (Doyle 1997)*

These voices were not able to move the topic off the agenda entirely. The 1997 Amsterdam Protocol not only considered the needs of society but also the need to preserve media pluralism. A strong PSB came to be seen as a decisive factor in ensuring plurality of information and opinion. This is a point strongly upheld by the Council of Europe, which has continuously been advocating media pluralism and diversity, going back at least to the [Recommendation on measures to promote media transparency](#) (R (94) 13, 22.11.1994). The [Recommendation on the guarantee of the independence of public service broadcasting](#) (R (96) 10, 11.09.1996) reaffirmed the vital role of PSB as an essential factor of pluralistic communication which is accessible to everyone, followed by the [Recommendation on measures to promote media pluralism](#) adopted in 1999. The 1998 amendments of the [European Convention on Transfrontier Television](#) included a new article on media pluralism (10bis). In its [Recommendation on measures to promote media pluralism](#) (R (99) 1, 19.01.1999), the CoE stressed the importance for individuals to have access to pluralistic media content and therefore of a multiplicity of autonomous and independent media outlets at the national, regional and local levels and it addressed new technologies and digital broadcasting.

The [Media Diversity in Europe](#) report, prepared by the CoE’s Advisory Panel on Media Diversity (H/APMD(2003)001, December 2002), starts from Article 10 of the European



Convention on Human Rights which places States under a “duty to protect” and, when necessary, to take positive measures to ensure diversity of opinion in the media. It emphasises that a competition law approach to media pluralism objectives alone is not sufficient and sector-specific media ownership measures and regulations are necessary. Among the different methods for assessing media concentrations, the report favours the audience share approach, which reflects the real influence of a broadcaster in a given market. “Whichever the indicator employed, permissible thresholds vary at around 1/3 of the audience, 1/3 of revenues or 1/3 of the network capacity, implying a general European understanding that controlling one third of the market is tolerable, but that going beyond that level could infringe upon freedom of expression and information” (ibid.: 4). The authors again highlight the essential role of PSB in ensuring media pluralism and diversity. Liberalisation, globalisation and digital technology are analysed as increasing the pressures for concentration. States are called to strengthen national regulators and authorities. Constant monitoring is required for protecting media pluralism.

Given the failure in creating European media concentration legislation, the next report prepared by the Advisory Panel on Media Diversity [Transnational media concentrations in Europe](#), (AP-MD(2004)007, November 2004) makes another compelling case for it. The authors observe that the media dynamics in Europe have led to a larger number of channels but not to more diversity of content. “Unchallenged, content in a media environment dominated by transnational media owners will most likely become less local, less controversial, less investigative and less informative.” (ibid.: 5) On the other hand, economically strong media “can act as public watchdog on the European scene, promote European standards, content and diversity and create a European alternative to cultural imports.” (ibid.). The report recommends supporting PSB and community media, a clear separation between political authorities and the media and appropriate legislation by MS. On the CoE it calls to conduct ongoing monitoring of transnational media concentrations and necessary action at the international level: “The Council of Europe should urgently study the appropriate means, including a convention, to prevent the negative impact that this phenomenon may have on freedom of expression, pluralism and diversity.” (ibid.)

Three years later, in the [Declaration on protecting the role of the media in democracy in the context of media concentration](#) (31.01.2007, p. 302), the CoE notes that from Article 10 of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights, States emerge “as ultimate guarantors of pluralism” and should take measures to safeguard a diverse public sphere that serves democratic society. It stresses again the importance of PSB and not-for-profit media in promoting diversity. It calls for “effective and manifest separation between the exercise of control of media and decision making as regards media content and the exercise of political authority” and for measures to guarantee full transparency of media ownership.

Building on the Declaration, the [Recommendation on media pluralism and diversity of media content](#) (CM/Rec(2007)2, 31.01.2007), issued on the same day, recommended detailed

measures for promoting structural pluralism of the media, including ownership regulation, PSM as well as community, local, minority and social media and access and interoperability, for promoting content diversity, media transparency and support of scientific research in the field of media concentration and pluralism.

Meanwhile in the Union, the [Commission staff working document – Media pluralism in the Member States of the European Union](#) (SEC/2007/0032, 16.01.2007) referred to the 2004 CoE report and its concern that national competition remedies become more difficult to enforce against foreign undertakings which were becoming active in the liberalised European media landscape. The Commission voiced the opinion, that foreign owners do not necessarily pose a threat to media pluralism if there are legal safeguards in place and real editorial independence from the owner. It did point to worrying developments globally<sup>26</sup> and within the Community.<sup>27</sup> But it also noted that too restrictive ownership rules in Europe might hinder European companies from competing globally and increase the influence of non-European media owners. The report, which includes country profiles of the then 27 MS, found that while there was a number of studies on these very complex and multifaceted issues, none of them identified systematically the range of concrete indicators necessary to measure media pluralism. The Commission therefore announced that it would procure an independent study in order to define indicators in a risk-based analytical framework.

This study, authored by three academic institutes and the consultancy firm Ernst & Young was published two years later: [Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach](#), Prepared for the European Commission, DG Information Society Leuven, April 2009. The third step in what was called the ‘Reding-Wallström three steps’ on media pluralism ([press release](#) 16.01.2007), a Communication and a public consultation on it, was never launched. Another exertion on this difficult issue ended in nothing.

In 2000, the EU adopted the [Charter of Fundamental Rights of the European Union](#). Article 11 almost literally replicates Article 10 ECHR and adds in Article 11(2) the respect for freedom and pluralism of the media. Kevin et al. (2004) in their report on [The information of](#)

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26 “News Corp, Rupert Murdoch’s press and pay-television empire; US media magnate Haim Saban purchasing the financially troubled German Kirch group’s television channels in summer 2003; the SBS broadcasting group, based in Luxemburg but US owned, controlling several channels in Northern Europe and expanding into South-Eastern Europe.”

27 “West European companies have significantly invested in the countries that joined the Union in 2004 and 2006. The Springer and Ringier groups, from Germany and Switzerland respectively, have launched several high-circulation publications in the countries of Central and Eastern Europe; WAZ has gained a significant position in the Central and Eastern European press markets, dominant in some of them. For instance in the case of the Czech Republic, German and Swiss companies own 80 percent of Czech newspapers and magazines. Foreign capital – mostly German, Austrian, French and Scandinavian – also dominates print media in Bulgaria, Hungary, Poland and the Baltic states. In the audiovisual field the most successful commercial broadcasters in Hungary are TV2 and RTL Klub. RTL Klub is 49% owned by Bertelsmann whereas the main shareholder in TV2 is SBS Broadcasting, a US-owned Luxembourg based company. The third commercial channel is Viasat 3, which is operated by the Modern Times Group.”

[the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed](#) prepared for the European Parliament, start from this right to be fully and objectively informed. They noted further trends in de-regulation of the media industry with an increased loosening of the rules regarding ownership at the international level, with the US Federal Communications Commission planning a relaxation of ownership rules (allowing media corporations to reach 45% rather than just 35% of television viewers), and the recent Communications Act in the UK (relaxing foreign ownership restrictions and cross media ownership rules). Both moves have been highly controversial and in the case of the UK a compromise has been reached with the development of a 'public interest test' which is intended to determine the potential share of the 'public voice' which a merged company would have (ibid.: 13, see also the UK report, 203 ff.). The report provides country portraits on all 25 EU MS, and all EUMEPLAT partners, except Bulgaria and Turkey. Among their recommendations was the establishment of an observatory focusing on media markets and concentration, with the provision of a database on EU MS, in order to provide transparency and enhance national systems of regulation.

For the Liverpool Audiovisual Conference Media Pluralism in July 2005, the Commission had prepared an [Issues Paper](#). In it, it summarised measures to safeguard pluralism in place at EU and MS level. It recalled that the European Parliament has continuously asked the Commission to propose additional measures and that Member States had clearly expressed their views that they consider this as a task for themselves. It highlighted fundamental methodological issues. First, this concerned the divergence in the way a company's influence on the market is assessed: circulation and audience share, number of licenses, capital shares, voting shares, advertising revenues or involvement in a certain number of media sectors. Second, it remained impossible to find clear and comparable data regarding circulation and audience figures in the MS, let alone ownership. Therefore, the Commission echoed the recommendation of the CoE for and up-to date collection of such data and suggested the establishment of an observatory focusing on media markets and concentration.

The EP in its [Resolution on concentration and pluralism in the media in the European Union](#) (2007/2253(INI), 25.09.2008) welcomed the Commission's intention to develop specific indicators to evaluate media pluralism (pt. 14) and stressed the need to institute monitoring based on reliable and impartial indicators (pt. 21). It now emphasised that rules on media concentration should govern also the electronic channels and mechanisms for access to and dissemination of content on the Internet, such as search engines (pt. 16), and it expressed concern "about the dominance of a few large online players, which restricts new market entrants and thereby stifles creativity and entrepreneurship in this sector" (pt. 48).

In 2011, a High-Level Group (HLG) on Media Freedom and Pluralism was asked to draw up recommendations ([Terms of Reference](#), September 2011). It delivered its final report [A free and pluralistic media to sustain European democracy](#) to then Vice President of the European Commission Neelie Kroes in January 2013. In it, it recommended to task the

[European Union Agency for Fundamental Rights](#) (FRA) with monitoring of freedom and pluralism of the media. The FRA had been established (by [Council Regulation \(EC\) No 168/2007](#), 15.02.2007) to assist the EU institutions in fundamental-rights issues. Alternatively, the HLG suggested to establish an independent monitoring centre, partially funded by the EU and ideally as part of academia. In addition, all MS should establish independent media councils with competences to investigate complaints, like a media ombudsman, but also to check that media organisations have revealed ownership details, declarations of conflicts of interest, etc. The HLG also recommended that digital intermediaries, such as search engines, news aggregators, social networks and app stores should be included in the monitoring of the sector.

Naturally, the HLG highlighted the important role of PSM and other not-for-profit media in maintaining media pluralism. Concerning the European public sphere, it recommended the provision of funding for cross-border European media networks (including such items as translation costs, travel and coordination costs). Support for journalists specialised in cross-border topics should be included in such funding.

Digital platforms have also become a concern for the CoE. In its [Recommendation on media pluralism and transparency of media ownership](#) (CM/Rec(2018)1, 07.03.2018) it points out that:

*“Internet intermediaries have acquired increasing control over the flow, availability, findability and accessibility of information and other content online. This may affect the variety of media sources that individuals are exposed to and result in their selecting or being exposed to information that confirms their existing views and opinions, which is further reinforced by exchange with other like-minded individuals. Selective exposure to media content and the resulting limitations on its use can generate fragmentation and result in a more polarised society.” (ibid.: pt. 6)*

In particular, highly targeted advertising had affected a shift of advertising and marketing revenues away from traditional media (ibid.: pt. 7). The CoE stressed again the need for rules to ensure transparency of media ownership, organisation and financing to enable media accountability and effective media-ownership regulation, which needs to include cross-media ownership (ibid.: pt. 11). Against this background, it reaffirmed the importance of existing CoE standards dealing with different aspects of media pluralism and transparency, from its 1994 its Recommendation on media transparency to the most recent ones: [CM/Rec\(2016\)5](#) on Internet freedom, [CM/Rec\(2016\)4](#) on the protection of journalism and safety of journalists and other media actors and [CM/Rec\(2016\)1](#) on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality. The present Recommendation emphasised the need for its MS to fully implement these standards and adjusted and supplemented them to ensure their continued relevance in the current multimedia ecosystem.

While there are no specific EU rules on concentrations in the media sector, the general EU competition law has regularly been applied to media.<sup>28</sup> The [White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty – Commission Programme No. 99/027](#) (COM (99) 101 final, 28.04.1999) noted that since the Council had adopted Regulation 17 in 1962, the system of prior notification, supervision and enforcement had been applied for over 35 years without any significant change. It applies general rules on restrictive practices (Art 85 / 101 [TFEU](#)) and abuses of dominant position (Art 86 / 102 [TFEU](#)) as well as the derogations on permissible concentrations (Art 86(3) / 102(3) [TFEU](#)). The Commission found that it had proved very effective for the establishment of a “culture of competition” in Europe. In the meantime, each MS had established a national competition authority (ibid.: pt. 4). A centralised enforcement system requiring decisions by the Commission was no longer appropriate for the Community with 15 Member States (ibid.: pt. 5). To continue would require enormous resources and impose heavy costs on companies (ibid.: pt. 10). At the same time, since law and policy had been clarified, the Commission suggested that the burden of enforcement could now be shared with national courts and authorities. The Commission would then be able to concentrate on the most important cases of cross-border cartels, merger control and liberalisation of hitherto monopolised markets (ibid.: pts. 8, 9). The White Paper therefore proposed to abolish the centralised notification and exemption system and to replace it by a Council Regulation which would render the exemption rule of Article 85 (3) directly applicable without prior decision by the Commission. Article 85 as a whole would be applied by the Commission, national competition authorities and national courts, as was already the case for Articles 85(1) and 86 (ibid.: pt 12). These changes have been implemented by the [Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty](#) (1/2003/EC, 16.12.2002).

There is still no specific [competition legislation in the media sector](#) aside from state aid rules for PSM and films and audiovisual production. In general competition law, the Commission investigates major cases with a Union dimension ([Factsheet on Antitrust procedures in anticompetitive agreements, Article 101 TFEU cases](#), and [Factsheet on antitrust procedures in abuse of dominance, Article 102 TFEU cases](#)). The Commission is required to publish its decisions (in the [Competition Database](#)). These include a planned online joint venture between ProSiebenSat.1 and RTL in 2010 which the Commission referred to German and Austrian competition authorities ([M.5881](#)). A few cases on [antitrust](#) and on [mergers](#) in the media sector are listed on a DG Comp webpage, including cross-border access to pay-TV ([AT.40023](#)), Comcast’s acquisition of Sky ([IP/18/4183](#)) and Disney’s acquisition of parts of Fox ([IP/18/6312](#)). A few more recent cases are on the “[What's new? \(Media\)](#)” page, including the [objections to Apple on App Store rules for music streaming providers](#) in April 2021. There seems to be some ‘convergent’ confusion about sectors, as the Apple case is also listed under

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28 e.g. concerning UEFA Champions League, network sharing among telecom providers, IFPI simulcasting (see [Commission Decisions based on Regulation 1962/17](#); see also relevant EU [case law](#)).

[Cases in the Information Communication Technologies \(ICT\) sector](#). Here we also find a number of investigations against Google.

The first case involved Google's acquisition of the advertising technology company DoubleClick in 2008, which the Commission found unlikely to have harmful effects on consumers and therefore cleared ([M.4731](#)). In 2016, the Commission started to investigate both Google's comparison shopping and AdSense for Search. The latter provided search adverts to websites that embed Google as their local search engine. The investigation showed that Google was by far the strongest player in this market for online search advertising intermediation in the EEA with a market share above 70% from 2006 to 2016. By imposing restrictive clauses in contracts with third-party websites, competitors in online search advertising such as Microsoft and Yahoo were excluded. The Commission found that Google was abusing its market dominance and imposed a fine of EUR 1.49 billion ([AT.40411](#)).

The Commission started to look into the way Google favoured its own comparison shopping service in its search results to the detriment of competitors in 2010. After an extensive investigation it decided that the company was indeed abusing its dominance in search and in 2017 issued a fine of EUR 2.42 billion and ordered it to end the conduct within 90 days or face penalty payments of up to 5% of the average daily worldwide turnover of Alphabet, Google's parent company ([AT.39740](#)). Commissioner Margrethe Vestager, in charge of competition policy, said: "What Google has done is illegal under EU antitrust rules. It denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation." ([press release](#) 27.06.2017). Google appealed the decision. On 10 November 2021 the General Court of the EU dismissed the appeal and upheld that Google had broken antitrust law in how it used its search engine to promote its shopping comparison service and demote those of its rivals ([Case T-612/17](#)).

While the Commission focusses on the largest cases with an impact on the entire Union, the majority of antitrust proceedings are being conducted in the Member States. Next to national law, national Competition Authorities and national courts since the 2002 Regulation are empowered to apply Articles 101 and 102 of the Treaty fully. Therefore, we can conclude that even without an EU media concentration directive in the combined approach of EU and MS, anti-competitive behaviour in the media sector can be checked.

There is also progress on monitoring. The longest-standing source of data and regular reports is the CoE's [European Audiovisual Observatory](#) (EAO) established in December 1992. Its most recent report is the [IRIS Special, Media pluralism and competition issues](#), October 2020. It suggests "public value" as measure for diversity and considers plurality also for "algorithmic media". It provides country reports on eight MS, including Belgium, Germany, Italy and Sweden.

The dedicated [Centre for Media Pluralism and Media Freedom](#) (CMPF) at the European University Institute Florence was established in 2011 for research on media



competition in Europe and beyond and to provide knowledge support to the international, European and national policy and rulemaking processes. It is co-financed by the European Union. Since 2013 the CMPF has been developing and implementing the [Media Pluralism Monitor](#) (MPM) to assess the risks for media pluralism in EU member states and candidate countries. Its first report was the [Media Pluralism Monitor 2014](#). The [Media Pluralism Monitor 2021](#) covers 32 European countries (EU 27 plus Albania, Montenegro, Republic of North Macedonia, Serbia and Turkey).

Reporters Without Borders operates a global [Media Ownership Monitor](#) since 2015. The indicators are inspired by and harmonized with the Media Pluralism Monitor of the CMPF. It includes a [country report](#) and data in the [Media & Owners Database](#) on EUMEPLAT member Turkey.

Under conditions of the Covid-19 pandemic, the [European Democracy Action Plan](#) (COM(2020) 790 final, 03.12.2020) is intended to protect the democratic opinion forming process from undue interference by establishing transparency rules for political advertising and revising the rules on the financing of political parties, by protecting the safety of journalists, by improving the toolbox for countering disinformation and by checking concentration of market power through the new [Media Ownership Monitor](#). Whereas in the economic context it is all about informed choices of consumers, in the political context it is about citizens' electoral choices:

*“For participation to be meaningful, citizens must also be able to form their own judgements – they should be able to make electoral choices in a public space where a plurality of views can be expressed freely and where free media, academia and civil society can play their role in stimulating open debate, free from malign interference ... allowing everyone to express their views, regardless how critical they are towards the governments and those in power.”* ([Democracy Action Plan](#))

The Commission issued a [Call for Proposals: Media ownership monitor](#) on 02.12.2020 for a pilot study to establish a database on European media ownership transparency. On 27.09.2021, the Commission commissioned the [Euromedia Ownership Monitor](#) (EurOMo) to be coordinated by the [Paris Lodron Universität Salzburg](#). The monitor will provide a country-based database containing information on media ownership, as well as systematically assess relevant legal frameworks and identify possible risks to media ownership transparency. The project receives funding of €1 million and is expected to last until September 2022. This initiative is part of a broader effort in the field of [media freedom and pluralism](#), as outlined in the [European Democracy Action Plan](#).

To sum up, we can state a fundamental dilemma in the field of media concentration. On the one hand, concentration processes are fundamentally inherent in a profit orientated media market due to the reigning economies of scale. On the other hand, media concentration with its consequences of restricting competition is in obvious contradiction to the most noble aim of the EU to safeguard competition. Thus, media concentration has been a long-standing issue of EU media policy debates, but never came to a coherent regulation due to the divergent

positions of the MS and strong lobbying. Nevertheless, recent activities of the Commission show, the problem has become so pressing that the Commission is beginning to take first steps of action.

## 4 Digital networked media and platform regulation

Digitalisation of the EU media policy discourse started when audiovisual media services came to be complemented by “information society services” in 1994, by the Internet proper in 1996 and by online platforms from 2000 onwards. In parallel to the media-technological developments, there was a fundamental shift in the organisation of society. The 1980s and 90s saw the most intense period of neoliberal reconstruction of the European states. In broadcasting this led to the dual system in which the public service system and citizen media were maintained next to commercial providers. This was because of a recognition that profit-oriented media alone would not answer to the democratic, social and cultural needs of society. In contrast, telecommunications came to be seen as a mere transport service without direct impact on the content flowing through its channels. Liberalisation here meant that the public national service providers were abolished entirely within only ten years starting from 1987. The interest of society was expressed by universal service requirements.

The telecommunications environment is, of course, highly relevant for assessing European media platforms. While telecom law is not supposed to apply to transmitted content, it does regulate the transport layer for the audiovisual sector. For content to reach audiences there need to be wireless or wired transmission capacities, protocols to provide services over them and devices allowing audiences to display and interact with content and services.

The legal instruments on audiovisual media, as we have seen, came to be amended first by provisions addressing digital issues from the 1990s and then decisively from the turn of the century onwards. This is expressed in name changes, e.g. from SatCab Directive (1993) to Online SatCab Directive (2019). After 2000, in a now thoroughly liberalised environment a new generation of ‘born digital’ content instruments were adopted. These are specific platform laws or address issues such as in copyright and of data protection that emerged specifically in the digital sphere.

Our milestones in this section, because digital platforms are based on networked computers, start with the liberalisation of telecommunications (heralded by the 1994 Bangemann Report) which led to 4.1.1) the European Electronic Communications Code (EECC, 2018) and set the tone for the entire European digital media policy. The Internet, or more specifically hosting services for user uploads, brought individuals into a regulatory space which before was reserved to professional, commercial actors. It raised the question whether

these individuals should be held responsible for their illegal and harmful communications or also the service providers allowing them to make them available to the world. The answer was the limited liability regime in 4.2.1) the E-Commerce Directive (ECD, 2000) which is currently transformed into 4.2.2) the DSA and DMA. The same phenomenon of individual users entering the public sphere and ‘making available’ content of themselves and of others also triggered the development of digital copyright and the second cornerstone of platform regulation next to the ECD: 4.3.1) the Copyright in the Information Society Directive (2001). The appearance of global social media platforms then required to update it in 4.3.2) the Digital Single Market Directive (DSMD, 2019). While ECD and DSA address the relations of platforms and individual users, the 4.4) P2B Regulation (2019) deals with the contractual relations of platforms and their business users. The Internet allows anyone connected to it to speak publicly but also to surveil and track that person. Privacy and data protection are therefore a prerequisite for a democratic public sphere. The EU milestones here are 4.5.1) the Data Protection Directive (1995), which was replaced by the 4.5.2) General Data Protection Regulation (2016). The led the CJEU to introduce a new fundamental right, that of being forgotten, and to prohibit the data transfer from the EU to the USA, which is the biggest European blow to US platform power so far.

## 4.1 Liberalising telecommunications

The official entree of the digital world into the European legislative arena came in 1994, when the [Bangemann Report: Europe and the Global Information Society](#) (26.05.1994) was presented. The European Council had requested a report by a group of prominent persons on measures for the infrastructures in the sphere of information. This High-Level Group was headed by Martin Bangemann, former German Federal Minister of Economics, former Chairman of the liberal party FDP and at the time Commissioner for industrial policy, information technology and telecommunications in the Delors Commission. The HLG consisted nearly exclusively of industrialists from telecommunication, computing and publishing.<sup>29</sup>

The text bubbles with enthusiasm over nothing less but “a new industrial revolution”, an “information revolution” that “adds huge new capacities to human intelligence” and will

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29 The other members of the HLG were: Peter L. Bonfield (Chairman and Chief Executive, ICL), Enrico Cabral da Fonseca (Presidente Companhia Comunicações nacionais), Etienne Davignon (president SGB), Peter J. Davis (Chairman, Reed Elsevier), Jean-Marie Descarpentries (President Bull), Carlo De Benedetti (Presidente Amministratore Delegato, Olivetti), Brian Ennis (Managing Director, IMS), Pehr G. Gyllenhammar (former Executive Chairman, AB Volvo), Hans Olaf Henkel (Chairman and Chief Executive Officer, IBM Europe), Anders Knutsen (Administrerende Direktor, Bang & Olufsen), Pierre Lescure (President Directeur General, Canal+), Constantin Makropoulos (former Managing Director ELSYP (Hellenic Information Systems)), Pascual Maragall (Alcalde de Barcelona, Vicepresidente de POLIS), Lothar Hunsel (designierter Vorsitzender der Geschäftsführung DeTeMobilfunk GmbH), Romano Prodi (Presidente Direttore Generale, IRI), Gaston Egroont Thorn (President du Conseil d' administration du CLT), Jan D. Timmer (Voorzitter, Philips Electronics), Candido Velazquez Gastelu (presidente, Telefónica), Heinrich von Pierer (Vorsitzender des Vorstandes, Siemens AG) ([Bulletin of the European Union, Supplement 2/94](#): 6).

create “large numbers of new jobs”, a “market-driven revolution” that poses “a revolutionary challenge to decision makers”. The authors promised advantages for everyone, a wider choice of services for citizens and consumers from home banking and teleshopping to a near-limitless choice of entertainment on demand and pay-per-view, for businesses teleconferencing and electronic mail (which is “faster, more reliable and can save 95% of the cost of a fax”) and electronic payments systems (which are “already ushering in the cashless society”) and, not the least, opportunities for telecom operators and computer and consumer electronics industries (ibid.: 5) whose CEOs had written the report.

The report creates a sense of urgency: “Competitive suppliers of networks and services from outside Europe are increasingly active in our markets.” (ibid.: 7) Frontrunner and role model, as in AV media, were the USA where 60% of households had cable TV versus 25% in Europe, and where there were 34 PCs per hundred citizens versus only 10 in Europe (ibid.: 10).

The report highlights two European technological success stories: One is France's Minitel, the centralised videotex system active from 1980 to 2012, which at the time had nearly 30 million subscribers and about 15,000 different services. The other is optical storage media, in particular CD-ROM and CD-I, co-developed by Dutch Philips and Sony, which the HLG considered “the basis for a raft of non-networked applications and services during the early formative years” (ibid.: 10). It did not fail to mention the continuing weakness of the European AV programme industry.

The network technologies mentioned in the Bangemann Report, next to videotex were ISDN<sup>30</sup> and ATM,<sup>31</sup> the first fully digital European mobile phone standard GSM<sup>32</sup> and satellites<sup>33</sup> (21 f.). And then there was this other network, clearly still a bit alien, culturally, linguistically

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30 Integrated Services Digital Network, the first phase of digitalising the telephone network to provide voice, video, data, Teletex, Telex etc. “ISDN is particularly suited for the communications needs of small and medium sized enterprises. It permits, for example, direct PC to PC communication, for instant, low-cost transmission of documents. Teleworking using ISDN services can be attractive to a wide range of businesses. ISDN is also an ideal support for distance learning.” (21) The report points to EURO-ISDN, which had started at the end of 1993 and in which “a number of European countries have a leading position”. In line with Commission proposals it calls for extending it and reducing tariffs (34).

31 Asynchronous Transfer Mode, a similar protocol to ISDN but suitable for handling broadband, high-throughput data traffic, used on the backbones of the public switched telephone network (PSTN) and ISDN.

