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**Plenary Session 1 > New Media & Regulation: Towards a Paradigm Shift?
 New Services and Scope: "What's in, what's out Revisited"**

Comparative background document
(Public Version)

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Introduction

The extension of the scope from broadcasting services in the Television without Frontiers Directive to 'audiovisual media services' in the AVMS Directive has been a leitmotiv in the agenda of EPRA meetings for several years. At first, papers and presentations aimed at unravelling the provisions of the AVMS Directive dealing with scope (*Dubrovnik/Sofia meetings*). Then, discussions shifted to a problem-oriented approach. EPRA members were asked, as a kind of practical simulation, to try and classify different types of media services (*Dublin, Oct. 2008*²). NRAs also provided information on how they were preparing for the implementation in practice and on any practical arrangements to deal with the widened scope (*Dresden Oct. 2009*³). One and a half years after the deadline for transposing the AVMSD, the plenary session in Ohrid⁴ (*May 2011*) looked at how NRAs followed the development of and/or monitored on-demand media services, whether they produced any guidance to ease the practical application of the seven cumulative criteria which underpin the definition of an AVMS and addressed issues of implementation and first experiences of NRAs with assessing whether specific services fall within the scope.

Almost exactly one year after the last EPRA discussion on new services and scope, the present session will revisit the topic to assess the progress made by the practical implementation. This is particularly timely, as it coincides with the recent publication of the Commission's first report⁵ on the application of the AVMS. In addition, the issue of blurring boundaries between broadcasting and new media has been experiencing even more hype with the much publicised advent of Connected TV. A Commission policy document on Connected TV addressing the issue of potential adjustments to the existing regulatory framework is expected for the end of 2012. Against the background of the emerging connected environment, several traditional broadcasters also raise their voice to question potential regulatory asymmetries and have been asking for "*a much needed clarification of the scope of the AVMS Directive*"⁶.

This document is based on the responses to a questionnaire prepared and circulated by the EPRA Secretariat. It compiles answers from 34 regulatory authorities: KommAustria (AT), the NTRC (AZ), the Communications Regulatory Agency (BA), The Flemish Council for the Media (BE), the CSA of the French Community of Belgium (BE), The Council for Electronic Media (BG), OFCOM/BAKOM (CH), the Cyprus Radio-Television Authority (CY), the Council for Radio

¹ **Disclaimer:** This document has been produced by the EPRA, an informal network of 53 regulatory authorities in the field of broadcasting. It is a background information document aimed to facilitate and stimulate debate at EPRA meetings. It is not a comprehensive overview of the issues, nor does it purport to represent the views or the official position of the EPRA or of any member within the EPRA network.

² <http://www.epra.org/attachments/519>

³ <http://www.epra.org/attachments/657>

⁴ <http://www.epra.org/attachments/102>

⁵ First report from the Commission (...) on the application of Directive 2010/13/EU "Audiovisual Media Service Directive", Audiovisual Media Services and Connected Devices: Past and Future Perspectives:
http://ec.europa.eu/avpolicy/docs/reg/avmsd/application_rep_1/report_temp_en.pdf

⁶ See the presentation by Carolina Lorenzon, Mediaset, joint workshop EPRA/Cullen International on Policy and regulatory challenges of connected TV - Brussels, May 3, 2012:
<http://www.epra.org/attachments/connected-tv-workshop-presentation-by-carolina-lorenzon-mediaset>

and TV Broadcasting (CZ), The Director's Conference of the Lander Media Authorities (DE), The Radio and Television Board (DK), The Catalan Audiovisual Council (ES), The FICORA (FI), The Conseil superieur de l'audiovisuel - CSA (FR), Ofcom (GB), The National Media and Infocommunications Authority-NMHH (HU), The Agency for Electronic Media (HR), The Broadcasting Authority of Ireland (IE), the Second Authority for Radio and Television (IL), The Autorita per le Garanzie nelle Comunicazioni - AGCOM (IT), The Radio and Television Commission of Lithuania (LT), The Conseil National des Programmes (LU), the NEPLP (LV), the Agency for Electronic Media (ME), the Broadcasting Council of the Republic of Macedonia (MK), the Commissariaat voor de Media (NL), the Norwegian Media Authority (NO), the National Broadcasting Council (PL), the Regulatory Authority for the Media-ERC (PT), the National Audiovisual Council (RO), The Swedish Broadcasting Authority (SE), The Post and Electronic Communication Agency of the Republic of Slovenia-APEK (SI) and The Council for Broadcasting and Retransmission (SK).

Foreword on recent changes of the legal framework with relevance to issue of scope

Progress of AVMS transposition by EU Members:⁷

The Commission's first report on the application of the AVMS Directive states that "by the end of 2011 notifications had been received from a total of 23 Member States, twenty of which amounted to full transpositions. Three Member States still need to make some changes to their legislation in order to comply with the Directive. Measures communicated by two Member States are still being examined. At the end of 2011, seven infringement proceedings for non-communication of transposition measures were still pending. In 2011 the Commission wrote on various issues to 24 Member States seeking information about their implementation of the AVMS Directive".

Two years after the deadline, the transposition process is not quite fully achieved. Since May 2011, the Directive was transposed in **Gibraltar**⁸ and **Slovenia**⁹. In Slovenia, on 19 October 2011, the Act on Audiovisual Media Services was adopted and entered into force on 17 November 2011. Currently, the regulator is in the process of drafting and adopting several statutory acts which are necessary for the full implementation of the Directive (expected by the end of May 2012¹⁰).

In addition, several regulatory authorities from countries having already transposed the Directive (Netherlands, Belgium/French speaking Community) have adopted bylaws, regulations or recommendations concerning the scope of the AVMS Directive (see infra point 2.1 p. 11¹¹).

In Poland, however, provisions concerning VOD have, to this date, not yet been transposed¹².

Acceding, candidate and potential candidate countries¹³

Croatia had transposed the AVMSD in December 2009, and by-laws regarding scope were amended in 2010. At the end of 2011, the AEM finished the review of the register of providers of electronic publications. **In Macedonia**, the process of harmonisation of the national

⁷ See the table of national provisions as communicated by the Member States:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72007L0065:EN:NOT>

⁸ The Audiovisual Media Services Regulations took effect on 20 October 2011.

⁹ <http://merlin.obs.coe.int/iris/2012/2/article36.en.html>

¹⁰ Note of the Secretary: in the meantime, APEK has prepared and adopted the act on notification of non-linear AVMS, the act on product placement and sponsorship, the act defining the methodology of monitoring and classification of programmes and act on financial contribution (fee) of AVMS providers to APEK, and is currently working on the protection of minors act (consultation expected in September).

¹¹ Also note that on 20 December 2011, the French CSA has adopted a new binding recommendation ("délégation") modifying the rules on the protection of minors on on-demand audiovisual media services.

¹² Note that the European Commission has decided to refer Poland to the European Court of Justice for failing to fully implement the AVMS Directive:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/631&format=HTML&aged=0&language=en&guiLanguage=en>

¹³ Stabilisation and Association countries (the western Balkan countries) have a legal obligation to incorporate the AVMSD irrespectively of being candidate countries (MK, ME, RS) or potential candidate countries (AL, BA, Kosovo - under UN resolution 1244).

legislation with the AVMSD is expected for the end of 2012. In **Bosnia and Herzegovina**, the CRA adopted a set of by-laws in November 2011 transposing the provisions of AVMSD into the regulatory framework. The application of new rules began on 1 January 2012.

