

## THE NEW AUDIOVISUAL MEDIA SERVICES DIRECTIVE: TELEVISION *WITHOUT* FRONTIERS, TELEVISION *WITHOUT* CULTURAL DIVERSITY

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### 1. Introduction

To see one's favourite TV show nowadays, one no longer needs to sit punctually in front of the screen at the hour specified in the TV schedule. Indeed, there are now numerous other options, such as pre-ordering the show *via* one's mobile or the Internet to be viewed on IPTV (internet protocol television<sup>1</sup>) at a convenient time, recording it on a digital video recorder, web-streaming it from the Internet or downloading it to a mobile phone, iPod or similar portable device. Not only that, but one can also skip the often too-long commercial breaks or order previous, missed or particularly worth-seeing episodes of the show.

To the casual observer, this wide range of options may seem like just another series of business tricks intended to lure customers into spending more money. The more perceptive and technologically savvy observer, however, would notice some distinct features of these scenarios. Besides shattering the reality of the "couch potato", they are all examples of the practical implementation of the digitization<sup>2</sup> and

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1. On IPTV, see Horlings, Marsden, van Oranje and Botterman, "Contribution to Impact Assessment of the Revision of the Television without Frontiers Directive", Report Prepared for DG Information Society and Media of the European Commission, RAND Europe, TR-334-EC DG, 1 Nov. 2005, at p. 5; Marsden, Cave, Nason, Parkinson, Blackman and Rutter, "Assessing Indirect Impacts of the EC Proposals for Video Regulation", Report Prepared for the United Kingdom Office of Communications, RAND Europe, 2006, at pp. 55–78.

2. In its simplest form, a digital code is a binary bit or digit indicating one of two alternatives (represented as either 0 or 1) to denote the presence or absence of an electrical signal or two different voltage levels. Binary bits can be grouped in various combinations to represent numbers, alphabetical characters, symbols or any other type of information. Through a combination of microprocessors and sophisticated algorithms, these bit streams can then be compressed to manageable lengths, therewith allowing a wide range of content to be stored, retrieved and transported electronically in the form of encoded text, audio and video traffic over any digital network.

convergence<sup>3</sup> processes, which have obliterated the boundaries between media, telecommunications and information technology sectors and moulded new patterns of consumer and business behaviour. These scenarios also reveal the massive degree of penetration of the digitization/convergence phenomena into our everyday lives and our decreasing defiance of the ubiquity of ones and zeroes.<sup>4</sup>

Before attempting an analysis of the regulatory implications of novel technological developments in the media, which is one of the objectives pursued by the present article, it should be noted that both digitization and convergence have progressed immensely in the last five years. As far as digitization is concerned, Moore's law<sup>5</sup> has remained valid and the potential of microprocessors has continued to increase at a rapid pace, allowing the processing and storage of vast amounts of information (be it audio, video or text). Furthermore, the breadth and capacity of networks have substantially been enhanced<sup>6</sup> and almost all networks (in developed and even in developing countries) have become IP-based.<sup>7</sup> In its totality, these developments have allowed for swift data transmission and have thereby changed existing business and consumer behaviour models.<sup>8</sup> Convergence, as a process stemming from digitization,<sup>9</sup> has also reached a new level of advancement. The long heralded merging of telecommunications, media and information technology services, networks and market players has become reality, as we saw above (albeit not in the

3. On convergence, see Blackman, "Convergence between telecommunications and other media" (1998) *Telecommunications Policy*, 163–170; Longstaff, "New ways to think about the visions called 'convergence': A guide for business and public policy", Program on Information Resources Policy, Harvard University, April 2000; OECD, "The implications of convergence for regulation of electronic communications", DSTI/ICCP/TISP(2003)5/final, 12 July 2004; Geradin and Luff (Eds.), *The WTO and Global Convergence in Telecommunications and Audio-Visual Services* (Cambridge University Press, 2004), especially therein Mueller, "Convergence: A reality check", pp. 311–322 and Larouche, "Dealing with convergence at the international level", pp. 390–422.

4. See e.g. OECD, "The future digital economy: Digital content creation, distribution and access", DSTI/ICCP/IE(2006)2/ANN, 22 May 2006.

5. Gordon Moore of Intel postulated in 1965 that the transistor density on a single integrated circuit microchip would double approximately every eighteen months. This rule showing the incredible pace of technological advance became known as Moore's law. On Moore's law, see e.g. Frieden, *Managing the Internet-Driven Change in International Telecommunications* (Boston/London, Artech House, 2001), at pp. 17 et seq.

6. Metcalfe's law holds that the potential value of network increases by the square of the number of nodes, while the Fibre Law holds that capacity doubles every 9 months. See e.g. Marsden et al., *supra* note 1, at pp. 72 et seq.

7. I.e. internet protocol-based: OECD, *Information Technology Outlook 2006* (Paris: OECD, 2007).

8. *Ibid.*

9. See Mueller, "Digital Convergence and its Consequences: a Report on the Digital Convergence and Market Structures", 1999, available at <[dcc.syr.edu/miscarticles/rp1.pdf](http://dcc.syr.edu/miscarticles/rp1.pdf)>

originally predicted shape and form<sup>10</sup>). There is now a real *supply* and, what is more important, a *demand* for converged services.<sup>11</sup> Particularly on the broadband Internet, different media, such as video gaming, music, streamed radio and online newspapers have proliferated and are widely accepted as substitutes for traditional analogue media.<sup>12</sup> Beyond this, there is a new generation of Internet-based services (such as social networking sites, blogs and wikis<sup>13</sup>) – the so-called *Web 2.0*<sup>14</sup> – which emphasize online collaboration and content creation, to enrich and stimulate the communication environment.<sup>15</sup>

Among the various consequences of the advanced digitization/convergence, we consider the magnified importance of *content* as the core one.<sup>16</sup> A second notable implication concerns the new ways of accessing and consuming content, which also lead to new ways of creating it. Although in the audiovisual media, the progress of digitization/convergence has been less pronounced (especially if compared with the most advanced convergence platform of the Internet), we argue in this article that its repercussions could be the most far-reaching. The availability of multiple new channels for distribution of content (and of new content), the new opportunities for consumers to access and interact, and the repositioning of global market players along the entire value chain of content creation, packaging and distribution, strongly

10. See Longstaff, *supra* note 3.

11. The lack of demand for converged services was one of the reasons for the “bursting” of the dotcom bubble in 2001. See *The Economist*, “Beyond the Bubble”, 9 Oct. 2003.

12. Horlings et al., *supra* note 1, at p. 6.

13. Social networking sites are websites, where communities of people who share interests or activities can interact using various web-based tools, such as chat, messaging, video, file sharing, discussion groups, etc. Blogs (or web blogs) are websites, where entries are written in chronological order and displayed in reverse chronological order. Blogs can combine text, images and links, and provide commentaries or news on a particular subject, or function as personal online diaries with possibilities for comments and interaction. Wikis are web applications allowing multiple authors to add, remove and edit content.

14. Web 2.0 is a phrase coined by O’Reilly Media ([www.oreilly.com/](http://www.oreilly.com/)) in 2004. Proponents of the Web 2.0 concept say that it differs from early Web development (labelled Web 1.0) in that it moves away from static websites, the use of search engines and surfing from one website to the next, towards a more dynamic and interactive World Wide Web. See O’Reilly, “What Is Web 2.0?”, available at <[www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html](http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html)>. See also OECD, “Participative web: User-created content”, DSTI/ICCP/IE(2006)7/FINAL, 12 April 2007.

15. See Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006). See also Jenkins, *Convergence Culture: How Old and New Media Collide* (New York University Press, 2006).

16. See OECD *op. cit.*, *supra* note 7. See also OECD, “Digital broadband content: Digital strategies and policies”, DSTI/ICCP/IE(2005)3/FINAL, 19 May 2006 and OECD *op. cit.*, *supra* note 4.

influence all media and their role in modern society. Such possibilities fundamentally change the character of communication and impinge upon our culture.<sup>17</sup>

In a world of profound changes and dynamism, what has remained surprisingly unaffected is regulation. Particularly in respect of the audiovisual media, there have been literally no changes to the regulatory framework since the onset of convergence and despite the substantial modifications in the parallel telecommunications regime.<sup>18</sup> In the European Union, the new Audiovisual Media Services Directive (AVMS), proposed by the European Commission on 13 December 2005,<sup>19</sup> should allegedly rectify this situation. Amending the existing Television without Frontiers Directive (TVWF),<sup>20</sup> it should offer a “fresh approach”<sup>21</sup> and meet the challenge of appropriately regulating media in a complex and dynamic environment. It is meant to achieve a balance between the free circulation of TV broadcast and new audiovisual media and the preservation of values of cultural identity and diversity, while respecting the principles of subsidiarity and proportionality inherent to the European Community.<sup>22</sup>

The main purpose of the present article is to examine whether and how the changes envisaged to the EC audiovisual media regime might influence cultural diversity in Europe and, subsequently, address the question of whether the AVMS appropriately safeguards the balance between competition and the public interest in this regard.

17. Castells, *The Information Age: Economy, Society and Culture, Vol. 1: The Rise of the Network Society*, 2<sup>nd</sup> ed. (Blackwell, 2000), at p. 356. Castells noted that, “[t]he potential integration of text, images, and sounds in the same system, interacting from multiple points, in chosen time (real and delayed) along a global network, in conditions of open and affordable access, does fundamentally change the character of communication. And communication decisively shapes culture...”.

18. On the developments of EC telecommunications law, see Nihoul and Rodford, *EU Electronic Communications Law* (OUP, 2004); Walden and Angel (Eds.), *Telecommunications Law and Regulation*, 2<sup>nd</sup> ed. (OUP, 2005).

19. Commission, Proposal for a Directive of the European Parliament and of the Council 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, COM(2005)646 final, 13 Dec. 2005. See also Commission Staff Working Document, Annex to the Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC, SEC(2005)1625/2, 13 Dec. 2005.

20. Council Directive 89/552/EEC of 3 Oct. 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, O.J. 1989, L 298/23.

21. Proposal for a Directive, *supra* note 19, at p. 2.

22. See Art. 5(3) EC and the Protocol on Subsidiarity and Proportionality, Attached to the Treaty of Amsterdam, O.J. 1997, C 340/1.

The article tackles these issues in four parts. The first outlines with a few broad brushstrokes the development of the EC audiovisual media regulation and its main tenets. The second part draws upon this background and discusses the proposed changes thereto. Part three examines their potential impact on cultural diversity in Europe and questions the concept of cultural diversity used by the Commission as a policy goal. Part four draws conclusions and suggests that the AVMS does not appropriately address the new media environment, and the balance between competition and cultural diversity as a legitimate public interest objective may be endangered through its implementation.