32 In 1983, the European Conference of Postal and Telecommunications Administrations (CEPT) had set up the Groupe Spécial Mobile (GSM) to develop a standard for digital mobile communications involving 26 European telcos. “Over a very turbulent period in 1987 Europe produced the very first agreed GSM Technical Specification (February). Ministers from the 4 big EU countries cemented their political support for GSM with the Bonn Minister's Declaration (May) and the GSM MoU was tabled for signature (September)” when 17 telcos from 15 European countries signed a Memorandum of Understanding in Copenhagen to develop and deploy the common system. Decisive in bringing the whole of Europe behind GSM in a rare unity and speed were four Ministers: Armin Silberhorn (Germany), Stephen Temple (UK), Philippe Dupuis (France) and Renzo Failli (Italy) ([History of GSM](#)). The first operational systems were demonstrated in 1991. The following year the first GSM mobile phones were put on the market and many telcos started commercial operation of their GSM-900 networks.

33 Which the report suggests not only for television broadcasting, earth observation and telecommunications but also for providing rural and remote areas with advanced communications.

and business-wise, and yet, as flawed and insecure as it may be, already so big that Europe should closely watch it:

*“INTERNET is based on a world-wide network of networks that is not centrally planned. In fact, nobody owns INTERNET. There are now some 20 million users in more than 100 countries. The network offers electronic mail, discussion fora, information exchange and much more. INTERNET is so big, and growing so fast, that it cannot be ignored. Nevertheless, it has flaws, notably serious security problems. Rather than remaining merely clients, we in Europe should consider following the evolution of INTERNET closely, playing a more active role in the development of interlinkages.” (ibid.: 23)*

The central message of the Bangemann Report was liberalisation. Industry signalled that it was willing and able to handle the revolution. Governments should get out of the way. They should abolish the remainders of the former public telecommunications monopolies. Telcos should be relieved of political burdens such as the public service responsibility of the universal service obligation. The authors questioned the fitness of official EU standards institutes, which were allegedly not sufficiently market-driven. Instead, their ideal model was standards setting by industry as in the GSM Association. “The Group” made it very clear that what they are asking for does “NOT mean more public money, financial assistance, subsidies, dirigisme or protectionism” (ibid.: 3).

On the other hand, the authors did see a role for “the authority” and actually had quite a list of demands. “The prime task of government is to safe-guard competitive forces and ensure a strong and lasting political welcome for the information society, so that demand-pull can finance growth” (ibid.: 8). Then there are those operations which, because of their Community-wide nature, need to be addressed at the European level, such as licensing, network interconnection, management of shared scarce resources (e.g. radio-frequency allocation and subscriber numbering), practical rules for dispute resolution and speedy remedy against abuse of dominance (ibid.: 13).

The prime task for the publishers and for telcos vying for the content market is protection of so-called intellectual property rights (IPR). The report sees a high priority in protecting two of the Union's most important assets: creativity, i.e. copyright, and innovation, i.e. patents. Because of the global nature of digital services, it called for global harmonisation of rules, but also pointed to initiatives already under way within Europe, namely a directive on the legal protection of electronic databases, which should be completed as a matter of priority (ibid.: 18).

The [Directive on the legal protection of databases](#) (96/9/EC, 11.03.1996) is arguably one of the strangest pieces of European legislation. It creates a *sui generis* protection of databases as such, regardless of its contents being protected by copyright or not. Its intention was to nurture a database market like the one in the USA. Yet the US do not grant special protection to databases. This “Community creation with no precedent in any international convention” was reviewed for the first time in 2005 (COM, [First evaluation of Directive 96/9/EC on the legal protection of databases](#), 12.12.2005). It consisted of an empirical evaluation that

showed that the production of databases had fallen to pre-Directive levels, while the US database industry, which has no such special right, was growing faster than the EU's. It also involved a questionnaire to the European database industry asking if they liked the database right. Their reply: it brought about legal certainty, reduced the costs of protection of databases and facilitated the marketing of databases. The Commission summarised: "While this endorsement of the 'sui generis' right is somewhat at odds with the continued success of US publishing and data base production that thrives without 'sui generis' type protection, the attachment to the new right is a political reality that seems very true for Europe." (ibid.: 25) Furthermore, repealing the Directive would reopen the debate, and change would involve costs. The result was that the Directive was left unchanged. US law scholar James Boyle in his review of the review analysed it as 'faith-based policy', assuming that "the more new rights we create, the better off we will be", while ignoring any proof to the contrary:

*"Imagine applying these arguments to a drug trial. The patients in the control group have done better than those given the drug, and there is evidence that the drug might be harmful. But the drug companies like their profits, and want to keep the drug on the market. Though "somewhat at odds" with the evidence, this is a "political reality." Getting rid of the drug would reopen the debate on the search for a cure. Change is costly – true. But what is the purpose of a review, if the status quo is always to be preferred?" (Boyle, [Two database cheers for the EU](#), Financial Times, 02.01.2006)*

The second IPR issue the Bangemann Report mentioned was another *sui generis* protection, that of Digital Rights Management (DRM) technology. "Encryption will ensure that only those who pay will receive the service. It will also provide protection against personal data falling into the public domain." (Bangemann 1994: 19) It calls for harmonisation of standards for conditional access systems such as scrambling. This should be accompanied by "a legal framework that would secure service providers against piracy of their encryption system" without which "there is the risk that they will not get involved in the development of these new services" (ibid.). A DRM circumvention prohibition was indeed being negotiated at WIPO at the time and was adopted in the WIPO Internet Treaties of 1996 (→ 4.3.1 InfoSoc Directive).

The CEOs also demanded that public investment be refocussed on research and development that is more responsive to market requirements (ibid.: 20) and to 'awareness campaigns' including education that would lead to "public acceptance and actual use of the new technology" (ibid.: 6).

Surprisingly, the CEOs of these industry sectors called not only for speedy remedy against abuse of dominance but for harmonisation of media ownership rules. In order to maximise the benefits of the single market they saw a solution required at the European level (ibid.: 17). The existing national rules to preserve pluralism "are a patchwork of inconsistency which tend to distort and fragment the market." (ibid.: 20) In the European framework, "the notion of a global, rather than a Union-wide, market should now be used in assessing European competition issues such as market power, joint ventures and alliances" (ibid.: 20), implying that national and even European dominant industry champions should be welcomed if they can succeed in the global information society market.



Finally, the Bangemann Report proposed ten application areas for creating 'critical mass' to launch the information society from teleworking to healthcare networks, and it called for the establishment by the Commission of a Board composed of eminent figures, i.e. the institutionalisation of the HLG, so the CEOs could lobby the EU continuously.

The Commission followed up with its Communication [Europe's Way to the Information Society: An Action Plan](#), (COM(94) 347, 19 July 1994), which echoed the demands of the Bangemann Report, simply declaring that "the private sector will take the leading role in the implementation of the Information Society" (ibid.: 8). The EU Council Summit in Corfu in June 1994, for which the Report had been commissioned, had endorsed the application areas proposed by the HLG. The Report was distributed widely throughout the EU institutions, national administrations, the media and was "also available to a global readership using worldwide electronic networks" (ibid.: 15). The current Communication agreed on the task to accelerate the ongoing liberalisation of the telecom sector (ibid.: 3) and listed all the measures already under way to implement the proposals (ibid.: 10 ff.). On networking, the focus was on Euro-ISDN and Euro-ATM but the Commission announced that it will set up a group "to identify the benefits and the conditions for coexistence and convergence of the INTERNET and OSI protocol suites" (ibid.: 9). While the Internet, based on the TCP/IP protocols, had been developed by the computing world, Open Systems Interconnection (OSI) had been developed by the telcos in order to create an 'orderly' Internet. It included the packet-switching protocol X.25 that was used for Minitel, Compuserve, cash machines and ISDN. Together with the other OSI protocols it 'converged' away into TCP/IP in the early 2000s. OSI morphed from actual protocols into a reference model.<sup>34</sup> One point on the work plan of the Commission was the organisation of a G7 conference.

The [G7 Ministerial Conference on the Information Society](#) took place in Brussels on 25-26 February 1995. It started with a Round Table of [45 business leaders](#), including most of the CEOs from the Bangemann Group, and chaired by the previous EU Commission President Jacques Delors. Next, the Ministers of the G7 countries discussed plans for the Global Information Infrastructure and agreed to launch pilot projects for the Information Society in eleven areas from global interoperability for broadband networks via electronic libraries and global healthcare applications to maritime information systems ([Conclusions](#): 77 ff.). The conference featured a keynote by US Vice-President Al Gore (ibid.: 95 ff.).

Gore was the one who had broken the news about the Internet to the world in January 1994 at the [Superhighway Summit](#) held at the University of California. He outlined the Clinton Administration's dream for the Internet to 'save lives, create jobs and give every American the chance for the best education'. Also present were the CEOs of Walt Disney Co. and Walt Disney Studios, ABC Television Group and NewsCorp. The conference started the national dialogue about the implications of the Internet and alerted political and business leaders

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34 On the clash of cultures between telcos and computing see Grassmuck 1997.

around the world that something on a par with the Gutenberg revolution was in the making. Also in 1994, Tim Berners-Lee who had invented the WWW, founded the [World Wide Web Consortium](#) (W3C), and the first popular web browser Netscape Navigator was released.

Therefore, it is surprising that the word “Internet” can hardly be found in the European political and legal literature of that time, and if so only as this exotic and flawed new technology as it is framed in the Bangemann Report. Only in 1996, the Internet started to properly appear in EU documents, most prominently in the Commission [Communication on Illegal and harmful content on the Internet](#) (COM(96) 487) and the [Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services](#) (COM(96)483), both published on 16.10.1996. While the “Information Society” was met with enthusiasm, the “Internet” was framed in the negative effects of illegality and harm that attracted the attention of the EU. And this is how it remained. Most of the EU platform regulation to this day is reactive and defensive, including measures against child abuse material, terror propaganda, hate crimes, disinformation and copyright violations. All of it is highly contested.

But for now, the highest priority under Commissioner Bangemann was the liberalisation of the telecommunications sector. It had been gradually opened up for competition, starting from the [Green Paper on the Development of the Common Market for Telecommunications Services and Equipment – Towards a Dynamic European Economy](#) (COM(87) 290, 30.06.1987). Over time, consumers became able to choose among devices such as fixed and mobile phone, fax and modem and among different service operators. The grand plan was that within ten years the former state telcos would be fully privatised, the operations of networks and of services separated, the different markets opened to commercial competitors and regulatory bodies separated from operators. The milestones in this first phase included:

- [Directive on the establishment of the internal market for telecommunications services through the implementation of Open Network Provision](#) (90/387/EEC, 28.06.1990)
- [Green Paper on the liberalization of telecommunications infrastructure and cable television networks](#) (COM(94)682 final, 25.01.1995)
- [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, 03.12.1997)

The first phase was completed in 1997. As the [Communication Towards a new framework for Electronic Communications infrastructure](#) (COM(1999) 539 final, 10.11.1999) recounted, “the liberalisation of Europe’s telecommunications market reached its peak on 1 January 1998 with the complete liberalisation of all telecommunications networks and services in virtually all Member States.”

This changed the objective of EU media policy. “Following the full liberalisation of the formerly state-controlled telecommunications networks, the Directives and Regulations are aimed at improved regulation of the markets to ensure increased competition, at realising the internal market for electronic communication and, increasingly, at improved consumer protection and user rights.” (Dreyer et al. 2020: 12)

In laying out its strategy over the next five years, the Commission in its [Communication on Principles and guidelines for the Community's audiovisual policy in the digital age](#) (COM/1999/657, 14.12.1999) reaffirmed the distinction between content, where the objective was to safeguard public interests, such as cultural and linguistic diversity, and transmission: “With regard to regulation, the Commission proposes separate approaches to the regulation of transmission infrastructure and content.” (ibid.: 2)

The emerging issues in telecommunications were addressed in the next phase leading to the EU regulatory framework for electronic communications. It came into force in 2002, with its five Directives transposed into the national law of all 27 Member States:

- [Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector \(ePrivacy Directive\)](#) (2002/58/EC, 12.07.2002)
- [Directive on a common regulatory framework for electronic communications networks and services \(Framework Directive\)](#) (2002/21/EC, 07.03.2002)
- [Directive on the authorisation of electronic communications networks and services \(Authorisation Directive\)](#) (2002/20/EC, 07.03.2002)
- [Directive on access to, and interconnection of, electronic communications networks and associated facilities \(Access Directive\)](#) (2002/19/EC, 07.03.2002)
- [Directive on universal service and users' rights relating to electronic communications networks and services](#) (2002/22/EC, 07.03.2002)

This package was complemented by the [Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws](#) (2006/2004/EC, 27.10.2004). In the meantime, the issue emerged that mobile telcos operated on a territorial basis, just as the copyright markets, and levied excessive charges on customers of other providers when those were using their mobile telephones while travelling abroad within the Community. This was first addressed by the [Regulation on roaming on public mobile communications networks within the Community](#) ((EC) No 717/2007, 27.06.2007). The next revision of the regulatory framework came in 2009 with three amending directives and the [Regulation establishing the Body of European Regulators for Electronic Communications \(BEREC\)](#) ((EC) No 1211/2009, 25.11.2009)

[BEREC](#) institutionalised the consultative European Regulators Group, set up in 2002, into an EU Agency against the resistance in particular of Germany and Spain who wanted the group to be a strictly private organisation. Based on the 2009 Regulation, BEREC consists of representatives of the national regulatory authorities (NRAs) of all MS and, as observers, the European Commission, the EFTA Surveillance Authority (ESA) and additional European states such as Norway, Switzerland and Turkey. BEREC provided the model for ERGA in the AV sector, which was created by the 2018 AVMSD (→ 3.1.9 AVMSD).

The rules on roaming were amended again by [Regulation \(EU\) No 531/2012](#) (13.06.2012) and by the [Regulation amending Regulation \(EU\) No 531/2012 as regards rules for wholesale roaming markets](#) ((EU) 2017/920, 17.05.2017).

#### **4.1.1 Directive establishing the European Electronic Communications Code (EECC, 2018)**

The [Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values](#) (COM(2013) 231 final, 24.4.2013) defined ‘convergence’ “as the progressive merger of traditional broadcast services and the internet.” With the lines quickly blurring, also the traditional separation between content and transmission regulation came to be questioned. In this Green Paper, the Commission consulted on its current thinking on issues from the AVMSD, such as commercial communications, protection of minors and accessibility for persons with disabilities, from competition law, such as media freedom and pluralism, and from telecommunications law, such as interoperability, infrastructure and spectrum.

This was followed by the [Directive on measures to reduce the cost of deploying high-speed electronic communications networks](#) (2014/61/EU, 15.05.2014) and the [Regulation laying down measures concerning open Internet access and amending Directive 2002/22/EC and Regulation \(EU\) No 531/2012](#) (2015/2120/EU, 25.11.2015), which sets up a new retail pricing mechanism for Union-wide regulated roaming services in order to abolish retail roaming surcharges. The Communication [A Digital Single Market Strategy for Europe](#) (COM(2015) 192, 06.05.2015) announced a review of the telecommunications framework.

In 2018 in the so far final revision, the existing telecommunications framework was consolidated by two acts, one reviewing the rules on BEREC ([Regulation establishing the Body of European Regulators for Electronic Communications \(BEREC\) and the Agency for Support for BEREC \(BEREC Office\), amending Regulation \(EU\) 2015/2120 and repealing Regulation \(EC\) No 1211/2009](#) ((EU) 2018/1971, 11.12.2018)).

The other is the [Directive establishing the European Electronic Communications Code \(EECC\)\(Recast\)](#) (EU) 2018/1972, 11.12.2018). The EECC Directive recast the 2002 Directives (with the exception of the ePrivacy Directive), made substantive amendments to the

framework and subjected it to simplification under a Regulatory Fitness (REFIT) rules. It thereby subjected the freedom to provide electronic communications networks and services to a single directive (Recs. 5, 7). It justifies this by the convergence of the telecommunications, media and information technology but reiterates the necessity to separate the regulation of electronic communications networks and services from the regulation of content, where this Directive covers only the former.

“However, it takes into account the links existing between them, for example to foster media pluralism and cultural diversity” (Streel/Hoepied 2021: 111), referring to assignment of radio frequencies and to must-carry obligations. The EECC Directive also acknowledges overlaps with information society services addressed by the E-Commerce Directive (Rec. 10, → 4.2.1 ECD).

The Treaty definition of “services” as provided ‘normally in exchange for remuneration’ is extended to end-users paying for services with data: “In the digital economy, market participants increasingly consider information about users as having a monetary value.” (Rec. 16)

Electronic communications services refers to both wired networks, based on copper wire, coax cable and optical fibres, and wireless networks. The EECC clearly signals that it is in the interests of end-users to facilitate the migration from legacy copper networks to fibre networks. NRAs should establish the conditions for an appropriate migration process (Rec. 209).

Large parts of the Directive deal with the allocation and management of radio frequencies to avoid harmful interference and provide cross-country coordination. Spectrum management is dealt with by the ITU, the European Conference of Postal and Telecommunications Administrations (CEPT) and the Radio Spectrum Policy Group (RSPG) established by [Commission Decision 2002/622/EC](#). “Radio spectrum is a scarce public resource with an important public and market value.” It should therefore be allocated and assigned by NRAs “to objective, transparent and non-discriminatory criteria, taking into account the democratic, social, linguistic and cultural interests” (Rec. 107). This allows MS, when assigning frequencies, to ensure that their national PSM have available the transmission capacities needed to fulfil their public remit. Otherwise, the EECC provides that where granting rights to use of scarce resources is necessary (for use of radio spectrum, for numbering resources such as telephone numbers or rights to install facilities), the least onerous authorisation system possible should be used (Rec. 41). MS may make authorisation conditional to providing the service also in remote and thinly populated areas.

Universal service requirements were introduced to balance public interests against the liberalisation of the telecommunications sector. The EECC calls universal service “a safety net to ensure that a set of at least the minimum services is available to all end-users and at an affordable price to consumers, where a risk of social exclusion arising from the lack of such

access prevents citizens from full social and economic participation in society.” (Rec. 212) It includes basic broadband Internet access and fixed and mobile voice telephony.

The obligation has two aspects. One is to cover the national territory or different parts thereof with its service (Art 86). The other, that the service is affordable to consumers with a low income or special social needs (Arts 84, 85). MS shall decide on the basis of objective criteria which undertakings are designated as universal service providers (Rec. 231). Where the cost of the universal service obligations (Art 89) is determined to subject a provider to an unfair burden, MS may compensate that provider from public funds or require other providers to share the net cost of the universal service of the designated provider (Art 90). The concept of universal service should evolve to reflect advances in technology, market developments and changes in user demand.

A must-carry provision had been introduced in Universal Service Directive (2002/22/EC, 07.03.2002). In the EECC it states that MS

*“may impose reasonable ‘must carry’ obligations for the transmission of specified radio and television broadcast channels and related complementary services, in particular accessibility services to enable appropriate access for end-users with disabilities and data supporting connected television services and EPGs, on undertakings under their jurisdiction providing electronic communications networks and services used for the distribution of radio or television broadcast channels to the public, where a significant number of end-users of such networks and services use them as their principal means to receive radio and television broadcast channels. Such obligations shall be imposed only where they are necessary to meet general interest objectives as clearly defined by each Member State and shall be proportionate and transparent.” (Art. 114(1) EECC)*

The Recitals stress that such obligations require “legitimate public policy considerations” and “an objective justification” (Rec. 308). They could, where appropriate, entail a provision for proportionate remuneration which should be set out in national law (Rec. 309). Networks and services used for the distribution of broadcasts to the public include cable, IPTV, satellite and terrestrial networks and might include others such as OTT. Complementary services include those designed to improve accessibility, such as videotext, subtitling for end-users who are deaf or hard of hearing, audio description, spoken subtitles and sign language interpretation, possibly access to the related raw-data as well as EPG functionalities (Rec. 310).

Furthermore, the EEC contains specifications on rights of way for establishing and expanding telecommunications networks, provisions for network access and for shared use of network components and facilities, on network neutrality and on the security and integrity of networks and services, specifications on the standardisation and interoperability of networks, services and associated facilities, including digital TV services and DAB+ (promoted in Art. 113 and Annex XI), on the protection of consumer rights, procedures for resolving disputes between companies and on monitoring of dominant telecommunications companies.

The EECC provides the level playing field for platforms in the Digital Single Market and, after liberalisation, now steers it to “a gradual transition to deregulated markets” (Rec. 170).



The Directive was to be [transposed](#) until 21 December 2020. At the time of writing, all EU MS had done so except Ireland, Croatia, Poland, Portugal, Romania, Slovenia and Sweden.

During his term of office, Commissioner Bangemann primarily promoted the liberalisation of the telephone markets in Europe. But Europe owes him another lasting achievement. When the following Commission under Jacques Santer in 1999 had to resign in its entirety under allegations of corruption, Bangemann announced that he would take up a post with Telefónica while still acting in office until the following Commission Prodi would take over. This led to his suspension from official duties ([CORDIS 02.07.1999](#)). The Council feared that Bangemann's behaviour would jeopardise the Commission's reputation and not only sued for the withdrawal of his pension rights before the CJEU but also adopted a [Code of Conduct for Commissioners](#) and an ethics committee to guard it in order to prevent such revolving door moves from regulator to regulated in the future.

### 4.1.2 Summary

This chapter looked at the height of the neoliberal transformation of society characterised by a gold rush for public network assets, which was also a time of increasing convergence of telecommunications, computing and media. EU policy attempts to separate the regulatory approaches to content and to transmission infrastructure. As to the latter, the focus of public policy is to ensure competition and to support industry measures. For instance, industry builds and deploys encryption systems. The role of public law then is to secure them against piracy.

Yet telecommunications provides not only a supposedly neutral transport layer for the audiovisual sector. Public interest issues with respect to consumer protection and a vibrant media content environment start from conditional access, network neutrality and interoperability. They include the allocation of scarce spectrum and numbers and the support for cross-border interconnections. Not the least they interfere with market freedom by providing requirements on universal service, must-carry and roaming. The 2018 EECC consolidated the EU rules on telecommunications which had developed in the AV age and continue to underlie the platform age.

## 4.2 Platform liability

“What is illegal offline remains illegal online,” the Commission stated concisely in its [Communication on Illegal and harmful content on the Internet](#) (COM(96) 487, 16.10.1996: 4). The Internet does not exist in a legal vacuum. All involved – authors, content providers, host service providers who actually store the documents and make them available, network operators, access providers and end users – are subject to the laws of the Member States. In most cases that is straightforward, e.g. a publisher is fully responsible for what she publishes.

But what about platforms that allow their users to upload content and make it available to others? The question of intermediary liability is the core issue of the E-Commerce Directive (ECD) and its current revision into a Digital Services Act. The earliest answers provided the basis for user upload platforms such as weblogs and social media to emerge at all.

After an introduction (“How does the Internet work?”, which, consisting of Mail, Newsgroups, IRC and WWW, was far away from today’s monopolistic platform-centric Internet), the 1996 Communication explained at length the difference between illegal and harmful content: Some illegal content is considered as criminal by the laws of Member States such as child pornography, trafficking in human beings, dissemination of racist material or incitement to racial hatred, terrorism or fraud (e.g. credit-card fraud). Other content may be illegal under civil law, such as violations of privacy and reputation, copyright and data protection, which require the initiative of the person whose rights are infringed. Harmful content is not considered illegal but may still offend the values and feelings of other persons by expressing political opinions, religious beliefs or views on racial matters (ibid.: 10 ff.). All three categories vary among MS. International initiatives, the Commission emphasised, have to take into account different cultural and ethical norms and, in any case, have to respect fundamental rights, especially the right of freedom of expression.

In the following [Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services](#) (COM(96)483, 16.10.1996) the Commission pointed to recent technological developments which could provide new solutions through greater parental control, both in the television (v-chip) and on-line (PICS, Platform for Internet Content Selection) environments. In both cases, content rating was a key part of the system. The new technical possibilities were more limited in the television than in the on-line environment, but both had the advantage of offering ‘bottom-up’ rather than ‘top down’ solutions that obviate the need for prior censorship and increase the potential effectiveness of self-regulation.

The Green Paper established two principles that will be formative for platform regulation to this day. One is to use technology to solve problems that technology has seemingly created: chips prevent minors from seeing pornography, cryptographic access systems ensure that only those who pay can watch, DRM controls copyrights. The other is to enable – or to burden – the party affected, in this case the consumer, with solving her own problems ‘bottom-up’ by private ordering so that public authorities do not have to enforce public interests.

A [Commission Staff Working Paper](#) summarised the results of the consultations on the Green Paper among EU institutions, Member States and interested parties (SEC (97) 1203 final, 13 June 1997). It noted an emerging Europe-wide consensus on the responsibilities of the different operators involved in the communication chain: liability is to be determined by degrees according to the operator’s involvement with the content. Content providers are to be fully liable. Providers who supply content originating elsewhere are to be liable only to the degree that it is physically possible for them to identify harmful material and technically feasible to control it. “This type of liability is the hardest to evaluate.” (ibid.: 4 f.) For operators who merely provide access to services or networks, a majority came out in favour of an absence of

liability. This thinking found expression in the E-Commerce Directive of 2000 with its limited liability regime for hosting platforms, which is currently transformed into the Digital Services Package.

#### 4.2.1 Electronic Commerce Directive (ECD 2000)

The EP, which had just recently adopted the revised TV Directive, in its [Resolution on the Green Paper on the protection of minors](#) (A4-0227/97, 10.11.1997) saw it as a model for the Internet: “As regards harmful and illegal content, the experience and the level of protection achieved in the broadcasting sector should be regarded as a yardstick in this respect (ibid.: pt. 25). Yet, the yardstick only fit the first part of the dual liability that Parliament suggested: full, including criminal, liability for the content that operators provide themselves. In contrast, for illegal outside content “they should assume liability if they are definitely aware of the nature of the content and if it is technically feasible and reasonable for them to prevent its use” (ibid.: pt. 14). Finally, for legal content which may nevertheless harm minors and human dignity, the EP opted for voluntary self-regulation. The technical feasibility of detecting illegal content would therefore be crucial, and the EP recommended that filtering and screening devices should be extensively tested with the active participation of the EU (ibid.: 17). It also stressed that on the global Internet protection can be effective only if it is coordinated at global level and called on Commission and MS to work for agreements at the United Nations, the World Trade Organization, the G7 and the OECD and in bilateral talks with the USA and Japan (ibid.: pt. 7).

Meanwhile in the USA, a first law expanded rules from the audiovisual realm to the Internet: the [Communications Decency Act](#) adopted in February 1996. The amendment to the US Telecommunications Act was intended, as the title implies, to regulate pornographic material. This public interest objective was balanced with the goal of nurturing the Internet industry. If providers, which host content uploaded by their users, were held responsible for it, they risked being sued out of existence. Therefore, the Act which became [Section 230](#) of Title 47 of the United States Code declares that such hosting provider shall not be treated as the publisher of the third-party content and thus be exempted from liability for it. Furthermore, a provider, who in good faith takes voluntarily action to restrict access to or availability of pornographic, harassing or otherwise objectionable material or provides the technical means to do so, is also declared not liable. This provision is called protection for “Good Samaritan” blocking.<sup>35</sup> It avoids holding platforms liable because that would incentivize them to over-removal and lead to collateral censorship. It rather encourages platforms to ‘Good Samaritan’ blocking of obscenity and other offensive materials while clarifying that such ‘proactive’

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<sup>35</sup> It is based on the biblical parable of the compassionate Samaritan who helped the traveller who had been stripped and beaten half dead by robbers, while a priest and a Levite had passed him by on the other side.

measures do not make the platforms 'active', meaning they would lose the benefit of freedom from liability.