EEA countries

In **Norway**, the AVMSD is still not implemented. It has not yet been incorporated in Annex XI of the EEA Agreement¹⁴. Negotiations between Norway and the Commission took place concerning the continuation of the Norwegian prohibition to ban advertisements for alcoholic beverages in foreign broadcasts.

Other countries

No recent regulatory or legislative changes with regard to the new media were reported in **Azerbaijan, Armenia or Israel**.

FIRST PART: Knowing who you deal with Or how regulators follow the market of on-demand audiovisual media services (ODAVMS)

1.1. Registration/Notification Requirement

As highlighted by the paper on scope of last year, most countries have introduced a system of prior registration or notification of ODAVMS when transposing the Directive into national law. Such a notification system may, on the one hand, help identifying the services subject to regulation, especially if they are offered by new players in the value chain who are not the usual contact persons of NRAs. It may, on the other hand, help communicating on legal requirements, ease future monitoring of the compliance with legal requirements and ensure the transparency of basic information on media service providers towards the public as required by Art. 3a of the AVMSD. Such a notification system also constitutes a less stringent requirement than traditional licensing and is thus more in keeping with the principle of freedom of expression.

Since May 2011, six new countries have introduced a notification requirement for on-demand audiovisual media services: Bosnia and Herzegovina, Slovenia, Hungary, Latvia, Netherlands and Finland; it is pending in Catalonia.

In the Netherlands, the CvdM published a Regulation containing policy rules defining "commercial media on-demand services", or VOD services, under the Dutch Media Act. Under the regulation, which came into force on 1 November, such video services must be registered as of 1 November 2011. The CvdM has created an online application form to facilitate the notification process.

In **Slovenia**, ODAVMS are expected to notify their activity to the APEK, as the Act introduced the establishment of a database of non-linear AVMS providers. The notification (prior to the start of service) must contain the information needed for the identification of the service and for determination whether APEK is competent to deal with it.

In **Bosnia and Herzegovina**, regulation of ODAVMS has been established in line with the AVMSD two-tiered approach, with obligatory free-of-charge registration procedure.

In Catalonia, the CAC has just published a general Instruction¹⁵ on a system of prior communication applying to audiovisual communication services which do not use spectrum. Already operative audiovisual media services will have to notify the CAC within 3 months after the Instruction comes into force.

Malta has adopted the substantive part of the law as reflected in Article 16(O) of the Broadcasting Act which states that non-linear services have to register with the Broadcasting

¹⁴ Note that in the meantime, on 15 June 2012, the AVMSD was incorporated into the EEA Agreement: <http://www.efta.int/eea/eea-news/2012-06-15-Audiovisual.aspx>

¹⁵ Instrucció general sobre les condicions i el procediment de la comunicació prèvia per a la prestació de serveis de comunicació audiovisual mitjançant tecnologies altres que l'espectre radioelèctric http://www.cac.cat/pfw_files/cma/normativa_sa/Instruccio_comunicacio_previa.pdf
The general Instruction will come into force one month after its publication in the Official Gazette.

Authority. However the procedural secondary legislation which spells out the process and fees has yet to come into force; to date non-linear services are not registered.

No registration/notification	Registration/notification requirement
AZ, CH, DE, DK, FR, IL, ME, MK, NO, PL, PT	AT, BA, BG, BE-CSA, BE-VRM, BG, CY, CZ, ES-CAC*, FI, GB, HR, HU, IE, IT, LT, LV, LU, MT*, NL, RO, SE, SI, SK
11	24

Table 1: registration/notification requirement for on-demand services

* Pending in ES-CAC and MT

Countries who have not introduced such a registration/notification system include:

- Non-EU countries whose legal framework is not yet dealing with OD media services: Norway, Switzerland, Azerbaijan, Israel;
 - EU countries/candidates which do not have fully transposed the Directive: Poland, Macedonia, Montenegro;
 - EU countries having transposed the AVMSD but whose legislation does not impose any notification requirement: Denmark, France, Germany, Portugal.
- In Germany, while ODAVMS do not require a licence or a registration, to achieve legal certainty the provider of a so-called *telemedia service* is entitled to apply for confirmation by the competent state media authority that a service would not raise objections under broadcasting law (art. 20 para 2 Interstate Treaty).

1.1.1. Notification for which kind of services and for which kind of delivery?

From the responses to the questionnaire, it appears that the registration or notification mostly covers on-demand services and catch-up services.

Count	Answer	Country
13	1. VOD services	BA, BE-CSA, BG, FI, HU, HR, IT, LU, LV, NL, RO, SE, SI
6	2. Catch-up TV	BE-CSA, HU, IT, FI, NL, SI
3	3. Other services	BE-CSA, BG, NL

Table 2: Notification for which kind of services

Notification seems to only cover VOD services in several countries such as Bosnia and Herzegovina, Croatia, Latvia, Romania and Sweden. It is however not completely clear from the responses whether or not catch-up services are considered as VOD. In **Italy**, Catch-up services are dealt with under the framework applicable to linear services, where concerned subjects have to flag a box (flagging procedure) if they also provide catch-up services, but they are not required to apply for a specific authorisation. Web simulcast of linear services also falls under the simplified flagging procedure.

The CSA of the **French speaking Community of Belgium** specified that the registration requirement also extends to all services which may fulfil the definition of an on-demand AVMS under the Directive, i.e.:

- Connected TV applications;
- Applications for smartphones/tablets - If their content differs from another version of the service that is already delivered by another means, such as a regular website and is already notified as such;
- Newspaper websites with video section - as long as the section is the principal purpose of the service or can be isolated from the rest of the website as a service in its own right;
- Download-to-own (DTO) and download-to-rent (DTR) services;
- Webradios (the notion of AVMS also covers traditional and new radio services in Belgium).

In **Croatia**, the notification system also extends to electronic publications (internet portals). The register currently contains electronic publications that are provided by the media companies that are registered in Croatia, have an editor in chief, produce and regularly update

content and address a wide audience. In **Bulgaria**, providers of pay-per-view services (although non-linear services) are also required to register.

As a rule, the means of delivery of a service appears to be not relevant to decide whether it has to be notified to the NRA. The CSA of the French speaking Community of Belgium reports that if one identical service is being delivered by different means, the provider only needs to notify it once.

In several countries, (France, Luxembourg, Spain-Catalonia), however, ODAVMS require a licence if they use terrestrial frequencies.

1.1.2. Where do on-demand services need to register?

Most respondents state that the non-linear services, which fall under their jurisdiction, will be under obligation to register with their regulatory authority.

Count	Registration	Country
19	With NRA	AT, BA, BE-CSA, BE-VRM, BG, CY, CZ, ES-CAC, HU, HR, IT, LT, LV, MT, NL, RO, SE, SI, SK
3	With co-regulator	IE, UK, FI
1	With Ministry	LU
0	Other	

Table 3: Where do OD services need to register?

In Luxembourg, ODAVMS have to notify the Ministry of communications or apply for a concession from the Minister of communications. However, the CNP may be asked by government to give its advice about a specific programme, for example whether it should get a concession or not.

A system based on self or co-regulation has been introduced in three countries, the latest example being Finland.

In Finland, the registration of ODAVMS is with The Finnish Centre for Media Education and Audiovisual Media, a newly established authority¹⁶. The authority is responsible for the supervision of audiovisual programme provision (classification of films, protection of minors) and the coordination and promotion of national media education.

