

HERMES

Study on the Future of Audiovisual Regulation

Summary

Regulation designed primarily for linear media (such as traditional scheduled television services) has not adequately kept pace with the growth of non-linear media (such as on-demand services on televisions or other devices). This trend towards non-linear media represents a significant challenge to regulators. Technological development necessitates flexible and coherent rules.

These trends call for rethinking the structures of regulation. This report recommends the use of opt-in regulation that offers favourable terms for the provision of content of ‘public value’. Such an approach will ensure that common European aims and values are maintained and national cultural particularities respected in a stable and long-lasting regulatory framework.

What are the aims of media regulation?

The European media regulatory framework seeks to protect certain values and promote certain objectives that are commonly held across the European Union’s 28 member states.

These values include access to balanced news and information that is free from government control, diversity and inclusion, the protection of young people and respect for human dignity, consumer protection and the protection of personal data, the promotion of media literacy and the promotion of European content.

How is the use and delivery of media changing?

The fundamental change in the **use of media** is the growth of non-linear media. Regulation needs to address this phenomenon while also recognising that, for a large number of consumers, linear media remains important and the primary source of information and entertainment.

Another significant change is the use of the **‘second screen’** – accessing content simultaneously on more than one device (such as a television and a tablet or smartphone).

There are also **changes in the ‘value chain’**, with an increasing number of opportunities for new players to enter the media services market. The regulatory framework needs to ensure they comply with and respect the interests of other stakeholders, including content providers and consumers.

What is the current regulatory framework?

There are three core pieces of European Union law that govern media services.

- The **Audiovisual Media Services Directive (AVMSD)** provides basic regulation for the distribution of media content in the EU. However, it distinguishes between linear and non-

linear audiovisual media, meaning that the same content may be treated differently, depending on the method of delivery.

- The **Universal Service Directive (USD)** contains ‘must carry’ rules, but generally does not address non-linear media (although there are provisions in the related area of net neutrality. The USD also covers technological aspects and ‘findability’ of content.
- The **Access Directive (AD)** provides rules on the ‘findability’ of content but is rarely employed by member states.

In addition, there is a series of other rules that play a role in shaping the media regulatory environment, as well as competition law.

What are the options for future media regulation?

The regulatory structure needs to be “flipped”. Media related goals – such as protecting diversity, but also minor protection, consumer protection and others – could serve as a structure for a new regulatory framework that is more normative and risk-oriented. Whoever triggers a risk concerning these goals would fall within the scope of the regulation, regardless of the type of service.

There is no need for the EU media policy to be comprehensive. It should – coming back to the roots – rather be seen as a frame. Consequently the questions should be:

- Where do we need **coordination**?
- Where do we need **minimum standards** in the EU guaranteed?
- Where do Member States need **leeway**, and therefore sufficient margin of appreciation, including certain levels of ‘opting out’ from the European framework, to follow their media policy aims?

Proposal: A framework of incentive based regulation

In the light of these observations, the study proposes that future regulation will have to be based on four pillars to ensure the necessary flexibility:

- **Principles rather than strict rules:** The advantages of principles are flexibility, but also scalability and adaptability. At the same time, clear principles offer strong guidance and provide a safeguard for a sufficient consistent European approach.
- **Technological neutral and functional approach:** Technology-focused regulations would not only bear the risk of impeding innovation in technology – such regulations could easily fail to meet the purpose of media regulation.
- **Learning aptitude:** Regulation should be subject to regular evaluation and – if necessary – to adjustments of the regulatory framework.
- **Rulemaking by regulators:** The legal framework should enable the regulators to not only decide on individual subject areas such as licenses or the enforcement of rules, but also provide an opportunity to enact by-laws to specify the legal framework.