This mechanism of immunity for hosting platforms with respect to third-party content resonated with the debate in Europe. It entered EU law in 2000, and with it an approach that favours legally mandating private ordering, i.e. the law stipulating that service providers put into their terms and services and 'voluntarily' enforce rules in the public interest.

Just as the AVMSD, the objective, derived from the Treaties, of the **Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market** (E-Commerce Directive, ECD, (2000/31/EC, 17.07.2000) is to ensure the free movement of services within the Union, in this case of 'Information Society services' (Art 1(1)). These are defined in the [Directive laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services](#) (98/48/EC, 20.07.1998, which amended [Directive 98/34/EC](#), 22.06.1998): An Information Society service is "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services", but expressly not radio and TV broadcasting services (Art 1(2)). This definition is included by reference in Article 2(a) of the ECD.

Again, following the model of the AVMSD, it is the responsibility of the MS to ensure that information society services providers established on their territory comply with the national provisions (Art 3(1)). MS may not restrict the freedom to provide these services from another MS (Art 3(2)), unless this is deemed necessary for the prevention of criminal offences (including violations of minors and of human dignity and incitement to hatred), the protection of public health, public security and of consumers and on condition that before taking the measures the MS has asked the other MS unsuccessfully to take measures and has notified the Commission and the other MS (Art 3(4)). Different from broadcasting services, the ECD stipulates that providing an information society service may not be made subject to prior authorisation (Art 4(1)).

The central element of the ECD are the provisions on the liability of intermediary service providers. The directive addresses three distinct types of intermediaries:

1.) A 'mere conduit' service provides access to a communication network or the transmission of information provided by a user and shall not be liable for the information, on condition that the provider does not initiate the transmission, select the receiver or the content of the transmission and does not modify the transmitted content. This may include the automatic, transient storage of the transmitted information but solely for technical purposes of carrying out the transmission in the communication network (Art 12).

2.) A 'caching' service provides automatic, temporary storage of information of its users for the sole purpose of making more efficient the information's onward transmission to other recipients of the service and shall not be liable, on condition that the provider does not modify

the information, complies with conditions on access to the information, with rules regarding the updating of the information and the measuring of its use and that “the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement” (Art 13).

3.) A ‘hosting’ services provides the storage of information provided by a user and shall not be liable, on condition that “the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.” (Art 14)

All three provisions providing a ‘safe harbour’ for services leave unaffected the possibility for a court or administrative authority to require the service provider to terminate or prevent an infringement, and in cases 2.) and 3.) the possibility for MS of establishing procedures governing the removal or disabling of access to stored information.

The decisive criterion for limited liability in cases 2.) and 3.) is whether a provider has ‘actual knowledge’ of removed or illegal content. One can imagine that law enforcement agencies, copyright holders and other affected parties demand that providers actively screen their online storage for such content. The European legislator has foreseen and expressly excluded such demands: “Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.” (Art 15 (1)).

Recital 47 points out, however, that while the ECD prohibits MS from imposing monitoring obligations “of a general nature”, it does not prohibit monitoring obligations “in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation”. It also allows MS to require service providers to apply “duties of care” specified by national law, in order to detect and prevent certain types of illegal activities (Rec. 48). MS and Commission are to encourage the drawing-up of voluntary codes of conduct by industry and consumer associations (Rec. 49, Art 16). Without actually expressly mandating them, the Directive is presented as the basis for “the development of rapid and reliable procedures for removing and disabling access to illegal information” which are voluntary and expected to include the development of “technical systems of protection and identification and of technical surveillance instruments made possible by digital technology” (Rec. 40).

This complicated construct is based on the assumption that the actual perpetrators of the criminal or infringing acts are not the service providers but their users. The privacy of these individuals was protected by the [Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data](#) (95/46/EC, 24.10.1995)

and the [Directive concerning the processing of personal data and the protection of privacy in the telecommunications sector](#) (97/66/EC, 15.12.1997). The ECD therefore succinctly notes that “this Directive cannot prevent the anonymous use of open networks such as the Internet.” (Rec. 14). Yet, it does permit MS to act. They may oblige service providers promptly to inform the competent public authorities of alleged illegal activities or content by their users and, at the authority’s request, provide information for identifying those users (Art 15 (2)).

Around these core provisions on intermediary liability, the ECD approximates national rules on the establishment of service providers (based on the country of origin principle, Art 2(c)), information requirements (Art 5), commercial communications (Arts 6-8), including regulated professions (Art 8; see the EU [database on regulated professions](#)), electronic contracts (Arts 9-11), out-of-court dispute settlements (Art 17), court actions (Art 18) and cooperation between Member States (Art 19). Its final provision requiring every two years a report on the Directive’s application, points to a number of issues that were apparent already but not yet addressed: the liability of providers of hyperlinks and location tool services, ‘notice and take down’ procedures and the attribution of liability following the taking down of content.

Notice-and-take-down procedures are not explicitly mentioned in the ECD, but developed from the ‘actual knowledge’ provision. Users are given the possibility to alert providers to content they deem illegal, upon which the provider decides whether to block public access to the content or delete it from its servers. Over time, this procedure has been extended to a ‘notice-and-action’ model where a notice can not only be followed by a take-down but by actions including demoting the visibility of a content, demonetising it or forensically storing all evidence and reporting it to law enforcement before deleting it.

In 1986, MS had concluded the [Single European Act](#) (SEA) that by 1992 had created a “Single Market” in the Community. In April 2011, the Commission presented its [Communication on a Single Market Act](#) (COM(2011) 206 final, 13.04.2011) which set out twelve levers to boost growth and strengthen confidence in the European economy. This was accompanied by a report on the [results of the consultation](#) and a [progress report](#) in February 2012. It was followed by the [Communication on the Single Market Act II](#) (COM/2012/0573 final, 03.10.2012) proposing a second set of actions to further develop the single market and exploit its untapped potential as an engine for growth.

The Single Market was updated to the “Digital Single Market” in May 2015 ([Communication on a Digital Single Market Strategy for Europe](#) (COM(2015) 192 final, 06.05.2015)). It is to be built on three pillars: 1.) better access for consumers and businesses to online goods and services across Europe, 2.) creating the right legal and infrastructure conditions for digital networks and services to flourish, and 3.) maximising the growth potential of our European Digital Economy through investments in R&D, infrastructures and public services (ibid.: 3). In particular, the Commission announced actions to harmonise rules for cross-border e-commerce, including affordable cross-border parcel delivery and preventing unjustified geo-blocking, on protecting personal data while also building a data economy, on



copyright, telecommunications, audiovisual media services and combatting illegal content on the Internet as well as building digital skills and expertise.

In its DSM Strategy, the Commission had stated to address a specific type of service providers called ‘online platforms’. These are only defined by example: e.g. search engines, social media, e-commerce platforms, app stores, price comparison websites, Video on Demand platforms etc. “New platforms in mobility services, tourism, music, audiovisual, education, finance, accommodation and recruitment have rapidly and profoundly challenged traditional business models and have grown exponentially.” Some of these platforms, which were active in many sectors of the economy and had become very powerful, raised concerns.

In order to assess their risk in the DSM, the Commission then launched a [public consultation](#) on the regulatory environment for platforms and online intermediaries from September 2015. The [results](#) as reported by the Commission showed divided views on the continuing fitness of the ECD. A majority of respondents considered that different categories of illegal content require different policy approaches as regards notice-and-action procedures and agreed on the need for more transparency of the content policies and practices of intermediaries.

This led the Commission to issue its [Communication on Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe](#) (COM/2016/0288 final, 25.05.2016) together with the [Commission staff working document on online platforms accompanying the Communication on Online Platforms](#) (SWD(2016) 172 final, 25.05.2016). In it, the Commission now noted broad support for the existing principles of the e-Commerce Directive in the consultation. It would therefore maintain its horizontal liability regime for online platforms and instead favoured ‘a sectorial, problem-driven approach’ to different categories of illegal content. Specifically, it proposed updating the audiovisual and copyright regulations and encouraging coordinated EU-wide self-regulatory efforts by online platforms.

Despite statements to the contrary, this strategy caused concern among law scholars that it would break with the horizontal safe harbour regime of the ECD and promote platforms to adopt private enforcement and voluntary measures for monitoring and filtering. Vertical rules would cause a shift from a negligence-based to a strict liability regime, leading Frosio (2017) to expect an “intermediary liability earthquake in Europe” that would threaten the rights of consumers. “Shaking the intermediary liability system from horizontal to vertical might possibly serve as a screen to operate a reform that would be only based on governmental and industry assumptions. Nonetheless, the systemic damages that this earthquake shall produce might break down the eCommerce intermediary liability regime.” (Frosio 2017: 18).

According to the Commission’s preference for self-regulatory efforts in the online realm, measures taken in the following years follow that path, even though some were turned into a directive and eventually into a regulation.

After the Russian annexation of the Ukrainian Crimea in March 2014, the EU registered an increase in Russian propaganda in the European public sphere. In March 2015, the European Council instructed the High Representative of the Union for Foreign Affairs to prepare an action plan for strategic communication. Result was the website [EU vs Disinformation](#) of the East Stratcom Task Force of the [European External Action Service](#) (EEAS). Its task is to communicate the EU more effectively in the region, to promote media diversity and to counter pro-Kremlin disinformation. Furthermore, the EU appointed a [High-Level Group on Fake News and Online Disinformation](#) in January 2018. It comprised representatives of the civil society, social media platforms, news media organisations, journalists and academia and published its [final report](#) in March 2018. A public consultation was followed by a [Communication on Tackling online disinformation: a European Approach](#) (COM(2018) 236 final, 26.04.2018). A central proposal in this text was a self-regulation of the actors. A forum of representatives of platforms, social media and advertisers then worked out a [Code of Practice on Disinformation](#) which was adopted in September 2018.

The Islamist attacks in Europe in 2015 culminating in the coordinated series of attacks in Paris in November again triggered the EU into action. In December 2015 the “EU Internet Forum” was launched by Dimitris Avramopoulos, then Commissioner for Migration, Home Affairs and Citizenship, to tackle terrorist content online. The Forum brings together EU Interior Ministers, Europol, the Internet industry and other stakeholders in a voluntary partnership to reduce terrorist content online. Europol in mid-2015 had set up the [EU Internet Referral Unit](#) (IRU) at its European Counter Terrorism Centre (ECTC) for detecting and investigating terrorist content online and referring it to platforms. One year after the start of the Forum, the Commission announced that Facebook, Microsoft, Twitter and Youtube had agreed a [Code of Conduct on countering illegal hate speech online](#) (30.06.2016), later joined by Snapchat, Tiktok and others, and were launching a prototype of a shared database of hashes of terrorist content that the platforms had removed from their services. In this case, the voluntary rules were hardened first by the [Counter-Terrorism Directive](#) (2017/541/EU, 15.03.2017) and then by the [Regulation on addressing the dissemination of terrorist content online](#) ((EU) 2021/784, 29.04.2021).

The Commission followed up on the Code on illegal hat speech, by setting out general guidelines to online platforms and MS in the [Communication on Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms](#) (COM(2017) 555 final, 28.09.2017) and in the [Recommendation on measures to effectively tackle illegal content online](#) (2018/334/EU, 01.03.2018). The Recommendation consolidates the measures developed in the framework of voluntary arrangements regarding different types of illegal content. It focusses on notice-and-action mechanisms, including counter-notices, out-of-court dispute settlement and other safeguards, on the one hand and one the other, on “proactive” measures by hosting services such as automated content detection based on a database of hashes of known terrorist content that was developed in the framework of the EU Internet Forum. The Recommendation laid the ground for the current work on the Digital Services Package.

Specific rules for e-Commerce in the EU include the [Regulation on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations \(EC\) No 2006/2004 and \(EU\) 2017/2394 and \(\(EU\) 2018/302, 28.02.2018\)](#), which is to ensure that customers, when purchasing goods or services on- or offline, no longer face unjustified barriers such as being re-routed to country-specific websites or having to pay with debit or credit cards from a certain country. Excluded from this prohibition of geo-discrimination are audiovisual services and other copyright goods which are provided on the basis of exclusive territorial licenses.<sup>36</sup>

In 2015 the Commission proposed directives on contracts for selling content, services and goods online. This turned into the [Directive on certain aspects concerning contracts for the supply of digital content and digital services](#) (2019/770/EU, 20.05.2019), covering e.g. streaming music or social media accounts, regardless whether they are paid for by money or by personal data, and the [Directive on certain aspects concerning contracts for the sale of goods, amending Regulation \(EU\) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC](#) (2019/771/EU, 20.05.2019), which covers contracts for the sale of non-digital, tangible goods. Both give consumers specific contractual rights in case the product or service received is not as agreed or as they reasonably expected. Also, in 2018 the Commission announced [A New Deal for Consumers](#) (COM(2018) 183 final, 11.04.2018) which aims to modernise existing rules and fill the gaps in the current [consumer acquis](#).

To sum up, the liability limitation in the ECD provided the basis for user upload platforms such as weblogs and social media to emerge in the first place. Had platform providers been held fully liable for their users' uploads they would either have been sued out of existence in no time or they would have had to quarantine each upload and check if it contains illegal or infringing content, which given more than 500 hours of video uploaded every minute to Youtube alone would not have been feasible short of relying on error-prone automation. Because data protection does not allow to prevent the anonymous use of the Internet, holding individual users liable for their deeds on a mass-scale would also not have been possible, as this requires reasoned requests from competent authorities for identifying information in each case. Both over-blocking and chilling effects would have prevented not only illegal content but also large amounts of legitimate communications from being published. The ECD therefore tried to balance different legal rights by providing that a hosting service must act expeditiously once obtains 'actual knowledge' of illegal content. This led to establishing notice-and-take-down procedures and over time to more differentiated notice-and-action models where content is demoted or demonetised and repeat infringers are suspended. The result, as we have seen, is that the worst hate-mongers with the largest reach such as Donald Trump or in Germany Attila Hildmann have been deplatformed, from Youtube, Facebook, Twitter and now even the elusive Telegram. The Commission's announcement to move away from the horizontal ECD

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36 See also: COM, [Q&A on the Geo-blocking Regulation in the context of e-commerce](#), 2018.

to a sectorial approach in AV and copyright regulations caused concern but, as we shall see in the following chapter, the ECD's safe harbour regime that has served Europe well for two decades seems to hold in its current reform.

#### 4.2.2 Digital Services Act package (DSA & DMA, 2022)

Even with all these specific, vertical rules filling in the gaps, the underlying horizontal rules applying to all digital services remained unchanged since the adoption of the ECD in 2000. Since then a lot has changed, most notably, the GAFAM had emerged as dominant platforms and changed the digital playing field. Nearly 20 years after its adoption, the need to overhaul the ECD was evident.

The thinking of DG Connect on the review of the ECD into a Digital Services Act (DSA) is expressed in an [internal document](#) leaked by Netzpolitik.org in June 2019. It notes that the horizontal framework in the ECD from 2000 did no longer adequately reflect the reality of today's services. All citizens were now increasingly relying on non-EU services for essential services on a daily basis. The perceived lack of control over the activities of globally operating service providers leads to increasing national regulatory activity and thus divergence of rules. Germany and France have different national laws for hateful comments online. Ireland, Hungary and France have or were preparing national laws for online advertising. Harmful content is addressed at EU-level (in the AVMSD), but also at MS level (e.g. the draft French fake news law, the UK Online Harms White Paper). Even if rules on the protection of consumers and data and on contracts have converged across the EU, in today's fragmented regulatory environment only the big platform companies can grow and survive. Home-grown start-ups such as Taxify cannot scale-up across the EU and grow to compete with US rivals such as Uber.

The Commission found legal uncertainty as to the status of a number of new information society services. The review of the ECD should close these regulatory gaps and cover all intermediary services across the entire Internet stack from mere conduits such as ISPs, cloud services, content delivery networks and domain name services, via online platforms such as social media services, search engines, so called 'collaborative economy platforms' such as Uber as well as online advertising services and digital services built on electronic contracts and distributed ledgers. It stressed that "online advertising services now play a key role, e.g. in the context of cross-border micro-targeted political advertising or in the context of disinformation campaigns" (p. 2).

The document also lamented ineffective public oversight. Although digital services regulators exist for data protection, audio-visual media, competition, electronic communication services and consumer protection, there is no dedicated 'platform regulator' in the EU, who could exercise effective oversight and enforcement, e.g. in areas such as content moderation

or advertising transparency. Many of the existing regulators also lack the digital capacities needed to interface with online platforms today.

*“One consequence is that many public interest decisions that should be taken by independent public authorities are now delegated to online platforms, making them de-facto regulators without adequate and necessary oversight, even in areas where fundamental rights are at stake.” (p. 3)*

Nevertheless, the Commission found the cornerstones of the ECD well-proven and still valid. It has been subject to a rich case law by the Court of Justice. New sector-specific rules for audiovisual services, copyright, terrorist content, child sexual abuse as well as the recent New Deal for Consumers and the P2B Regulation leave the horizontal ECD unaffected. A review should aim to update, clarify and harmonise rules for digital services in the Single Market, which could mean that the Directive should evolve into a Regulation. Its main structural components would build on the existing building blocks of the ECD.

That is first of all the Internal Market or country of origin principle. This needs to be complemented by rules for services established in third countries, mandating a single digital representative in the EU.

Then it is the general principle of a harmonised graduated and conditional liability exemption for intermediaries, of which the report said that it “continues to be needed as a foundational principle of the Internet” (p. 4). It needs to be updated by codifying existing case law (e.g. on search engines or WLAN hotspots) and clarifying its application to new services. Also, the concept of active/passive hosts would be replaced by notions such as editorial functions, actual knowledge and the degree of control. Finally, a binding ‘Good Samaritan’ provision would encourage voluntary measures by platforms by clarifying that they would not lose the liability exemption because of them.

Also, the prohibition of general monitoring obligations should be maintained “as another foundational cornerstone of Internet regulation”. This must not be mistaken for a prohibition of general monitoring. Therefore, the Commission suggests specific provisions to ensure the necessary transparency and accountability of algorithms for automated content moderation systems and automated filtering technologies, where these are used.

Furthermore, the Commission suggested that notice-and-action rules could be tailored to the types of services and to the types of content in question, possibly applying thresholds for imposing different obligations. It also wanted to examine the definition of a category of services with a large or significant market status, complementing the competition threshold of dominance, in order to impose supplementary conditions. Rules for online advertising services, in particular on political advertising, should ensure adequate possibilities for auditing and accountability. To achieve service interoperability and data portability, it suggested standardisation initiatives. For oversight and enforcement of the rules, DG Connect favoured a dedicated regulatory structure with appropriate digital capacities and competences, including access to data such as content notifications and advertisements.

In August 2019, then still candidate for President of the European Commission Ursula von der Leyen presented her political guidelines for the next European Commission 2019-2024: [My agenda for Europe](#). It featured “A European Green Deal” and “A Europe fit for the digital age”. Digital fitness included grasping the opportunities of Artificial Intelligence (AI), the Internet of Things, 5G networks and achieving “technological sovereignty in some critical technology areas”. It also announced that the EU would lead the way on next-generation “hyperscalers” by investing in blockchain, quantum computing and data sharing, and that it would overhaul the ECD: “A new Digital Services Act will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market.” (ibid.: 13) Under the heading “A new push for European democracy”, von der Leyen declared that digital platforms are “actors of progress for people, societies and economies. To preserve this progress, we need to ensure that they are not used to destabilise our democracies.” She announced common standards to tackle issues such as disinformation and online hate messages as well as a European Democracy Action Plan to address external interventions in European elections by ensuring greater transparency on paid political advertising and clearer rules on the financing of European political parties (ibid.: 21).

Six months later, the Commission laid out its work plans for addressing the “twin challenge of a green and digital transformation” and striving for “European technological sovereignty” in the [Communication on Shaping Europe's Digital Future](#) (February 2020). The key actions announced include an initiative to improve labour conditions of platform workers, one on business taxation, a Media and audiovisual Action Plan focussing on trustworthy quality news media, a European Democracy Action Plan to improve the resilience of our democratic systems and support media pluralism, a Global Digital Cooperation Strategy and an update of the horizontal rules on digital services and online platforms, i.e. the Digital Services Act.

The first proposal for the DSA did not come from the Commission but from the European Parliament. The EP Committee on Legal Affairs under Rapporteur Tiemo Wölken (S&D) issued a [Draft Report with recommendations to the Commission on a Digital Services Act: adapting commercial and civil law rules for commercial entities operating online](#) (2020/2019(INL), 22.04.2020). After Parliament’s competence had been extended by the Treaties and it had adopted new [Rules of Procedure](#) for itself in December 2019, it was now able to take its own initiative and, in the annex proposed the actual text of the legislative proposal requested from the Commission.

The proposal considers content management on content hosting platforms the most urgently in need of regulation:

*“User-targeted amplification of content based on the views in such content is one of the most detrimental practices in the digital society, especially when such content is amplified on the basis of previous user interaction with other amplified content and with the purpose of optimising user profiles for targeted advertisements.” (Rec. 6)*



The business-model of targeted advertisements, on the one hand, leads to extensive tracking and collection of data on users' interactions for the purpose of building targeted advertisement profiles, in the case of dominant platforms offering an identity verification access infrastructure even on third party websites. On the other hand, it leads to platforms curating, i.e. selecting, prioritising and recommending content to users based on their individual profile so as to increase engagement and thereby the opportunity to collect more data and display ads.

*"In practice, this leads to the likely amplification of content that is attention-seeking and sensationalist in nature. This not only leads to a situation in which 'clickbait'-content is more likely to appear prominently in news feeds and recommendation systems, it may also, more crucially, impact the freedom of information of users if they have little influence over how content is curated for them."* (p. 23)

The rapporteur therefore suggested, that 1.) targeted advertising must be regulated more strictly in favour of less intrusive forms of advertising that do not require extensive tracking and profiling of user behaviour, such as contextual advertisements. 2.) Users should be able to assert their rights. They "should be given an appropriate degree of influence over the curation of content made visible to them, including the possibility to opt out of any content curation altogether. In particular, users should not be subject to curation without specific consent." (Rec. 7). 3.) Algorithms used by platforms to curate content should be subject to audits by a new European Agency to be established by the DSA. 4.) Platforms should make available an archive of advertisements they displayed, including information on the advertiser, the time during which the ad was active, the total number of users reached, the amount paid for it and the group of users the ad targeted (p. 10). And 5.) he suggested, also in order to address imbalances in market power, to facilitate the interoperability and portability of data.

The draft proposal of the EP's legal committee furthermore suggested standards for notice-and-action procedures, including a 'stay-up principle', i.e. content that has been challenged by a notice shall remain visible until a final decision on its removal has been taken (Art 12). Finally, the committee report calls on the Commission to assess the development of distributed ledger technologies, including blockchain and, in particular, of so-called smart contracts, that enable decentralised and fully traceable record-keeping and self-execution. These are increasingly being used in a number of areas while there is uncertainty concerning the legality of such contracts and their enforceability in cross-border situations. Therefore, the Rapporteur asked the Commission to make proposals for the appropriate legal framework.

The Committee Report was amended and [adopted by the EP](#) on 5 October 2020. This was followed by two EP Resolutions on the DSA, one [on adapting commercial and civil law rules for commercial entities operating online](#) (2020/2019(INL), 20.10.2020) and one on [improving the functioning of the Single Market](#) (2020/2018(INL), 20.10.2020).

The preparatory documents leading up to the Commission's proposal include inception impact assessments on different aspects of the proposal and a [public consultation](#) on the Digital Services Act package launched on 2 June 2020. The [factual summary report of the public consultation](#) and the final [Impact Assessment accompanying the Proposal for a DSA](#)

(SWD(2020) 348 final, 15.12.2020; [summary](#)) were published on the same day as the proposals for DSA and DMA, while the [Opinion of the European Data Protection Supervisor](#) (27.04.2021) followed four months later. Legislative financial statements on the estimated impact of the proposed Regulations including administrative expenditure are attached to the Proposals themselves. They show that the Commission expects to add additional staff of 50 persons for the DSA (DSA Proposal 2020: 98) and 80 persons for the DMA (DSA Proposal 2020: 71 f.). This compares to Apple's legal department alone with a staff of 900 and ample budget to hire more ([Macwelt 11.06.2019](#)).

The [Digital Services Act package](#) consists of the Digital Services Act (DSA) and the Digital Markets Act (DMA). The objective of both is to establish a level playing field for economic actors in the European Digital Single Market and to protect the fundamental rights of users of digital services.

The DSA addresses the different types and sizes of online intermediaries, their liabilities and their graded obligations from micro and small providers which are exempt to very large online platforms with the most comprehensive obligations.

The DMA concerns gatekeepers between businesses and customers which provide core platform services and because of their systemic role, entrenched position and impact on the entire market threaten competition. Some of these services are also covered in the DSA, but for different reasons and with different types of provisions.

The [Proposal for a Regulation on a Single Market For Digital Services \(Digital Services Act\) and amending Directive 2000/31/EC](#) (COM(2020) 825 final, 15.12.2020) is not a consolidated form of all EU platform law, not the grand unification of all regulatory aspects of platforms, of the dozens of directives and regulations into one instrument. It does not amend the sector-specific legislation. It does not even replace the ECD, which remains the central legal framework for all digital services, but it does amend it. And in doing so, it codifies the [Recommendation on measures to effectively tackle illegal content online](#) ((EU) 2018/334, 01.03.2018). Its purpose, just as that of the ECD, is to provide for a horizontal framework beyond specific content or subcategories of services regulated in sector-specific acts (ibid.: 6).

It is of little surprise even to the casual observer that stakeholders in the consultations agreed on the basic problem: "A majority of respondents, all categories included, indicated that they have encountered both harmful and illegal content, goods or services online, and specifically noted an alarming spike during the Covid-19 pandemic." (ibid.: 9). Most who notified such content to services expressed dissatisfaction with the response. Stakeholders also agreed among themselves and with EP and Commission that the main principles of the ECD remain relevant and should be maintained, including the internal market principle for the supervision of digital services, the liability regime and the prohibition of general monitoring obligations.

The Proposal pulls these principles out of the ECD (Arts 12 to 15 are to be deleted from the ECD: (Art 71)) and moves them to the front of the DSA: the liability limitations for the providers of mere conduit (Art 3), caching (Art 4) and hosting (Art 5) services and the general monitoring prohibition (Art 7) remain essentially unchanged. In between the ‘Good Samaritan’ clause of not losing the safe harbour for voluntary own-initiative measures (Art 6) is inserted. Finally, in this chapter, the Proposal imposes an obligation on service providers to follow orders from national judicial or administrative authorities to act against illegal content (Art 8) and to provide information (Art 9).