## 2. Overview of the development of EC audiovisual media regulation

Broadcasting was not one of the original regulatory domains of the EC and was not covered by the Treaty of Rome establishing the European Economic Community in 1957. It was only with the Maastricht Treaty,<sup>23</sup> which entered into force on 1 November 1993 that the audiovisual sector was referred to explicitly, although arguably different rules of the emerging body of Community law touched upon diverse aspects of media regulation even before the change took place.<sup>24</sup>

The attempts to shape a distinct EC audiovisual policy began before the Maastricht Treaty, however. They were triggered mostly by *endogenous* factors, which were epitomized by the development of satellite broadcasting, the

23. The Maastricht Treaty inserted a new Title IX into the structure of the Treaty of Rome. It bore the broad rubric of “Culture” and included one article – Art. 128, which is now, since the Amsterdam renumbering, Art. 151 EC. Art. 151 entails an obligation for the Community to “contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity”. Following the principle of subsidiarity, the Community is to encourage cooperation between Member States but could, if necessary, supplement their action in certain fields, notably, “artistic and literary creation, including in the audiovisual sector”. Art. 151(4) EC specifies further that the Community must take cultural aspects into account in its action under other provisions of the Treaty. For a comprehensive analysis of Art. 151 EC, see Craufurd Smith (Ed.), *Culture and European Union Law* (OUP, 2004). On the duties of the EC institutions in the field of culture, see de Witte, “Trade in culture: International legal regimes and EU constitutional values” in de Búrca and Scott (Eds.), *The EU and the WTO – Legal and Constitutional Issues* (Hart, 2003), pp. 237–255.

24. The ECJ played an important role in expanding the scope of activities falling under the Community’s prerogative. Since *Sacchi*, it is clear that the broadcasting of televised messages falls under the rules of the Treaty relating to the provision of services. See Case 155/73, *Giuseppe Sacchi*, [1974] ECR 409. See also Case 52/79, *Procureur du Roi v. Marc J V C Debaue and others*, [1980] ECR 860; Case 62/79, *Coditel v. Ciné-Vog Films (Coditel I)*, [1980] ECR 881 and Case 262/81, *Coditel v. Ciné-Vog Films (Coditel II)*, [1982] ECR 3381.

proliferation of TV broadcasters and the rapidly increasing deficit with the US in audiovisual trade. The Green Paper on the Establishment of a Common Market in Broadcasting of 1984<sup>25</sup> marked the beginning of the Community's audiovisual media policy. The latter advanced in parallel to but independently<sup>26</sup> of the undertakings of the Council of Europe (CoE). The Council of Europe had indeed a longer established stance on media matters.<sup>27</sup> It was also the first to adopt a regulatory act to that effect with the *Convention on Transfrontier Television (CTT)*.<sup>28</sup>

The Community decided to follow the blueprint of the CTT.<sup>29</sup> Consequently, 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,<sup>30</sup> which was adopted in 1989, mirrors to a great extent the structure and the basic provisions of the CTT.<sup>31</sup> Since the beginning of the 1990s,<sup>32</sup> this Directive,<sup>33</sup> commonly

25. Commission, *Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable*, COM(84)300, May 1984. For the developments leading to the adoption of the TVWF, see Levy, *Europe's Digital Revolution: Broadcasting and Regulation, the EU and the Nation State* (Routledge, 1999), at pp. 41–43.

26. Graber, "Kulturpolitische Auswirkungen eines Schweizer Beitritts zur Europäischen Union – Untersucht am Beispiel des Film- und Fernsehrechts" in Cottier and Kopše (Eds.), *Der Beitritt der Schweiz zur Europäischen Union: Brennpunkte und Auswirkungen* (Schulthess, 1998), pp. 987–1024, at p. 995.

27. The endeavours of the CoE to adopt a binding legal instrument covering certain cultural aspects of transfrontier broadcasting began in the early 1980s. Various steps followed, which found expression in a number of recommendations. For an account, see Explanatory Report to the European Convention on Transfrontier Television (ETS No 132), Strasbourg, 5 May 1989, as amended by the provisions of the Protocol (ETS No 171), which entered into force on 1 March 2002.

28. CoE, *European Convention on Transfrontier Television (ETS No 132)*, Strasbourg, 5 May 1989. The CTT was opened for signature by the CoE Member States and other States Party to the *European Cultural Convention (ETS No 018)*, Paris, 19 Dec. 1954.

29. See European Council Decisions of 2 and 3 Dec. 1988, Rhodes, in Bull. EC, No 12/1988, at para 1.1.9.

30. See *supra* note 20.

31. The CTT provides a minimum of common rules in fields such as programming, advertising and the protection of certain individual rights. It entrusts the transmitting States with the task of ensuring that the TV programme services transmitted comply with its provisions. In return, freedom of reception of programme services is guaranteed, as well as the retransmission of the programmes which comply with the minimum rules of the Convention.

32. Pursuant to Art. 25 TVWF, Member States were obliged to bring their laws, regulations and administrative provisions into conformity with the Directive by 3 Oct. 1991.

33. Updated and revised through Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 Amending Council Directive 89/552/EEC, O.J. 1997, L 202/60. In the course of this paper, we shall refer to the consolidated version of Directive 89/552/EEC and Directive 97/36/EC.

known as the *Television without Frontiers Directive*, has provided the essential regulatory framework for television broadcasting and related activities at the Community level. As the prime EC regulatory tool for audiovisual media, the TVWF will be at the heart of our enquiry.

The TVWF can be best described as a liberalization measure. It is in essence a concretization of the freedom of services under the specific conditions of television, including a minimum level of partial harmonization,<sup>34</sup> which ensures the conditions necessary and sufficient for the consolidation of the single market for media services.<sup>35</sup> As a piece of secondary law, the Directive follows the basic principles of freedom to provide services and freedom of establishment.<sup>36</sup> Article 2(a) TVWF explicitly guarantees these freedoms and provides that no Member State can restrict reception or retransmission of a broadcast from another Member State for reasons falling within the areas coordinated by the Directive. The TVWF regulates four major areas that cover: (i) the promotion of European works<sup>37</sup> and works by independent producers;<sup>38</sup> (ii) advertising, teleshopping and sponsoring;<sup>39</sup> (iii) the protection of minors and public order;<sup>40</sup> and (iv) the right of reply.<sup>41</sup> The TVWF, in the amended version of 1997,<sup>42</sup> ensures further that events which are regarded by a Member State as being of major importance to society (such as, most manifestly, the Football World Cup), may not be broadcast in such a way (e.g. on pay-TV only), as to deprive a substantial part of the population of that Member State of the opportunity to watch them.<sup>43</sup>

The core principle of application of the *lex specialis* TVWF rules is the so-called “country of origin” rule (also referred to as “home State” or “sending State” rule), whereby each Member State must ensure that all televi-

34. Joined Cases C-34, 35 & 36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and TV-Shop I Sverige AB*, [1997] ECR I-3843, at para 32. See also Drijber, “The revised Television without Frontiers Directive: Is it fit for the next century” 36 CML Rev. (1999), 87–122, at 92. On the different types of harmonization in EC law, see Slot, “Harmonisation”, 21 EL Rev. (1996), 378–396.

35. See Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, [1995] ECR I-179, at paras. 28–29 and *De Agostini*, *supra* note 34 at paras. 24–28. See also Wheeler, “Supranational regulation: Television and the European Union” (2004) *European Journal of Communication*, 349–369, at 351–357.

36. See Arts. 43 and 49 EC. See also *supra* note 24.

37. Arts. 4 and 6 TVWF.

38. Art. 5 TVWF.

39. Arts. 10–20 TVWF.

40. Arts. 22, 22(a) and 22(b) TVWF.

41. Art. 23 TVWF. Teleshopping rules were added by the 1997 amendment of the TVWF.

42. See *supra* note 33.

43. Art. 3(a) TVWF.

sion broadcasters under its jurisdiction comply.<sup>44</sup> Member State jurisdiction is defined through the principle of country of establishment with specific practical criteria applying to its precise determination (e.g. head office of the service provider; place where programming policy decisions are taken).<sup>45</sup> Each broadcaster falls under the jurisdiction of one Member State *only* and it is *sufficient* that the broadcasters comply with the law of the Member State from which they emanate.<sup>46</sup> The receiving State cannot exercise secondary control<sup>47</sup> except under special, restrictively interpreted,<sup>48</sup> derogations (such as the protection of minors or prevention of incitement to hatred).<sup>49</sup> It should not, however, be forgotten that the TVWF defines only a *minimum set* of common rules and Member States are free to impose more detailed or stricter rules upon broadcasters under their jurisdiction.<sup>50</sup>

With the benefit of hindsight and summarizing the 17 years of application of the TVWF, one can argue that the TVWF has been a clear success. It has contributed to overcoming the existing fragmentation of national laws and, by facilitating the free circulation of television broadcasts, has fostered the European audiovisual media industry. The numbers contained in the recent Commission report on the implementation of the TVWF<sup>51</sup> are unambiguous evidence in this regard: whereas, at the beginning of 2001, over 660 channels with potential national coverage were broadcast *via* terrestrial transmitters, satellite or cable,<sup>52</sup> three years later over 860 such channels were active in the EU15.<sup>53</sup> This should be compared to the fewer than 90(!) channels existing in 1989.<sup>54</sup> As the number of channels has grown, so have the revenues of

44. Art. 2 TVWF.

45. See Art. 2(3)–(5) TVWF. For the relevant case law, see Drijber, *supra* note 34, at pp. 92–97.

46. See Case C-11/95, *Commission v. Belgium*, [1996] ECR I-4115, at para 34 and Case 14/96, *Criminal Proceedings against Paul Denuit*, [1997] ECR I-2785, at paras. 32–34. For the limitations of the transmitting State principle, see *De Agostini*, *supra* note 34, at paras. 33–35.

47. *De Agostini*, *ibid.*

48. See e.g. Case C-348/96, *Calfa*, [1999] ECR I-0011, at paras. 21 and 23. For a more extensive overview of the case law, see Drijber, *op. cit. supra* note 34 at 98–104 and the annotation of *De Agostini* by Stuyck in 34 CML Rev. (1997), 1445–1468.

49. See Art. 2(a)(2) TVWF.

50. See Art. 3(1) TVWF.

51. Commission, Fifth Report on the Application of Directive 89/552/EEC “Television without Frontiers”, COM(2006)49 final, 10 Feb. 2006.

52. *Ibid.*, referring to the European Audiovisual Observatory, 2001 Yearbook.

53. *Ibid.*, referring to the European Audiovisual Observatory, 2004 Yearbook.

54. Papathanassopoulos, *European Television in the Digital Age* (Cambridge, Polity, 2002), at p. 14.



broadcasters, which now make a substantial contribution to overall economic growth.<sup>55</sup>

Yet, although these data show what the European Commission likes to describe as a flourishing content industry,<sup>56</sup> there is a flipside to the coin. Deregulation of TV markets has had multiple, less glamorous, effects.<sup>57</sup> The quantity of imported programmes and their costs have soared.<sup>58</sup> Beyond this, and more importantly, the quality and the range of programmes on offer have been radically altered.<sup>59</sup> The pursuit of a maximization of profits and a minimization of financial risks has resulted in much “imitation, blandness and the recycling of those genres, themes and approaches regarded as profitable”.<sup>60</sup> The formats and contents of TV programmes, films and shows have become increasingly homogeneous.<sup>61</sup> The traditional function of television, to inform, has been twisted and has led to a “tabloidization of news”<sup>62</sup> and infotain-

55. Public service broadcasters in the EU25 zone had total revenues of € 29.1 billion in 2003, whereas private broadcasters recorded revenues totalling € 18.3 billion. Pay-TV and package subscriptions increased their revenues to an overall amount of € 13.6 billion in 2003. See Commission, Fifth Report, *supra* note 51, referring to the European Audiovisual Observatory, 2005 Yearbook.

56. Commission, The Commission Proposal for a Modernisation of the Television without Frontiers Directive, MEMO/06/208, Brussels, 18 May 2006, at p. 1.