As was reported last year, the regulation of non-linear services in **Ireland** has been delegated by statutory instrument to the industry which established ODAS (On Demand Audiovisual Services) to undertake this activity. A voluntary Code of conduct was drafted in May 2011 by ODAS and approved by the BAI. The code stipulates that "*Audiovisual Media Service providers of on-demand audiovisual media services shall notify the Minister or the relevant regulatory body of their intention to provide or continue to provide such services (...)*". ODAS has however no reporting function to the BAI in relation to registration.

In the UK, a co-regulatory system has been established and providers are required to notify the ATVOD if they are operating a VOD service that falls within scope. The ATVOD is responsible for timescale of notification, receipt of notification and extent and management of notification while Ofcom retains responsibility for decision-making on borderline scope decisions and the enforcement of decisions surrounding notification and scope.

In Hungary, whereas a co-regulatory regime has been established, providers are required to notify the regulatory authority.

1.1.3. How many on-demand services have notified/registered so far?

¹⁶ <http://www.meku.fi/index.php?lang=en>

Country	Status May 2011	Status May 2012
AT	35	Approx. 80
http://www.rtr.at/de/m/Abrufdienste		
BA	N/A	3
http://www.rak.ba/eng/index.php?uid=1276851773		
BE - VRM	14	About 25
BE - CSA	4	10
http://www.csa.be/documents/1652 (list currently updated)		
BG	11	9 VOD Services, PPV
CY	2	?
CZ	79	104
http://www.rrtv.cz/cz/static/prehledy/seznamy-provozovatelu/list_other_ondemand.htm		
ES (CAC)	N/A	N/A (not yet in force)
GB	119	Approx 200
http://www.atvod.co.uk/regulated-services/directory-of-notified-services		
HU	-	About 70
HR		6 on-demand (video) services 78 providers of electronic publications
http://www.e-mediji.hr/ostalo/emediji1.php		
IE*	?	?
IT	N/A	3 VOD, 4 web TV, 88 web simulcast of linear services (status 20/04/2012)
LT	4	5
LV	-	1
LU	1	2: Netflix and iTunes (Source: CNP ¹⁷)
http://www.mediacom.public.lu/medias/television/concessions_programmes/VOD/index.html		
NL	23 services, from 17 parties	Around 45
RO	?	1
SE	8	31
SI	N/A	N/A (secondary act to be adopted)
SK	32	39
http://www.rada-rtv.sk/sk/spravy/index.php?aktualitaId=1040		

Table 4: Number of ODAVMS notified

*(IE): not known, information not provided to BAI

The above table compiles the list of ODAVMS that registered/notified with regulatory authorities. It does not always reflect the actual number of ODAVMS services active in the countries. It does not imply that all notified services will eventually qualify as ODAVMS under the AVMSD. As explained below (point 1.1.5), many NRAs are currently in the process of assessing the status of the services that have notified or even inviting providers of services to notify.

Several lists (Italy, Austria) also include linear services such as web simulcast of linear services. It is also unclear whether catch-up services are included or not in all the lists.

1.1.4. Does your RA have powers to enforce the registration/notification requirement? Have they been applied so far? Is your RA actively looking for services who might have omitted to register?

Count	Answer	Country
18	YES	AT, BA, BE-CSA, BE-VRM, CY, CZ, BG, FI, GB, HR, HU, IT,LT, LV, NL, SE, SI, SK
3	NO	ES-Catalonia, LU, RO

Table 5: Has your RA powers to enforce the registration/Notification Requirement?

¹⁷ ODAVMS on pay TV packages have a concession, e.g. "Air TV" on the package "Télé vun der Post" or "Libido TV" on the "Canal+" package

According to the responses, most NRAs have been vested with powers to enforce the notification requirement.

In Italy, Italian companies have to declare their main activity to the Chamber of commerce. Agcom is connected to this database and can match this information with the balance sheets of the companies (to check the 100.000 EUR threshold¹⁸) and the applications that have been submitted to Agcom. If the records do not match, they would be subject to a sanction (transmission without authorization).

The NRAs in **Catalonia, Luxembourg** (where the competent authority is the governmental service for media and communications, the "Service des Médias et des Communications") and **Romania** do not have such powers.

From the outcome of the survey, it appears that, so far, only the **Slovakian CBR** has sanctioned two service providers via a warning for not registering their OD services. The CBR does not however look actively for services that have omitted to register. The first case (Euromustra, see infra point 2.5) was based on a complaint; the second one emerged from an investigation of the CBR concerning another regulatory concern.

In several countries (Bosnia and Herzegovina, Finland, Slovenia) the notification requirement has been introduced only recently. **Slovenia** has however already conducted a preliminary scanning according to which around 40 services would need to notify. In **Bosnia and Herzegovina**, such services are relatively new on the market and there are no indications of OD service providers who failed to register.

Several NRAs have started monitoring the Internet in search of new services which would qualify as AVMS but have not yet registered (Austria, Belgium-CSA, Czech Republic, Latvia). In such cases, providers are invited to register with the NRAs.

So far, the CSA in **Belgium** focuses only on services attracting some attention (ex. with a lot of users, organising press conferences around their launching, etc.). If a new service does not really compete with registered AVMS, it is assumed that it does not comply with the criterion of "economic service". The CSA has not been confronted with an AVMS clearly refusing to register but it may be complicated to convince some Web TVs even when they completely fulfill the AVMS criteria.

As reported in last year's paper, in 2011 the **Czech RRTV** started using specialised computer software in order to search for ODAVMS which might have omitted to register. 500 websites with content potentially falling under the jurisdiction of the Act on Audiovisual Media Services on Demand were identified. To date approximately one third of this number has been analysed, whereas seven of these websites were really recognised as services requiring registration.

Other authorities (e.g. **KommAustria**) reported on their intention to actively start looking for providers of services which may have omitted to register.

In **Croatia**, the AEM has budgeted an extensive survey to be conducted by a third party institution in order to gather information on online media market. The results of the survey will be made available in autumn. On that basis, the Council will take further steps towards identifying possible media providers that have not yet registered their service. In the **Netherlands**, the CvdM has drafted a list containing the largest services that may be considered to be OD media services. The providers of these services will be notified in near future that they should register with the NRA.

1.1.5. Did your RA assess services who have notified/registered? Did your RA requalify some of these services (e.g. as out of scope?)

¹⁸ The AGCOM has introduced a monetary threshold as presumption for economic activity able to compete with broadcasting activities. This condition is considered to be satisfied for providers who collect yearly revenues above 100.000 EUR - a threshold based on average revenues of local broadcasters and top websites.

Several NRAs have not yet conducted any assessment of the notified services, possibly because the registration system is only recently in place or due to the small number of registrations (**Hungary, Romania**).

A few NRAs did not have to qualify any services so far as being out of scope owing to informal contacts with the applicants. Informal contacts prior to the registration have solved possible interpretative issues (**Belgium-CSA, Italy**).

In **Bosnia and Herzegovina** and **Latvia**, NRAs only assessed formal requirements so far (e.g. whether the request for registration was complete etc).

Several authorities (**Netherlands, Austria, Slovakia, Sweden**) report that they declined to register some services since they had to be considered as out of scope. The CvdM listed a few concrete cases, such as:

- a local municipality website where there is no catalogue of videos present;
- a website providing information about first aid during accidents; where videos are only supplementary and do not constitute the principal purpose.

KommAustria mentioned two concrete services which were denied registration:

- a musical blog (<http://www.klavierhaus.info/blog/index.html>), and
- a university website with videos from lectures (<http://campustv.uni-klu.ac.at>).