In addition to the three services, the DSA Proposal introduces the concept of an “online platform”, meaning “a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information” (Art 2(h)). That seems no different than a hosting service, but a [DSA webpage](#) of the Commission explains that a platform is a hosting service that brings together sellers and consumers, such as online marketplaces, app stores, “collaborative economy” platforms and social media platforms.

A sub-category of those and of special concern to the Proposal are the “very large online platforms” which are defined as having an average number of monthly active recipients amounting to 10% of the Union’s population or currently 45 million persons (Art 25 ff.). The Commission considers this threshold proportionate to the risk they pose, because due to their reach they have acquired “a central, systemic role in facilitating the public debate and economic transactions” (p. 6). These very large enterprises demand the most stringent obligations for preventing harm, including a supervised risk management, while at the same time, they also have the capacity to absorb the additional burden (p. 13).

What follows, is a graded – the Proposal calls it “asymmetric” – system of due diligence obligations (p. 6) building on the fourfold nested categories from ‘intermediary services’, which includes any kind of online service, starting from Internet access providers and domain name registrars, via ‘hosting services’ and ‘online platforms’ to ‘very large online platforms’. These obligations revolve around ‘content moderation’, which here has nothing to do with what radio or TV moderators are doing on air, but rather refers to detecting, identifying and addressing illegal content including measures such as demotion, disabling of access to, or removal thereof (Art 2(p))

The smallest set of the cumulative due diligence obligations (see the [DSA webpage](#) for a compact overview) is burdened on the providers of intermediary services that are not hosting services and on small and micro enterprises in any category (p. 6, Arts 13(2), 16). These have to establish a single point of contact to facilitate direct communication with authorities (Art 10), and if they are not established in any MS but offer services in the Union, they must designate a legal representative in the Union (Art 11). They have to set out in their terms and conditions any restrictions that they impose on the use of their services and act responsibly in enforcing those restrictions (Art 12). Finally, they shall report once a year the number of orders from authorities and of notices received, the number of content decisions taken at the providers’ own initiative and number of complaints against such decisions (Art 13)

Hosting services in addition have to provide a notice-and-action mechanism, allowing users to notify them of alleged illegal content, act appropriately (Art 14) and inform providers of removed content with a statement of reasons (Art 15). A qualified notice shall give rise to ‘actual knowledge or awareness’ that requires a hosting provider to act expeditiously to remove or to disable access to the illegal content (Rec. 22).

All online platforms are furthermore obliged to provide an internal complaint-handling system that enables users to contest decisions to remove their content, to suspend or terminate the provision of the service to them or to suspend or terminate their account (Art 17) and, where the internal mechanism fails to resolve the conflict, they have to participate in procedures of certified out-of-court dispute settlement bodies (Art 18). Platforms also have to treat notices submitted by entities granted the status of ‘trusted flaggers’ with priority. These are organisations with particular expertise in identifying illegal content such as child abuse material, which represent collective interests and are independent from any online platform (Art 19). Users do not have to go these stony paths alone but can mandate an organisation to exercise the rights referred to in Articles 17, 18 and 19 on their behalf (Art 68). To protect against misuse, platforms must suspend the provision of their services to users who frequently provide manifestly illegal content and the processing of notices by entities who frequently submit notices that are manifestly unfounded (Art 20). When they become aware of any information indicating a possible serious criminal offence involving a threat to the life or safety of persons, they shall promptly inform law enforcement or judicial authorities (Art 21). They have to ensure the traceability of traders on their platform by requiring, storing, publishing and making reasonable efforts to assess the reliability of information on these traders (Art 22).

Finally, for any advertising on a platform it shall display in a clear and unambiguous manner that the information is an advertisement, on whose behalf the advertisement is displayed and “meaningful information about the main parameters” used to determine why it was targeted at a specific user (Art 24), “including when this is based on profiling” (Rec. 52).

The final category of very large online platforms (VLOP, defined in Art 25) is deemed to give rise to ‘systemic risks’. Therefore, such a VLOP shall assess at least once a year any significant systemic risks it may cause, including the dissemination of illegal content, any negative effects for the exercise of fundamental rights and the intentional manipulation of their service with an actual or foreseeable negative effect on the protection of public health, minors, civic discourse or on the electoral processes and public security. In the assessments, it shall take into account how its systems for moderating and recommending content and for displaying ads might amplify the rapid and wide dissemination of illegal content (Art 26). A VLOP shall then take appropriate measures to mitigate the risks identified (Art 27). They are also to submit themselves to external and independent audits at least once a year (Art 28). If a VLOP uses a recommender system, it shall inform its users in its terms about the main parameters used and the options to influence those main parameters, “including at least one option which is not based on profiling” (Art 29). In addition to the requirements on advertising in Article 24, VLOP have to create a publicly available repository containing the ads themselves

and information about the advertiser, whether the ad was targeted and the number of users it reached (Art 30). Aside from the ads database, a VLOP must give access to data that are necessary to monitor and assess compliance with this Regulation to the Digital Services Coordinator of establishment, the Commission as well as independent vetted academic researchers. VLOP furthermore have to appoint professionally qualified compliance officers (Art 32) and fulfil additional transparency reporting obligations (Art 33).

The provisions on implementation and enforcement include that MS shall designate a novel institution, the Digital Services Coordinator who is responsible for ensuring coordination at national level and shall cooperate with the Coordinators from other MS, the Commission (Art 38) and the European Board for Digital Services composed of all national Coordinators and chaired by the Commission (Arts. 47-49). Coordinators are to designate VLOPs and award the status of trusted flagger, and they are given far-reaching powers to investigate service providers (Art 41). These powers of Coordinators and the Commission are even stronger in respect of VLOP (Arts 50-66), including, in case of non-compliance, ordering interim measures where there is an urgency due to the risk of serious damage for the recipients of the service (Art 55) and fines of up to 6% of a VLOP's total turnover in the preceding financial year and in certain cases periodic penalty payments of up to 5% of its average daily turnover.

On the same day as the DSA, its companion was published, the [Proposal for a Regulation on contestable and fair markets in the digital sector \(Digital Markets Act\)](#) (COM(2020) 842 final, 15.12.2020). The DMA begins with the observation that over 10,000 online platforms operate in Europe, most of which are SMEs. Yet a small number of large online platforms because of strong network effects capture the biggest share of the overall value generated in the digital economy. A few large platforms act as gatekeepers between business users and end users. They often create conglomerate ecosystems and thereby entry barriers. The Proposal notes that many of them are also comprehensively tracking and profiling end users, but adds in a footnote that “such tracking and profiling of end users online is as such not necessarily an issues, but it is important to ensure that this is done in a controlled and transparent manner, in respect of privacy, data protection and consumer protection.” (p. 1)

The DMA Proposal builds on the existing EU competition law acquis, starting from Articles 101 and 102 TFEU, whereas the Commission considered that Article 102 TFEU is not appropriate for gatekeepers, which may not necessarily be a dominant player (p. 8). It also builds on the Platform-to-Business Regulation (→ 4.4 P2B), taking from it the definitions of ‘online intermediation services’ and ‘online search engines’ and adding to its transparency and fairness rules specific rules for gatekeepers (p. 3).

Stakeholders in the consultations pointed out that the economic objective of ensuring a level playing field should be complemented by measures to safeguard the values of cultural diversity and media pluralism. Civil society and media publishers called for an adequate degree of transparency in the market as well as the guarantee of a certain degree of media diversity and the respect of consumers' autonomy and choice (p. 8). This was also stressed by the

Council in its conclusions on the strengthening of European content in the digital economy and on safeguarding a free and pluralistic media system (p. 1).

While the DSA addresses all digital intermediary services up to very large ones with a graded system of provisions, the DMA is limited to a specific category of gatekeeping platforms. While the DSA provides rules for the liability of intermediaries for third party content and safeguarding user rights, the DMA is concerned with “economic imbalances, unfair business practices by gatekeepers and their negative consequences, such as weakened contestability of platform markets” (p. 3). In fact, before being named ‘DMA’ the instrument was called the ‘New Competition Tool’.

To the four categories of online intermediaries in the DSA, the DMA adds another two concepts, that of ‘core platform services’ and that of ‘gatekeepers’. Core platform services include: (i) online intermediation services (incl. marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy) (ii) online search engines, (iii) social networking (iv) video sharing platforms, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services and (viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed above (p. 2, Art 2(2)).

Market concerns do not arise from core platform services per se, but rather when these are operated by a gatekeeper. The Proposal suggest to define a ‘gatekeeper’ as a provider of core platform services that (a) has a significant impact on the internal market, (b) operates one or more important gateways for business users to reach end users and (c) enjoys or is expected to enjoy an entrenched and durable position in its operations (Art 3(1)). The requirement in (a) is presumed to be satisfied when the service is provided in at least three MS and the undertaking to which it belongs achieved an annual EEA turnover of more than EUR 6.5 billion in the last three financial years or its average market capitalisation amounted to at least EUR 65 billion. The condition in (b) is met when the core platform service has more than 45 million monthly active end users and more than 10,000 yearly active business users established in the Union, and it is deemed to be (c) entrenched when the thresholds in point (b) were met in each of the last three financial years (Art 3(2)).

A service provider that meets all these criteria shall notify the Commission thereof (Art 3(3)). If it fails to do so, the Commission can designate it as a gatekeeper when, after conducting a market investigation, it finds it meets all criteria (Art 3(4)). Even when it does not satisfy each of the thresholds, the Commission, upon a case-by-case assessment of its threat to competition, can designate it as a gatekeeper (Art 3(5)). The Commission shall regularly review the status of a gatekeeper (Art 4).

Articles 5 and 6 then lay out the obligations of gatekeepers. The proposal builds on and complements the EU data protection laws, in particular the General Data Protection Regulation (→ 4.5.2 GDPR). It notes that extreme scale economies and very strong network effects create



data driven-advantages over competitors, in particular where providers control whole platform ecosystems and can combine end user data from different sources (Rec. 36). It therefore stipulates that gatekeepers must refrain from combining personal data sourced from their core platform services with personal data from any other services (Art 5(a)). A gatekeeper such as Amazon that provides core platform services to business users while competing with them in providing the same end-user services, should not unfairly benefit from exclusive access to data generated from transactions on the platform. “This may be the case, for instance, where a gatekeeper provides an online marketplace or app store to business users, and at the same time offer services as an online retailer or provider of application software against those business users.” (Rec. 43, Art 6(a)). Therefore, requiring business users or end users to register with any other core platform services such as identification services is prohibited (Art 5(e, f)). Business users shall get real-time access to data generated by their use of the service, but this shall include personal data only if the end user has given explicit consent to such sharing (Art 6(i)). The gatekeeper shall facilitate and provide tools for the portability of data generated through users’ activities on the service (Art 6(h))

The dual role of provider of services and of intermediary between business users and end users is particularly problematic with respect to advertising. Accordingly, a dual role gatekeeper should be prohibited from using data of its business users (Rec. 44). Advertisers and publishers, to which a gatekeeper supplies advertising services, should be able to request information on the price paid for the services and the amount paid to the publisher for a given ad (Art 5(g)). They should also get access to the performance measuring tools of the gatekeeper free of charge, to carry out their own independent verification of the ad inventory (Art 6(g)).

As operating systems are among the core platform services and a pertinent source of Gatekeeper-status, the Proposal mandates user choice of software (Art 6(b, c, e)) as well as, for business users and providers of ancillary services, access to and interoperability with the same operating system, hardware or software features that the gatekeeper uses on any of its ancillary services (Art 6(f)). Services ancillary to core platform services are defined by example to include payment services, identification or advertising services (Art 2(14)). If the gatekeeper provides a search engine, it shall give any third party providers of search engines access to ranking, query, click and view data, subject to anonymization (Art 6(j)).

Where the Commission finds that the measures that the gatekeeper implements do not ensure effective compliance with these obligations, it may by decision specify the measures that it shall implement (Art 7). This is followed by provisions for exemptions from and updating and against circumvention of obligations. A gatekeeper shall inform the Commission of any intended concentration within the meaning of the EU Merger Regulation (Art 12).

While the Proposal does not prohibit profiling or targeted advertising, as the Wölken draft of the EP had suggested, it does mandate an independent audit of any techniques for profiling of consumers that the gatekeeper applies (Art 13).

Next, there are rules for carrying out market investigations (Art 14) of different types: for the designation of a gatekeeper (Art 15), for investigating systematic non-compliance (Art 16) and new core platform services and new practices (Art 17). The most far-reaching device, also referred to as the 'nuclear bomb', is Article 16: Where the market investigation shows that a gatekeeper has systematically infringed the obligations in Articles 5 and 6 and has further extended its gatekeeper position, the Commission may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance. Systematic non-compliance deems to occur when the Commission has unsuccessfully issued at least three non-compliance or fining decisions against a gatekeeper within a period of five years prior. In that case, the Commission can impose additional behavioural, or, where appropriate, structural remedies, "such as legal, functional or structural separation, including the divestiture of a business, or parts of it" (Rec. 64).

The Proposal continues with the powers of the Commission to investigate, including access to data bases and algorithms (Arts 19-21), to impose interim measures in case of urgency due to the risk of serious and irreparable damage for business users or end users (Art 22) and to impose fines of up to 10% of a gatekeeper's total turnover and periodic penalty payments of up to 5% of its average daily turnover. It also suggests to introduce a new Digital Markets Advisory Committee to assist the Commission (Art 32).

The Commission's Proposals on DSA and DMA opened the official debates in Council and Parliament which were held intensely throughout 2021.

Wölken in his EP draft had emphasised the importance of whistleblowing in helping to "prevent breaches of law and detect threats or harm to the general interest that would otherwise remain undetected." The EU had already adopted a directive to protect whistleblowers ([Directive on the protection of persons who report breaches of Union law](#), (2019/1937/EU, 23.10.2019)). He suggested to amend it so that it applies to the DSA Package as well (Rec. 18).

As if he had foreseen it and just in time for the final negotiations on the DSA Package, Frances Haugen, data engineer and former Facebook product manager, disclosed tens of thousands of pages of internal documents from the company in October 2021. They show how Facebook's internal research was aware of the negative impact of its Instagram app on the mental health of teen girls and others, while the company was targeting preteens as "a valuable but untapped audience." While Facebook employees flagged drug cartels and human traffickers, the company's response was weak. Internal research documented how the platform has contributed to divisive, inter-religious conflict in India and other countries. People inside the company have suggested a systematic approach to restrict features that disproportionately amplify incendiary and divisive posts. "Facebook rejected those efforts because they would impede the platform's usage and growth. Instead, Facebook is making ad hoc decisions about groups it deems harmful." It exempted high-profile users like Donald Trump from its rules. It was not able to stem the flood of pandemic-denier and anti-vaccination messages (Wall Street Journal, [The Facebook Files](#), 01.10.2021).

Evidently, Facebook internally does actively assess significant systemic risks, as the DSA Package proposes to mandate, only that based on that information it decides in its own profit interest, not to ensure public interest and wellbeing. A month after the first publications, Haugen spoke at the European Parliament. In the hearing, she stressed the need for transparency of data and algorithms and for companies to do more to counter disinformation and demote harmful content and limit its reach by setting limits on how many times content can be reshared, making platforms more human-scaled and enabling users to moderate each other rather than being moderated by artificial intelligence. On the DSA, she commented that it has the potential to be a “global gold standard” and inspire other countries to “pursue new rules that would safeguard our democracies”. Otherwise, “we will lose this once-in-a-generation opportunity to align the future of technology and democracy”. She commended lawmakers for their content-neutral approach, but warned against possible loopholes and exemptions for media organisations and trade secrets ([press release, IMCO, 08.11.2021](#)).

After this strong call for action, EP and Council went to formulate their final positions before the start of the trilogue negotiations. The Council stayed close to the initial Commission Proposals for both the DMA and DSA. The latest publicly available text of the Council’s version of the DMA (leaked by [Investigate Europe and Netzpolitik.org](#)) is the [Presidency third compromise text on the proposal for the DMA](#) (12.10.2021), agreed by the Council’s Working Group on Competition, that was to be adopted by the EU Council in November.

Most of the amendments concern the obligations of gatekeepers under Article 6. The Council suggests that they shall not be prevented from taking measures enabling end users to protect security in relation to third party software and app stores (Art 6(1)(c)). They shall not degrade access and interoperability of ancillary services provided by third parties (Art 6(1)(f)). They must enable users to terminate the use of a core platform service without disproportionate conditions and undue difficulty (Art 6(1)(l)).

The Council deleted “public morality” from the list of grounds on which a gatekeeper can be exempt from obligations (Art 9), because the vagueness of the concept may lead to legal uncertainty. It also complemented the anti-circumvention rules by prohibiting an undertaking from segmenting, dividing, fragmenting or splitting its services to circumvent the quantitative thresholds that would designate them as a gatekeeper (Art 11(1a)) and by prohibiting the use of behavioural techniques or interface designs that would undermine the effectiveness of the obligations in Articles 5 and 6 (Art 11(1)), which addresses manipulation by dark patterns. A bid from Germany, France and the Netherlands to give stronger implementation and enforcement powers to national authorities was rejected, however, cooperation between the Commission and national regulators through the European Competition Network (ECN) (Art. 32a) and with national courts (Art 32b) has been further detailed (for the list of amendments tabled and reasoned by the different MS, see another [internal document](#) published by [Investigate Europe and Netzpolitik.org](#)). This version was unanimously adopted without further changes by the Ambassadors from the 27 Member States

as the [General approach to the DMA](#) (16.11.2021) and agreed by the Council on 25 November 2021 ([press release 25.11.2021](#)).

In the European Parliament, the responsible Committee for Internal Market and Consumer Protection (IMCO, rapporteur: Andreas Schwab, EPP, Germany) adopted its final position on 23 November 2021 with a large number of [amendments](#) ([press release 23.11.2021](#)). It was voted on in plenary on 15 December 2021: [Text adopted by the EP on the DMA](#) (A9-0332/2021, 15.12.2021).

The EP proposal extends the scope of the DMA to include web browsers, virtual assistants (i.e. smart speakers) and connected TVs (Art 2(2)(f), defined in Art 2(1)(10)). Ancillary services now include in-app payment systems, and 'fulfilment', including parcel delivery and freight transport (Art 2(1)(14)). It raises the threshold for services to fall under the DMA from 6.5 to 8 billion euro in annual turnover and from 65 to 80 billion euro in market capitalization (Art 3(2)(a)), under the insistence of Schwab.

Most of all, the EP strengthens the obligations imposed on gatekeepers. On advertising it requires free of charge, high-quality, effective, continuous and real-time access to full information for advertisers and publishers (Art 5(1)(g)). A gatekeeper is prohibited from combining personal data for the purpose of delivering targeted or micro-targeted advertising, except if a clear, explicit, renewed, informed consent has been given by an end-user, but not at all to minors (Art 6(1)(aa)).

To ensure interoperability and choice, it provides that end users must be allowed to access and use content, subscriptions, features or other items on the gatekeeper's services by using the software of a third party business user (Art 5(1)(ca)). The problem that 95% of users never change defaults is addressed by requiring that an end user, who first uses any pre-installed platform service on an operating system, must be prompted to change the default settings, be presented a list of third-party services available, be allowed at any stage to uninstall pre-installed software (Art 5(1)(gb)) and use third party software and app stores (Art 6(1)(c)). The most far-reaching requirement the EP introduced is interoperability of messaging services and social media. A gatekeeper shall allow any provider of number independent interpersonal communication services free of charge to interconnect with the gatekeeper's own messaging service, allowing for a fully functional interaction between these services (Art 6(1)(fa)), and the same for social network services (Art 6(1)(fb)).

The EP strengthens the anti-circumvention provision, by prohibiting behavior that while conceptually or technically different from behaviour prohibited by Articles 5 and 6, is capable in practice of having an equivalent object or effect (Art 6a(1a)). In addition, the gatekeeper shall not discourage interoperability by using technical protection measures, discriminatory terms of service, subjecting application programming interfaces to copyright or providing misleading information (Art 6a(1b)). It also strengthens the provisions on systematic non-compliance by implying to impose structural remedies not only as a last resort as envisaged in

the Commission text (by deleting Art 16(2)). In case of such repeated infringements, the Commission shall restrict gatekeepers from acquiring other companies (Art 16(1a)).

On enforcement, the EP proposal gives business users, competitors and end-users of a gatekeeper's services as well as other persons with a legitimate interest the right to complain to the competent national authorities about any of its behaviour that might violate this Regulation (Art 24a). This expressly includes whistleblowers for whom there should be adequate arrangements to alert competent authorities to infringements of the DMA (Recs. 39, 77b). It requires gatekeepers to establish a compliance function (Art 24b) and it raises the maximum fine from 10% to 20% of the company's total worldwide turnover (Art 26(1)). Finally, it wants the Commission to prepare an annual report on the state of the digital economy, including an analysis of the market position, influence and business models of the gatekeepers in the common market (Art 30a), it suggests a new High Level Group of Digital Regulators to assist the Commission (Art 31a) and strengthens its cooperation with MS (Art 31d). One of the most controversial points in the EP, and doubtlessly in the upcoming negotiations with the Council, was the proposed ban on targeted ads, which was pushed from centre-left MEPs and resisted from the centre-right as well as from publishers, as Wölken relayed in several public discussions.

In mid-November 2021, the Council agreed its final negotiation position on the DSA: the [General approach to the proposal for a DSA](#) (13613/21, 12.11.2021), here in a document leaked by French magazine [Contexte](#).

The Member States propose to introduce a stand-alone category of online search engines, which are included in the liability exemption under the same conditions as caching services, and accompanied by 'very large online search engines', to which the same conditions (45 million active users) and obligations apply as to very large online platforms (VLOP, Art 33a).

To the already unclear distinction between 'hosting service' and 'online platform', the Council adds another category: an 'online marketplace' defined as "an online platform which allows consumers to conclude distance contracts with traders" (Art 2(ia)). The new section 3a incorporates the article on traceability of traders (Art 24a), adds one on 'compliance by design' that addresses dark patterns: "Providers of online marketplaces shall not design, structure, or organise their online interface in a way that either purposefully or in effect deceives or manipulates recipients of the service, by subverting or impairing their autonomy, decision-making or choices." (Art 24b(-1)), and an obligation to inform consumers of illegal products or services offered through its services when the marketplace becomes aware of them (Art 24c). The prohibition of dark patterns (Rec. 50a) is repeated in similar wording for recommender systems of VLOPs (Art 29(3)).

To enhance the protection of minors, the text suggests that an intermediary which is primarily aimed at minors must in its terms explain the conditions and restrictions for the use of the service in a way that minors can understand (Art 12). Also, VLOPs have to take targeted

measures to protect the rights of the child, including age verification and parental control tools, or tools aimed at helping minors signal abuse or obtain support, as appropriate (Art 27(g)).

The Council is evidently not very concerned about targeted advertising and the collection and processing of personal data it is based on. It only proposed to add to the transparency requirements that users of a platform must be able to declare that content they provide is or contains advertising. The platform must ensure that users can identify ads as such in a clear and unambiguous manner and in real time, including through prominent markings (Art 24). On the repository of ads that VLOP are required to maintain, it remarks: “This information should include both information about targeting criteria and delivery criteria, in particular when advertisements are delivered to persons in vulnerable situations, such as minors.” (Rec. 63)

The European Parliament approved 457 amendments to the Commission Proposal and adopted its [Text on the Proposal for the DSA](#) in January 2022 (A9-0356/2021, 20.01.2022). Safeguarding fundamental rights is always one of the main concerns of the EP. Therefore, it adds to the safe harbour for intermediaries that their voluntary own-initiative investigations and measures shall be accompanied by human oversight, documentation or any additional measure to ensure that those are non-discriminatory, proportionate, transparent and do not lead to over-removal of content. Platforms shall not be obliged to use automated tools for content moderation (Art 7(1a)), but where they do, they must limit “to the maximum extent possible” errors that wrongly mark information as illegal content (Art 6(1a)).

Privacy and anonymity feature strongly in the EP proposal. MS shall not prevent providers of intermediary services from offering end-to-end encrypted services (Art 7(1b)). MS shall not impose a general obligation on intermediaries to limit the anonymous use of their services. They must also not require them to generally and indiscriminately retain personal data of their users. Any data retention targeted at an individual shall be ordered by a judicial authority (Art 7(1c)). Users must be able to pay for an online service without having personal data collected (Art 7(1d)). Providers of intermediary services shall not require recipients of the service other than traders to make their legal identity public in order to use the service (Art 12 (2d)). The anonymity of individuals who submitted a notice shall be ensured towards the recipient of the service who provided the content, except in cases of alleged violations of personality rights or of intellectual property rights” (Art 14(5a))

In contrast, to address issues such as ‘revenge porn’, the EP proposes to add an article with obligations for platforms primarily used for the dissemination of user-generated pornographic content. Those shall ensure that users who disseminate content have verified themselves through a double opt-in e-mail and cell phone registration, that the content is subject to professional human content moderation and an additional notification procedure allowing individuals to claim that images depicting them is being disseminated without their consent, leading to content being suspended without undue delay (Art 24b).



The EP addressed the fear that information, such as on abortion or LGBTQ, being illegal in some MS, could lead to orders for takedowns in other parts of the Union, by providing that judicial orders to act against illegal content must be limited to the territory of the MS issuing the order, unless the illegality derives directly from Union law (Art 8(2)(b)).

The EP provides for stronger remedies for different affected parties. A user whose rights are infringed by illegal content shall be able to call on the authorities to issue an injunction order to remove that content against an intermediary (Art 8(4a)). Conversely, a user whose content was removed or whose information was sought shall have effective remedies, including restoration of content that has been erroneously considered as illegal by the service provider (Art 9a). An intermediary receiving a removal order can call on the Digital Services Coordinator to intervene on its behalf, who then may request the authority to withdraw or repeal the order or adjust its territorial scope to what is strictly necessary (Art 8(2b)). Likewise, there shall be effective remedies against orders to provide information, including the right to challenge the order before the judicial authorities (Art 9(2b)). But also the measures against misuse are strengthened by allowing platforms to suspend providers of content permanently, if “the items removed were components of high-volume campaigns to deceive users or manipulate platform content moderation efforts” or were related to serious crimes or if a trader has repeatedly offered goods and services that do not comply with Union or national law (Art 20(3a)). Among the changes on enforcement, the most remarkable one provides that users shall have the right to seek compensation from intermediaries against any direct damage or loss suffered because a provider violated obligations under this Regulation (Art 43a).

Just as the Council, the EP requires services that are primarily directed at minors to explain conditions in a way that minors can understand (Art 12(1c)). Just as the Council, the EP addresses dark patterns. i.e. manipulative elements in the design and organization of online interface, including the cookie consent nuisance of making the ‘agree’ button more prominent than the ‘disagree’ option, nudging users to change settings they have already chosen and making terminating a service more cumbersome than signing up to it (Art 13a).

Also, the notice and action mechanisms get more detailed, including the EP’s original stay-up proposal, meaning that “information that has been the subject of a notice shall remain accessible while the assessment of its legality is still pending” (Art 14(3a))

VLOPs have apparently convinced the MEPs that, in calculating the number of its users, account shall be taken that users connected on multiple devices are counted only once, indirect use of service, via a third party or linking and automated interactions, accounts or data scans by a non-human (“bots”) shall not be counted (Art 25(1)).