57. For an overview, see Papathanassopoulos, *op. cit. supra* note 54, pp. 9–32.

58. Papathanassopoulos, *ibid.* at pp. 17–18.

59. Papathanassopoulos, *ibid.* at pp. 18–19, referring to Blumler, “Vulnerable values at stake” in Blumler (Ed.), *Television and the Public Interest: Vulnerable Values in Western European Broadcasting* (London, Sage, 1992), pp. 22–24; Achile and Miège, “The limits of adaptation strategies of European public service television”, (1994) *Media, Culture and Society*, 31–46.

60. Papathanassopoulos, *ibid.* at p. 19, referring to McQuail, “Commercialisation and Beyond” in McQuail and Siune (Eds.), *Media Policy: Convergence, Concentration and Commerce* (London, Sage, 1998), pp. 107–127, at pp. 119–120 and Ouilette and Lewis, “Moving beyond the ‘vast wasteland’: Cultural policy and television in the United States”, (2000) *Television and New Media*, 95–115, at p. 96. See also Webster, *Theories of Information Society* (Routledge, 1995), at p. 22. On the “multi-channel paradox”, whereby despite the diversity of channels, there is no actual diversity of content, see Ariño, “Competition law and pluralism in European digital broadcasting: Addressing the gaps” (2004) *Communications and Strategies*, 97–128, at pp. 98 et seq.

61. For a critique of the cultural industries and on the homogeneity of content, see Graber, *Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung* (Staempfli, 2003), at pp. 18 et seq. For counter arguments, see Romano, “Technologische, wirtschaftliche und kulturelle Entwicklungen der audiovisuellen Medienmärkte in den letzten Jahren” in Graber, Girsberger and Nenova, *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services* (Schulthess, 2004), pp. 1–13, at pp. 4 et seq.

62. Papathanassopoulos, *op. cit. supra* note 54, at pp. 20–23. See also Esser, “‘Tabloidization’ of news: A comparative analysis of Anglo-American and German press journalism” (1999) *European Journal of Communication*, 291–324.

ment.<sup>63</sup> The competitive pressure has also changed the position of public service broadcasters and initiated a process of convergence of the public and the commercial systems, in particular with respect to their programming output.<sup>64</sup>

Against this backdrop, one could suggest that whilst the TVWF has been a “victory for commercial forces and those who favoured anti-protectionist policies”,<sup>65</sup> it has done little for the achievement of *cultural* goals. Although, as mentioned above, the TVWF followed the CTT,<sup>66</sup> the two acts had essentially different bases. While the latter initiative of the CoE had as its underlying rationale the freedom of expression, enshrined in Article 10 of the European Convention of Human Rights,<sup>67</sup> the Community act has been primarily a single market measure.<sup>68</sup> It is based upon Articles 47(2) and 55 EC (ex 57(2) and 66) and is a harmonization instrument meant to ensure that the free movements of establishment and services are not unduly restricted.<sup>69</sup>

The intrinsic duality of audiovisual services as having both an economic and a cultural nature, albeit repeatedly stated by the Community institutions,<sup>70</sup> could not be properly reflected at the EC level. The conflicting values and objectives belonging to distinct differentiated societal spheres<sup>71</sup> could not be appropriately resolved through the chosen legal model. This became apparent not only in the provisions of the TVWF, but was also later revealed by the failed attempt to adopt a Directive regulating media ownership.<sup>72</sup> The “[t]ensions between ‘the economic aims of completing the single market [and] ... the concern to protect cultural identity and a pluralist media’ further complicate the more conventional EU conflicts between interventionists and

63. Franklin, *Newszak and News Media* (London, Arnold, 1997), at p. 4.

64. Papathanassopoulos, *supra* note 54, at p. 19, referring to Pfetsch, “Convergence through privatization? Changing media environments and televised politics in Germany” (1996) *European Journal of Communications*, 427–451, at 428–429.

65. Negrine and Papathanassopoulos, *The Internationalisation of Television* (London, Pinter, 1990), at p. 76.

66. The ECJ has even held that the CTT and its explanatory memorandum can be used to clarify the interpretation of the TVWF. See Joined Cases C-320, 328, 329, 337, 338 & 339/94 *Reti Televisive Italiane SpA (RTI), Radio Torre, Rete A Srl, Vallau Italiana Promomarket Srl, Radio Italia Solo Musica Srl and Others, and GETE Srl v. Ministero delle Poste e Telecomunicazioni*, [1996] ECR I-6471, at para 33.

67. ECHR as amended by Protocol No 11, ETS No 155.

68. Graber, *supra* note 26, at pp. 996–998.

69. See *supra* note 35.

70. See *infra* section 5.

71. See Fischer-Lescano and Teubner, “Regime-collisions: The vain search for legal unity in the fragmentation of global law”, (2004) *Michigan Journal of International Law*, 999–1046.

72. See Levy, *op. cit. supra* note 25, at pp. 50–59. See also Westphal, “Media pluralism and European regulation”, (2002) *European Business Law Review*, 459–487, at 461–467.

liberalizers, and between integrationalist and intergovernmental approaches”<sup>73</sup> and render a coherent media regulation at the Community level unattainable. Paradoxically, it has been the EC competition rules (in the sense of economic regulation), applying both in the fields of media and telecommunications,<sup>74</sup> that by fighting the concentration in these markets, safeguarded a certain level of content diversity.<sup>75</sup> In the next sections, we shall see whether the new EC act regulating audiovisual media will be better able to meet the public interest goal of protecting the diversity of cultural expressions and whether the Community has indeed properly defined this goal.

### 3. The need for a change and steps leading to the AVMS

The TVWF Directive incorporated an obligation for the Community to review it by 2002.<sup>76</sup> This was however not the sole reason that prompted the revision. Neither can the reason be found in some of the shortcomings of the TVWF as an instrument for regulating European audiovisual media, as hinted above. Rather, the reason for a change was exogenous to the legal model and endogenous to the audiovisual environment. The development and application of digital technologies, combined with strong convergence effects, as sketched at the beginning of the article, have radically and irreversibly transformed the media landscape. They have also triggered some specific developments in broadcasting markets, such as: (i) increased pay-per-view; (ii) new non-linear services delivery (e.g. video-on-demand); (iii) peer-to-peer exchanges

73. Hitchens, “Identifying European Community audio-visual policy in the dawn of the Information Society” in *Yearbook of Media and Entertainment Law 1996* (OUP, 1997), at pp. 71–72, as referred to by Levy, op. cit. *supra* note 25, at p. 40. See also in the same sense, Wheeler, op. cit. *supra* note 35.

74. See e.g. the 2006 decision of the Commission to bring court proceedings against Sweden for its failure to change rules giving the State-owned company Boxer TV Access a monopoly over the provision of access control services in the Swedish digital terrestrial broadcasting network. The case is based upon Commission Directive 2002/77/EC of 16 Sept. 2002 on Competition in the Markets for Electronic Communications Networks and Services, O.J. 2002, L 249/21. See Commission, “Competition: Commission takes Sweden to Court for failure to end broadcasting services monopoly”, IP/06/1411, 17 Oct. 2006.

75. See e.g. Commission Decision of 2 April 2003 Declaring a Concentration to be compatible with the Common Market and the EEA Agreement (Case No COMP/M. 2876 – *News-corp/Telepiù*), C(2003) 1082 final, 2 April 2003. Previous cases on media concentration include Case No IV/M.110, *ABC/Generale des aux/Canal+/WH Smith*, O.J. 1991, C 244/06; Case No IV/M.469, *MSG Media Service*, O.J. 1994, L 364; Case No IV/M.490, *Nordic Satellite Distribution*, O.J. 1995, L 53; Case No IV/M.553, *RTL/Veronica/Endemol*, O.J. 1996, L 294; Case No IV/M.993, *DFI/Premiere*, O.J. 1997, C 374/4.

76. See Art. 25(a) TVWF.

of audiovisual content; (iv) changed viewer habits; and (v) new advertising methods. Together, these phenomena and processes called for a modernized legal framework to fit the new reality of European broadcasting.<sup>77</sup>

Despite the wide agreement on the need for a change, the revision of the TVWF has not been a smooth but rather a rough ride. It was an essential part of the overall reform, launched by the Green Paper on Convergence in 1999,<sup>78</sup> in reaction to the turbulently developing, technologically driven sectors of telecommunications, information technologies and audiovisual media. The reform of the media sector was indeed the last building block in this major undertaking of the Community, which is also endowed with a specific role in the context of the Lisbon strategy to establish the EU as the “most competitive and dynamic knowledge-based economy in the world”.<sup>79</sup>

The actual review process of the TVWF commenced with the Fourth Communication on the application of the TVWF Directive for the period 2001–2002.<sup>80</sup> In an annex to this Communication, the Commission proposed a work programme for the modernization of audiovisual services rules and a timetable of future actions.<sup>81</sup> The subsequent efforts<sup>82</sup> focused upon six priority areas, namely: (i) rules applicable to audiovisual content services (scope); (ii) cultural diversity and promotion of European and independent audiovisual production; (iii) media pluralism; (iv) commercial communications;

77. See Horlings et al., *supra* note 1, at pp. 3–20.

78. Commission, Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation: Towards an Information Society Approach, COM(97)623 final, 3 Dec. 1997. See also Commission communication on Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age, COM(1999)657 final, 14 Dec. 1999.

79. European Council, Presidency Conclusions, Lisbon, 23 and 24 March 2000, at para 5. See also Commission, i2010 – A European Information Society for Growth and Employment, COM(2005)229 final, 1 June 2005.

80. Commission, Fourth Report on the Application of Directive 89/552/EEC “Television without Frontiers”, COM(2002)778 final, 6 Jan. 2003.

81. In the period up to the adoption of the new Directive, legal certainty in the changing environment of European media has been guaranteed through an interpretative Communication on television advertising, in particular new advertising techniques (split screen, virtual and interactive advertising) and update of the Recommendation on the protection of minors and human dignity. See Commission, Commission Interpretative Communication on Certain Aspects of the Provisions on Televised Advertising in the “Television without Frontiers” Directive, O.J. 2004, C 102/2 and Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European Audiovisual and Information Services Industry, O.J. 2006, L 38/72.

82. There were particularly intensive discussions, which involved manifold stakeholders. All stakeholders’ opinions from the diverse hearings are available at <ec.europa.eu/avpolicypolicy/reg/tvwf/modernisation/index\_en.htm>.

(v) protection of minors and human dignity, right of reply; and (vi) rights to information and short reporting.<sup>83</sup>

Procedurally, the adoption of the AVMS was subject to the co-decision formula set out in Article 251 EC, which involves the Commission, the Council and the European Parliament (EP). Key documents in this process are the original proposal of the Commission of 13 December 2005;<sup>84</sup> the compromise text tabled by the Finnish Presidency,<sup>85</sup> the Report of the Committee on Culture and Education,<sup>86</sup> and the text adopted by the EP<sup>87</sup> amending in first reading the Commission's proposal. On 24 May 2007, after some subsequent changes brought in by the Commission,<sup>88</sup> a political compromise on the text of the AVMS was reached.<sup>89</sup> In our analysis, we refer to the latter.

#### 4. Main tenets of the AVMS reform

Of the various changes that the AVMS brings about, we focus our attention on three of the novel (and most contentious) solutions, which are likely to have substantial effect upon the media ecosystem in Europe and on the diversity of cultural expressions therein. These key issues are (i) scope of the AVMS; (ii) rules on advertising; and (iii) product placement.