In Slovakia, most services deemed beyond the scope of the AVMSD were newspapers or e-magazines where the video was only complementary to the written article; the CBR stated that the providing of programmes was not the principal purpose of these services. In a few cases the CBR ruled that the service did not have a primarily economic character (services provided by Universities, using University's equipment, students as TV presenters, etc.)

In **Croatia**, every request for registration with the Council's register has to go through an assessment procedure conducted by an ad-hoc commission.

1.2. Observing new media service providers on the market

1.2.1. Has your RA conducted/commissioned any recent surveys/studies listing on-demand audiovisual services or new media providers in your country?

As mentioned above, several NRAs conduct permanent surveys on the Internet to see whether new services comply with the seven cumulative AVMS criteria (e.g. Netherlands, Belgium-CSA). Such surveys form part of an internal working process and are not publicly accessible.

In Portugal, the ERC has a list provided by the broadcasters of the on-demand services that they provide, allowing the NRAs to have a general overview of their offer.

- **FI**: in summer 2011, the Ficora prepared a market overview on Finnish VoD and IPTV service providers. (Results are only available in Finnish).

- **FR**: The French CSA has not commissioned any recent survey. They are however working with the Centre national de la cinématographie (National film agency) which has set an Observatory on VOD and is conducting periodical surveys with GfK to list most VOD and catch-up services active on the French market (currently about 100-adult content excluded)¹⁹.

<http://www.cnc.fr/web/fr/barometre-de-la-television-de-rattrapage-tvr>

- **DE**: the 14th yearly report of the KEK (Kommission zur Ermittlung der Konzentration im Medienbereich) provides an overview of the VOD platforms on the German market²⁰.

- **ES** (Catalonia): (2011): *Pantalles, continguts i usuaris. Panorama de la convergència mediàtica digital, els continguts i el consum a Catalunya* (Users, contents and screens. Panorama of the digital media convergence, the contents and the consumption in Catalonia). (2010): *Els reptes de la regulació en l'era de la convergència mediàtica* (The media convergence era regulatory challenges); Estudi d'opinió Estudi d'opinió pública sobre els

¹⁹ <http://www.cnc.fr/web/fr/barometre-de-la-television-de-rattrapage-tvr>

<http://www.cnc.fr/web/fr/barometre-video> <http://www.cnc.fr/web/fr/dossier/-/ressources/1578675>

²⁰ http://www.kek-online.de/Inhalte/jahresbericht_10-11.pdf (from p. 62)

mitjans audiovisuals de Catalunya (Survey on the public opinion about the Catalonia audiovisual media). All available on www.cac.cat (research and quaderns del CAC)

- **SE**: the SBA published a report listing OD services in Sweden in May 2011. The number of VOD services in Sweden is far greater than the number that has registered. The report also suggested that VOD-services connected to newspapers should not automatically be registered as VOD services²¹.

The European Audiovisual Observatory has, in recent years, been working on gathering data on the on-demand services market in Europe.²² In the recent Yearbook 2011, the Observatory outlines an initial examination of a range of types of on-demand services: pure online, apps for smart phones and tablets, apps for connected TV etc. This is part of an on-going census to establish the number of on-demand services in Europe. Reinforcing data collection on on-demand audiovisual services is defined as a key priority of the Observatory in its 3 year action plan 2012-2014. Alongside those offered by broadcasters, there are also the services of the distribution companies (in particular IPTV and cable) and the pure online services of newcomers and those of the traditional production (film and television) companies. The growing market plus the rapid changes in technology and methods of distribution add to the complexity of providing immediate accurate data.

The most recent data from the Yearbook²³ of the European Audiovisual Observatory and from the MAVISE database²⁴ shows:

- there are currently approx 7500 TV channels established in the EU,
- more than 8900 TV channels are available in the EU and candidate countries,
- more than 280 pure online VOD services have been established (in the 38 countries of the Observatory), **at a minimum given that all have not yet been identified**,
- the main distributors (IPTV, cable, satellite etc.) have approximately 80 of their own VOD services **at a minimum given that all have not yet been identified**,
- the analysis of broadcaster VOD services for pay or rent (DTR and DTO) is ongoing, and the number of catch-up TV services is vast particularly as the majority of TV channels (including local) provide this online.

1.2.2. Does your NRA collect information about the revenues of the new services? Are there studies that can be referred to?

Only a few NRAs collect information about the revenues of new media services.

- **In Austria**, the media sector, including providers of AVMS, have to make financial contributions to finance the expenditure of the KommAustria. The contributions are determined according to the respective turnover of the provider liable to contribute in proportion to the total turnover of the sector.

- **In Belgium** (French speaking Community), new services providers must inform the NRA on a yearly basis about their revenues. This information is used to collect the contribution of the providers whose AVMS-linked revenues exceed a certain amount. The contribution is dedicated to the production of audiovisual works. In order for the NRA to calculate the contribution owed by each service provider, they have to communicate their accounts each year to the NRA. The turnover of each provider is published on the website of the NRA²⁵.

- **In Croatia**, the AEM receives reports about revenues of all registered media providers with the Council's register. Data from *Gemius* and the Association of commercial media online providers (IAB) provides further information on the Croatian on-line market.

- **In Italy**, all registered operators have to provide Agcom with economic figures, filling in specific forms²⁶ in the "Informativa Economica di Sistema". This database is also used to verify

²¹ <http://www.radioochtv.se/Documents/Publikationer/Rapporter/Rapport%20best%20a4ll-tv%20maj%202011.pdf>

²² Video on Demand in Europe (2007); Video on Demand in Europe (2008); and Video on Demand and Catch-up TV in Europe (2009). See: http://www.obs.coe.int/oea_publ/market/vod2009.html

²³ http://www.obs.coe.int/oea_publ/yb/index.html

²⁴ <http://mavise.obs.coe.int/>

²⁵ <http://www.csa.be/pluralisme> => insert the name of a service: you can get information about its provider, and its annual turnover.

²⁶ <http://www.agcom.it/Default.aspx?message=contenuto&DCId=350>

the existence of dominant positions and the main findings are published in Agcom's annual report²⁷.

- **In France**, the Government Decree of 12 November 2010 which sets the rules on the promotion of European and French-speaking works states that ODAVMS under the CSA's jurisdiction have to declare how they have complied with the obligations of the Decree. Obligations on financial contribution apply only for services whose annual turnover is over €10 million but the CSA may ask service providers for evidence that their annual turnover is less than €10 million. First declarations are to be submitted by June 2012. In 2011, the CSA has also asked an independent consulting agency to carry out a study on the business models of on-demand services acting on the French market²⁸.

- **In Norway**, the Norwegian Media Authority collect information (ownership, advertisement revenues and revenues from paid content) from some new media services (online services, TV-like services over the internet and services that originate from newspapers or broadcasters) on a yearly basis.

- **In the UK**, ATVOD collects revenue data from providers of on-demand programme services for the purpose of fee setting but this is not generally available.