VLOPs in their assessment of systemic risks now must take into account negative effects on consumer protection, respect for human dignity, the protection of personal data and the freedom of expression and information, as well as to the freedom and the pluralism of the media and the right to gender equality (Art 26(1)(b)) as well as any malfunctioning or intentional manipulation of their service, but also risks inherent to the intended operation of the service,

including the amplification of illegal content, of content that is in breach with their terms and conditions or any other content with a negative effect on the protection of minors and of other vulnerable groups, on democratic values, media freedom, freedom of expression and civic discourse and on the electoral processes and public security (Art 26(1)(c)).

Another novel proposal of the EP concerns deep fakes: Where a VLOP becomes aware of a generated or manipulated image, audio or video content that appreciably resembles existing persons, objects or places falsely appears to a person to be authentic or truthful (deep fakes), the provider shall label the content in a way that informs that the content is inauthentic and that is clearly visible for the recipient of the services (Art 30a).

When conducting risk assessments, VLOPs shall consult representatives of users, representatives of groups potentially impacted by their services, independent experts and civil society organisations (Art 26(2a)), who shall also be involved in the design of a VLOP's risk mitigation measures (Art 27(1a)).

On one of the most heated issues in the DSA debate was that of reining in the adtech industry and the surveillance-based business model of platforms. The EP in its resolutions in October 2020 called for “a phase out, leading to a prohibition” of tracking-based ads, as later also advocated for, among others, by the [EDPS](#) and the [EDPB](#) in their opinions on the DSA and by civil society (Buri 2022).

The EP's agreed negotiation position falls short of this, providing that platforms shall ensure that users can easily make an informed choice on whether to consent to processing their personal data for the purposes of advertising by providing them with meaningful information, including about how their data will be monetised. Refusing consent must not be more difficult than giving it, and if users refuse, they must be given other fair and reasonable options to access the online platform (Art 24(1a)). And more strongly: Targeting or amplification techniques that process, reveal or infer personal data of minors as well as personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership and data concerning health and a person's sex life or sexual orientation (the processing of which is prohibited under Art 9(1) GDPR) for the purpose of displaying advertisements are prohibited (Art 24(1b)). Whereas in the Commission text obligations on recommender system only applied to VLOPs, the EP extends them to all platforms and adds details (Art 24a).

### 4.2.3 Summary

With the negotiation positions of both Council and EP now finalised, the trilogue with the Commission is about to begin. Under French Council presidency since January 2022, one of the priorities is to finalise both DSA and DMA before the summer. There will be changes in trilogue and the entire project might still fail. Therefore, it is too early to draw any conclusions. Yet, if the DSA package is adopted, it will bring significant change to the platform environment.

For journalistic editorial media there are two controversial issues at stake. One is a media exemption. This proposal came at the eleventh hour via the JURI Committee of the EP which had received a [Joint Letter](#) by industry actors including EBU, EPC and News Media Europe. It would prevent platforms from down-ranking, deleting or even labelling any content from a “press publication” or an “audiovisual media service”, regardless of whether a given post is actively peddling hateful, patently false or otherwise harmful content. Disinformation researchers warn that it is virtually impossible to meaningfully define who or what is a legitimate ‘press publication’ in the online environment and that this amendment would reverse much of the progress in the fight against hate speech and disinformation ([EU DisinfoLab 05.11.2021](#)).

The other is targeted commercial and political advertising. Profiling and user-targeted amplification of content on which it is based have been singled out as one of the most detrimental practices in the digital realm by the EP. Due to an odd alliance of the ad tech’s biggest players Google and Facebook and publishers, it is not likely that targeted advertising will be banned altogether but there might be more options for users to object and a mandatory database that will create transparency and allow policy-maker to intervene when patterns and structural harm becomes evident.

## 4.3 Copyright

What to media channels appears as ‘content’, in copyright terms are ‘creative works’. Copyright law is the fundamental regulation for the production, distribution and use of most any kind of textual, audiovisual or interactive work. Copyright protection extends to expressions fixed in a tangible form and not to ideas, procedures, methods of operation or mathematical concepts. Copyrights accrue to authors whereas ‘related rights’ accrue to performers, producers and broadcasters. Exclusive rights, i.e. the rights to exclude others, are not intended to prevent the dissemination of works but to allow authors to authorise their use under certain conditions. Licensing is the main mechanism for the exercise of these rights. Those may be individually negotiated licensing contracts, e.g. to publish an author’s book, or licences provided by law or by associations of authors or performers, i.e. collective rights management organisations, e.g. for playing music on the radio.

Legally, copyright is considered a property right, yet not only because the exclusive claim expires after some time and the work enters the ‘public domain’, copyright is a property unlike any other. Nevertheless, copyright is conventionally bundled with patents, trademarks, trade secrets and some other rights under the label “intellectual property”.<sup>37</sup>

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<sup>37</sup> In an attempt to resolve this tension, the [Max Planck Institute](#) renamed its department to ‘rights of immaterial goods’ (Immaterialgüterrecht) in German, while retaining ‘intellectual property’ in its English communications.

The dilemma that copyright has to solve is this: creating the first copy, e.g. of a movie, can be very expensive, whereas making a copy of it can be exceedingly cheap. The author of a novel wants the whole world to read it, but once she puts the first copy on the market, the world can copy and share it without having to ask for permission, let alone pay her. And there is a tension between private and public inherent in the work itself: Every novel work builds on the language and the expressions before it, which are common to an entire culture, and adds to it some innovations. If these innovations spread throughout the culture, they return to the pool from which they came, to the public domain shared by all. The economic interest in exclusion has to be balanced against the public interest in ensuring access in order to nurture ongoing creation. Therefore, the protection of copyrights evolved together with its limitations, the demarcation of what cannot be protected by copyright, and with exceptions to its rules, permitting uses for educational, journalistic, archival, etc. uses. At the heart of copyright law is this balance between the interests of authors, performers and exploiters of works and the public interest in access to and use of works.

In the 19<sup>th</sup> century, cross-border trade in copyrights increased and called for a legal framework beyond national laws. In 1886 the [Berne Convention for the Protection of Literary and Artistic Works](#) was adopted and originally signed by Belgium, France, Germany, Great Britain, Haiti, Italy, Spain, Switzerland and Tunisia. It defines both rights and exceptions and requires signatories in their territory to grant to foreign authors the same protection as to their domestic authors.

The Conventions of Berne, Paris and Madrid originally each had their own office of administration. These were joined in 1893 to form the Bureaux internationaux réunis pour la protection de la propriété intellectuelle (BIRPI) at Berne. BIRPI was superseded by the World Intellectual Property Organization (WIPO) in 1970. WIPO became a specialized agency of the UN in 1974. The WIPO member states negotiated the [Revised Berne Convention](#), adopted in 1979. One of its novelties is a fundamental rule on exceptions and limitations: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” (Art 9(2)). This ‘Berne three-step test’ (also called the ‘limitations limitation’) will literally enter European copyright law.

All European Member States are signatories to the Berne Convention and adhere to it in their national copyright laws. The first European copyright act, as we have seen, were the Council of Europe’s [European Agreement concerning Programme Exchanges by means of Television Films](#) (1958) and the [European Agreement on the Protection of Television Broadcasts](#) (1960).

The European Community started to build its copyright acquis only in the 1980s and from a rather specific digital issue. The first instrument was the [Directive on the legal protection of topographies of semiconductor products](#) (87/54/EEC, 16.12.1986), which was amended by the [Council Decision on the extension of the legal protection of topographies of semiconductor](#)

[products to persons from a Member of the World Trade Organization](#) (94/824/EC, 22.12.1994) and the [Council Decision to extend the protection of semiconductor topographies to persons from the Isle of Man](#) (96/644/EC, 11.11.1996).

The first step towards harmonising copyright law more generally was the [Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action](#) (COM/88/172 final, 7.06.1988). It begins with the fundamental dilemma and the need for balance between protection and access to information and the pursuit of cultural goals. The Commission called intellectual and artistic creativity a precious asset, the source of Europe's cultural identity and of that of each individual State. It is a vital source of economic wealth and of European influence throughout the World (p. 6). It notes that the objectives are contradictory because undue protection may hamper the possibilities of dissemination as well as constitute the basis of unduly high remuneration. On the other hand, uncontrolled dissemination may make protection inoperative and thereby prejudice the possibilities of generating adequate income (p. 7). It hints at a distinction between expressive and functional works, warning that in respect of purely functional industrial designs and computer programmes copyright protection can become excessive, and without suitable limits can in practice amount to a genuine monopoly, unduly broad in scope and lengthy in duration (p. 5). It notes the ambivalence of new techniques that make community-wide dissemination possible and the territorial application of national copyright law obsolete. This de facto situation serves the Treaty objective of free circulation of goods and services from which follows that “in particular, recourse to copyright law as a means of artificially partitioning the market is as effectively prohibited, being equivalent in effect to a quantitative restriction” (p. 10). Yet it conflicts de jure with the laws of the MS.

The Commission states that because all MS adhere to the Berne Convention, a certain fundamental convergence of their laws has already been achieved (p. 7). It then provides empirical evidence on ‘piracy’ in copyright goods in the different MS, on audiovisual home copying that some MS treat as infringement while others as permitted under national legislation, on new technical protection devices as well as on computer programmes and databases. It suggests and puts up for discussion legislative or technical solutions to the issues that it considered most urgent in requiring attention at Community level: “In brief, they are piracy; home copying of sound and audio-visual material; distribution and rental rights for certain classes of work, in particular, sound and video recordings; the protection available to computer programs and data bases; and finally, the limitations on the protection available to Community right holders in non-Member States.” (p. 15)

The [Follow-up to the Green Paper – Working Programme of the Commission in the Field of Copyright and Neighbouring Rights](#) (COM/90/584 final, 17.01.1991) then defined a programme of priority action which should strengthen the rights and take as far as possible a comprehensive approach to tackle all the main aspects which might have implications for the Internal Market.

This resulted in the five specific directives which prepared the ground for the first comprehensive European copyright instrument in 2001. The [Council Directive on the legal protection of computer programmes](#) (91/250/EEC, 14.05.1991) provides that computer programmes are protected by copyright as literary works. The [Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property](#) (92/100/EEC, 19.11.1992) establishes exclusive rental and lending rights for all works and all matter protected by copyright. It addressed video rental stores that were popular at the time, but potentially also online VoD services which could be considered a form of remote video rental. The SatCab or [Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission](#) (93/83/EEC, 27.09.1993) has been discussed already (→ 3.2.1 SatCab). The [Directive on the term of protection of copyright and certain related rights](#) (93/98/EEC, 29.10.1993) carried out a total harmonization of the terms of protection at 70 years after the death of the author for copyright and at 50 years after first publication for related rights. The [Directive on the legal protection of databases](#) (96/9/EC, 11.03.1996) has already been discussed (→ 4.1.1 EEC).

After the 1988 Green Paper and in the wake of the 1994 Bangemann Report the next [Green Paper on copyright and related rights in the Information Society](#) (COM/95/382, 19.07.1995) focussed on the digital environment and the “special nature of digital technology, which allows a large volume of data to be transmitted and copied with far greater ease than was possible in the traditional analogue environment” (p. 3) and provides multimedia products, which combine data, pictures (still or animated), text, music and software (p. 19). In the Community, it points to the four existing copyright directives and the fifth one on the protection of databases which was about to be concluded and which the Paper expected to put the Community ‘ahead of its commercial partners’. It also pointed to studies conducted in several European MS on the emerging issues.

On the international level, the Paper noted similar activities in Japan, the USA, Canada and Australia. At WIPO, it had been decided in October 1989 to work on a new instrument that would adapt the Berne Convention to new technical developments since the 1979 Paris Act. UNESCO and OECD had also started to examine the new technological and legal problems. In the World Trade Organization (WTO), the [TRIPs Agreement on Trade-related Aspects of Intellectual Property Rights](#) had been adopted in April 1994. The Green Paper notes that Article 9 of the TRIPs Agreement obliges Members to comply with the Berne Convention, with the exception of Article 6 bis concerning moral rights. Article 14 of TRIPs provides protection for performers, phonogram producers and broadcasting organisations. It also stipulates that computer programmes are to be protected as literary works and that compilations of data, which by reason of the selection or arrangement of their contents constitute intellectual creations, are to be protected as such.

The Green Paper concluded by highlighting nine areas that should be given priority, including applicable law, exhaustion of rights and parallel imports, communication to the public,



particularly in the digital forms of dissemination and broadcasting, and technical systems for identification and protection of works.

The EP in its [Resolution on the Green Paper on copyright and related rights in the information society](#) (A4-0255/96, 19.09.1996) emphasised that the right to communicate to the public in the digital context should be clearly delimited in scope, 'which is much more extensive than in the traditional context'. It called on the Council and the Commission, in parallel with the work in progress within the Council of Europe, to work towards the conclusion of a multilateral agreement to combat piracy. It stressed that technical systems will facilitate the normal exploitation of digital works and encouraged public research into their development and standardisation. Finally, it deplored the fact that the decision-making procedure had still not resumed on the directive on private copying, which the EP considered indispensable to harmonise the rules including levies, and which, in fact, still does not exist today.

The multilateral agreement came in the form of the [WIPO Internet Treaties](#), which were adopted after seven years of work in December 1996. These are the [WIPO Copyright Treaty](#) (WCT) and the [WIPO Performances and Phonograms Treaty](#) (WPPT). They clarify that existing rights and exceptions under Berne continue to apply in the digital environment. They also create new online rights. It was found that placing a copy of a copyright protected work on a web server so that members of the public can access it on demand whenever they wish, is clearly a copyright relevant act but it did not fit any of the existing protected uses, such as reproduction, distribution or broadcasting. The solution was an extension of the right of communication to the public which came to include "the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them" (Art 8 WCT).

The belief of the time was that digital technology that caused the problems of controlling copyright works should also provide the solution. Digital Rights Management (DRM) puts the work into a cryptographic capsule that can only be opened in a technical environment on the user's computer that enforces the conditions set by the rightsholders. A DRM system, for example, prevents that a piece of music is stored in unencrypted form or it might allow to make a copy that is again encrypted and cannot be copied further (for a comprehensive DRM vision see Stefik 1996; for a critique see Grassmuck 2008).

Yet, these digital restrictions systems were regularly hacked. Since they cannot protect themselves technically, they came to be protected by law. The WIPO Treaties stipulate that "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights" (Art 11 WCT).

DRM systems are based on information which identifies the work, its creators, performer or owner and the terms and conditions for its use. In a second technological adjunct to the actual copyrights the Treaties therefore require to "provide adequate and effective legal remedies against any attempt to remove or alter any electronic rights management information

without authority or to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered” (Art 12 WCT).

The first case where Community law protected protection technology was the [Directive on the legal protection of services based on, or consisting of, conditional access](#) (98/84/EC, 20.11.1998). This refers to scrambling and encryption systems for controlling access to satellite or cable broadcasts, requires MS to prohibit illicit devices and services to circumvent such systems (Art 4) and was still unrelated to the WIPO Internet Treaties.

At the same time, in particular the music industry felt most dramatically affected by digitalisation. The containers for music had shifted from Vinyl record to CD to MP3 files. The MP3 audio compression format had been introduced in 1991. It made the transmission of high-quality music over the Internet possible. MP3 players became very popular. In 1999, Napster was launched, allowing millions of participants to share their entire music libraries with each other.

#### **4.3.1 InfoSoc Directive (2001)**

The objectives of the new copyright directive were to implement the WIPO Internet Treaties, which the Community and a majority of MS had already signed and were in the process of making arrangements for the ratification (Rec. 15), and to harmonise three central copyrights and neighbouring rights and the entire list of permissible exceptions. It does not harmonise the full scope of copyright. Issues such as moral rights or collective management are not addressed, neither are the term of protection or rental rights which are already dealt with by the existing copyright directives. Nor does it address questions of liability. That was the objective of the E-Commerce Directive which was created at the same time. As a horizontal instrument applicable to any kind of intermediary service and products and services including copyright, it complements the copyright directive and was intended to come into force at the same time.

The legislative procedure began with the Commission Proposal in April 1998 and resulted in the [Directive on the harmonisation of certain aspects of copyright and related rights in the information society \(InfoSoc Directive\)](#) (2001/29/EC, 22.05.2001). The Single Market argument for harmonising MS's laws is the same as in all legal acts we have discussed: Realising the four freedoms requires a harmonised framework so that the transborder movement of copyright goods and services are not hindered by barriers. Legal certainty and a high level of protection of intellectual property will foster substantial investment in creativity, which increases competitiveness and creates jobs. New developments in media technology raise new challenges. MS meet them with national legislative initiatives which leads to fragmentation of the internal market and legislative inconsistency (Recs. 1-6).

The directive provides for three exclusive rights to authorise or prohibit. The first is the reproduction right for authors of their works and for performers, phonogram producers, film producers and broadcasting organisations of the fixations of their efforts (Art 2).

The second is the right of communication to the public of works which accrues to authors and the four categories of neighbouring rightsholders mentioned in the reproduction right. This should be understood in a broad sense covering all communication to the public not present at the place where the communication originates (Rec. 23), primarily broadcasting. The Directive adds to it the new making available right introduced by the WIPO Internet Treaties in its original wording: the right of “making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them” (Art 3).

The third one is the distribution right only of authors to authorise or prohibit any form of distribution to the public by sale or otherwise of the original of their work or of copies of it incorporated in a tangible article (Art 4(1)). This right is exhausted by the first authorised sale in the Community (Art 4(2)), meaning that a rightsholder afterwards no longer has the right to control resale of that object in the Community (Rec. 28) and shops for second hand books or CDs are legal. The recitals point out that exhaustion does not arise in the case of services and on-line services in particular. Therefore, a copy made from a video from a rental store, a CD burnt from a downloaded music album or a book printed from a download may not be resold (Rec. 29).

These rights are followed by an exhaustive enumeration of exceptions and limitations which MS may introduce or keep if they have them already. It starts with a single mandatory exception for transient reproductions as part of a technological process of a transmission (Art 5(1)), e.g. caching.

The exceptions to the reproduction right include photocopying, of which sheet music is expressly excluded, and private copying (reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial), both of which require compensation, unless DRM is applied, certain copies made by public libraries, educational establishments, museums or archives and reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, again on condition of compensation to rightsholders (Art 5(2)).

Exceptions to both reproduction and the right of communication to the public include the non-commercial purpose of illustration for teaching or scientific research, uses for the benefit of people with a disability, such as copies for making a text available to a Braille reader, reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and use of works in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated,

quotations for purposes such as criticism or review, use of political speeches as well as extracts of public lectures or similar works, use for the purpose of caricature, parody or pastiche and communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of libraries, educational establishments, museums or archives of works contained in their collections and not subject to purchase or licensing terms. All of these are permitted to the extent required by the specific purpose and not subject to compensation (Art 5(3)). Finally, for good measure, Berne three-step test is literally added at the end: all these exceptions shall only be applied “in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder” (Art 5(5)).

The third element of the Directive are the WIPO Internet Treaty provisions on the protection of technological measures (Art 6) and of rights information (Art 7). The application of DRM not only prevents infringements but also the exercise of legal uses under exceptions. Therefore, the Directive provides that, if rightsholders have not taken voluntary measures to do so, MS shall take measures to ensure that rightsholders make available to the beneficiary of an exception the means of benefiting from that exception (Art 6(4)). Nevertheless, at this point in the debate it was unclear whether an exception is only a privilege that a rightsholder can contractually or technically disable or a right that a beneficiary can enforce in court. This is a question that only the revision of the InfoSoc Directive in 2019 will answer.

In the wake of the InfoSoc Directive, the European copyright acquis was consolidated and grew in specific areas before the next major overhaul started in 2015. This includes the [Directive on the enforcement of intellectual property rights \(IPRED\)](#) (2004/48/EC, 29.04.2004, corrected on 02.06.2004).

The [Directive on certain permitted uses of orphan works](#) (2012/28/EU, 25.10.2012) created an exception for ‘orphan works’, defined as works which are protected by copyright or related rights and for which no rightsholder can be identified or even if identified, cannot be located. The Directive requires a ‘diligent search’ for such rightsholders and, if unsuccessful, permits publicly accessible libraries, educational establishments, museums, archives, film or audio heritage institutions and public-service broadcasting organisations in respect of works in their collections to make them available to the public and to reproduce them for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

In the international arena, two new WIPO-administered treaties were agreed. The first, the [Beijing Treaty on Audiovisual Performances](#) (24.06.2012) updated the 1961 Rome Convention on neighbouring rights and addresses the longstanding need to extend the economic and moral rights of actors and performers in audiovisual performances including films, videos and television programmes. The Treaty grants performers different kinds of economic rights for their performances fixed in audiovisual fixations, such as motion pictures. The Treaty has been [signed](#) by all EU MS and the EU, but not yet ratified. In February 2021,

a [parliamentary question](#) to the Commission asked when it will proceed to the procedures needed for ratification by the EU. The [answer](#) by Commissioner Breton in May 2021 stated that the Commission is committed to launching this process during the current mandate.

The second WIPO instrument is the [Marrakesh Treaty on Visually Impaired Persons](#) (27.06.2013). It creates another exception which permits the production and international transfer of specially-adapted books for people with blindness or visual impairments. It was signed by all EU MS and ratified by the EU in October 2018, after implementing it by the [Directive on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC](#) (2017/1564/EU, 13.09.2017).

Back in the EU, the [Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market](#) (2014/26/EU, 26.02.2014) addressed the proper functioning of collective rights management organisations (CMOs) and enabled them to issue multi-territorial licences for authors' rights in musical works for online use. The need to improve the functioning of CMOs had already been identified in the Commission [Recommendation on collective cross-border management of copyright and related rights for legitimate online music services](#) (2005/737/EC, 18.05.2005). It set out a number of principles, such as the freedom of rightsholders to choose their CMO, equal treatment of categories of rightsholders and equitable distribution of royalties. It called on CMOs to provide users of the rights they represent with sufficient information on tariffs and repertoire in advance of negotiations. It also contained recommendations on accountability, rightsholder representation in the decision-making bodies of CMOs and dispute resolution. "However, the Recommendation has been unevenly followed" (Rec. 6). Therefore, further coordination by means of this Directive became necessary. It led to the creation of pan-European organisations of national music CMOs, including [ICE](#), [SOLAR](#) and [ARESA](#), which issue multi-territorial licenses to services such as Spotify and Google Music.

Europeans increasingly subscribed to online content service and became more mobile. When travelling in Europe, they often found that services to which they had access in their home country were not available due to copyright reasons. The [Regulation on cross-border portability of online content services in the internal market](#) (2017/1128/EU, 14.06.2017) removed these obstacles to free movement. It requires providers of content services to give their providers access anywhere in the Single Market without any additional charges (Art 3). The Regulation declares contractual provisions to the contrary unenforceable (Art 7).

Finally in the copyright acquis, the latest revision of the [SatCab Directive](#) (2019/789, 17.04.2019; → 3.2.2 Online SatCab) was negotiated in parallel to the DSM Directive.

The review of the InfoSoc Directive was preceded by a number of evaluations and reports, including the [Commission Report on the application of InfoSoc Directive](#) (SEC(2007) 1556, 30.11.2007), the [Communication on Copyright in the Knowledge Economy](#) (COM(2009) 532 final, 19.10.2009), the [Communication on a Single Market for Intellectual Property Rights](#)

(COM(2011) 287 final, 24.05.2011), a [public consultation on the review of the EU copyright rules](#) in 2013 and an external [Study on the application of the InfoSoc Directive](#) in 2013.

### 4.3.2 Copyright: DSM Directive (2019)

The review of the InfoSoc Directive of 2001 started at the end of 2014. Julia Reda, MEP for the Pirate Party, was rapporteur on the review for the EP's Committee on Legal Affairs (JURI). In her [Draft Report on the implementation of Directive 2001/29/EC](#) (2014/2256(INI), 15.01.2015) she presented some far-reaching proposals. These included a single European Copyright Title, making all exceptions and limitations permitted in the InfoSoc Directive mandatory in all Member States, considering an exception for transformative uses like the one for non-commercial 'user-generated content' in [Sec. 29.21 of the Canadian Copyright Act](#), introducing an open fair-use exception and expressly extending the quotation exception to include audiovisual works. On the last point, the Reda Report argued that "for exceptions to fulfil their purpose of protecting the freedom of expression and of information in the digital environment, they must not be limited to the written word". It therefore urged the European legislator to expressly include audiovisual quotations in its scope and generally phrase copyright exceptions in a more technology-neutral and future-proof way to accommodate possible new forms of cultural expression.

When the EP adopted the amended JURI Report in its [Resolution on the implementation of Directive 2001/29/EC](#) (A8-0209/2015, 09.07.2015), all that remained is a paragraph (60) hinting at the problem ('user-generated content') and the solution (copyright levies).

JURI had also requested from the European Parliament Research Service (EPRS) an ex post impact study on the InfoSoc Directive. This [Review of the EU copyright framework. European Implementation Assessment](#) (October 2015) found that the InfoSoc Directive "has not been effective or efficient overall for the industry or for users and needs modernising urgently in light of the digital transformation which has occurred since 2001" (p. 14). A range of major gaps emerged from the EPRS' analysis, including the absence of clarity as regards the compatibility of the InfoSoc Directive with the E-Commerce Directive, uncertainty as regards the responsibility of online intermediaries, absence of clear rules on geo-blocking practices, lack of flexibility and adaptability to new uses, such as mass digitisation and text and data mining and the lack of clarity on the implementation of specific exceptions, e.g. the exception covering parody, caricature and pastiche (p. I-183).

However, the debate came to be dominated by a different gap, the so-called 'value gap'. This rhetorical device had been coined by the music industry. Hosting services such as Youtube are covered by a safe harbour and have to act only upon notice to remove the content of their users. Some of them offer voluntary revenue sharing through systems like Content ID,



but that earns the music industry even less money than from streaming services like Spotify. The 'value gap' then is supposedly between the added value for the platform by music uploaded by its users and the income it generates for the rightsholders (Husovec 2016). The objective of the music industry therefore was to abolish the safe harbour and be able to sue, not individual uploaders, which is much too cumbersome, but platforms for the uploads of their users.<sup>38</sup>

The legislative procedure started with the [Proposal for a Directive on copyright in the Digital Single Market](#) (COM/2016/0593 final, 14.09.2016), accompanied by an [Impact Assessment on the modernisation of the EU copyright rules](#) and it ended with the adopted [Directive on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC \(DSMD\)](#) (2019/790/EU, 17.04.2019). The DSMD does not replace the InfoSoc Directive, but only amends it in three places (Art 24) and fills the 'gaps' left by the copyright framework by covering a range of issues, some of which were highly controversial. Its objectives include to further harmonise copyright law in the Internal Market and to increase lawful cross-border access to content in the Union. It makes a number of the exceptions, which are optional under Articles 5(2) and (3) of the InfoSoc Directive, mandatory and introduces new ones. It facilitates licensing, in particular by collective management organisations (CMO), and it increases the pressure to establish a comprehensive automated content identification and control infrastructure wherever on the Internet users can upload content.