83. See Commission, Fourth Report, *supra* note 80, at Annex, pp. 33–37. See also the six Issue Papers of July 2005, available at <[ec.europa.eu/comm/avpolicy/docs/reg/modernisation/liverpool\\_2005/uk-conference-report-en.pdf](http://ec.europa.eu/comm/avpolicy/docs/reg/modernisation/liverpool_2005/uk-conference-report-en.pdf)>

84. See *supra* note 19.

85. The Council addressed in particular four major issues, namely the Directive's scope, jurisdiction, product placement and quantitative advertising rules. Following a long discussion, a compromise text was agreed that was supported by all delegations except Sweden, Ireland, Latvia, Belgium, Lithuania, Luxembourg and Austria.

86. Report of the Committee on Culture and Education, Rapporteur: Ruth Hieronymi, A6-0399/2006, 22 Nov. 2006.

87. European Parliament, Legislative Resolution on the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC, P6\_TA-PROV(2006)0559, 13 Dec. 2006.

88. Commission, Amended Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC ("Audiovisual Media Services without Frontiers"), COM(2007)170 final, 29 March 2007.

89. Commission, "Commission welcomes political agreement on new Directive for Europe's audiovisual media", IP/07/706, Brussels, 24 May 2007. See also Council Report on the Amended Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC, 2005/0260 (COD), 10 May 2007 and the Addendum to it containing the text agreed upon.

#### 4.1. *Extended scope of the AVMS*

The first and most groundbreaking element of the reform involves a readjustment of the scope of the Directive. The Commission's crucial argument in this respect was that, given the impact that audiovisual media services have on the economy and society, the AVMS rules should apply to *all* content services, irrespective of the technology that delivers them. This is in stark contrast to the previous situation, where the different delivery modes received different regulatory treatment and caused regulatory asymmetries. To remedy this situation, a broader, generic definition of *audiovisual media service* was proposed, which also implies a larger scope for application of the AVMS. Pursuant to Article 1<sup>90</sup> thereof, an audiovisual media service is identified through six essential elements, which must be simultaneously present. These elements are:

- (i) a *service* within the meaning of the Treaty provisions (Arts. 49 and 50 EC);
- (ii) provided under *editorial responsibility* of a media service provider;<sup>91</sup>
- (iii) the principal purpose of which is the *provision of programmes* consisting of moving images with or without sound;<sup>92</sup>

90. "‘Audiovisual media service’ means a service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council. Such audiovisual media services are either television broadcasts as defined in paragraph (c) of this Article or on-demand services as defined in paragraph (e) of this Article and/or audiovisual commercial communication". Pursuant to some examples given by the Commission, the following qualify as audiovisual media services: films, telefilms, serials on demand; sports events on demand; entertainment shows on demand; video reports of concerts and live arts performances on demand; TV news reports on demand; and advertising delivered in connection with these on-demand services. In contrast, advertising not delivered in connection with the on-demand services; video clips inserted in websites when the main purpose is not the delivery of audiovisual content but to deliver information on the activities of the site owner; animated images inserted on press websites and blogs for non-commercial purposes, are not covered by the definition of audiovisual media service. See Commission proposal for a modernisation of the Television without Frontiers Directive, MEMO/05/475, Brussels, 13 Dec. 2005.

91. Media service provider is defined in Art. 1(b) AVMS as "the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised".

92. The concepts of "programmes" and "editorial responsibility" were introduced by the EP in pursuit of a clearer delineation from other audiovisual services. Programme is defined as "a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedy, documentary, children's programmes and original drama" (Art. 1(aa) AVMS). Editorial responsibility is "the exercise of effective control both over

- (iv) *in order to inform, entertain or educate;*
- (v) *to the general public;*
- (vi) *by electronic communications networks.*<sup>93</sup>

Pursuant to this definition, it is apparent that *any* content service of commercial nature<sup>94</sup> will be caught by the AVMS.

#### 4.1.1. *Linear and non-linear audiovisual media services*

Under the all-encompassing category of audiovisual media services, two sub-categories are defined, which, as we shall see below, are treated differently under the AVMS regime. The first sub-category is that of *television broadcast* or *linear service*. It covers audiovisual media services “provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule”.<sup>95</sup> The second sub-category comprises *on-demand* or *non-linear services*, which are offers of audiovisual content “for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider”.<sup>96</sup> On the basis of these definitions, one can say that the rule-of-thumb for delimitating the categories of linear/non-linear services is the possibility of *choice and control* the user can exercise and also the *impact* they have on society (being “pushed” to everyone or “pulled” individually).<sup>97</sup>

the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided” (Art. 1(ab) AVMS).

93. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), O.J. L 108/33, 24 April 2002. Art. 2(a) thereof defines electronic communications networks as “transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed”.

94. In Recital 13 AVMS, it was stressed that the economic element must be significant to justify the application of the Directive. Accordingly, the scope “does not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest”. See also Recitals 14–16 AVMS.

95. Art. 1(c) AVMS.

96. Art. 1(e) AVMS.

97. Recital 28 AVMS. See also Case C-89/04, *Mediakabel BV v. Commissariaat voor de Media*, [2005] ECR I-4891.

Taken together, the broader definition of audiovisual media service and the delineation of the two categories have three important effects:

(i) first, the overarching idea of platform-neutral content regulation is properly reflected and the transport technology does not lead to the exclusion of any content services from the reach of the AVMS;

(ii) second and most importantly, the “country of origin” principle, as the core to the Community audiovisual media regime, is extended to all content services, including non-linear services. This minimum level of harmonization guarantees a functioning single market and prevents the emergence of an uneven playing field laden with diverging national rules: Indeed, while it is often said that non-linear services were previously unregulated, 19 out of the 25 Member States do already have some form of regulation.<sup>98</sup> The rules at the EC level can allegedly also contribute to legal certainty, which will support the convergence of linear and non-linear on the supply side and create a beneficial environment of consumer trust and product awareness;<sup>99</sup>

(iii) third, some flexibility is preserved, which allows for a less stringent approach to new media services. The regulation of conventional television broadcast (or linear media services) remains almost unchanged (with some relaxation of the rules on advertising and product placement, as discussed in section 4.2 below). In contrast, non-linear services are subject to a much lighter regime and would have to satisfy only a basic tier of rules. These rules cover the protection of minors and human dignity; right of reply; identification of commercial communications; and minimum qualitative obligations regarding commercial communications.

The overall effect aspired to by the above-outlined reform was, in the words of the Commission, to increase choice, diversity and investment in the European audiovisual media leading to a “vibrant ‘audiovisual content without frontiers’ industry that is strongly rooted in the EU”.<sup>100</sup> Yet, this aspiration may remain unfulfilled. In practical terms, the effects of the changes made cannot be unequivocally framed as positive. While the TVWF affected only licensed broadcasters, the AVMS now covers a much broader range of stakeholders, who formerly were, if not *unregulated*, at least *less regulated*<sup>101</sup> (by generic rules such as the e-Commerce Directive<sup>102</sup>). Although the pro-

98. All of the Member States had some requirements on advertising, protection of minors and human dignity. None had rules regarding European or independent productions and only one Member State had some regulation of advertising limits. See Horlings et al., *supra* note 1, at pp. 16–17.

99. Horlings et al., *ibid.*, at p. 75.

100. Commission, *supra* note 90.

101. Marsden et al., *supra* note 1, at p. vi.

102. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on



viders of non-linear services will only have to comply with the laws of their own Member State, the regulatory burden upon them is substantial and may be detrimental.<sup>103</sup> Innovation and entry of new market players may indeed be seriously hampered.<sup>104</sup> User-generated content as an emerging feature of broadband use and the related business models, such as Google and YouTube, which support the insertion of advertising into the more popular pieces of content will now be affected: the content producer, who chooses to accept advertising, will be subject to the AVMS as a non-linear provider, even though the advertising itself is chosen by the site host.<sup>105</sup> This may be prohibitive for furthering the positive effects of user-generated and distributed content,<sup>106</sup> which is often central to consumers' Internet experience,<sup>107</sup> and may suppress this new type of creativity.

New linear operators (e.g. new channel providers) will also face relatively heavy regulatory burdens (in contrast to the incumbent linear operators for whom the nominal burden is small). In seeking a reduction in sunk costs and realization of positive network effects, content providers will have the stimulus to consolidate, which will reinforce concentration in broadcasting markets<sup>108</sup> and thus have a negative impact on the diversity of cultural expressions in the European media environment.

#### 4.1.2. "Cultural" quotas for non-linear services?

An immediate concern in the context of this new, broader definition of audiovisual media services and cultural diversity is whether the existing quota mechanisms for European works (Art. 4 TVWF) and for independent produc-

Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), O.J. 2000, L 178/1.

103. This was a major contentious issue during the AVMS adoption. See e.g. McDowall, "The Television without Frontiers Directive: Another 'Directive Too Far'", *IT Analysis*, 5 May 2006, available at <[www.it-analysis.com/business/content.php?cid=8476](http://www.it-analysis.com/business/content.php?cid=8476)> and *The Economist*, "Regulation without Frontiers", 12 Oct. 2006.

104. Marsden et al., *supra* note 1, *passim*.

105. Marsden et al., *ibid.*, at p. 25.

106. A recent report of the OECD acknowledges the enormous potential that user created content has. It states that, "[t]he Internet as a new creative outlet has altered the economics of information production and led to the democratisation of media production and changes in the nature of communication and social relationships (sometimes referred to as the 'rise – or return – of the amateurs'). Changes in the way users produce, distribute, access and re-use information, knowledge and entertainment potentially gives rise to increased user autonomy, increased participation and increased diversity. These may result in lower entry barriers, distribution costs and user costs and greater diversity of works as digital shelf space is almost limitless". See OECD, Participative Web, *supra* note 14, at p. 5.

107. See Benkler, *supra* note 15.

108. Marsden et al., *supra* note 1, at p. 130.

tions (Art. 5 TVWF) are preserved under the AVMS regime. In the framework of TVWF, Article 4(1) prescribed that Member States ensure “where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping”.<sup>109</sup> This proportion was to be achieved progressively, on the basis of suitable criteria.<sup>110</sup> Article 5(1) TVWF provided further that, where practicable and by appropriate means, broadcasters reserve at least 10 percent of their transmission time, or alternatively, 10 percent of their programming budget, for European works created by producers who are independent of broadcasters.

Articles 4 and 5 TVWF were the only tools at Community level that were *per se* meant to serve cultural goals, ensuring a balance of offerings in the EC broadcasting markets. Regardless of the implementation option chosen by the individual Member States,<sup>111</sup> the impact study prepared for the TVWF review<sup>112</sup> showed that the measures to promote European and independent productions have indeed had considerable impact. The average ratio of European works in the qualifying transmission time of the channels rose from 52.1 percent in 1993 to 57.4 percent in 2002. The average proportion of independent productions increased from 16.2 percent in 1993 to 20.2 percent in 2002 and the share of recent independent productions from 11.3 percent to 15.7 percent.<sup>113</sup> The impact study suggested further that, taking into account

109. Emphasis added. “European works” were defined pursuant to criteria set out by Art. 6 TVWF.

110. Art. 4(1) TVWF.

111. For an overview of the national legislation put in place in the diverse Member States, see Graham & Associates, *Impact Study of Measures (Community and National) Concerning the Promotion of Distribution and Production of TV Programmes Provided for under Art. 25(a) of the TV Without Frontiers Directive*, Final Report Prepared for The Audiovisual, Media and Internet Unit of DG Information Society, 24 May 2005, at Chapt. 6. While the majority of Member States has transcribed the definitions directly into national legislation, France and Germany apply stricter definitions. France distinguishes between audiovisual works and cinematographic works. Germany defines what is included as qualifying hours: feature films, television movies, series, documentaries and comparable productions. Six Member States – Finland, France, Italy, The Netherlands, Spain and the UK – apply higher percentage requirements than those contained in TVWF on some or all of their broadcasters. For example, in France, legislation requires all broadcasters to reserve at least 60% of their qualifying hours for European audiovisual and cinematographic works (*ibid.*).