1.2.3. Do traditional broadcasters provide new media services in your country?

Country	VOD	Catch-up	OTT	UGC professional content	video sections on news websites	NPVR	EPG	DTO	DTR
AT	X(mainly)								
AZ					X		X		
BA		X							
BE/CSA	X	X	X	Youtube (PSB)					X
BE/VRM	X	X							
BG	X								
CH	X	X		X	X		X		
CZ	X	X							
DE	x	X			X			X	
DK	X	X	pilot/DR						
FR*	X	X	X	X	X			X	X
HR*	X	X					X		
HU	X	X	X						
IE		X mainly							
IT*	X	X	X	X		X	X		
SE	X								
PL	X	X	X				X		
RO	X	X							
LV	X					X			
ME		X rarely							
LT		X					X	X	
LU		X							
NL*	X	X	X	X				X	
MK	X	X							
NO*	X	X		X				X	
FI		X mainly							
UK	X	X	X	X					
ES/CAC	X	X	X						
SK	X	X							X
IL	X	X	X		X				
SI		X	X						
MT	X	X					X	X	
PT	X	X	X				X		

Table 6: Do traditional broadcasters provide new media services in your country?

²⁷ <http://www.agcom.it/Default.aspx?message=contenuto&DCId=5>

²⁸ <http://www.csa.fr/Etudes-et-publications/Les-dossiers-d-actualite/Etude-sur-les-modeles-economiques-des-SMAD-actifs-sur-lemarche-francais>

- (1) IT: The main terrestrial pay-tv operator (Mediaset Premium) delivers VOD services called "Premium PLAY" (<http://www.mediasetpremium.it/play/>). The satellite pay TV operator (Sky Italia) delivers a PVR service called "My SKY" (<http://www.sky.it/offerta-sky/decoder-hd/my-sky-hd.html>), EPG and an App called "Sky GO" (<http://www.sky.it/sky-go/index.html>) allowing satellite subscribers to access the same services on PCs, tablets and smartphones. Main national DTT channels provide catch-up services on their websites as RAI with the service called "RAI Replay" (<http://www.rai.tv/dl/replaytv/replaytv.html>) and La7 (<http://www.la7.tv/>). RAI delivers also an App called "Rai.TV"
- (2) FR: All DTT broadcasters, including PSB, now provide catch-up TV services; most of them also offer VOD services (incl. PSB France Télévisions and Arte). Though initially only small channels offered programmes on Dailymotion and YouTube, most major commercial channels now offer some programmes on these platforms (with the exception of Canal+). Most DTT broadcasters have implemented hbbTV applications for connected TVs. PSB France Télévisions has launched a new website dedicated to news and information with video sections. VOD services provided by traditional broadcasters are more often Download-to-Rent.
- (3) NL: VOD, e.g. Veamer by SBS, Catch-up TV: most broadcasters: e.g. SBS Gemist, Uitzending Gemist of National Public Broadcasting. Professional channels on UGC platforms: several broadcasters are active on YouTube for instance with own channels. Connected TV applications: both public and private broadcasters have started to launch HbbTV apps.
- (4) NO: DTO: NRK Beta; experimental service from the national PSB
- (5) SI: The biggest commercial TV broadcaster (part of CME group) offers an OTT TV service (VOYO) and already reached an agreement on serial integration of their app with most important producers of TV receivers.
- (6) HR: The TV channels of all Croatian broadcasters are also made available by operators of OTT services. Broadcasters have not yet made their channels available through connected TV platforms. Broadcasters have not yet started to provide DTR/DTO services, but EPG became mandatory for all broadcasters since the switch-over.

1.2.4. Do new operators (who were not traditional broadcasters) provide new services in your country?

Country	VOD	Catch-up	OTT	professional content on UGC	video sections on newspaper websites	NPVR	EPG	DTO	DTR
AT	X (mostly)								
AZ									
BA	X	X				X	X		
BE/CSA	X								X
BE/VRM	X						X		
BG	NO								
CH	X	X					X		X
CZ									
DE	X	X	X		X			X	X
DK					X		X		
FR*	X	X		X	X		X	X	X
HR	X	X	X						
HU	NO								
IT *	X				X			X	X
ES/CAC	YES								
SE	YES								
PL	X	X			X		X	X	
RO									
LV	NO								
ME	NO								
LT	X	X			X		X		
NL	X		X	X	X		X	X	X
MK	X						X		X
NO	X			X	X		X	X	X
FI			X		X				
SK	X	X			X		X		X
IL				X					
SI *	YES								
MT	X						X	X	
PT	X	X	X		X	X	X		

Table 7: Do new operators provide new media services in your country?

(IT): Both DTO and DTR services are delivered by traditional ecommerce operators, as Mediaworld with the service called "NetMovie" (<http://www.net-movie.it/>) allowing both to rent for seven days and to own. A similar service is provided by rights holders (www.movieondemand.it) allowing rental for 30 days in addition to purchase.

(FR): Distributors who were traditionally bundling channels to provide viewers with thematic offers are now enjoying a new role with the development of new services. They first host a lot of VOD offers provided by other operators. All major distributors also provide for their own VOD service. Some distributors, especially triple-play ISPs, also aggregate catch-up TV services. Operators coming from the Internet world have also launched new services such as "TV Replay", an EPG-like guide dedicated to catch-up TV with direct links to programmes on the channels' websites. Newspaper websites offer more and more news videos with sometime dedicated video sections. The UGC platform Dailymotion sometimes makes its own programmes filmed on set. There are also online shops and pure players which sell films and series (such as Virgin Mega or UniversCiné) to rent or to own or both.

(SI) VOD, PVR, EPGs provided by telecom operators, almost all newspapers online offer, among others, also video content.

SECOND PART: Qualification of the new media services by NRAs

2.1 Has your NRA developed guidance related to scope (such as guidelines, recommendations, FAQ) to ease the practical interpretation of the AVMSD, since May 2011?

Several NRAs have undertaken to draft some guidelines or recommendations for media service providers on the issue of scope to help assessing who is likely to be the provider of a relevant service, to ease the understanding of and the compliance with legal provisions. As regulators are not legislators, nor the judiciary, such guidance is not legally enforceable, and only provides interpretative guidance as to how RAs are likely to apply the notion of AVMS and its seven underpinning criteria in practice. The main idea is to provide some predictability regarding the new legal framework, and to guarantee equitable treatment between the stakeholders.

Only three NRAs have developed guidance related to scope since May 2011 (Czech Republic, Netherlands, Belgium-CSA).

In Belgium (French speaking Community), the CSA issued a recommendation about the scope of the notion of AVMS²⁹ on 29 March 2012. The recommendation analyses the seven cumulative criteria underpinning the definition of an audiovisual media service. The guidance document was published further to the organisation of a public consultation and a seminar. It is based on the preparatory work for the (Belgian) Coordinated Decree and on the recitals and the preparatory work for the AVMSD. The CSA also drew inspiration from the work of the European Audiovisual Observatory, the legislation of other European States and positions of other EPRA members.

In the Netherlands, on 22 September 2011 the CvdM published a Regulation containing policy rules defining "commercial media on-demand services", or video on-demand services, under the Dutch Media Act, which came into force on 1 November. The main purpose of the guidelines is clarifying when a commercial OD media service needs to be registered with the CvdM and is subject to its supervision. The policy elaborates on the criteria that determine whether a commercial media OD service is covered by the Dutch Media Act (catalogue, main purpose, editorial responsibility, mass media character, economic service). Every service that meets the five criteria must register within a two-week period after the new policy has come into force or risk a fine³⁰.

²⁹ http://www.epra.org/news_items/avms-scope-recommendation-of-belgian-csa

³⁰ For further detail, see the Dutch country report submitted for Portoroz, the information brochure in English: <http://www.cvdM.nl/dsresource?objectid=11318&type=org> and the IRIS-Merlin article: <http://merlin.obs.coe.int/iris/2011/10/article34.en.html>

In the Czech Republic, the RRTV issued a recommendation in order to ensure the transparency of basic information on media service providers towards the public as required by Art. 3a AVMSD. The recommendation requires basic information and details of the OD audiovisual service provider and the mention that the RRTV is the authority supervising the provision of OD audiovisual media services. The recommendation suggests that if a provider of AVMSD offers his services via cable it should be done as for TV broadcasting. If a provider offers his services via Internet then the information should be found on his website under the tag "contact" or "about us" or "about the web".