'Text and data mining' is defined as automated analytical technique aimed at analysing text, sound, images and data in digital form in order to generate information such as patterns, trends and correlations (Art 2(2)). Such processing of Big Data is also relevant for training AI algorithms. It can involve reproductions, the extraction of contents from a database or transformations when the data are normalised, protected acts that would require authorisation from rightsholders. While existing exceptions may apply, these are not harmonised. Legal uncertainty, the text argues would risk that the Union's competitive position as a research area would suffer (Recs. 8-18). The DSMD therefore provides for a second mandatory exception in two versions, one for the purposes of scientific research by research organisations and cultural heritage institutions (Art 3) and another one not limited to scientific purpose and organisation (Art 4).

The DSMD also makes the educational exception mandatory in order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching on the premises of an educational establishment, or through a secure electronic environment accessible only by the educational establishment's students and teaching staff.

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<sup>38</sup> An [early draft of the Proposal](#) for the Directive shows that the Commission had appropriated the industry rhetoric in its own thinking.

The exception for orphan works in the 2012 Directive gets complemented by a provision for 'out-of-commerce works'. These are defined as still protected by copyright, but "not available to the public through customary channels of commerce" (Art 8(5)).

The legal framework for VoD services is provided by the AVMSD. However, the DSMD notes, "the availability of such works, in particular European works, on video-on-demand services remains limited. Agreements on the online exploitation of such works can be difficult to conclude due to issues related to the licensing of rights. Such issues could, for instance, arise when the holder of the rights for a given territory has a low economic incentive to exploit a work online and does not license or holds back the online rights, which can lead to audiovisual works being unavailable on video-on-demand services. Other issues could relate to windows of exploitation." (Rec. 51). To facilitate such licensing, the DSMD therefore requires MS to provide for a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body or of mediators (Art 13).

Authors and performers are regularly in the weaker bargaining position vis-a-vis exploiters. To strengthen their position, the DSMD mandates that, when they license or transfer their exclusive rights for exploitation, they are entitled to receive 'appropriate and proportionate remuneration' (Art 18). This might seem like a fundamental right at the very basis of all of copyright law. Yet, it has been codified for the first time in the German copyright reform of 2002 ([§ 32 Urheberrechtsgesetz](#)) and is here introduced in a weakened form into EU law. It includes the duty of publishers and other exploiters to regularly inform authors about the uses of their works and the revenues generated (Art 19), and the right of authors to adjust their contract, if the agreed remuneration turns out to be disproportionately low compared to the actual revenues derived from the exploitation (Art 20) and to revoke the contract if no exploitation takes place (Art 22).

One of the most contentious articles of the DSMD is entitled "Protection of press publications concerning online uses" (Art 15). It could also be called a 'Lex Google News'. In the news section of its search engine, Google showed snippets and links as results for a search word. Google argued that the few displayed words cannot replace an entire article and that it was providing a free service to newspapers by letting its users find their articles and sending them to the publishers' websites. Publishers argued that Google was diminishing their business opportunities while unfairly profiting from their work, even though no ads were shown on Google News. Publishers then lobbied successfully for legislation, first in Germany ([§ 87f-k Urheberrechtsgesetz](#)) and then in Spain, introducing a new ancillary right of press publishers on top of the copyrights which their journalists have transferred or licenced to them. Their hope was that, by being rightsholders in their own right, they could convince or sue Google and similar platforms into paying them licence fees for displaying search results for their articles. Instead, Google both in Germany and in Spain dropped publishers from their search who were demanding payments. Publishers then lobbied the EU legislative and again succeeded. The DSMD introduces the neighbouring right for news publishers and news agencies in all MS, enforceable against information society service providers, but not against individuals making

non-commercial uses of press publications, neither against journalists reusing their own articles. Authors shall receive an appropriate share of the revenues that press publishers generate from this right. The right does not apply to acts of hyperlinking, neither to quotations or parodies, nor to the use of individual words or very short extracts of a press publication. It expires two years after first publication (Art 15). The European Copyright Society, an association of eminent law scholars, in one of its statements during the legislative process concluded: “As indicated by its precedents in Germany and Spain, such a rule is also unlikely to achieve its intended purpose., i.e. actually to support the ailing newspaper industry.” (ECS 2017: 6)

Publishers also pushed for another article that is even more contentious but received little attention in the public debate. The InfoSoc Directive knows three kinds of exploiters which hold neighbouring reproduction rights: phonogram producers, film producers and broadcasting organisations (Art 3(2) InfoSoc Directive). These participate in the collectively managed compensations for the use of exceptions. Print publishers are not among them. Yet, conventionally in some MS the CMO for textual works distributed up to half of the revenues collected on exceptions to publishers rather than to authors. The CJEU had ruled in November 2015 that MS must ensure that the full amount of the compensation for photocopying and private copying (the exceptions to the reproduction right under Art 5(2)(a) and (b) InfoSoc Directive) is paid to authors. Paying parts of it to publishers is not permissible ([C-572/13, Hewlett-Packard Belgium v Reprobel](#)). The DSM Directive, instead of confirming the Court’s Judgment and ensuring that MS correct the illegal practice of CMOs where it exists, actually reverses the CJEU’s Reprobel decision by declaring that “Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right.” (Art 16)

Article 17 was the single provision of the DSM Directive that caused the largest controversy, including the broadest protest movement against any EU legal act ever, with more than 170,000 people taking to the streets across Europe during the final phase of negotiations in spring of 2019 ([Netzpolitik.org 23.03.2019](#)). It introduces another new category of platform: online content-sharing service providers (OCSSP).

“Sharing” is actually not a use known in copyright. It refers to a reproduction for the purpose of communication to the public by live-streaming, which under certain conditions can be considered broadcasting, or by making available on demand. The concept of “video-sharing services” was introduced in the 2018 AVMSD (→ 3.1.9 AVMSD). The DSM Directive now generalizes it to “content-sharing services”. Recital 62 explains:

*“The services covered by this Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it.” (Rec. 62)*

It distinguishes platforms such as Youtube and Facebook, to which users – individuals, professional influencers and media companies alike – upload content, from VoD services, which offer licensed content, such as Netflix and Spotify. It also only addresses services “that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences” (ibid.). Stressing that these services organise and promote the content they hold serves to distinguish them from the supposedly passive hosting services which the ECD exempts from liability.

That is indeed the primary purpose of Article 17: to abolish the limitation of liability established in Article 14(1) of the ECD for OCSSPs (Art 17(3)). The DSMD decrees that from now on these platforms are deemed to perform the act of communication to the public when they give the public access to works uploaded by their users. Whereas before, users were liable for their uploads and hosting platforms only had to reply to notices, OCSSPs are now deemed to be doing the deeds of their users, and they “shall therefore obtain an authorisation from the rightholders” (Art 17(1)).

To facilitate such authorisation, “for instance by concluding a licensing agreement” (Art. 17(2)), is the second purpose of Article 17. This is what the music industry wanted, which even before the DSMD had concluded agreements with e.g. Google in order to be remunerate for user uploads through Google’s Content ID system, only that now it is in a much stronger bargaining position. In contrast, other branches of the creative industry, in particular the film industry, are not willing to allow user uploads of their works at all, let alone blanket license entire catalogues.<sup>39</sup> When an OCSSP does get a licence, this shall also cover acts carried out by its users “when they are not acting on a commercial basis or where their activity does not generate significant revenues” (ibid.).

Making platforms responsible for acts of their users of which they have no ex ante knowledge or control creates a high risk for them and the structural pressure to over-remove, e.g. anything that looks like a movie, and deal with complaints later, rather than under-remove and be sued. To alleviate this effect, it became apparent during the legislative negotiations that the abolished safe harbour from the ECD would have to be replaced by something similar. Therefore, Article 17 provides that if no authorisation is granted, platforms have to fulfil three cumulative requirements in order to escape liability: 1.) They must demonstrate that they have made best efforts to obtain an authorisation, 2.) ensure the unavailability of specific previously

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<sup>39</sup> This is why a coalition of rightholders from the audiovisual and sports sectors ([01.12.2018](#)) urged EU lawmakers, that if what they call the “Value Gap” provision, i.e. Article 17, includes a new liability privilege for platforms that have taken specific measures, they should disapply Article 17 to their respective sectors, i.e. audiovisual and sports, and make it specific to musical works and phonograms, as was the case in Title III of the CMO Directive of 2014. Shortly after ([15.01.2019](#)), a similar coalition called for a suspension of negotiations on the Article altogether and urged to wait for the decision of the CJEU in the request for a preliminary ruling from the German Bundesgerichtshof in *Rightholders v. YouTube/Google* lodged on 6 November 2018 ([C-682/18 Google e.a.](#)).

notified works and 3.) expeditiously take down works upon notice and ensure their future unavailability as well (Art 17(4)).

The apparent solution to one problem creates a range of new problems. The DSMD maintains from the ECD that “the application of this Article shall not lead to any general monitoring obligation (Art 17(8)). Yet requiring that notified identifiable works are not uploaded and stay down, platforms have no choice but to deploy automated upload filters. Alternatives, like a qualified human review, are not feasible against a tide of 500 hours of video uploaded every minute on Youtube alone. One could argue that filtering by hashes of notified copyright works constitutes specific, rather than general monitoring. But this would be splitting hair, because in order to find the needles, platforms do have to search through the entire haystack.

Also, the requirement to demonstrate best efforts to license can only be understood to mean that an OCSSP has to actively monitor all uploads for content for which it has neither a license nor staydown information. When it finds such content, it has to decide whether an authorisation is needed and if so, make and document best efforts to identify and contact its rightsholders in order to obtain a licence. In consequence, platforms will have to monitor one hundred percent of user uploads.

A similar double bind of at the same time prohibiting and mandating general monitoring appears in respect to exceptions. Article 17(7) says that this Article shall not result in the prevention of the availability of works uploaded by users, which do not infringe copyright and related rights, including where such uses are covered by an exception or limitation. It continues even stronger by providing that MS shall ensure that users in each MS are able to rely on the exceptions for quotation, criticism, review and use for the purpose of caricature, parody or pastiche (Arts 5(d) and (k) InfoSoc Directive.). This actually makes these two exceptions mandatory (Rec. 70), at the very least in the context of OCSSPs. And even further, Article 17(9) provides that users must have access to a court to assert the use of an exception. This puts an end to the contested idea that exceptions might only be permissions and makes them enforceable rights. These user rights get strengthened ex post, but weakened ex ante. Exceptions are the most problematic for automated systems to detect and assess. Given that courts sometimes take years to decide whether a given use was a permissible quotation or parody, it is no surprise that upload filters systematically fail on this task. And it is again the negligible risk of being sued by individual users versus the much higher risk of being sued by a record label or a film studio that will lead OCSSPs to set their filters to err on the side of caution. The new liability regime creates structural pressure to over-remove and deal with complaints later rather than under-remove and be sued.

Before having to go to court, users who feel their uploads have unjustly been removed are given access to a complaint and redress mechanism to be provided by the OCSSP. A complaint shall be processed without undue delay and be subject to human review. In case this internal mechanism fails to resolve the conflict, MS must ensure that users can access an independent out-of-court dispute resolution mechanism (Art 17(9)).

In the final paragraph of Article 17, the EU legislative admits defeat in its struggle to create legal certainty as to the new liability regime for OCSSPs. It provides that after adoption of the Directive, Commission and MS shall conduct stakeholder dialogues in order to find out what the new regime might mean in practice, after which the Commission will issue guidance on its application (Art. 17(10)).

The Commission Proposal for the DSM Directive underwent significant amendments in Parliament and Council (for a list of the documents see the [Austrian Parliament's database](#)). In first reading, the Council had agreed its [position on 25.05.2018](#), Parliament its [position on 12.09.2018](#) and trilogue negotiations started in October 2018. This led to an acceleration of activities, because in particular positions on Article 17 still diverged with France and Germany as the main contenders, and not the least because the European election was coming up in May 2019, and MEPs wanted to avoid having to deal with this high-profile file during the election, let alone dragging it on into the next legislative period. It seems that a last minute compromise between Germany and France on their different priorities cleared the way. Representatives of the Netherlands, Poland, Italy and Finland still voiced their dissent in a [joint statement](#) (20.02.2019), arguing that the final text of the Directive is a step back for the Digital Single Market, it fails to strike the right balance between the protection of rightsholders and the interests of EU citizens and companies, it lacks legal clarity and may encroach upon EU citizens' rights.

The proposal was adopted by the EP in the [final vote](#) on 26 March 2019 with 348 MEPs in favour, 274 against and 36 abstentions. In the [final vote in Council](#) (15.04.2019), 19 MS, representing 71% of the European population, voted in favour, 6 MS (26%) voted against and 3 abstained.

[Stakeholder dialogue on copyright](#) took place from October 2019 till February 2020. The six meetings produced a rich pool of expertise from different sectors of the creative industries, platforms, technology providers and civil society, which together with the video recordings of the meetings can be accessed from the Commission webpage. Five months later but only one month before the transmission deadline, the Commission published its [Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market](#) (COM(2021) 288 final, 04.06.2021). It stressed that implementations must contain provisions to ensure that lawful content is not blocked. Where MS have already adopted laws that lack such provisions, the Commission made it very clear, that these must be revised. This was addressed in particular to France and the Netherlands which both had proposed to transpose Article 17 literally but omitting precisely the safeguards for lawful content.

France, like other MS, is splitting the implementation of the DSMD into different legal acts. In October 2019 it implemented the new ancillary press publishers' right contained in Article 15. Google had announced that it would not pay publishers in France, but instead limit search results to hyperlinks and "very short extracts" of press articles which are not covered by the new right ([Politico.eu 25.09.2019](#)).



The DSMD had to be transposed into MS's national copyright laws until 7 June 2021. Only three Member States have met this deadline: the Netherlands, Hungary and Germany. One month later, the Commission opened infringement procedures for being late in fully implementing the DSMD against 23 MS (Austria, Belgium, Bulgaria, Cyprus, Czechia, Denmark, Estonia, Greece, Spain, Finland, France, Croatia, Ireland, Italy, Lithuania, Luxembourg, Latvia, Poland, Portugal, Romania, Sweden, Slovenia and Slovakia) as well as for not having implemented the SatCab Directive (2019/789) (against the same group of countries, except Denmark) by sending letters of formal notice ([press release, 26.07.2021](#)). MS afterwards had two months to respond to the letters and take the necessary measures. Otherwise, the Commission may decide to issue reasoned opinions.

At the beginning of 2022, the state of transposition in the nine EU EUMEPLAT countries was as follows:

**Belgium:** The [Communia page](#) shows a [preliminary draft law](#) agreed by the Belgian Council of Ministers on 4 June 2021 as latest step. Most of the provisions will be transposed into Book XVII of the Belgian Code of Economic Law, but some provisions (relating to the procedure) will be transposed into the Belgian Judicial Code ([CREATE](#)).

**Bulgaria:** According to the [Communia tracker](#), as latest step the Bulgarian Government published a consolidated text of its [law proposal](#) on its consultations portal on 15 September 2021, consisting of three documents concerning articles 8-12 (no 2), 13-17 (no 3) and 18-23 (no 4) ([CREATE](#)).

**Czechia:** The [Commission site](#) lists seven laws, into which the DSMD had been transposed, including the copyright law, civil law and data protection law ([Commission](#), [CREATE](#), [Communia](#)).

**Germany:** The [Act to adapt copyright law to the requirements of the Digital Single Market](#) was promulgated on 31.05.2021. It amends the Copyright Act and the CMO Act and it creates the new [Act on the Copyright Liability of Online Content Sharing Service Providers](#) (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG, 31.05.2021) for implementing Article 17 ([Commission](#), [CREATE](#), [Communia](#)).

**Greece:** A public consultation on the implementation of DSM and the CabSat Directives was held in April 2020. On 12 May 2021 the Ministry of Culture and Sports established a Working Group for the implementation of both Directives ([CREATE](#), [Communia](#)).

**Italy:** The Decree implementing the DSMD Directive [is published in the Official Gazette](#) on 27 November 2021 ([Commission](#), [CREATE](#), [Communia](#)).

**Portugal:** The Ministry of Culture prepared a [law proposal](#) that was approved by the Council of Ministers on 23.09.2021. A public consultation on it was opened on 22.10.2021 ([CREATE](#), [Communia](#)).

**Spain:** The Spanish government approved a [Royal Decree](#) ('Real Decreto Legislativo') transposing the DSMD on 03.11.2012, which was corrected on 25.11.2021 and [approved](#) by Parliament on 11.12.2021 ([Commission](#), [CREATe](#), [Communia](#)).

**Sweden:** The Ministry of Justice published its a [memorandum on Copyright in the Digital Single Market](#) (Ds 2021:30) with proposals on how to implement the articles in Swedish legislation on 08.10.2021 ([CREATe](#), [Communia](#)).

### 4.3.3 Summary

Copyright law over time has developed into an intricate fabric of rights in the economic interest and exceptions in the public interest. Legislation always has to strike a balance between exclusion and access, as copyright rules over both sides of the dilemma of media as merit goods and as market goods.

In the audiovisual age, copyright involved only professional, commercial and institutional actors like authors and performers, publishers and broadcasters, film producers and collecting societies. Individual citizens came only onto the scene with private copying devices. And even then, a collective management solution was found that left most users unaware that there was even a problem.

The Internet changed the situation fundamentally. It allowed individuals on Napster or the Pirate Bay to do what before was reserved to global distribution conglomerates. As for regulation, just as in telecommunications the initiative is on the industry's side with public policy in support, e.g. by protecting DRM against circumvention. At the same time, the legislator is struggling to protect fundamental rights, most of all the freedom of speech and information against the industry's technical measures.

The most recent step in this evolution, the DSMD, is a large and complex mix of diverse rules. Some of them serve to open the law to new affordances of the platform age such as text and datamining and forms of access such as to out-of-commerce works. On the other hand, it pitted individuals who want to make use of their right of quotation in order to comment on current affairs against industry giants such as Springer who want to control and monetize the use of even the smallest snippet of their 'intellectual property'. It both strengthened and weakened the position of authors and performers. Its most far-reaching effect, without doubt, is to cement the development of a comprehensive infrastructure of automated content identification and control that is profoundly changing the digital public sphere.

## 4.4 Platform to Business Regulation (2019)

Platforms such as social networks and search engines generate and direct the attention of millions of users. Even without providing outright market places, they facilitate and impact

commerce. They have brought forth their own forms of celebrity, e.g. by enabling the novel figure of the influencer to emerge. But also the stars of the rock and pop age as well as politicians found that they have to be on social media to reach their fans or voters. Media companies as well, including PSM, realised that if they want to continue to inform, entertain and educate young generations, they have to reach out to them on social media. Yet, when media providers started to put content onto Youtube, Facebook etc., they found themselves on difficult, unpredictable terrain. These platforms might look like public spaces, but in fact are privately operated and, like shopping malls, enact and enforce their respective house rules. Media services and other commercial users which invest in their presence on a platform, become dependent on single platform providers and subject to their decisions on technical features and terms and conditions. These regularly change at short notice or, in case of algorithms, without any public notice at all. Media, in particular PSM, might find it difficult to comply with their obligations under the new conditions, or they might be faced with copyright or data protection issues, e.g. when Instagram was taken over by Facebook. Criteria for ranking in search and in recommendations are intransparent. An entire sector of search engine optimisation services attempts to divine how after every change to the algorithms their customers' websites need to be tweaked in order to improve their ranking. When there are disputes with an intermediary, business users find that they have limited possibilities to seek redress and they might even fear retaliation.

Complaints and lawsuits arising from this situation led the European legislative to address it with a Regulation. The objective is to ensure the transparency of, and trust in, the platform economy by businesses and indirectly also by consumers. This is the 'purest' platform regulation, without any preceding EU legal act that it would be amending, with no roots in the analogue era. It does build on a set of commercial and contract law<sup>40</sup> as well as on the data protection acquis (→ 4.5.2 GDPR). Legislation began with a Commission [Communication on Online Platforms and the Digital Single Market](#) (COM(2016) 288, 25.5.2016), a [public consultation](#) in late 2017 and an [impact assessment](#) published on 26 April 2018.

The [Regulation on promoting fairness and transparency for business users of online intermediation services](#) (2019/1150/EU, 20.06.2019) provides for rights and obligations of two sets of actors: on the one side, online intermediation services and online search engines, and on the other business users and corporate website users. Multi-sided intermediaries include e-commerce market places, app stores, social media and voice assistants, where it is irrelevant if the service is provided for monetary payment by the consumer. Not included are pure business-to-business services, including online payment

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<sup>40</sup> Including the EC Merger Regulation (139/2004/EC, 20.01.2004), the Directive on certain aspects of mediation in civil and commercial matters (2008/52/EC, 21.05.2008), the Regulation on the law applicable to contractual obligations (Rome I) (593/2008/EU, 17.06.2008) and the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1215/2012/EU, 12.12.2012).

services, advertising tools and advertising exchanges (Art 1(3)), search engine optimisation or advertising-blocking services, neither are online payment services (Rec. 11).

A 'business user' is defined as a private or legal person who, through online intermediation services offers goods or services to consumers (Art 2(1)), which includes both journalists offering podcasts on Spotify or videos on Youtube and media companies. A 'corporate website user' (Art 2(7)) refers to a private or legal person whose business depends on being found on search engines. Both might or might not have contractual relations with the intermediary. Indirectly also consumers are addressed by the P2B Regulation. A functioning online ecosystem is essential for consumer welfare and trust. A 'healthy competition' increases consumer choice (Recs. 3, 4, 8).

The P2B Regulation follows a by now standard framework for platforms that we have already seen in the horizontal DSA and the DSMD. It consists of ex ante information requirements in the terms and conditions of the platforms. These have to be accessible and in intelligible language. Here, platforms have to notify business users about proposed changes of their terms at least 15 days in advance, and longer if necessary to allow business users to make technical or commercial adaptations to comply with the changes. A business user shall have the right to terminate the contract if it does not agree to the new terms (Art 3).

Both general intermediaries and search engines must explain in their terms and conditions the main parameters determining ranking, so that business users can obtain an adequate understanding of how ranking is influenced by characteristics of the goods and services offered or by design characteristics of the website of a corporate website user, including any possibility to influence ranking by paying direct or indirect remuneration. This does not require platforms to disclose algorithms or any information that, with reasonable certainty, would result in the enabling of deception of consumers or consumer harm through the manipulation of search results (Art 5). Explanations must include any differentiated treatment which a service gives in relation to goods or services, including against direct or indirect remuneration (Art 7).

The framework furthermore provides for ex post remedies: an internal complaint-handling system (Art 11), an external, independent dispute resolution and mediation mechanism (Art 12) and access to regular courts. Here the Regulation sees that SME might have limited financial means or fear of retaliation. It therefore provides that associations representing business users or corporate website users, as well as certain public bodies set up in MS, should be granted the possibility to take action before national courts to stop or prohibit infringements of the rules set out in this Regulation (Art 14).

Along with the P2B Regulation, the [EU Observatory on the Online Platform Economy](#) was set up by a [Commission Decision](#) in April 2018. In February 2021, at the end of its first mandate, the [expert group](#) published its final report. Starting with [introductory remarks](#) by the Chairman of the expert group, it covers [Measurement and Economic Indicators](#) of the online

platform economy, [Differentiated Treatment](#), [Data](#) in the online platform ecosystem, [Platform power](#) as well as a [case study on Market power and transparency in open display advertising](#).

The P2B Regulation entered into force on 31.07.2019 (Art 19(1)) and it became binding in its entirety and directly applicable in all Member States on 12 July 2020 (Art 19(2)).

Its consequences for media services in Europe are profound. Yet, as Dreyer at al. note, it could have served media diversity even more effectively if the EU had a mandate in this area:

*“The specifications of the P2B Regulation extend into an area of media policy which has long been a subject of debate: the question of the transparency of selection and ranking logics for intermediaries, in order to exclude intentional or targeted discrimination against particular content or providers, which could impact negatively on media diversity. In this area, the Regulation introduces – albeit from the perspective of contract law and competition law, and not with regard to the individual’s freedom of information or to media diversity – a provision which could establish the corresponding transparency. All the more notable is the fact that the perspective of media diversity did not play a role of any kind as part of the legislative process.” (Dreyer at al. 2020: 15)*

## 4.5 Data protection

Data protection should have stood at the beginning of the section on digital media law. Computers are data processing machines. With their spread in society, conflicts arose which eventually called for regulatory solutions. Indeed, the first Community data protection directive came in 1995, shortly after the Bangemann Report had heralded the age of the information society. It was even preceded by a Council of Europe convention in 1981. It is therefore safe to assume that data protection was among the first areas of law sparked by the digital revolution. It is discussed here at the end of this section, because it also marks the beginning of a new phase of EU law-making. It was the first major directive that was turned into a regulation, thereby shifting EU policy from coordinating Member State’s law to creating directly applicable EU law. It is also one of the EU law’s most successful export hits, starting from the 1995 directive and even more so in case of the 2016 regulation.

The concept of and eventual right to privacy emerged from its opposite, publicity. When newspapers became commercialised in the 19<sup>th</sup> century and engaged in fierce competition, what came to be known as yellow press in the US or tabloid journalism in the UK used exaggerations, sensationalism, scandal-mongering and gossip from the private lives of persons of more or less public interest to catch the attention of their audiences. Persons started to defend themselves against the invasion of their homes and family. The French Press Law

of 1868<sup>41</sup> for the first time codified the concept. It prohibited reports from private life and provided for fines in case of infringement (Warren/Brandeis 1890: 214).

In Europe, the right to privacy was introduced in the 1950 [European Convention on Human Rights](#) (ECHR), which states, “Everyone has the right to respect for his private and family life, his home and his correspondence.” (Art 8) On this basis, the European Union has sought to ensure the protection of this right through legislation.

The first legally binding international instrument in the data protection field was the [Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#) (CETS No. 108, 28.01.1981). It begins to define the vocabulary and the principles of data protection law to come. The ‘data subject’ is the individual identified or identifiable by ‘personal data’ (Art 2(a)). ‘Automatic processing’ includes storage of data, carrying out of logical and/or arithmetical operations on those data, their alteration, erasure, retrieval or dissemination (Art 2(c)). The ‘controller of the file’ is the natural or legal person, who decides the purpose of the processing, the personal data to be stored and which operations are to be applied to them (Art 2(d)). The scope covers processing in the public and private sectors. The principles include the purpose limitation of data processing and data minimisation (Art 5), the special categories of data which may only be processed with special safeguards in place (personal data revealing racial origin, political opinions or religious or other beliefs, concerning health or sexual life and criminal convictions; Art 6), data security (Art 7) and information rights of the data subject as to the existence of processing, its purposes and controller, whether and if so, which data are stored on him or her, and the right to rectification or erasure if such data have been processed contrary to the provisions of domestic law giving effect to the Convention (Art 8). The Convention opened for signature in January 1981. It was amended in [June 1999](#) and in [November 2001](#).