112. Graham & Associates, *op. cit. supra* note 111. See also Commission, *Seventh Communication on the Application of Articles 4 and 5 of Directive 89/552/EEC “Television without Frontiers”, as Amended by Directive 97/36/EC for the Period 2003–2004*, COM(2006)459 final, 14 Aug. 2006.

113. Graham & Associates, *ibid.*, at p. 14 and Chapter 7. The more prescriptive a Member State is in the way that it implements Arts. 4 and 5 TVWF, the higher the average ratio of Eu-

these developments, there is no need to change<sup>114</sup> either the majority share for European works or the minimum share for independent productions: Articles 4 and 5 TVWF were deemed to already be achieving their cultural aims “*inasmuch* as ... [they] have increased the proportion of European works and independent productions broadcast by channels in the EU”.<sup>115</sup>

The EU Commissioner for Information Society and Media, Viviane Reding was delighted by the high share of airtime devoted to European works and stated that, “[t]his is proof of the high quality of Europe’s home-grown audiovisual content and of the vitality of an audiovisual industry that draws upon Europe’s rich cultural diversity”.<sup>116</sup>

We argue to the contrary that the higher share of European productions is by no means a sign of increased (or existing) diversity of cultural expressions. The definition of what qualifies as “European work” is neither based upon originality and quality criteria nor does it require a particular expression of national and European themes.<sup>117</sup> It is based merely on the construct that a majority of its authors and workers reside in one or more Member States and comply with one of the three conditions: (a) the work is made by one or more producers established in a Member State or States party to the CTT; (b) the production is supervised and controlled by producer(s) established in one or more of those States; or (c) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by producer(s) established outside those States.<sup>118</sup>

Indeed, in this shape and form, the cultural diversity rationale for the promotion of European works is barely distinguishable from a protectionist one, aiming to secure a certain amount of airtime for works produced with European money.<sup>119</sup> It is noteworthy that the impact study could not prove that, in

European works to qualifying transmission hours in that country. Member States with a national average for European works greater than the EU average – such as Finland, France, Greece, Italy and Luxembourg – are also among the most prescriptive in the way they apply Arts. 4 and 5 (ibid. at section 8.1).

114. The impact study noted however that the “where practicable” mode, which offers an exemption from the requirements of Arts. 4 and 5 TVWF, compares unfavourably with other legislation (despite the existing reporting obligation), where general rules are established and the exemptions clearly defined, leaving less room for avoidance. It was further considered that the use of this exemption may need to be reviewed as secondary channels take a greater share and often become part of larger multi-channel conglomerates. Ibid at p. 181 and section 8.2.5.

115. Graham & Associates, *supra* note 111, at p. 181 (emphasis added) and section 4.6.3.

116. Commission, “European works’ share of TV broadcasting time now stable over 60%”, IP/06/1115, Brussels, 22 Aug. 2006.

117. Graber, *supra* note 61, at pp. 253–254.

118. Art. 6(2) in conjunction with 6(1)(a) and (b) TVWF.

119. Such a rationale is apparent from Recital 20 TVWF (“Whereas it is therefore necessary to promote markets of sufficient size for television productions in the Member States to recover

the absence of Articles 4 and 5 TVWF, the trade deficit with the US<sup>120</sup> would have been larger and that the measures to promote the circulation of programmes within the EU have also promoted exports.<sup>121</sup> We deem that such a definition of European works and the related policy measures does little to prevent the increasing homogenization of content and deteriorating quality of programmes.<sup>122</sup> A “Big Brother” type of show financed with European money qualifies perfectly as both a European work and an independent production.

The question of whether the quota mechanisms will be translated into the domain of non-linear audiovisual services was key in the discussions of the AVMS. They exposed yet again the existing divergences between the Community institutions and between the Community and the Member State levels, as well as the profound conflict inherent to the simultaneous pursuit of economic and cultural goals.<sup>123</sup> The majority agreed that the quota system, as contained in the TVWF, will be preserved under the AVMS but will apply only to linear (television broadcasting) services. With regard to non-linear services, there was a strong conviction that a quota rule would be burdensome and in any case, difficult to install and track. The AVMS does however include a soft-law provision, which creates an obligation for the Member States to ensure that media service providers under their jurisdiction “*promote*, where practicable and by appropriate means, production of and access to European works”.<sup>124</sup> It is further clarified that, such promotion could relate, *inter alia*, to the financial contribution to the production and rights acquisition of European works or to the share and/or prominence of European works

necessary investments not only by establishing common rules opening up national markets but also by envisaging for European productions where practicable and by appropriate means a majority proportion in television programmes of all Member States”). See e.g. Donaldson, “Television without Frontiers’: The continuing tension between liberal free trade and European cultural integrity” (1996) *Fordham International Law Journal*, 90–180.

120. Although it was found that, “there is a greater appetite for US programming among European audiences than for programmes produced in other Member States ... [because] US programme storylines have broad appeal, whereas European production has a national cultural appeal which does not travel well”. See Graham & Associates, *supra* note 111, at p. 18 and section 9.3.3. For an interesting comment on the global power of American popular culture (influencing through attraction rather than coercion), see Rosendorf, “Social and cultural globalization: Concepts, history, and America’s role” in Nye and Donahue (Eds.), *Governance in a Globalizing World* (Brookings Institution Press, 2000), pp. 109–134, at pp. 117 et seq.

121. Graham & Associates, *supra* note 111, at section 8.5.

122. See *supra* section 2. There is evidence that primary channels have reduced the proportion of European works that are stock programmes (generally more expensive) and increased the proportion of (generally cheaper) flow programmes. See Graham & Associates, *supra* note 111, at section 7.3.4.

123. These conflicts are not new and arose every time the TVWF was discussed. See Drijber, *supra* note 34, at 90.

124. Art. 3(h)(1) AVMS (emphasis added).

in the catalogue of programmes.<sup>125</sup> Member States are to report every four years on the implementation of this provision.<sup>126</sup> Upon the basis of these data and an independent study, the Commission is then obliged to report to the Parliament and the Council, taking into consideration the market, technological developments and the objective of cultural diversity.<sup>127</sup>

Interestingly, the AVMS does mention that, at least technically, a quota mechanism is possible despite the entirely different characteristics of non-linear audiovisual services: the quotas may be based upon the products on offer (instead of on broadcasts as with linear services) and take for instance the form of a minimum share of European works in on-demand catalogues.<sup>128</sup>

The question is therefore not so much whether imposing quotas is still doable. It is more fundamental: has the increase in consumer choice and multi-channel capacity rendered the rules on broadcasting quotas obsolete? And related to this: is there a need for a new legal model ensuring the diversity of cultural expressions in the new audiovisual media settings?

Before looking into these questions, one needs to acknowledge a few things that are pertinent in this context. Firstly, that the linear and non-linear market segments do compete, at least indirectly.<sup>129</sup> In the long term, non-linear audiovisual media services have the potential to partially replace linear services, a fact also admitted by the EC legislature.<sup>130</sup> Secondly, the effects of a quota mechanism for non-linear services are quite unpredictable and may even have diametrically opposed outcomes. A first option is that consumers (being empowered by technology) would simply *not* choose European works and thus render any investment/catalogue quota ineffective. Another, rather different option is an application of the so-called “Long Tail” theory.<sup>131</sup>

125. Art. 3(h)(1) AVMS.

126. Art. 3(h)(3) AVMS. Recital 35 AVMS clarifies that within the framework of these reports, Member States should take into account the financial contribution by such services to the production and rights acquisition of European works; the share of European works in the catalogue of audiovisual media services, as well as in the effective users’ consumption of European works proposed by such services.

127. Art. 3(h)(4) AVMS.

128. Art. 3(h)(1) and Recital 35 AVMS. A previous version of the latter provision also included the option of a minimum share of European works proportionate to economic performance. See also Horlings et al., *supra* note 1, at p. 52.

129. Horlings et al., *ibid.*, at p. 47.

130. Recital 35 AVMS.

131. In its briefest form, the Long Tail theory, pursuant to its author – the editor-in-chief of the *Wired* magazine – holds that in digital markets: (i) supply and demand are not concentrated only on a small definite number of products (as in the offline world) and the tail of available variety is almost endless; (ii) the entire tail is within reach economically; and (iii) all those niches, when aggregated make up a significant market. These developments are above all due to the significantly reduced in the digital environment storage and distribution costs, as well as the

This means that in the new environment of indefinitely diverse media, the consumer selection will constantly generate new and/or niche products (similarly to the Amazon bookselling platform<sup>132</sup>). Consumers will be stimulated to consume products that would otherwise not be available to them (because of the scarcity of timeslots in TV schedules) and will thus induce markets to offer new types of content, including, for instance, archived European content, original works, documentaries or director's cuts.<sup>133</sup> This may ultimately lead to a higher share of available and effectively consumed European works, which, if realized, will be a genuine expression of cultural diversity.

As a tentative conclusion based upon the above and as an answer to the questions raised, we suggest that the European legislature took a rather unimaginative approach in addressing cultural policy objectives at the Community level in the face of new technological developments, changed business and consumer behaviour patterns. Preserving the *status quo* quota system for linear services and creating soft-law stimulus for non-linear services is by no means an adequate answer to the dynamic and complex environment of audiovisual media and the redefined need to safeguard some diversity in it. Quota mechanisms based upon the existing definition of European works are in any case of dubious cultural value. The parties involved in the AVMS legislative process seemed unwilling however to take up and pursue the controversial "cultural questions" and reignite the latent conflicts between integrationists and intergovernmentalists, interventionists and liberalizers, when other, notably *economic*, interests were at stake.

#### 4.2. *Audiovisual commercial communications*

The second major reform brought by the AVMS is in the area of advertising, or what is now referred to as "audiovisual commercial communications". This is indeed a most crucial area of media regulation, since advertising is

new methods of searching and finding products and services online. See Anderson, *The Long Tail: Why the Future of Business is selling less of more* (New York, Hyperion, 2006). See also Brynjolfsson, Hu and Smith, "From niches to riches: The anatomy of the long tail", (2006) *Sloan Management Review*, 67–71; Brynjolfsson, Hu and Simester, "Goodbye Pareto principle, hello long tail: The effect of search costs on the concentration of product sales", February 2007, available at <ssrn.com/abstract=953587>.

132. Brynjolfsson, Hu and Smith, "Consumer surplus in the digital economy: Estimating the value of increased product variety at online booksellers", (2003) MIT Sloan Working Paper No 4305–03, available at <ssrn.com/abstract=400940>.