In Italy, existing provisions (Agcom deliberation no. 606/10/CONS applicable to web TVs and 607/10/CONS concerning VOD services, both adopted on 25/11/2010) have in the meantime entered into force. According to these deliberations, in order to establish their scope, all potential applicants are required to check their balances (the first one approved after the entry into force of these deliberations) in order to verify if they exceed the threshold of EUR 100.000 and therefore fall within their scope. Agcom adopted specific FAQs available also in English on the website. The FAQs concern not only the scope (editorial responsibility, calculation of revenues), but also the timing, procedural aspects related with the issue of the authorisation and the obligations applicable to AVMS providers.

Other guidance documents are pending:

In **Romania**, the CNA is currently debating a draft decision on VOD. In **Cyprus**, the CRTA is in the process of upgrading the relevant legislation. In **Denmark**, while basic information on the rules is available on the website of the authority, the RTB is working on the development of more detailed guidance. In **Hungary**, the drafting of an interpretative recommendation is still under way.

Country	Guidance documents
AT	Informationen für audiovisuelle Mediendienste auf Abruf (DE) http://www.rtr.at/de/m/InfoMDA/Merkblatt_Abrufdienste_10-2010.pdf
BE	Recommandation relative au périmètre de la régulation des services de medias audiovisuels (FR) http://csa.be/documents/1713
BG	http://cem.bg/cat.php?id=128&p=0 http://www.cem.bg/download.php?id=1007 (BG) - registration form
CZ	OZNÁMENÍ - Povinnost poskytovatelů audiovizuálních mediálních služeb na vyžádání umožnit příjemcům služby snadný, přímý a trvalý přístup k základním údajům podle ustanovení § 6 odst. 1 zákona č. 132/2010 Sb. CZ: http://www.rtv.cz/files/pdf/OZN%C3%81MEN%C3%8D%20II.pdf
DK	Generelle regler for on-demand http://www.bibliotekogmedier.dk/medieomraadet/tv/internet-mv/on-demand/generelle-regler/ (DK)
GB	Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS) Edition 2.0, Published 3 May 2012 http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf
IT	Regolamento in materia di fornitura di servizi di media audiovisivi a richiesta ai sensi dell'articolo 22-bis del Testo unico dei servizi di media audiovisivi e radiofonici (IT) – for Web-radio and web-TV http://www.agcom.it/default.aspx?DocID=5417 F.A.Q. (EN) http://www.agcom.it/default.aspx?message=contenuto&DCId=495
NL	Regeling van het Commissariaat voor de Media van 22 september 2011 houdende beleidsregels omtrent de classificatie van commerciële mediadiensten op aanvraag zoals bedoeld in artikel 1.1, eerste lid, van de Mediawet 2008 (Beleidsregels classificatie commerciële mediadiensten op aanvraag 2011) http://www.cvdm.nl/dsresource?objectid=12335&type=org
SE	Att ansvara for en bestall-tv-tjanst (being in charge of an on demand tv service) http://radioochtv.se/Documents/Publikationer/Att%20ansvara%20f%C3%B6r%20en%20best%3a%40%20tv%20tj%C3%A4nst.pdf?epslanguage=sv
SK	Rozsah posobnosti zakona č. 308/2000 Z. z. v súvislosti so zmenami zakona účinnými od 15. decembra 2009: http://tinyurl.com/3egura2 (SK)

Table 8: Updated overview of the main guidance documents produced by RAs

2.2 Please tick services that your NRA would TEND to qualify as AVMS - provided all 7 cumulative criteria of Art. 1.1 (a) are fulfilled

Count	Answer	Country
31	VOD	AT, BA, BE-VRM, BE-CSA, BG, CH, CY, CZ, DE, DK, ES-CAC, FI, HR, HU, IT, LT, LU, LV, ME, MK, MT, NL, NO, PT, RO, SE, SI, SK
25	Catch-up TV	AT, BA, BE-VRM, BE-CSA, ES-CAC, CY, DE, DK, FI, HR, HU, IT, LU, ME, MK, NL, NO, MT, PT, RO, SI, SK
8	OTT-TV /connected TV applications	AT, BE-CSA, CY, FI, LU, NL, SI
8	Professional channels on UGC platforms	AT, BE-CSA, FI, IT, NL, SI
15	Newspaper websites with searchable video section - if not merely complementary to the articles	AT, BE-CSA, CZ, DK, FI, LU, LT, ME, NL, NO, SE, SI
4	Network personal video recorder services (NPVR)	HU, LU, NO, SK
8	Electronic Program Guides (EPG)	CY, HU, LT, LU, ME, PT, RO
9	Download to own (DTO) services	BE-CSA, CY, CZ, HU, LU, NL, NO, SK
9	Download to rent (DTR) services	BE-CSA, CY, CZ, HU, IT, NL, NO, SK

Table 9: services that your NRA would TEND to qualify as AVMS

This question aimed at revisiting, after four years, the practical simulation conducted at the EPRA meeting in Dublin, to try and classify different types of media services. An important caveat at this point: the qualification of specific services under the AVMS services - as attempted above - is only to be seen as a highly subjective exercise in order to provide background information for the plenary debate and to identify main trends and potential practical problems in the application of the legal concepts enshrined in the Directive. A valuable response to this simulation could only be provided on the basis of a case-by-case assessment.

Generally, there seems to be no or little uncertainty among the respondents to the questionnaire as to the qualification of VOD and Catch-up TV as audiovisual media services. About half of the respondents would also tend to qualify newspaper websites with video sections - provided the section is the principal purpose of the service or can be isolated from the rest of the website as a service in its own right - as an AVMS.

It is rather surprising to see that as many as eight NRAs tend to consider EPGs as an AVMS. The main issue here is that of the definition of EPG: do NRAs refer to "traditional EPGs" or rather new types of EPGs such as "backwards facing EPGs" as offered in UK, i.e. enhanced EPGs with the ability to go both backwards and forwards and allow a viewer to navigate to a programme's webpage or view a trailer for the programme, and Remote Booking, where viewers can book recordings or set reminders from a website or application?

In contrast, most respondents tend NOT to consider Network personal video recorder services (NPVR) as AVMS. As an example, the **Belgian CSA** considers NPVR as a way for people to modulate the way they watch linear TV. NPVRs also offer enhanced EPGs services.

The level of uncertainty concerning the qualification of Download to Own (DTO) and Download to rent (DTR) services is worth highlighting. Economically speaking, they are usually considered as two sides of the same coin, i.e. different business models of video-on-demand. Internal EPRA discussions seem to indicate that positions differ greatly among NRAs as to the respective legal qualification of these two models. DTO services seem to raise most interrogations. It is reported that in **Italy**, while these services have not yet been qualified from a regulatory point of view, they would probably fall under different regimes: DTR under the AVMS directive and DTO under the E-Commerce Directive.

There are also many uncertainties with regard to the legal qualification of Connected TV applications.