#### 4.5.1 Data Protection Directive (1995)

The first legal act of the European Community in this field is the [Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data](#) (95/46/EC, 24.10.1995). It closely follows the Convention and adds two actors next to the ‘controller’: the ‘processor’ who processes personal data on behalf of the controller (Art 2(e)) and the ‘recipient’ to whom data are disclosed, whether a third party or not (Art 2(g)). It also adds a new principle, which will be crucial in the further course of data protection: ‘the data subject’s consent’ shall mean any freely given specific and informed indication of his agreement to personal data relating to him being processed (Art 2(h)).

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<sup>41</sup> [Loi Relative à la Presse](#), 11 Mai 1868.



New is a section on criteria for making data processing legitimate. These include the unambiguously given consent of the data subject, the necessity for the performance of a contract, the compliance with a legal obligation or other task carried out in the public interest and the rather vague and wide category of “purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed (Art 7).

MS shall provide for far-reaching exemptions for the processing of personal data carried out for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression (Art 9). Journalism was the reason privacy was invented. At the other end, it is now a reason to diminish privacy in the name of free expression.

The information requirements are strengthened. Where in the Convention any person was enabled to establish the existence of processing, in the Directive it is clearly the obligation of the controller to provide a data subject with information (Art 10, 11), including the right of access to and the right to rectify the data concerning him (Art 12).

Also new is the right of “every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.” (Art 15) In those cases, a decision taken by an algorithm must be subject to human review.

Furthermore, there is a new obligation of controllers to notify the supervisory authority before carrying out any automatic processing operation (Art 18). Operations likely to present specific risks to the rights and freedoms of data subjects must be examined prior to their start by the supervisory authority (Art 20). Notified processing operations must be publicized in a register kept by the supervisory authority (Art 21).

Another rather momentous new provision, adopted from the CoE Convention 108, prohibits the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer, unless the third country in question ensures an adequate level of protection (Art 25). Derogations are permissible if the data subject has given his consent, the transfer is necessary for the performance of a contract, on public interest grounds or to protect the vital interests of the data subject (Art 26(1)). Finally, a MS may authorize a transfer of personal data to a third country which does not ensure an adequate level of protection, where the controller adduces adequate safeguards which may in particular result from appropriate contractual clauses (Art 26(2)).

This Directive was supplemented by the [Directive concerning the processing of personal data and the protection of privacy in the telecommunications sector](#) (97/66/EC, 15.12.1997), which translated the data protection principles into specific rules for the electronic communications sector. These applied to the processing of personal data in connection with the provision of publicly available telecommunications services in public telecommunications networks, the

connection data but not the communicated content. The Directive in particular mentions ISDN and public digital mobile networks. It provided for the confidentiality of communications as well as for the exceptional cases in which listening, tapping, storage or other kinds of interception or surveillance of communications are permissible: national security, defence, public security and the prevention, investigation, detection and prosecution of criminal offences.

Authority for EU data protection regulation was ultimately derived from the ECHR. In addition, the EU's own [Charter of Fundamental Rights of the European Union](#) was proclaimed in December 2000. Two of its articles provide for data protection rules in a nutshell:

*Article 7: Respect for private and family life*

*Everyone has the right to respect for his or her private and family life, home and communications.*

*Article 8: Protection of personal data*

- 1. Everyone has the right to the protection of personal data concerning him or her.*
- 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
- 3. Compliance with these rules shall be subject to control by an independent authority.<sup>42</sup>*

The same year the [Regulation on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data](#) (45/2001/EC, 18.12.2000) was adopted. It specifies the data processing obligations of controllers within the Community institutions, bodies and agencies and established an independent supervisory authority, the European Data Protection Supervisor (EDPS). The EDPS who started his work in January 2004 is responsible for monitoring and ensuring that European institutions respect the right to privacy and data protection when they process personal data and develop new policies. The Regulation was repealed by [Regulation 2018/1725/EU](#) (23.10.2018) and now refers to 'Union institutions' rather than those of the Community.

The Privacy in Telecommunications Directive (97/66/EC) was repealed by the [Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector \(ePrivacy Directive\)](#) (2002/58/EC, 12.07.2002), which in its new form gets an additional name: Directive on privacy and electronic communications or ePrivacy Directive for short. Because of its major addition, it has also been nicknamed 'the Cookie Directive'. It refers to the two articles in the Charter (Rec. 2) as well as to the Internet and new risks for users' personal data and privacy it poses (Rec. 6). It clarifies that the Data Protection Directive (95/46/EC) applies to non-public communications services, whereas the ePrivacy Directive applies to public services on public networks (Rec. 10). Broadcasting services are outside its scope, however, in cases where the individual subscriber

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<sup>42</sup> This is translated into Article 16 [TFEU](#) (2007).

or user can be identified, for example with video-on-demand services, it is covered by this directive (Rec. 16).

This version introduced two new principles. The first declares that terminal equipment of users of electronic communications networks and any information stored on it are part of the private sphere of the users requiring protection under the European Convention. The most notable effect of this Directive was the proliferation of cookie consent pop-ups across the Internet.

The second principle mentioned here for the first time is data retention. The purpose limitation requires that data be deleted when no longer necessary for the given purpose. Yet MS may deviate from this principle and adopt legislative measures necessary to safeguard national security. The ePrivacy Directive specifies that to this end, MS may adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph (Art 15(1)).

This Directive therefore harmonises MS' obligations of the providers of communications services and networks to retain certain data. It applies to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user. It does not apply to the content of electronic communications (Art 1). Only the competent national authorities may access these data (Art 4). The Directive then stipulates the categories of data to be retained on the source (telephone number, name and address of the subscriber or registered user, user ID(s) and the IP address, user ID or telephone number which was allocated at the time of the communication) and on the destination of the communication (same including call forwarding, date and time of the log-in and log-off of the Internet access service, the International Mobile Subscriber Identity (IMSI) of the calling party, the International Mobile Equipment Identity (IMEI), in the case of pre-paid anonymous services, the date and time of the initial activation of the service and the location label (Cell ID) from which the service was activated) (Art 5). These data are to be retained for periods of not less than six months and not more than two years from the date of the communication (Art 6).

The ePrivacy Directive (2002/58/EC) was slated to be replaced by an ePrivacy Regulation which was supposed to be passed in 2018 at the same time as the GDPR came into force. Plans are to simplify the cookie consent provisions in browser settings, to include browser fingerprinting which has come to replace cookies for identifying users, to improve the privacy of metadata and content as well as the protection against spam and to address messenger services such as Whatsapp, Skype and Telegram. The [legislative process](#) is advanced, including an ex-post REFIT evaluation of the Directive, an impact assessment of and a [Commission Proposal for the Regulation](#) (COM(2017) 10 final , 10.01.2017). On 10 February 2021, the Member States agreed on a [mandate for negotiations](#) with the European Parliament and trilogues began on 20 May 2021. However, negotiations have not produced agreement on a number of significant issues and will continue into 2022.

Finally, there was the overhaul of the 1995 Data Protection Directive (95/46/EC) into the General Data Protection Regulation (GDPR).

## 4.5.2 General Data Protection Regulation (2016)

The Commission launched the review of the 1995 [Data Protection Directive](#) (95/46/EC) with a high level conference in May 2009, followed by a public consultation until the end of 2009. A number of studies were also launched. The Commission consulted the Article 29 Working Party. Europol and Eurojust gave their opinions. The Commission, under Justice Commissioner Viviane Reding, summarised its findings in the Communication [A comprehensive approach on personal data protection in the European Union](#) (COM/2010/0609 final, 04.11.2010). After further consultations, the legislative process formally began with the [Commission Proposal](#) (COM/2012/011 final, 25.01.2012).

In the EP, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) was in charge which nominated Jan Philipp Albrecht (Greens, DE) as rapporteur. Under pressure of the upcoming European elections in May 2014, Parliament adopted its [position on the GDPR](#) on 12 March 2014. In the Council, the Working Party on Information Exchange and Data Protection (DAPIX) was in charge of the file. The MS took significantly longer to agree its [negotiation position](#) (6/2016/EU, 08.04.2016)

In the meantime, the CJEU had decided two cases pertinent to the GDPR. In [C-131/12 Google Spain](#) (13.05.2014) the court had introduced the right to be forgotten, based on the 1995 Data Protection Directive. It found that a search engine displaying links to information on a person is 'processing personal data' and the operator is the 'controller' thereof. Because of a person's right to object on compelling legitimate grounds to the processing and demand erasure or blocking of data relating to him, the operator of a search engine is obliged to remove from the list of search results for that person's name links to web pages with information on her, even when its publication on those pages is lawful. The court drew a line, however, where the role of that person in public life justifies the preponderant interest of the general public in having access to the information in question. The CJEU thereby reaffirmed the distinction between private and public sphere that Warren and Brandeis had drawn at the end of the 19<sup>th</sup> century. Since May 2014, Google has been removing URLs from search results displayed in Europe. According to the company's [transparency report](#), at the beginning of 2022 it has received a total 4.8 million removal requests and actually removed 1.2 million URLs.

The second ruling concerned the international transfer of personal data over which Austrian law scholar and activist Max Schrems had sued the Data Protection Commissioner. The Commission had based a decision on the adequacy of the level of protection in the USA on the Safe Harbour Principles and related frequently asked questions issued by the US Department of Commerce in July 2000. In [C-362/14 – Schrems I](#) (06.10.2015), the CJEU found

that insufficient and ruled a supervisory authority must examine the claim of a person who contends that the law and practices in force in the third country do not ensure an adequate level of protection of his rights and freedoms. In June 2013, the revelations of former NSA contractor Edward Snowden had shown that US security agencies have access to essentially all data stored in the US and beyond. In October 2015, the CJEU declared by its ruling that transfers from the EU to the US based on the Safe Harbour Principles are not permissible.

The 1995 Data Protection Directive had not achieved the desired degree of harmonisation in the MS. The Commission therefore proposed to turn it into a directly applicable regulation. Law scholars Hert and Papakonstantinou (2016) find this unprecedented choice of legal instrument one of the most important aspects of the GDPR.

*“Until today [regulations] have been used in niche or in any way restricted fields such as, for instance, competition law, the establishment and management of EU agencies, or the regulation of the EU trademark. In all other fields a Directive, as was the case with the 1995 Directive, was deemed a preferable solution, leaving space for implementation to Member States. ... This inevitably signals an important qualitative change: data protection is no longer perceived as a local phenomenon, to be regulated according to local legislation with an EU Directive only issuing high-level instructions and guidelines. On the opposite, data protection is considered from now on an EU concern, to be regulated directly at EU level in a common manner for all Member States through a Regulation.”* (Hert/Papakonstantinou 2016: 182)

They see this shift from MS level to EU level – introduced by the Commission and upheld against the doubts and hostilities by many MS – as a turning point for EU data protection and potentially for all of EU law, depending on the GDPR’s ultimate success.

The [Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\)](#) (2016/679/EU, 27.04.2016), as a regulation, has to provide more detail than a directive. It comprises 88 pages and 99 articles. This begins by extended the vocabulary from 8 to 26 definitions. These include ‘profiling’, which means “any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements” (Art 4(4)).

‘Pseudonymisation’ is defined as processing of personal data in such a manner that it can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that it cannot be used to identify the data subject (Art 4(5)). Pseudonymised data are within the scope of the GDPR, whereas anonymous data are not (Rec. 26). There is also the ‘personal data breach’ from the ePrivacy Directive (Art 4(12), 34), ‘genetic data’ (Art 4(13)), ‘biometric data’ (Art 4(14)) and ‘data concerning health’ (Art 4(15)).

Individual consent is arguably the most important legal ground for personal data processing. Hert and Papakonstantinou argue that all other possible legal grounds (performance of a contract, legal obligation, vital interests, public interest, overriding interest of the controller) lie more or less outside an individual's sphere of control. Consent requirements are the last defence for individuals against the loss of control. In fact, "the only practical way an individual has in order to become aware that a controller is processing its data is when its consent is asked for it" (Hert/Papakonstantinou 2016: 187).

The consent requirement gets strengthened already in the definition which now requires that it is not only freely given, specific and informed, but also 'unambiguous' and indicated 'by a statement or by a clear affirmative action' (Art 4(11)). This is a reaction to various controllers' consent-collecting techniques such as pre-ticked opt-in boxes or implied consent in the event of entry into a contractual relationship. The GDPR now unambiguously declares that "silence, pre-ticked boxes or inactivity should therefore not constitute consent" (Rec. 32).

There is now an entire article on the "conditions for consent" (Art 7). It puts the burden of proof on the controller who "shall be able to demonstrate that the data subject has consented to processing of his or her personal data" (Art 7(1)). "The data subject shall have the right to withdraw his or her consent at any time. ... It shall be as easy to withdraw as to give consent." (Art 7(3)).

The drafters of the GDPR were aware of the tension between freedom and power: "In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation." (Rec. 43) No recognisable consequences are drawn from that observation. A power imbalance also exists when a social media service, into which a user has invested years of networking, changes its terms and requires consent to data processing that it claims to be necessary for the further provision of the service. If the consequence of rejection would be losing use the service, consent would also not be given freely.

The special categories of personal data, the processing of which shall be prohibited, now includes genetic and biometric data and sexual orientation (Art 9).

Data relating to criminal convictions and offences are separated from the other categories of sensitive data, providing that their processing shall be carried out "only under the control of official authority."

The existing rights of the data subjects become significantly more detailed. These include the right to be informed (Art 13, 14), the right of access (Art 15) and the right to rectification (Art 16). The right to erasure after the CJEU Google Spain ruling got the byname 'right to be forgotten' (Art 17), but different from that ruling it refers not only to links in a search



engine but to the actual data, e.g. when the data subject has withdrawn consent and there is no other legal ground for the processing.

New is the right to restrict processing (Art 18), e.g. if the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify the accuracy of the personal data, or if the controller intends to delete data while the data subject still requires them in relation to a legal claim.

Also new is the right to data portability requiring a controller to provide to the data subject the personal data concerning him or her in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller, including the “right to have the personal data transmitted directly from one controller to another, where technically feasible” (Art 20). This prescribes that individuals must be free to move around their personal data from controller to controller. It requires interoperability between different social media systems, which has seen become one of the central issues in the platform debate.

The right to object to processing in the directive required the data subject to show “compelling legitimate grounds”. Now the processor must show those compelling grounds if it wants to continue processing despite the objection. As before, use of the data for direct marketing is always a ground for objection, to which now ‘profiling’ is added explicitly (Art 21).

The 1995 Directive required controllers to notify all automatic personal data processing operations prior to their start to their competent supervisory Data Protection Authority (DPA), which had to maintain a central public register of all processing operations in that MS. This goes back to the 1970s when there were only few computers, controllers and data processes. As Hert and Papakonstantinou point out, this notion became outdated, and the notification requirement was dropped in the initial Commission proposal. Now, both controllers and processors may initiate personal data processing without having to notify anyone, but both internally have to maintain a record of the processing they are responsible for or they carry out. When a DPA conducts an investigation, they must provide this record and will be held liable if they have not complied (Art 30).

A novel requirement on controllers is data protection by design and by default. This refers to technical and organisational measures which ensure that the GDPR’s principles, such as data minimisation, are implemented in a system’s design and that, by default, only personal data which are necessary for each specific purpose are processed (Art 25).

Another new obligation concerns data protection impact assessments (DPIA) and prior consultations with a DPA (Art 36). When a controller, to its own judgement, finds that a planned processing “is likely to result in a high risk to the rights and freedoms of natural persons” it must conduct a prior DPIA.

The transfer of personal data to third countries had become a critical issue after the CJEU had invalidated the US Safe Harbour Privacy Principles. In the Directive MS and

Commission were to inform each other of countries they consider not to ensure an adequate level of protection. In the GDPR, the provisions on transfers have grown significantly (Art 44-50). It is now the Commission which decides that a third country, a territory or one or more specified sectors within that third country, or an international organisation ensures an adequate level of protection and it may decide by means of an implementing act (Art 45). In the absence of such a positive decision, a controller or processor may still transfer personal data if it has provided appropriate safeguards and on condition that enforceable data subject rights and effective legal remedies for data subjects are available (Art 46). At the beginning of 2022, the Commission had [recognised 14 countries](#) as providing adequate protection, not including the USA.

As for oversight, Hert and Papakonstantinou emphasise the importance of the Article 29 Working Party as the main body for consultation and harmonisation on all data protection matters within the EU. The GDPR now established out of the Working Party the European Data Protection Board (Art 64-76). The EDPB's main task is to achieve consistency among EU DPAs, through its opinions prior to adoption of any substantial decision by a national DPA (Art 64). The Commission had initially proposed few changes with the Working Party dependent upon the Commission. The outcome of the legislative process was a

*“strong and standalone Board with legal personality that is capable of deciding on itself and enforcing its opinions. In a way it could be held that the shift of power away from the Commission, through deletion of most of its powers to issue ‘delegated acts’ in the text of the initial proposal, moved towards the Board that assumed in essence the role that the Commission would presumably have liked to have kept for itself. At any event, the fact remains that the new Regulation introduces an important new player in the EU data protection scene, upon which essentially all hope for the success of the Regulation’s direct effect is vested.” (Hert/Papakonstantinou 2016: 193)*

The chapter on remedies, liability and penalties has grown from three short articles to eight extensive ones (Arts 77-84). Where before, sanctions were left to the MS, the GDPR now provides for fines of up to 20 million euro, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher (Art 83(5)).

Finally, mention must be made of the article on processing and freedom of expression and information (Art 85). It provides that for processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, MS shall provide for exemptions or derogations from essentially the entire GDPR, if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information. The recital explains that “this should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly.” (Rec. 153). It seems that data protection has gone full circle: journalistic publicity, which brought forth the notion of privacy in the first place, now has to be protected against the mechanisms for protecting privacy in order to still be able to fulfil its task in every democratic society.

This provision is also remarkable in that it counteracts the harmonising objective of a directly effective regulation by giving MS far-reaching leeway to implement their own national solutions for finding the necessary balance between the competing fundamental rights of freedom of expression and of privacy.

## **Achievements and shortcomings of data protection**

The GDPR is a complex and controversial piece of legislation. During law-making negotiations, lobbying in the EU allegedly reached unprecedented levels. There were around 4,000 amendment proposals in the EP. It did not end with adoption, as afterwards tens of delegated acts needed to be issued by the Commission. The two-year period until the Regulation came into effect was much needed for MS to adapt their national legislation before it came into force on 25 May 2018. As if to highlight the need for it, the Cambridge Analytica scandal broke in March 2018 just before the GDPR became effective.

The reactions remain ambivalent. The GDPR has been acclaimed as a global landmark. Others find that it does more harm than good. Shoshana Zuboff, vocal critic of “The Age of Surveillance Capitalism” (2018), praised the regulation as taking us much further ahead compared to the last 20 years. “Now we have the possibility of standing on the shoulders of the GDPR in order to develop the kinds of regulatory regimes that are specifically targeted at these mechanisms.”<sup>43</sup>

Already the 1995 Directive set the standard for data protection internationally. “Its basic components (processing principles, conditions for the lawfulness of the processing, data subjects’ rights, establishment of data protection authorities and the rules on cross-border data transfers) are in one way or the other addressed in all data protection instruments around the globe.” (Hert/Papakonstantinou 2016: 194). The GDPR as the new global ‘gold standard’ has led to legislation based on it from [Brazil’s LGPD](#) and [South Africa’s POPIA](#) via India, Kenya and China to California.

Not the least, the GDPR was the occasion for the Council of Europe to update its Data Protection Conventions 108. Working in parallel with the EU, the CoE took utmost care to ensure consistency between both legal frameworks (see [Amending Protocol](#) (CETS No. 223, 18.05.2018), the accompanying [explanatory report](#) and the [Consolidated version of Convention 108+](#)).

As to the GDPR’s effects, much is still developing, but what can be said with certainty is the “there is very little personal data processing that will remain unaffected... There will practically be no individual within the EU not directly affected by the reform. The new

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<sup>43</sup> [Resisting Surveillance](#), Interview with Shoshana Zuboff by Olaf Bruns, Green European Journal, 25.07.2019

instruments are therefore expected to affect the way Europeans work and live together.” (Hert/Papakonstantinou 2016: 180) As such, the GDPR creates a whole new industry for its application with its own products and services and a large demand for professionals. The posts of data protection officers in companies, institutions and organisations, specialists in oversight authorities, accreditation bodies for codes of conduct and certification, and in services providers e.g. for conducting impact assessments have to be filled (ibid.: 194).

As for the implementation across Europe, MS have to notify the European Commission on various decisions on opening clauses, including on their data protection authorities (Art 51(4)), on penalties (Art 84(2)) and on their derogations for reconciling freedom of expression and information with data protection (Art 85(3)). Among the nine EU EUMEPLAT partners at the beginning of 2022, notifications are documented by Belgium, Bulgaria, Czechia, Germany, Italy and Sweden but not by Greece, Portugal and Spain (EC, [MS notification under GDPR](#)).

Among the most visible effects of the GDPR are the fines issued by national DPAs and notified to the EDPB. These can amount to from little more than €1,000 to millions. One of the first complaints was filed in May 2018 by Max Schrems’ initiative NOYB (None of Your Business) and the French privacy rights group La Quadrature du Net against Google for lack of transparency, inadequate information and lack of valid consent regarding the personalization of ads. Since the DPA in Ireland, where Google is headquartered in the EU, did not have decision-making power, the French DPA CNIL was competent to take a decision. In its investigation, CNIL found severe infringements of essential principles of the GDPR and in January 2019 imposed a financial penalty of €50 million ([EDPB](#), [BBC](#), 21.01.2019).

In July 2020, the CJEU in its Schrems II judgment, declared the European Commission’s Privacy Shield Decision, which had replaced its Safe Harbour Decision, invalid as well. A US controller or processor is subject to the US surveillance legislation for the purposes of national security, which imposes on it the legal obligation to give the US authorities unrestricted access to personal data it holds, without being able to inform its customers of that fact. The US therefore does not provide for an equivalent level of protection as guaranteed by the GDPR to European data subjects, making transfers of personal data on the basis of the Privacy Shield Decision illegal ([Case C-311/18](#), Facebook Ireland and Schrems, 16.07.2020).

The EDPS itself issued a decision against the European Parliament after a complaint filed by NOYB. It confirmed that by using Google Analytics and the payment provider Stripe on its COVID testing website, the EP had violated the CJEU’s Schrems II ruling on EU-US data transfers. In August 2020, NOYB had filed 101 complaints against EU companies that included Google and Facebook functions on their websites and soon expects rulings which follow the EDPS decision. The EDPS issued a reprimand against the EP and an order to comply within one month. Different from national DPAs, the EDPS can only issue fines in limited circumstances that were not met in this case ([EDPS](#) 05.01.2022, [NOYB](#) 11.01.2022).

After Schrems II it is clear that sending personal data to the US such as in cloud-based applications like [MS Office 365](#), videoconferencing systems like Zoom or Cisco’s Webex,

Google analytics or Google fonts and Facebook like and share buttons are not permissible under the GDPR.

As for ad trackers, one of the most problematic practices on the Internet, a [study](#) by the providers of the privacy-enhancing tools Ghostery and Cliqz based on data from [WhoTracks.me](#) covering the four months after the GDPR came into force showed a decline in trackers on the 2000 most popular European sites by 3.4%, while during the same period the number on US sites increased by 8,29%. Trackers are primarily used for personalised ads, a market estimated at US\$ 270 billion globally in 2018. The study noted that most trackers are found on news websites: They still included an average of 12.4 trackers. Compared to April 2018, however, this corresponds to a decrease of 7.5%. Smaller advertising trackers saw the largest drop in reach of between 18 and 31%. Facebook's tracker reach declined by just under 7%, whereas market leader Google was even able to slightly increase its reach in Europe by 1%. Pondering over possible explanations for this uneven effect, the study authors noted that Google has extensive resources to ensure compliance with the GDPR. Website operators, in order not to risk penalties, may have dropped smaller advertising partners who had difficulties proving compliance with all regulations. The authors also refer to reports that suggested that Google may have used its dominant position to pressure publishers to reduce the number of their adtech partners ([E-Commerce Magazin, 11.10.2018](#)).

Even if the GDPR initially has led to a slight increase in the market dominance of Google, it does create a strong structural incentive for media and other providers to move their data processing to services in Europe, thereby strengthening European technological sovereignty. Even within its first months it caused a decrease in trackers, thereby minimising data collection. It has given individuals a degree on control over their private data.

Critics, on the other hand, see the GDPR as setting the data protection bar too high, creating chilling effects on public communication. Indeed, in the weeks before the GDPR came into force on 25 May 2018, a tangible wave of panic ran through the Internet in Europe. Sites were sending mass-emails to their users, asking for consent to their ongoing data processing. Scores of intimidated operators of blogs and small websites of SME, civil society organisations, clubs and private individuals were asking for help and advice or announcing that they would close down their sites because they found the requirements too difficult to fulfil and the risk of making mistakes too difficult to assess, in particular, given the immense fines that data protection authorities could levy in such cases. Jurist Paul Klimpel (2021) argues that data protection law has created an atmosphere of fear that threatens to paralyse social life

He sees the issue as inherent in the structure of data protection law, which is often described as a 'prohibition with reservation of permission'. "The fundamental 'prohibition' of 'processing personal data' is clear and easy to understand, while the circumstances under which it is permitted are far less obvious, their limits are disputed even among experts, and laypersons can hardly understand them." (ibid.)

There is no systematic research on how many blogs and other websites were closed down due to a real or perceived threat by the GDPR. Research is confronted with the methodological issue of how to measure ‘chilling effects’, i.e. publications activities that might have been undertaken but were omitted. What seems evident for now, is that the dominant technology platforms are able to adapt to the requirements of the GDPR more easily than smaller actors. One of the reasons is geographic.

In the ‘space without internal frontiers’ that is the Single and now Digital Market there are special places. These include Luxembourg and Ireland with their barely existing data protection authorities. Ireland hosts the European headquarters for some of the largest technology companies, including Apple, Google, Facebook and Twitter. Under the country of origin principle, the Irish DPA should be responsible for complaints against these companies, which is therefore the target of many of Schrems’ law suits.

The Irish Data Protection Commission has been subject to considerable criticism, including from Germany’s Federal Commissioner for Data Protection ([here](#)), an Advocate General from the Court of Justice of the EU ([here](#)) and a European Commission vice-president ([here](#)), over delays and enforcement action under the GDPR against large technology companies. In May 2021, the European Parliament [passed](#) a resolution calling on the European Commission to open an infringement procedure against Ireland for failing to enforce the GDPR. In September 2021, an Irish human rights organisation, the Irish Council for Civil Liberties (ICCL), published a [report](#) on how GDPR enforcement is “paralysed” by Ireland’s “failure to deliver draft decisions on major cross-border cases,” describing Ireland as “Europe’s Wild West when it comes to data protection,” and urged the European Commission to take action against Ireland. In November 2021, the ICCL filed a [complaint](#) with the European Ombudsman over the European Commission’s failure to initiate infringement procedures against Ireland. In late October 2021, the Irish government [stated](#) it was considering appointing up to two more Data Protection Commissioners (Fathaigh 2021).