133. Horlings et al., *supra* note 1, at p. 66; Marsden et al., *supra* note 1, at pp. 22–23. See in this respect, European Charter for the Development and the Take-up of Film Online, initiated in May 2005 by Commissioner Reding and endorsed by film makers and business leaders on 23 May 2006, at the Europe Day of the 59<sup>th</sup> Cannes Film Festival (available at <ec.europa.eu/comm/avpolicy/docs/other\_actions/film\_online\_en.pdf>).

the main source of revenue for European television broadcasters and likely to remain so.<sup>134</sup> The gross television advertising market has been consistently expanding and reached € 25.7 billion for the EU15 in 2004, which is a 7.2 percent increase in relation to 2003.<sup>135</sup> As far as new media are concerned, Internet advertising and computer games revenues are the fastest growing share of media spending and expected to continue growing considerably.<sup>136</sup>

Similarly to the “audiovisual media service” definition, the concept of “audiovisual commercial communication” is a broad one. It is a notion taken from the e-Commerce Directive with an almost identical content<sup>137</sup> and is meant to encapsulate *all* rules related to advertising. It is defined as “images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, teleshopping and product placement”.<sup>138</sup>

In the so-defined domain of audiovisual commercial communications, the first objective of the reform undertaken was to secure a basic tier of rules at the Community level, which would provide legal certainty across all Member States. Thus, pursuant to the AVMS, all audiovisual commercial communications must not: (i) use subliminal techniques;<sup>139</sup> (ii) prejudice respect for human dignity; (iii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation; (iv) encourage behaviour prejudicial to health or to safety; or (v) encourage behaviour grossly prejudicial to the protection of the environment.<sup>140</sup> Further, all forms of commercial communications regarding cigarettes and other tobacco products, medicinal products and medical treatment available only on prescription are prohibited.<sup>141</sup>

134. Commission, Fifth Report, *supra* note 51, at p. 4.

135. *Ibid.*, referring to the European Audiovisual Observatory, 2005 Yearbook. See also Graham & Associates, *supra* note 111, at section 3.2.1.

136. Horlings et al., *supra* note 1, at p. 9, referring to Zenith Optimedia, “Advertising Expenditure Forecasts”, July 2005, available at <[www.zenithoptimedia.com](http://www.zenithoptimedia.com)>

137. Directive 2000/31/EC (see *supra* note 102) defines in its Art. 2(f), “commercial communication” as “any form of communication by electronic means designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession”.

138. Art. 1(f) AVMS.

139. Art. 3(d)(1)(b) AVMS.

140. Art. 3(d)(1), point (c) AVMS.

141. Art. 3(d)(1), points (d) and (ea) AVMS.

The second objective of the TVWF review in the field of audiovisual commercial communications was to *deregulate* them and adopt a lighter, flexible approach allowing more possibilities for broadcasters and content providers to increase the value of advertising time, which would also properly reflect the more multi-faceted media environment.<sup>142</sup> According to the principles of flexibility and simplicity pursued, the EC legislature introduced two blocks of changes:

- (i) first, a relaxation of the rules on the insertion of advertising in TV programmes and daily advertising limits; and
- (ii) second, new regulation of product placement.

We shall look into these below and contemplate their justifications and potential effects on cultural diversity.

#### 4.2.1. *Rules on advertising*

The AVMS removes some of the existing quantitative limits on advertising. The current three-hours-per-day limit on advertising is dropped, since practical experience has shown that in fact no TV channel comes close to it. The 12-minute upper limit on all advertising in any given hour however is maintained.<sup>143</sup> As to the insertion of advertising, the Commission was eager to grant broadcasters more freedom to choose the most suitable moment for advertisements within the programmes. The EP however was adamant in this regard and insisted upon the principle that advertising and teleshopping spots can be inserted only *between* programmes. In the final AVMS, an explicit formulation of this rule is avoided and Article 11(1) states only that Member States must ensure, “where advertising or teleshopping is inserted *during* programmes, that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme” is not prejudiced.<sup>144</sup>

The frequency of advertising breaks was a hot topic in the discussions of the AVMS. In its initial proposal the Commission foresaw a minimum of 35 minutes between the advertisements inserted in films made for television (excluding series, serials, light entertainment programmes and documenta-

142. Horlings et al., *supra* note 1, at p. 79.

143. Art. 18 AVMS states that, “[t]he proportion of advertising spots and teleshopping spots within a given clock hour shall not exceed 20%”. See also Recital 44 and the Commission Interpretative Communication, *supra* note 81, at paras. 9–13.

144. Emphasis added. One could view Recital 43 AVMS as a sort of leftover of the EP’s demands. The latter states that, “[t]he Directive is intended to safeguard the specific character of the European television landscape, where advertising is preferably inserted between programmes, and therefore limits possible interruptions for cinematographic works and films made for television as well as for some categories of programmes that still need specific protection”.



ries), cinematographic works, children's and news programmes. The proposal of the EP Committee on Culture and Education reversed this to the TVWF benchmark of 45 minutes and included concerts, theatre plays and operas in the provision. Interestingly, the text adopted by the Parliament at first reading ignores the proposal of its own committee and even goes below the minimum suggested by the Commission. The rule is now that the transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by advertising and/or teleshopping once for each scheduled period of at least 30 minutes.<sup>145</sup>

Thus, while the EP has normally put brakes on the Commission's spur to liberalize advertising in audiovisual media, it is apparent here that the willingness to allow more freedom to broadcasters has prevailed. This will undoubtedly give better opportunities for broadcasters and content providers to monetize but will also speed up the already advanced commercialization of television.<sup>146</sup> Trying to show the programmes of greatest appeal in the most valuable timeslots in order to attract advertising naturally leads to marginalization of specific, original programmes and those that otherwise diverge from the mainstream.

#### 4.2.2. Rules on product placement

The second important change in the domain of audiovisual commercial communications is the newly formulated attitude towards product placement.<sup>147</sup> Product placement is defined as "any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration".<sup>148</sup>

145. Art. 11(2) AVMS. The provision clarifies further that the transmission of children's programmes may be interrupted by advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided the scheduled duration of the programme is greater than 30 minutes. No advertising or teleshopping may be inserted during religious services.

146. See Graber, *Zwischen Geist und Geld; Interferenzen von Kunst und Wirtschaft aus rechtlicher Sicht* (Nomos, 1994) at pp. 151 et seq.

147. The notion of product placement is not entirely new. The Unfair Commercial Practices Directive mentions in its provisions "legitimate product placement" and the Commission Communication interpreting the TVWF Directive allows product presentation for the purposes of identifying the sponsor. See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive"), O.J. 2005, L 149/22, at Recital 6.

148. Art. 1(k) AVMS.

In the original proposal of the Commission, product placement was fully “legitimized” and taken as an essential element of advertising techniques. The opposition was however too strong. The compromise reached is to preserve the ban on product placement but it is no longer an outright ban.<sup>149</sup> Product placement in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes is permitted.<sup>150</sup> Such programmes must respect certain conditions: they should never affect or jeopardize the editorial responsibility and independence of the media service provider, nor should they “directly encourage the purchase or rental of goods or services” or give “undue prominence to the product in question”.<sup>151</sup> Following the general rule of separate and clearly identifiable commercial communications,<sup>152</sup> viewers are to be appropriately informed of the existence of product placement at the start and at the end of the programme, and when a programme resumes after an advertising break.<sup>153</sup> In any event, product placement for tobacco products, cigarettes or medicinal products or medical treatments available on prescription only is not allowed.<sup>154</sup>

We need to note here that, while the EP limited the scope of the legitimization of product placement, what is allowed is *not* negligible: indeed, the major audiovisual formats of cinematographic works, films and series made for television and sports broadcasts do allow product placement.

The Commission argues that by providing a clear framework for product placement new revenues for the European audiovisual industry would be secured. This would increase its competitiveness, especially *vis-à-vis* the US media industry,<sup>155</sup> where product placement accounts for 1.7 percent of the total advertising revenues of free-to-air broadcasters and grew by an average of 21 percent per year between 1999 and 2004.<sup>156</sup> More oddly, the Commission also believes that the new rules on product placement will “help to boost

149. Surreptitious advertising remains fully banned. See Arts. 1(h) and 3(d)(1)(a) AVMS. See also Recitals 40 and 45 AVMS.

150. As well as in cases where no payment is made but certain goods or services are merely provided free of charge. See Art. 3(f)(2) AVMS.

151. Art. 3(f)(2), points (a)-(ba).

152. Art. 3(d)(1)(a) AVMS. See also Art. 10(1) AVMS.

153. Art. 3(f)(2)(c) AVMS. As an exception, however, Member States may choose to waive these requirements provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider (Art. 3(f)(2), last paragraph).

154. Art. 3(f)(3) AVMS.

155. The EU has a notoriously vast deficit *vis-à-vis* the US, which amounts to about € 4.1 billion. See Graham & Associates, *supra* note 111, at section 3.3.1.

156. See Carat & Koan, Final Report of the Comparative Study on the Impact of Control Measures on the Televisual Advertising Markets in European Union Member States and Certain Other Countries, prepared for the Commission, July 2005, at pp. 60–61.

our creative economy and thus reinforce cultural diversity”.<sup>157</sup> Indeed, both the rules on advertising and the rules on product placement are seen as “further instruments safeguarding cultural diversity”.<sup>158</sup>

While the less restrictive Community regime on product placement may be somewhat justified in view of its value as a financial source for content providers and in order to prevent the emergence of multiple national rules distorting the single market, it is difficult for us to see *how* product placement contributes to cultural diversity. The nature of product placement is such that it is an integral part of the fictional work or sports event.<sup>159</sup> Due to this essential characteristic, the viewer cannot simply skip the advertisement or switch channels until the commercial break is over. Furthermore, being often part of the storyline of fictional works and thus part of the “reality” they represent, its attractant effect may be much stronger than that of conventional advertising in commercial breaks. The commercial intention of product placement is indeed partly concealed and therefore less obtrusive or even not realized at all by the recipients who cannot avoid this type of integrated advertising easily.<sup>160</sup> With the advances in technology enabling consumers to “pull” content individually, the incentives to include product placement will be increased both for the content providers and for the companies whose products/services are advertised. This will naturally lead to an increase in the quantity and quality of product placement (in the sense that its intertwining with the plot will be perfected thereby multiplying its effects<sup>161</sup>). Thus, the commodification of artistic productions<sup>162</sup> will be strongly intensified and diversity of cultural expressions smothered rather than stimulated.

157. Commission, *supra* note 90.

158. *Ibid.*

159. There are different types of product placement. One can distinguish between product placement *per se*, where branded goods are presented, either visually (if the product is shown) or verbally (if it is mentioned or described). Endorsement is an intensification of the verbal placement, when the media representative mentions certain positive features of the product. One may also distinguish different degrees of product integration: on-set placement where the product is only part of the requisite scenery *versus* creative placement where the product plays an active role in the plot.

160. Rössler and Bacher, “Transcultural effects of product placement in movies” (2002) *Zeitschrift für Medienpsychologie*, 98–108, at 99.

161. It has been established that stronger placement effects can be expected when the placement is presented as a natural part of the story. See Rössler and Bacher, *ibid.*, at p. 101.

162. For the classic critique of the cultural industries, see Adorno, *Aesthetic Theory* (Routledge, 1984). On the relationship between art and money, see Graber, *supra* note 146. See also Graber and Teubner, “Art and Money: Constitutional Rights in the Private Sphere?” (1998) *Oxford Journal of Legal Studies*, 61–74.