2.3 What are the services your NRA considers particularly difficult to qualify?

Generally, it appears that NRAs consider most “non-traditional” services, i.e. any services which are provided exclusively through internet, as particularly difficult to qualify in practice. The following three services are considered as particularly challenging for the practical qualification:

- **Newspaper websites providing video** (BE-CSA, IT, LU, NL, SE, SI, SK) Such services, offer as a rule hybrid contents (audiovisual and other contents); making it sometimes difficult to assess which content is principal and which is ancillary, or to decide if a searchable video section can be considered as isolated from the rest of the website and as an AVMS in its own right. **In Italy**, all leading newspapers offer also video content on their websites and some of them appear to be TV-like. However, no decision has been adopted yet.

- **UGC platforms/Professional channels on UGC** (AT, SK, CY, NL, DK) UGC platforms appear particularly complex as to the distinction of selection and organization activity, and it is uncertain how they could develop in the future. **In Italy**, this has been subject to a strong debate of AGCOM board. The issue is currently debated **in Austria**.

- **OTT TV** applications (AT, CY, IT, SI). **In Italy**, OTT-TV are currently under assessment, but are considered as equivalent to web-TVs as to the technological and economic impact on the market. This is the case of an ongoing proceeding related with sports rights on emerging platforms.

Other services have also been reported as difficult to assess, such as:

- **Small-scale services**, such as services provided by Universities (but accessible to anybody with internet) consisting only of programs created by students and featuring students (students news, entertainment programs etc.).

- **The difference between DTO/DTR and VOD** (see paragraph 2.3)

- **Electronic publications** (webportals): Croatia
In Croatia, the AVMS Directive has been transposed not only by including non-linear media and linear media using internet, cable or satellite as distribution platform. The most difficult service to qualify would therefore be electronic publications.

2.4. Please indicate which AVMS criteria raise difficulties in the qualification of new services?

Several AVMS criteria have raised difficulties for the NRAs on the occasion of scope determinations; whereby editorial responsibility and principal purpose are considered as particularly complex.

Editorial Responsibility (CSA-BE, BE-VRM, BA, CY, ES-CAC, IT, MT, NL, UK, SI, SK)
The notion is difficult because it implies a double level of evaluation on the responsibility over the contents, as to their selection and organisation, in addition to their economic exploitation. But what if the selection and the organisation of the contents are controlled by two different persons/companies? And what if the person who selects commercials differs from the person who selects other contents (e.g. Youtube channels)? Responses seem to vary according to NRAs. The Belgian CSA decided in its recent recommendation that the person responsible for the organisation would be considered as editorially responsible. In contrast, the Agcom

deliberations (Italy) consider editorial responsibility to be effective only when selection and organization are exercised together with the economic exploitation. In other words, both levels have to be satisfied. Ofcom also considers the criterion of editorial responsibility a difficult one as it implies considering contractual arrangements; and conduct and practice of parties against actual provision of a service.

Principal Purpose (AT, CSA-BE, BA, ES-CAC, LU, CY, DK, UT, NL, FI, UK, SE, SI, SK)
This criterion is considered as very subjective and can be really difficult to apply (e.g. for newspapers website with video content). Determining whether the provision of AV content is the principle or an ancillary part of a service is seen as challenging, especially concerning some hybrid contents (e.g. OTT on connected TV).

Aimed at the general public (AT, CSA-BE, CY, ES-CAC, DK)
The Belgian CSA reports that traditionally, in the field of intellectual rights, a work is considered communicated to the general public when the intention is to aim at anybody, even when very few people actually listen to or watch the work. Their recent recommendation on scope followed this interpretation. Is this in line with the AVMS Directive? In the same vein, are you a mass media when you aim at the general public but when your actual audience is 10 people? In contrast, this criterion is considered as rather unproblematic in Italy, as the notion of general public implies an evaluation that has been used over decades for traditional broadcasting. It has allowed excluding in-store channels³¹ from the scope.

A Service according to Art. 56-57 TFEU (AT, SK)
The criterion of service also proves difficult to assess in particular for small-scale services.

TV-like character (CZ)
The Czech RRTV encounters most difficulties with the notion of "TV-like character", especially when traditional TV broadcasters do not offer a concrete format, but services connected to the presentation of certain services or products of concrete companies (e.g. a video guide).

2.5 Please indicate concrete examples of services whose qualification as AVMS has raised a problem and briefly explain why this raised a problem:

A number of concrete examples were reported with regard to:

Editorial responsibility (Belgian CSA, Ofcom UK, Slovakia, Italy, Netherlands)
- "*Webradio platform Radionomy*": In the French speaking Community of Belgium, the webradio platform Radionomy offers the opportunity to everybody to create its own webradio. Any user can create its radio using its own programmes and music or those offered by the platform. It is free and the platform takes care of the payment of intellectual rights. Two minutes of commercials (which they cannot choose) are inserted in their programme every hour. This raises the question of who is editorially responsible if the person who selects the commercials differs from the person who selects other contents.

- *MTV/Nickelodeon/Comedy Central*³², *BBC Worldwide*³³ decisions
Ofcom received an appeal on behalf of MTV, Nickelodeon and Comedy Central disputing ATVOD's determination that the channels held editorial responsibility for material broadcast on the Virgin Media platform. The Services in question consist of a library of complete programmes which have been broadcast on analogue linear television services. Ofcom noted that both the channels and Virgin media had a role in making the content available on-demand

³¹ Note of the EPRA Secretary: by in-store channels, the AGCOM means the channels that are accessible e.g. in stations, airports, shops, so they are potentially available to an indefinite number of people (travelers, shoppers) but at the same time they are restricted to a certain areas, even though they use electronic communications networks.

³² <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/nickelodeon.pdf>

³³ http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/bbc_worldwide_appeal.pdf

to the public but that a clear contractual arrangement gave MTV etc editorial responsibility. Ofcom therefore supported ATVOD's determination.

In April 2012, an appeal by BBC Worldwide against an ATVOD determination that it was providing an on demand programme service on the Italian Mediaset platform has been upheld by Ofcom. Taking into account new evidence from BBC Worldwide (which was not made available to ATVOD at the time of its determination), Ofcom considered that BBC Worldwide did not have *editorial responsibility* for the Service. The person who did, Mediaset, was not under the UK's jurisdiction for the purposes of the AVMS Directive.

- Slovakia reported on its recent decision³⁴ on a case (EuroMustra/www.tnity.weebly.com) which was presented in the plenary session of the EPRA meeting in Brussels (Oct. 2011). The case revolved around issues of editorial responsibility and jurisdiction. The CBR stated that the service constitutes an OD audiovisual media service and it was completely irrelevant where the server of the service is situated and also who owns the internet domain of the service. For the identification of the media service provider it is necessary to determine who is responsible for choosing and organising the service content, i.e. who has the editorial responsibility over it. The Council imposed a warning on the provider (owing to 1st violation) for the failure to notify the Council.

Principal purpose (United Kingdom, Slovakia, Denmark, Netherlands)

- UK: *Sun Video*³⁵ and *MTV Viva decisions*³⁶

In the Sun Video case, ATVOD determined that video content on a newspaper website met the defining criteria for an ODPS. The newspaper appealed the decision. Ofcom ruled that the video content on the website was not a service in its own right that had a principal purpose of providing TV like programmes.

In contrast, Ofcom agreed with ATVOD's determination that a section of the MTV Viva website that hosted music videos was an ODPS.