### 4.5.3 Summary

The far-reaching effects of the GDPR on media cannot yet be fully assessed. The regulation provides for media and free speech privileges in the processing of personal data in Article 85, yet rather than ensuring coherence it delegates their interpretation to the MS. Most of the MS have implemented their derogations for journalistic purposes in a way that balances freedom of expression and data protection. However, Azevedo Cunha and Monteleone (2021) point to countries that have not implemented any derogations (Croatia, Romania and Slovenia) or have not done so properly (Austria, Slovakia and Spain). They note that not having any derogations per se represents a risk for media pluralism and media freedom, as the requirement of full compliance with the GDPR provisions can be used to create restrictions for journalistic activity, “for instance in terms of individual consent, or information to be provided



to the data-subject on data processing activities, with the consequence of having to disclose the sources of the information published.” In Slovakia indeed, data protection rules have been used to force journalists to reveal their sources. In Bulgaria, the implementation did introduce rules on data processing for journalistic purposes, but these are considered to be unjustifiably burdensome to journalists and led the President to veto them (Azevedo Cunha/Monteleone 2021: 244 f.).

Dreyer et al. (2020) also find diverging approaches in the MS as to who qualifies as a ‘journalist’. ‘Amateur’ or ‘citizen journalist’ are not similarly covered by the media privileges under the national data protection laws in every Member State. Indeed, Article 85 only mentions journalistic purposes as one example of the freedom of expression it intends to protect – a fundamental right that accrues to all. They see the danger that the vagueness of Article 85 and the delegation of its implementation to individual MS could lead to overriding existing legal frameworks for the protection of general rights of expression and de facto to render them without force. “Thus, in the non-journalistic field and in the boundary areas of newer journalism-like offerings, the GDPR can have chilling effects. ... Accordingly, broad interpretation over implementation of Art. 85 GDPR is vital in order to protect freedom of expression against abuse of data protection.” (Dreyer et al. 2020: 38)

Unrelated to Article 85, they point out an issue that has been troubling media since long and that gets amplified by the GDPR. It concerns the area of legal protection of personality rights and one’s image. Television and film companies rely on written permissions from actors and interviewees. The right to revoke consent at any time under the GDPR poses the risk of a participant making use of that right, even years later, thereby blocking the distribution and making available of a production. But also websites of communities, civil society and cultural heritage institutions might be confronted with individuals withdrawing consent on showing photos of them. “Such practical challenges for media creatives and the sectors associated with them were not adequately thought through when the GDPR was adopted.” (ibid.: 38) The balancing of freedoms of expression and reporting, personality rights and guarantees of data protection threaten to tip against the communication freedoms under the GDPR. Differentiated protection of personality rights runs the risk of being overprinted by rigorous data protection regulations. Similar issues arise from the right to be forgotten.

The impact of the GDPR on targeted advertising and direct marketing is obvious and intended. In how far the adtech and media industries are able to adapt and find data-friendly ways to refinance their publications, is to be seen. Usage statistics, customer and subscription management and all other forms of processing of personal data by media have to become compliant. “The extent to which forms of media-related personalisation and the related processing of personal data to improve recommender systems fall under the aforementioned media privilege is the subject of debate amongst legal experts.” (ibid.: 37)

Not the least, European media companies will have to re-assess their channels on the dominant social media platforms. In this respect, Mark Zuckerberg pre-empted their thinking by announcing at the beginning of February 2022 that he is considering to shut down Facebook

and Instagram in Europe if Meta can not process Europeans' data on US servers. Alas, the announcement was short-lived ([City A.M. 10.02.2022](#)).

## 5 Conclusions: Towards a European digital public sphere

When the history of the EU began with a slow and arduous period of laying the groundwork, the past thirty years considered in this report can be seen as the time of fruition. The Maastricht Treaty of 1992 marked the conclusion of establishing the area of the four free movements and turned the ‘European Community’ into the ‘European Union’. It also made Parliament a full-fledged co-legislator next to the Council.

**Europeanisation** in this sense is the project of creating a union out of its member states, a federal democracy based on the principles of conferral, subsidiarity and proportionality, and that of the division of powers. The bicameral legislative of the Council of Member States and the directly elected Parliament has accumulated an extensive corpus of EU law, the *acquis communautaire*. In this study, we have looked in particular into media law and media-relevant regulations in copyright, telecommunications, competition law, consumer and data protection. The *acquis* is getting more complex with each new and amending act, creating a highly interwoven fabric. Not surprisingly, this contains a degree of inconsistencies with different instruments providing differing definitions of ‘service’ or ‘platform’ (Dreyer et al. 2020). Cookies are split between GDPR and the ePrivacy Directive. “Google can be considered both neutral (because of automation) under the ECD and a controller under the GDPR.” (Parcu/Brogi 2021: 181). The Charter of Fundamental Rights of the EU (2000) and something akin to a constitution in the Lisbon Treaty (2007) were the final building blocks for integrating Europe by means of law.

The executive started as three Commissions, became one and grew into a full-fledged government, guiding European law-making from the legislative initiative to the final negotiation phase in trilogue, through implementation and application to evaluation and revision. When law meets reality, conflicts escalate to apex courts. The Union judiciary is the Court of Justice of the EU (CJEU 1952), to which a Court of First Instance was attached in 1988 and a Civil Service Tribunal in 2004. The CJEU applies, interprets and clarifies EU law in light of concrete cases, thereby adding another layer of complexity.

Member States must transpose EU directives into their national laws correctly, fully and on time. The [Single Market Scoreboard](#), current as of late 2020, shows that the average transposition delay decreased compared to a year earlier, while transposition and conformity deficits have increased on average.

This is likely one reason for the shift in EU legislation from directives coordinating MS laws to directly applicable regulations. Hert/Papakonstantinou’s prediction of the GDPR as a turning point is confirmed if we look at the most recent legal instruments and those currently in the making. From the Portability Regulation of 2017, to the DSA Package, the ePrivacy Regulation, the Artificial Intelligence Act, the Chips Act, the Data Governance Act and the Data

Act to the planned Cyber Resilience Act and the Media Freedom Act they give evidence that the age of directives is coming to an end.

EU institution building is far advanced. Europe has attained statehood. The objective now is to end the divergence in transposition and application of directives by adopting directly applicable EU law. Even though, as we have seen, the opening clauses in regulations still lead to national differences in the Single Market. Another likely reason is the shift from the territorial AV culture, where audiences preferred national and generic US products, to the online age where non-European mega platforms raise the same issues everywhere, which are best addressed with a uniform approach. This development marks a power shift from Member States to the EU and a new phase of 'Unionisation'.

The internal integration was followed by **EU expansion** to the north and the east. This was prepared with the re-unification of Germany and the fall of the Iron Curtain in 1989. In referenda in 1995, the citizens of Austria, Sweden and Finland voted to join the EU, those of Norway against. In 2004, eight Central and Eastern European countries (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia), plus two Mediterranean countries (Malta and Cyprus) joined. Bulgaria and Romania followed in 2007, Croatia in 2013. This created tensions inside the EU and on the outside, in particular with Russia that feels threatened by countries from the former Soviet sphere of influence join not only the EU but NATO.<sup>44</sup>

The Maastricht Treaty says that any European state that respects the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law", may apply to join the Union (Art 49). The European Council set out the conditions for EU accession in June 1993 in the [Copenhagen criteria](#).

The accession of Turkey had been debated since the founding of the European Economic Community. Based on the Ankara Agreement of 1963, Turkey became an accession candidate in 1999, negotiations started in 2005. One of the issues is that Turkey does not recognize the Republic of Cyprus. The refugee crisis in 2015 brought the country and the EU closer together. The Turkish reactions to the attempted coup in July 2016 and the referendum on constitutional changes in 2017 drove them apart again. Since then, negotiations are frozen. In April 2018, the EU Commission gave Turkey its worst ever score card in its report on readiness for accession (Commission Staff Working Paper, [Turkey 2018 Report](#), SWD(2018) 153 final, 17.04.2018). It attested that Turkey had taken serious steps backward in terms of the rule of law, freedom of expression and the independence of the judiciary. "Turkey has been moving away from the European Union. The Presidency conclusions of December 2016 stated that under the currently prevailing circumstances, no new chapters [in the accession negotiations] are considered for opening." (ibid.: 3). One aspect of the longstanding tension

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<sup>44</sup> Poland, Czechia and Hungary joined NATO in 1999, Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia in 2004, Albania and Croatia in 2009, Montenegro in 2017 and North Macedonia in 2020.

between more or less Europe was resolved with Britain leaving the EU in January 2020 and the other MS rallying behind the Union.

The criteria which an EU accession candidate has to fulfil, i.e. the [body of all current EU rules](#) (the *acquis*) it has to adopt and implement, might be understood as a **legal definition of Europeanness**. The *acquis* enshrines Europe's values, above all the rule of law and the fundamental rights and freedoms, primarily the free movement of goods, workers, services and capital which constitutes the borderless Single Market. Yet, the Schengen area is fragile on the inside, with national borders closing again in a crisis such as the Covid-19 pandemic, and no common migration policy in place at its external borders.

The rule of law has to be defended inside the Union, which is currently challenged by Poland, Hungary, Slovenia and Czechia. And it has to be defended externally even towards allies such as the USA, where personal data do not have the same level of protection as in the EU. It is quite remarkable that the strongest practical impact in the debate on the dominance of US platforms so far comes from the CJEU prohibiting EU-US flows of data and services because the US does not adhere to EU data protection standards. Data protection made in the EU is a manifestation of European values. But does it create a common sense of belonging to a community of values? Do cookie banners make people feel a sense of Europeanness?

The 1973 Copenhagen Declaration defined the European identity as unity in diversity and dynamism. At the same time, it made it evident that the citizens had not been taken along in the project of unification. Identity and cohesion cannot be pursued by hard power of law alone but requires the soft power of ideas, feelings and narratives. This implies the need for European media and for **citizen participation**.

In 1973, the unification project and the European identity was thought to be based on the will of the peoples as expressed by their elected representatives. That this top-down approach was insufficient became painfully evident in the first direct elections to the EP in 1979. The recognition that not only the peoples but the people should be made to participate in the realization of the Union led to a flurry of activities and the 1985 Adonnino report [A People's Europe](#). Yet the political class was still taken by surprise when the EU Constitution failed in the referenda of 2005. In order to overcome the continuing disconnect between the people of Europe and their political leaders, the Lisbon Treaty of 2007 introduced the [European Citizens' Initiative](#) (ECI). Currently, in a large-scale deliberative democracy experiment in the [Conference on the Future of Europe](#) (CoFoE) 800 randomly selected EU citizens are discussing recommendations for the EU with parallel panels in the MS. While the format of the 'Citizens' Assembly' has been successfully institutionalised in Ireland and other MS, the EU exercise has been called into question as participating citizens felt that EU lawmakers were not really interested in their recommendations ([CoFoE: Citizens felt heard but recommendations were not debated as expected](#), Euractive 27.01.2022).

An awareness of Europe and Europeanness is closely linked to the (non) existence of **European media**. The three powers of European democracy cannot function fully without the

fourth power, a vibrant, critical public sphere. In the 1980s, hopes were set on a pan-European satellite TV channel, again with large-scale, promising experiments, which failed because of resistance from the MS. Broadcasting at the time was Public Service. Liberalisation had just started, but in this area never really challenged the crucial importance of PSM. The EU in the Amsterdam Protocol recognised that PSM serves “the democratic, social and cultural needs of each society”. This meant that the EU carved out an exception to the state aid prohibition, allowing MS to fund their PSM. But it was not able to take the logical next step to create a European PSM system that serves the needs of the European society. While the Union was growing together, PSM remained inherently restricted to the MS.

The Treaties envisage **EU media policy** as another sectorial industry policy with the regulatory objective of removing barriers to the development of the Single Market for media services, creating a harmonised regulatory framework for transborder media services, a level playing field, and to addressing public interest issues in protecting minors and fending off disinformation, communicative crimes and hatred.

The supportive measures for the audiovisual sector are directed at improving production and distribution capacities in order to make it more competitive, where the main instrument is the [Creative Europe](#) programme. The quota for European works mandated in the AVMSD, which over time came to include works from independent producers and on-demand platforms, is geared to increasing the consumption of European works which again improves industrial performance but also has the welcome side effect of fostering understanding, cohesion and a diverse identity across cultures on the continent. Over time, the Treaties conferred on the Union the competence to support, coordinate and supplement the actions of the MS in the areas of culture and education, not the least since the EU’s ratification of the 2005 UNESCO Convention. Measures here include the funding for the subtitling of programmes on the European culture channel [Arte](#) into four languages (English, Spanish, Polish and Italian, in addition to the original French and German) as well as for the core services of the European cultural heritage network [Europeana](#).

Given the market focus of EU media policy, one would expect that preventing anti-competitive concentrations and protecting media pluralism should be a primary goal, yet even here MS have so far prevented an effective EU instrument. The inherent dilemma of pluralism vs. economy of scale is still at work, with governments hoping to foster the next globally competitive ‘hyperscaler’.

A step forward towards a harmonised sectorial competition regulation is the [Media Ownership Monitor](#), recently commissioned within the [European Democracy Action Plan](#). This is in the tradition of the CoE’s [European Audiovisual Observatory](#) (1992) with its databases ([MAVISE](#), [Lumière](#), [Lumière VOD](#) and [IRIS Merlin](#)) which helps create transparency in the AV market and is one areas of happy cooperation between CoE and EU. In the same line, the [EU Observatory on the Online Platform Economy](#), established by the P2B Regulation in April 2018, serves to create a data basis of evidence to inform EU and MS media policy – a desideratum that is also painfully felt in the research in the EUMEPLAT project.



**Platformisation** changed the media landscape fundamentally. In contrast to the AV sector where liberalisation left PSM in place, in telecommunications, digitalisation went together with full liberalisation. The legislative was relegated to the role of impartial arbitrator on a 'level playing field'. The EU does have a shared competence in contributing to the establishment of trans-European telecommunications networks and promoting the interconnection and interoperability of national networks and access to such networks (Art. 170 TFEU). While a standardised interoperable telecommunications infrastructure is the foundation of both the Single Market and the digital European public sphere, the EU attempts to keep separate its approaches to regulating transmission infrastructure and content.

The latter is limited to addressing illegal and harmful content. Measures and structures to positively ensure a content diversity that serves the democratic, social and cultural needs of society, such as broadcasting councils composed of representatives from the whole breadth of society and steering PSM, have not yet emerged in the digital European public sphere.

In the AV world, EU media regulation was limited in scope but very detailed, proscribing the permitted minutes of ads per broadcast hour and the time of the day when programmes which might harm minors may be broadcast. In the platform age, regulation is an arm's length removed from the regulated. The transition in policy approach is marked by the eCommerce Directive (2000) which limits platforms' liability to having to respond to third party notices. Platform law incentivises self-regulation in the form of industry codes of conduct. It requires that providers make their 'house rules' transparent to their users in their terms and conditions and voluntarily and actively take measures to enforce them to address harm. Given the technical nature of the media environment and the sheer amount of content involved, these are primarily technical measures. These started in the AV age with scrambling and encryption for conditional access or the v-chip for parental control. In the digital age, DRM and content filters with databases of content signatures and AI have become the main instruments for addressing copyright infringement, terror propaganda, child abuse material and hate crimes. Technical measures are actively encouraged by the EU but self-organised by the platform industry. Over the past ten years, they have developed into an ever more comprehensive infrastructure for content identification and monitoring, pervasive on all user-upload platforms.

EU platform policy thus encourages the privatisation of rule-setting and enforcement by actors such as Google and Facebook. Fundamental rights of citizens and users are addressed by ex ante transparency requirements and ex post remedies such as internal complaint-handling systems and external dispute resolution mechanisms.

Arguably one of the greatest changes effected by platformisation is the appearance of **users as active participants** in the public sphere. Everyone with access to the Internet can 'share' her thoughts and photos, making the private public. This notion entered EU law as 'video-sharing platforms' in the AVMSD 2018 and as 'online content-sharing services' in the DSMD of 2019. What was once confined to a group of friends or people in a pub, now can reach thousands in a Facebook or Telegram group. Everyone who can speak publicly and globally also makes herself vulnerable to surveillance.

Platformisation significantly widens the space in which the intrinsic tension between public and private unfolds. Publicity by paparazzi media, as we have seen, was answered with the novel legal concept of privacy in the 19<sup>th</sup> century. At the other end of the development, a space for journalism has to be carved out from the space of data protection.

Journalistic editorial content appears side by side with that of commercial 'influencers' and private citizens. For PSM, social media mega platforms pose the biggest dilemma in the platform age. Their own platforms have not gained the hoped-for attention among young audiences. If they put their content on YouTube, Instagram, Twitter, etc., they strengthen the platforms' power to attract attention. If they do not, they simply do not feature in the opinion-forming process of the digital public sphere.

PSM are very much aware of the need to create alternative platforms which combine high-quality journalistic content and user interactions. So is the EU. Aside from regulating the media sector, the EU has to fulfil its own communications needs towards the European citizens. In the 1980s it supported the Eurikon and Europa TV satellite experiments in the hope of fostering a pan-European public sphere. Today, the EU's communication channels include the EP's webTV service in its [Multimedia Centre](#) and its own website [Europa.eu](#). It also commissions specific programmes in the European interest to [Euronews](#). Yet, this approach still follows the broadcast model of informing the public, while remaining disconnected from deliberative participation experiments such as the Conference on the Future of Europe.

The European Parliament in its [Resolution on journalism and new media – creating a public sphere in Europe](#) (2010/2015(INI), 07.09.2010) declared that "it must be the goal of the EU institutions to create together a European public sphere which is characterised by the opportunity for all EU citizens to participate, and the basis for which is free access, free of charge, to all Commission, Council and Parliament public information in all EU languages." This clearly goes beyond press releases on the latest policy decisions towards engaging in dialogue and improving cohesion.

In 2015, the 'mother of all PSM', the BBC, declared in its charter renewal ([British Bold Creative](#), September 2015) that it wanted to strengthen its platform function and open it up to other British "idea institutions" such as museums, theatres and universities. Although the big announcement ultimately became just a little mouse called [Ideas](#), it has resonated throughout with platform plans sprouting everywhere.

One of those who picked up the idea was Ulrich Wilhelm, then director of the Bavarian PSB. When he took over as ARD chair in January 2018, he made the establishment of a European "super-media platform" ([DF 26.03.2018](#)) the most prominent project of his tenure. At a time when everyone was thinking digitally but only ever nationally, Wilhelm deserves credit for putting the digital European public sphere on the agenda. His goal was emancipation from Youtube and Facebook. The European initiative, he suggested, could start from Germany and France. As an example, he mentioned Airbus, which also had needed a multinational governmental initial spark with start-up financing and research funding.

At the beginning of 2019, Wilhelm moved away from a single platform for all of Europe and started to speak of an “infrastructure for platforms in Europe” ([Berliner Morgenpost 02.03.2019](#)). This would mainly involve technical components, algorithms, which, unlike those of the US platforms, should be transparent and publicly verifiable. He argued that content is not the issue: “There is a lot of content that is publicly funded anyway – for example from public museums like the Louvre in Paris, from state orchestras, universities or the media libraries of ARD and ZDF.” The issue is the infrastructure which should be a public service – “comparable to a road or rail network”. This is not a project of the broadcasters, but of society as a whole, he said, and must therefore be publicly financed to a certain extent. “This is money well spent. The costs would be significantly higher if our countries became unstable.” (ibid.)

Indeed, after two years under Covid-19 conditions one wishes that there had been more elements of encounter and integration to counter the divisive forces on the Internet. And indeed, in the digital realm the old media idea of a single TV channel or a single online platform has to be replaced by that of a distributed and interoperable and interlinked infrastructure for many, diverse platforms, reflecting the European identity of unity in diversity.

In 2020, Wilhelm co-headed a working group at the German National Academy of Science and Engineering (acatech) which released its final report under the title [European Public Sphere. Towards Digital Sovereignty for Europe](#) (14.07.2020). It describes a digital ecosystem “which in its technical form already embodies European values” and consist of a technology stack from a cloud infrastructure via systems for recommendations and language translation all the way to news services. For governance the report proposes a dual structure of a public service Digital Agency for coordination and a broad European Public Sphere Alliance for developing and maintaining the components of the infrastructure.

Meanwhile in the Netherlands, a broad alliance from PSM, cultural heritage and civil society initiated by Geert-Jan Bogaerts, Head of Digital Media at the Dutch PSM VPRO had set up the [PublicSpaces Foundation](#). It has both the concept of a technology stack for media platforms and a governance structure in place and has begun to establish itself as a provider of middleware software components, that allow to build alternatives to Facebook and Youtube.

In June 2021, a group of media scholars launched [The Public Service Media and Public Service Internet Manifesto](#) that calls for the networking of PSM platforms in Europe and for a ‘public service Internet’. It has received more than 1,000 signatures, including by Jürgen Habermas and Noam Chomsky.

In order to translate these concepts into the European policy arena, various initiatives from PSM, citizen media, cultural heritage and academia came together to form the coalition for a [Shared Digital European Public Sphere](#) (SDEPS) (Baratsits 2021). The assumption is again that all the elements are there already for building alternatives to the existing commercially-driven platforms, alternatives that are based on democratic values, that are distant from the state and the market and serve the needs of society.

What is needed is to bring these elements together to create a stack of free software tools for media platforms in Europe. This is quite in line with policies at EU level ([Commission makes software available to all to benefit businesses, innovators and areas of public interest](#), PR 08.12.2021) as well as at MS level. The Open Knowledge Foundation and the German Federal Ministry for Economic Affairs have been operating the [Prototype Fund](#) to support developers of software in the public interest. They have now conducted a [Feasibility Study to Examine a Funding Program for Open Digital Base Technologies as the Foundation for Innovation and Digital Sovereignty](#). Based on the findings they are currently preparing the [Sovereign Tech Fund](#).

While in the AV age, the focus of EU media policy was on fending off a US content 'invasion', in the platform age the central narrative is on technological 'sovereignty.' To achieve this, the different strands of policy are coming together.

This involves regulating existing digital platforms as infrastructure for services of general interest (Busch 2021). In this sense the regulatory platform acquis will be culminating in the DSA package. Secondly, the EU's own communications needs in a participatory public sphere as called for by the EP in its 2010 Resolution match perfectly with the platform alternatives that the different civil society and PSM initiatives are advocating. And thirdly, an open technology fund for infrastructure of media platforms in the public interest is aligned with existing technology funding and complements that for content production.

The momentum is there to bring the different strands of EU media policy together and create a truly European digital public sphere that will turn a Europe of competing collectives into a Europe of sovereign citizens with equal rights, that will provide quality journalistic editorial content and diverse opinions from all corners of the continent as well as a participatory space for individual and collective opinion-forming that enables community and identification through participation, and that will, as expressed by Menasse, realise the idea which the founders of the European unification project had dreamed of.

# 6 Literature

## 6.1 The main primary sources

### 6.1.1 Television directive

COM, [Television without Frontiers. Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable](#) (COM(84) 300, 14.06.1984)

CoE, [European Convention on Transfrontier Television](#) (05.05.1989)

EEC, [Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities](#) (89/552/EEC, 03.10.1989)

EC, [Directive 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](#) (97/36/EC, 30.06.1997).

CoE, [European Convention on Transfrontier Television](#) ([ETS No. 171](#), 10.01.1998)

EC, [Directive 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](#) (2007/65/EC, 11.12.2007)

codify in the [Audiovisual Media Services Directive](#) (AVMSD, 2010/13/EU, 10.03.2010)

EU, [Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services \(Audiovisual Media Services Directive\) in view](#) (2018/1808/EU, 14.11.2018)

### 6.1.2 SatCab Directive

EEC, [Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission](#) (93/83/EEC, 27.09.1993)

EEC, [Directive laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC](#), (2019/789/EEC, 17.04.2019)

### 6.1.3 PBS: Amsterdam Protocol

CoE, [Recommendation No. R \(96\) 10 of the Committee of Ministers to member states on the guarantee of the independence of public service broadcasting](#) (11.09.1996)

CoE, [Recommendation on measures to promote the democratic and social contribution of digital broadcasting](#) (Rec(2003)9, 28.05.2003).

EU, [Protocol on the System of Public Broadcasting in the Member States](#), originally annexed the [Treaty of Amsterdam](#), then as Protocol No 29 to the [Treaty on the Functioning of the EU](#)

COM, [Commission Communication on Services of General Interest in Europe](#) (COM(2000) 580, 20.09.2000)

COM, [Communication on the application of State aid rules to public service broadcasting](#) (2001/C 320/04, 15.11.2001)

COM, [Commission Decision on Financing of public service broadcasters in Germany \(ARD/ZDF\)](#)(C(2007) 1761 final, 24.04.2007)

COM, [Commission Communication on the application of State aid rules to public service broadcasting](#) (2009/C 257/01, 27.10.2009)

### 6.1.4 Media funding

EEC, [Council Decision concerning the implementation of an action programme to promote the development of the European audiovisual industry \(MEDIA\) \(1991 to 1995\)](#) (90/685/EEC, 21.12.1990)

EC, [Council Decision on the implementation of a programme encouraging the development and distribution of European audiovisual works \(MEDIA II — Development and distribution\) \(1996 to 2000\)](#) (95/563/EC, 10.07.1995)

EC, [Council Decision on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works \(MEDIA Plus — Development, Distribution and Promotion\) \(2001 to 2005\)](#) (2000/821/EC of 20.12.2000)

EC, [Decision concerning the implementation of a programme of support for the European audiovisual sector \(MEDIA 2007 to 2013\)](#) (1718/2006/EC, 15.11.2006)

EU, [Regulation establishing the Creative Europe Programme \(2014 to 2020\) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC](#) (1295/2013/EU, 20.12.2013)



EU, [Regulation establishing the Creative Europe Programme \(2021 to 2027\) and repealing Regulation \(EU\) No 1295/2013](#) (2021/818/EU, 20.05.2021)

## **6.1.5 Media competition law**

EEC, [Regulation on the control of concentrations between undertakings](#) (4064/89/EEC, 21.12.1989)

COM, [Green Paper on Pluralism and Media Concentration in the Internal Market – An Assessment of the Need for Community Action](#) (COM (92) 480, 23 December 1992, [Annexes](#))

COM, [Green Paper on the Review of the Merger Regulation](#) (COM (96) 19 final, 31.01.1996)

EEC, [Regulation on the control of concentrations between undertakings](#) (139/2004/EEC, 20.01.2004)

CoE, [Recommendation on media pluralism and diversity of media content](#) (CM/Rec(2007)2, 31.01.2007)

COM, [Commission staff working document – Media pluralism in the Member States of the European Union](#) (SEC/2007/0032, 16.01.2007)

HLG on Media Freedom and Pluralism, final report [A free and pluralistic media to sustain European democracy](#), January 2013

COM, [White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty – Commission Programme No. 99/027](#) (COM (99) 101 final, 28.04.1999)

EC, [Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty](#) (1/2003/EC, 16.12.2002)

COM, [European Democracy Action Plan](#) (COM(2020) 790 final, 03.12.2020)

## **6.1.6 Liberalising telecommunications**

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## Get in touch

 [info@eumeplat.eu](mailto:info@eumeplat.eu)

 [www.eumeplat.eu](http://www.eumeplat.eu)



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