## 5. Conclusion on the impact of the AVMS on cultural diversity

As we already noted, the precise effects of the regulatory changes undertaken and the development of the diverse audiovisual media markets are hard to predict. “The extreme nature of the predictive challenge is due to the unusual volatility of content markets and citizen tastes in media consumption, which rely on network effects to a great extent (especially in non-linear demand patterns) as well as having extreme economies of scale because of the perfect reproducibility of digital content”.<sup>163</sup> The concrete implications for the diversity of cultural expressions are even harder to predict since cultural diversity itself is a dynamic parameter.

Despite the constraints of prediction, some trends in the development of European audiovisual media are already discernible. The completely new landscape we described at the outset of this article is likely to continue its transformation gradually but profoundly.<sup>164</sup> The multiplication of channels for content distribution is likely to go on. By 2010–2014 (i.e. within the projected lifetime of the AVMS), most Member States will have completed the transition to digital signal.<sup>165</sup> Upon this transition, every household will receive between 20 and 40 free TV channels.<sup>166</sup> This growth in channel choice will reduce the total audience share of the primary channels<sup>167</sup> and the share of individual primary channels in each Member State. Audience fragmentation will put revenue pressure on the primary channels (especially commercial ones) and undermine the public funding of leading public primary channels.<sup>168</sup> Furthermore, the new media distribution channels, above all broadband, will draw consumers away from traditional entertainment media, further reducing the audience share of primary channels.<sup>169</sup> “Pulling” individual content through digital TV or Internet channels is an emergent consumer behaviour pattern likely to change the business models of content providers, distributors and advertisers and further fragment the media environment. Whichever pattern of access to and use of audiovisual content prevails,<sup>170</sup> it is apparent that

163. Horlings et al., *supra* note 1, at pp. 4–5.

164. In the mid-term (2009-2010) and even for some time thereafter, no complete overhaul of the European audiovisual media is foreseen. See Horlings et al., *ibid.*, at p. 5. The same position is shared by the impact study, see Graham & Associates, *supra* note 111, at section 3.5.4.

165. Horlings et al., *supra* note 1, at p. 13.

166. Graham & Associates, *supra* note 111, at section 3.5.1.

167. These are defined as channels with audience share equal to or greater than 3%. See Graham & Associates, *ibid.*, at section 7.

168. *Ibid.*, at section 3.5.5.

169. *Ibid.*, at section 3.5.1.

170. RAND Europe outlines three plausible scenarios for the digital future of audiovisual media: (i) *Linear Continuum*: where the citizen behaviour will change at the margins, but me-

the split between multi-channel and analogue households, which is already a reality, will become more pronounced.<sup>171</sup> If Internet penetration is to stabilize at 65–75 percent by household and mobile phone penetration at 85 percent,<sup>172</sup> this means that a substantial proportion of people will remain offline. This minority is “both the most vulnerable in society and least likely to change (typically comprising the most elderly, non-formally qualified and/or poorest quartiles)”.<sup>173</sup>

The broader picture of the European media landscape will thus be one of increasing fragmentation of audiences and increasing gap between the digital “haves” and “have-nots”. At the same time, a concentration amongst the diverse market players, both horizontally and vertically, is expected, so they can make better use of all the existing channels (e.g. by placing a single video clip on broadband, mobile and digital TV networks) and benefiting from economies of scale. Such an environment makes the design of an appropriate regulatory model extremely difficult, in particular where objectives of catering for public interest are concerned. Our focus was upon only one of these objectives, namely the sustainability of the diversity of cultural expressions in audiovisual media.

Cultural diversity has always been defined as one of the vital justifications for European audiovisual media policy. At its very onset, epitomized by the Rhodes Summit of the European Council, the Council stressed that the future TVWF initiative should “provide an opportunity of demonstrating the richness and diversity of European culture”<sup>174</sup> and “contribute to a substantial strengthening of a European cultural identity...”.<sup>175</sup> Later, when formulating the principles of the Community’s audiovisual strategy for the digital age, the Commission stated that, “[t]he audiovisual industry is ... not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a cultural industry *par excellence*. It has a major in-

dia consumption will remain a largely linear experience; (ii) *Digital Content Divide*: where the digital “haves” will experience greatly increased interactive media use, while an equal number of “refuseniks” will continue exactly as before to rely on offline media and public service broadcasters; (iii) *Time Shifting Linear Consumption*: where the majority of the population will use broadband and mobile or in-home devices to time-shift their media to suit their schedule instead of that of the broadcaster. See Horlings et al., *supra* note 1, at p. 8. The same scenarios have been reiterated by the Commission in its Staff Working Document annexed to the AVMS proposal, see *supra* 19.

171. Horlings et al., *supra* note 1, at p. 8.

172. Horlings et al., *ibid.*, at p. 6, referring to the Oxford Internet Survey (OxIS), February 2005, available at <[www.oii.ox.ac.uk/](http://www.oii.ox.ac.uk/)>.

173. Horlings et al., *ibid.*

174. European Council Decisions of 2 and 3 Dec. 1988, Rhodes, *supra* note 29.

175. *Ibid.*

fluence on what citizens know, believe and feel and plays a crucial role in the transmission, development and even construction of cultural identities”.<sup>176</sup>

In the AVMS, the Parliament was particularly insistent on the amendment of Recital 3, which, pursuant to the EP’s formulation, held that, “[a]udiovisual media services are as much cultural goods as they are economic goods. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services, and the enforcement of those rules, notably in order to preserve the fundamental rights and freedoms laid down in the Charter of Fundamental Rights of the European Union, the European Convention for Protection of Human Rights and Fundamental Freedoms and the United Nations Covenant on Civil and Political Freedoms, and in order to ensure the protection of minors and vulnerable and disabled people”.<sup>177</sup>

Despite these lengthy deliberations and handsome rhetoric, in our examination of the major provisions of the AVMS, we saw no concrete solutions addressing cultural diversity considerations or any of the values innate to cultural identity and diversity. The broad definition of audiovisual media services would allow for expanding the reach of the EC media framework and an extension of the economically beneficial “country of origin” principle. On the other hand, the regulation of non-linear services may be onerous for smaller market players or individual providers of content, which may in turn create a barrier to newly emerging creativity and online content distribution. The preservation of the *status quo* regarding quotas for European works and independent productions, which remain applicable to television broadcast but not to non-linear services, is a mere political compromise, which disregards the new technological developments and the increasing fragmentation of audiences. In its present form, we argue that it bears no real relation to cultural policy objectives and even if achieved, the quotas do not reflect cultural diversity. With respect to advertising and product placement, we held that the liberalizing rationales have prevailed and there are no genuine considerations of protecting and promoting the diversity of cultural expressions.

176. Commission communication on Principles and Guidelines for the Community’ Audiovisual Policy in the Digital Age, COM(1999)657 final, 14 Dec. 1999, at p. 8. See also Council Resolution of 21 Jan. 2002 on the Role of Culture in the Development of the European Union, O.J. 2002, C 32/2, and Council Conclusions of 19 Dec. 2002 on the “Television without Frontiers” Directive, O.J. 2003, C 13/1, at Recital 3.

177. The final AVMS text, while preserving the above text, substantially shortened it. Recital 3 now reads: “Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services”.

The amazing gap between the rhetoric of the European legislature and the reality of the regulatory instruments adopted in the AVMS also reveals no real understanding of what cultural diversity in audiovisual media is. Indeed, this at times frivolous waving of the banner of cultural diversity may undermine the very value of this notion.

Pursuant to the United Nations Educational, Scientific and Cultural Organization (UNESCO) *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,<sup>178</sup> “cultural diversity” is defined as “the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.”<sup>179</sup> This all-encompassing, broad concept of cultural diversity and the inherent complexity of the notion of culture<sup>180</sup> admittedly make it hard to delineate clear-cut contours of cultural diversity in audiovisual media.

It should have been precisely the task of the European legislator to find these contours. In the concrete setting of audiovisual media, one could follow the basic lines that, “[d]iverse is such a cultural landscape, where next to the big commercial productions, which pursue above all maximization of viewers’ numbers, there is the possibility for existence of other productions – productions that depart from the ‘mainstream’ through, for instance, the original touch of their author, their ‘low budget’ production costs, experimental or avant-garde nature, or due to other reasons, which stimulate the fantasy and thoughts of the public”.<sup>181</sup> Looking at the *markets* for audiovisual media

178. UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted at the 33<sup>rd</sup> Session of the General Conference of UNESCO, 20 Oct. 2005, entered into force 18 March 2007 (hereinafter UNESCO Convention on Cultural Diversity). On the UNESCO Convention, see Graber, “The new UNESCO Convention on Cultural Diversity: A counterbalance to the WTO” (2006) *Journal of International Economic Law*, 553–574. On cultural diversity, see Graber, *supra* note 61, at pp. 73 et seq.; Smiers, *Arts under Pressure* (New York, Zed Books, 2004) and the collection of contributions in Graber, Girsberger and Nenova, *supra* note 61.

179. Art. 4(1) of the UNESCO Convention on Cultural Diversity.

180. It was in 1952 when Kroeber and Kluckhohn compiled a list of more than 200 different definitions of culture (see Kroeber and Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Cambridge, MA: Peabody Museum, 1952)). Since then the concept has only gained in complexity and controversies despite the ample literature discussing it.

181. Graber, *supra* note 61, at p. 74. In the original: “Vielfältig ist eine Kulturlandschaft, in der neben kommerziellen Grossproduktionen, bei denen die Maximierung der Zuschauerzahlen allem andern vorgeht, auch solche existieren können, die sich z.B. durch die eigenwillige Hand-

services, the EC legislature may then examine possible *objective* parameters for “measuring” diversity and identify the regulatory options. Moreau and Peltier suggest, for instance, three dimensions of diversity: *variety*, *balance* and *disparity*<sup>182</sup> and by quantifying them, attempt an analysis of national film markets,<sup>183</sup> allowing thereby for an assessment of the efficiency of the different cultural policy measures taken. The EC is undoubtedly free in its choice of approaches but not, we argue, free to simply protect European media under the disguise of cultural diversity policy.

## 6. Commitments of the EC to the protection of cultural diversity

An almost perfect justification for the lack of real provisions on the protection and promotion of cultural diversity in the AVMS is that the Community has no explicit regulatory competence on these issues. Indeed, the relatively fuzzy definition of the scope of the Community competences in Article 151 EC<sup>184</sup> and, above all, the principle of subsidiarity leave little room for the Community action. The Member States are meant to pursue their own cultural policy goals as they see fit and the Community has repeatedly confirmed the conformity of measures intended for their achievement with EC law. In addition to the derogations to the free movements explicitly formulated in Article 30 EC, it was in *Cassis de Dijon*<sup>185</sup> that the Court of Justice developed an open-ended list of mandatory requirements (also known as “imperative requirements” or “overriding requirements in the public interest”).<sup>186</sup> Cultural

schrift ihrer Autoren vom ‘mainstream’ abheben, mit einem ‘low budget’ produziert wurden, experimenteller oder avantgardistischer Machart sind oder aus anderen Gründen einen eigenen Aufwand des Publikums an Phantasie oder Gedanken erfordern.” (translation by the author).

182. Variety refers to the number of categories into which a certain quantity can be partitioned (e.g. types of programmes). Balance refers to the pattern in the distribution of that quantity across the relevant categories. As for disparity, it refers to the nature and the degree to which the categories themselves are different from each other. The greater the variety, the balance and the disparity of a system are, the larger its diversity. See Moreau and Peltier, “Cultural diversity in the movie industry: A cross-national study” (2004) *Journal of Media Economics*, 123–143.

183. Moreau and Peltier examine the EU15, France, Hungary, South Korea and Mexico and refer to both supplied and consumed diversity. *Ibid.*

184. For a critique, see e.g. Craufurd Smith, “Article 151 EC and European Identity” in Craufurd Smith, *op. cit. supra* note 23, pp. 277–297.

185. Case 120/78, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649.

186. See e.g. Scott, “Mandatory or imperative requirements in the EU and the WTO” in Barnard and Scott (Eds.), *The Law of the Single European Market: Unpacking the Premises* (Oxford: Hart, 2002) and Spaventa, “On discrimination and the theory of mandatory requirements”, (2000) *CYELS*, 457–478. These mandatory requirements are still available as justifica-



policy measures implemented in the audiovisual sector fall within this category and “constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services”.<sup>187</sup> Thus, the creation of the single market, while certainly being the more dominant goal of the Community policies, does allow the parallel existence of other objectives, including within the domain of culture.<sup>188</sup> It is important to note however that the EC Courts have been protecting these public interest goals only “negatively”, in the sense of an exception from the freedom to provide services, rather than in the “positive” manner of the European Court of Human Rights when interpreting and applying the freedom of speech provision of Article 10 ECHR.<sup>189</sup>

The new audiovisual media environment, elements of which we described above, calls however for a *positive* and *comprehensive* approach at the Community level. A puzzle of fragmented measures at the Member State level would not work properly in an ecosystem of increasingly fragmented audiences, multiple channels and new technologies enabling consumers’ choice and control. Subsidized programming and national rules of origin will tend to affect a continually diminishing slice of the average household’s content alternatives.<sup>190</sup> Furthermore, the measures taken at the national level often appear to be pursuing more protectionist than cultural goals, thereby leading to both distortion of the market mechanisms and devaluation of the cultural objectives.<sup>191</sup>

tion only of indistinctly applicable measures (Case 113/80, *Commission v. Ireland (Irish Souvenirs)*, [1981] ECR 1626, para 11; Case 177/83, *Ringelhan*, [1984] ECR 3651, para 19; Case 59/82, *Schutzverband gegen Unwesen in der Wirtschaft v. Weinvertriebs-GmbH*, [1983] ECR 1217, para 11; Case C-21/88 *Du Pont de Nemours* [1990] ECR I-889, para 14; Joined Cases C-1 & 176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151). And only in the absence of harmonization (Case 120/78, *Cassis de Dijon*, *supra* note 185, at para 8).

187. Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, [1991] ECR I-4007, at para 23. See also Case C-353/89, *Commission v. the Netherlands*, [1991] ECR I-4069, at para 30; C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR I-487, at paras. 9–10 and Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, [1994] ECR I-4795, at paras. 18–19.

188. Graber, *supra* note 26, at p. 997.

189. *Ibid.*, at p. 998.

190. Mueller, *op. cit. supra* note 3 at p. 322.

191. The impact study has pointed out that, “[t]he additional content requirements on broadcasters to reflect linguistic or cultural specificities of a particular Member State, intentionally or otherwise, ... act as barriers to cross-border trade in programmes and channels because (a) they set conditions on programme content that only domestic programme producers can meet; and (b) they lead to channel schedules that are specific to a Member State, thereby limiting the appeal of these channels in other markets”. See *Graham & Associates*, *supra* note 111, at section 6.4.3.

We argue further that as parties to the UNESCO Convention on Cultural Diversity, the EC Member States and the European Community itself<sup>192</sup> have clearly taken, if not legally binding obligations,<sup>193</sup> at least an engagement with regard to the protection and promotion of cultural expressions and need to meet these aims.<sup>194</sup> Indeed, first steps to the fulfilment of this commitment are already discernible in the Commission's recent Communication on a European agenda for Culture in a Globalizing World.<sup>195</sup> It remains however to be seen whether and how exactly this ambitious, but still rather fuzzy, programme<sup>196</sup> is to be implemented in practice and whether it will effectively advance the diversity of cultural expressions in European audiovisual media (especially considering the extremely positive stance of the Communication towards the TVWF and its contribution "to the strengthening of media pluralism and cultural diversity"<sup>197</sup>).

192. The EC itself is a party to the Convention. See Council Decision of 18 May 2006 on the Conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, O.J. 2006, L 201/15.

193. See in particular Arts. 7–11 of the UNESCO Convention on Cultural Diversity. For a critique of the lack of binding obligations in the Convention, see Acheson and Maule, "Convention on Cultural Diversity" (2004) *Journal of Cultural Economics*, 243–256.

194. This engagement has been reiterated in the AVMS. Recital 3(a) thereof states: "In its resolutions of 1 December 2005 and 4 April 2006 on the Doha Round and on the WTO Ministerial Conferences, the European Parliament calls for basic public services, such as audiovisual services, to be excluded from liberalization under the GATS negotiations. In its resolution of 27 April 2006, Parliament supports the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in particular that 'cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value'. The Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions approved the UNESCO Convention on behalf of the Community. The Convention entered into force on 18 March 2007" (footnote omitted).

195. Commission communication on a European Agenda for Culture in a Globalising World, COM(2007)242 final, 10 May 2007. See also Commission, "Inventory of Community Actions in the Field of Culture", Accompanying Document to the Communication on a European Agenda for Culture in a Globalising World, SEC(2007)570, 10 May 2007.

196. Three interrelated sets of objectives are defined, to which all actors (the Member States and their regions, stakeholders in the field of culture and the Commission) are called upon to contribute. These sets of objectives encompass: (i) promotion of cultural diversity and intercultural dialogue; (ii) promotion of culture as a catalyst for creativity in the framework of the Lisbon Strategy for growth and jobs; and (iii) promotion of culture as a vital element of the Union's international relations. See Commission communication on a European Agenda for Culture in a Globalising World, *ibid.* at p. 8.

197. *Ibid.*, at p. 10.

## 7. Some concluding thoughts

A revision usually entails a correction, improvement and/or an update. The AVMS is an update but hardly an improvement on the previous TVWF regime, in particular as far as its contribution to cultural diversity in the European media is concerned. The AVMS also reveals that, at the Community level, as well as in the Member States, “[c]ultural policy making is in a profound state of transition as the audiovisual sector moves from being a separable and quarantined domain of governance to its enactment as part of a whole-of-government modelling in which it emerges as a service industry in a ‘digital economy’”.<sup>198</sup>

When examining the provisions of the AVMS, we exposed a wide gap between the cultural diversity rhetoric and the real instruments put in place by the Community legislature. The lack of a clear and comprehensive vision of how to approach the new dynamic multi-faceted audiovisual environment and the misunderstanding and/or ignoring of new phenomena and processes is also apparent. This may have unexpected consequences in numerous directions, such as reduced creativity or wrong incentivizing of European content producers. Isolated actions such as the promotion of co-productions may have also dubious effects, and may even lead to a loss of cultural diversity as (i) producers focus on the lowest common cultural denominator and (ii) move from unique concepts to the development of formats for the global marketplace.<sup>199</sup>

Furthermore, it is obvious that the EC legislature in its cultural policy endeavours still tends to stick to versions of international relations theory stressing the competitiveness of nations *vis-à-vis* others as the primary governance problem.<sup>200</sup> The High Level Group on Audiovisual Policy was deeply convinced, for instance, that, “[a]t the heart of the matter is the question of whether the predicted explosion in demand for audiovisual material will be met by European productions or by imports. ... The danger is that the channel proliferation brought about digital technology will lead to further market fragmentation, making it more difficult for European producers to compete with American imports”.<sup>201</sup> To put it simply, we argued in contrast that cultural diversity in European media is certainly not a question of whether the

198. O’Regan and Goldsmith, “Making cultural policy: Meeting cultural objectives in a digital environment” (2006) *Television and New Media*, 68–91, at 88.

199. Horlings et al., *supra* note 1, at p. 56.

200. O’Regan and Goldsmith, *supra* note 198, at p. 69, referring to Schlesinger, “Television production, audio-visual policy and the creative industries”, paper presented at the Television: Past, Present and Future Conference, University of Queensland, Brisbane, 3 Dec. 2000.

201. High Level Group on Audiovisual Policy, *The Digital Age: European Audiovisual Policy*, Chaired by Commissioner Marcelino Oreja, 26 Nov. 1998.

European production of “Big Brother” will be replaced by a US production of “Big Sister”.

We deem that in its present form the AVMS, while securing a competitive environment and also providing for legal certainty for new media, does not actively contribute to the diversity of cultural expressions in European audiovisual media. In the new audiovisual media landscape and taking account of the changed patterns of viewers’ and businesses’ behaviour, we see a set of new priorities emerging, which should be carefully considered and reflected in the overall Community framework of audiovisual media policy. In no particular order, these involve:

(i) making full use of the phenomena of digital media distribution and content creation in the sense of prolonging the “Long Tail”,<sup>202</sup> which may include *inter alia* efforts to digitize all European content, facilitate the search of such content<sup>203</sup> and create public awareness in this respect;

(ii) stimulating the Web 2.0 effects in user-generated content creation and harnessing the new creativity;

(iii) reducing the asymmetry of information between the digital “haves” and the digital “have-nots”: provision of diverse content in non-digitized form and active promotion of media literacy. The latter may be a vital asset to actively choosing, filtering, consuming and creating media, thus shaping communication and culture;

(iv) rethinking the role of public service broadcasters in the new media setting;

(v) creating proper incentives for the production of European works using criteria not simply based upon their origin.

Admittedly, the Community has been already taking steps in some of these directions (e.g. media literacy,<sup>204</sup> content online<sup>205</sup> and content production in

202. See *supra* section 4.1.2.

203. See Brynjolfsson, Hu and Smith, “From Niches to Riches...” (*supra* note 131), who stress the importance of search as enhancing choice and prove that the facilitation of search changes the distribution of sales.

204. Recital 25(a) AVMS states that, “[m]edia literacy refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people will be able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They will be better able to protect themselves and their families from harmful or offensive material. Therefore development of media literacy in all sections of society should be promoted and monitored”. See also Commission, “Making sense of today’s media content: Commission begins public media literacy consultation”, IP/06/1362, Brussels, 6 Oct. 2006. On the media literacy initiative, see also <[ec.europa.eu/comm/avpolicy/media\\_literacy/index\\_en.htm](http://ec.europa.eu/comm/avpolicy/media_literacy/index_en.htm)>.

205. See *supra* note 133. See also <[ec.europa.eu/comm/avpolicy/other\\_actions/content\\_online/index\\_en.htm#filmonline](http://ec.europa.eu/comm/avpolicy/other_actions/content_online/index_en.htm#filmonline)>.

the framework of the Media 2007 programme<sup>206</sup>), but there is a significant lack of coherence and prioritization. We believe that, while “[c]oherence has never been the strongest aspect of EU audio-visual policy”,<sup>207</sup> it may become indispensable in the new digital media environment.

206. Decision No 1718/2006/EC of the European Parliament and of the Council of 15 Nov. 2006 Concerning the Implementation of a Programme of Support for the European Audiovisual Sector (MEDIA 2007), O.J. 2006, L 327/12.

207. Levy, *supra* note 25, at p. 40.