- Slovakia: borderline cases were reported where online newspapers developed a separate section which goes beyond the traditional scheme of having a short video to accompany the journalistic text. These services offer audiovisual content specifically produced by the newspapers (in clear TV-like form), content produced by other entities and even acquired TV programmes (usually foreign). It is quite problematic to determine when this type of section already constitutes a separate service and when it is still only a part of a bigger service. So far the RA tends to act in these cases in according to the rule *in dubio pro libertate* especially when there is very little experience from other countries or any ECJ case-law in this matter.

- Denmark: The RTB decided that some websites (or rather sub-sites) of newspapers consisting mainly of television/videos qualified as AVMS.

- Netherlands: The Dutch CvdM encountered difficulties in assessing video sections of websites which have a mixed nature. Substantial videos which are clearly stand-alone and videos which are clearly supplementary to the text content on the site are offered together in one single video catalogue.

Mass Media character (Belgian CSA)

Local webTVs with a very small audience raise issues of scope determination. Should they be considered as directed to the general public? Are they a mass media?

Specific services

- Teletext (CNP Luxembourg): In the view of the CNP, teletext is qualified as an audiovisual media service, which is not necessarily the opinion of the TV-operators and the governmental

³⁴ Decision of the Council for Broadcasting and Retransmission of the Slovak Republic c. RL/98/2011 of 23 November 2011, Rada pre vysielanie a retransmisiiu, Rozhodnutie c. RL/98/2011, 23.11.2011: http://www.rada-rtv.sk/_cms/data/modules/download/RL_98_2011.pdf (SK)

See the detailed report on the case by Juraj Polak in IRIS-Merlin: <http://merlin.obs.coe.int/iris/2012/5/article37.en.html>

³⁵ <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf>

³⁶ http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/MTV_Viva_TV_Decision_Annexes.pdf

“Service des Médias et des Communications”. As a consequence the CNP accepts and processes complaints against teletext-contents (for example with regard to protection of minors).

Switzerland reports an issue with the qualification of the Apple iTunes Store and whether it is considered as an AVMS or not. From internal discussions within the EPRA, views seem to differ on this point.

PART 3: Regulatory Implications of the qualification of new services by NRAs

3.1. What rules and regulatory requirements do you apply to the services that you qualified as AVMS in question 2.2? I.e. rather AVMS regulation (i.e. regulation for linear services) or light AVMS regulation (i.e. regulation for non-linear services)?

In the absence of detailed explanations, most responses to this question were not very conclusive. It appears however that the majority of NRAs (BG, DK, CZ, FR, HR, NL, FI, PT, UK, SI, SK, SE) would tend to apply 'light' regulation to the services that they qualified as AVMS in table 2.2, i.e. predominantly VOD and Catch-up service. In the UK, if a service does not require a broadcast licence it will be subject to light regulation.

In Belgium (Flemish speaking Community), the legislation contains provisions which are common for linear and non-linear services, dispositions specific for linear services and dispositions specific for non-linear services. VOD and Catch-up TV have to comply with the dispositions which are common for linear and non-linear services, and the dispositions specific for non-linear services.

In the **French speaking Community**, new services provided by traditional broadcasters considered as AVMS must follow the rules applying to their category of AVMS (depending on whether they are linear or non linear, or provided on an open platform - such as Internet- or on a closed platform - such as cable)³⁷.

In **Luxembourg**, according to the legislation, the same rules apply for linear and on-demand services.

In **Bosnia and Herzegovina**, AVMS regulation for linear services will apply as catch-up TV is mainly offered by existing broadcasters on their official websites for the purpose of providing programmes which have already been broadcast.

In **Malta**, currently the AVMS regulations apply to linear services only. The Authority is proposing a less formal approach for non-linear services provided that key concepts such as protection of minors, protection against racial hatred are strictly observed.

3.2 What rules and regulatory requirements are applicable to the services that you did NOT qualify as AVMS in the question 2.2? (e.g., self regulation, co-regulation, general law). Is there a debate to extend those further?

As was maybe to be expected, the responses to this question were not very detailed. NRAs are as a rule not competent to regulate services which go beyond the scope of the AVMS Directive. Services deemed to be beyond the scope of the AVMS Directive are regulated by:

- General law : e.g. BE (CSA), CZ, FR, NL, UK, SK
- General consumer protection law, copyright law, general penal law: FI, NO
- Self-regulation: e.g. IE, RO, CH, NL

³⁷ To understand how the Belgian CSA applies lighter rules to certain categories of services, see p. 6-7 of the recommendation about the scope of AVMS

- In the Netherlands**, as far as for instance content of advertising is concerned, the Dutch Advertising Code applies, which is a form of self-regulation.
- Switzerland** reported about an industry agreement between the four most relevant internet providers to improve youth protection in media and to promote media literacy. An in depth assessment of existing self-regulatory mechanisms will be completed in 2015 and will constitute basis for further policy measures.
- In **Malta**, there is no structured approach to co and self regulation. The Authority is in the process of initiating discussions with the stakeholders to explore ways and means how such codes of conduct can be introduced in the industry.
- Rules applicable to information society services: IT
- In Italy** services that do not fall under the AVMSD are subject to rules applicable to information society services, as laid down in the Italian electronic communication code (legislative decree no. 159/2003).
- In **France**, with specific regard to hbbTV applications, legal agreements were signed last year between traditional DTT broadcasters and the CSA, they are annexed to the general legal agreements of the channels. They include main core principles of law and regulation and specific rules on commercial communications as regards the protection of minors and political pluralism.

Considering the number of recent conferences on Connected TV and the outcry of some traditional broadcasters against the regulatory asymmetry, it is somewhat surprising that many respondents (such as AT, BG, DK, SK, SE, UK) do not report any national debates on the issue of extending some regulatory requirements to emerging service providers which directly compete with incumbent players.

For the past years, the **French CSA** has been calling for a co-regulation on new services which are outside the scope of AVMS. In the view of the **Italian AGCOM**, a debate at European level should be encouraged due to the transnational level of hybrid services, as a level playing field ensured by a uniformity of treatment across Europe is crucial for a fair competition. In **Slovenia** though there appears to be no big public debate, the APEK will tackle this issue in one of its policy papers that are currently in preparation. In **Croatia**, the current debate revolves around the co-regulation of electronic publications.

3.3 Who enforces the rules? What are the enforcement tools used by NRAs in practice?

According to the responses to the questionnaire, NRAs as a rule are competent to ensure the rules applicable to AVMS services under their jurisdiction. In the UK, **Ofcom** works within a co-regulatory framework, whereby day to day enforcement rests with ATVOD but Ofcom retains enforcement powers. The **Catalan CAC**, which is a regional authority, informs the competent authorities (Secretary of State for Telecommunications and Information Society or the Telecommunications Market Commission) of potential infringements if the broadcasters are not under the CAC's jurisdiction.

There are however only a few exceptions:

- **Ireland**, where the BAI does not regulate ODAVMS beyond approving draft Codes which have transposed AVMSD requirements for these services (the self regulatory authority ODAS is competent). The BAI, however, deals with appeals for non-compliance with the voluntary programming codes (none reported to date) and implements the AVMSD requirements for linear services;
- **Luxembourg**, where the Ministry of communications/the Luxemburgish government is competent with regard to enforcement aspects;
- **Norway**, where the legal framework does not yet apply to ODAVMS. The authorities competent to enforce this regulation are the Consumer Ombudsman and the prosecuting authority.

From the answers to the questionnaire, it seems that Audiovisual Media Services are subject

to the usual range of sanctions at the disposal of regulatory authorities³⁸. The only specific characteristic is that, as was mentioned earlier, most NRAs have the power to enforce the notification requirement for ODAVMS and may therefore impose sanctions, such as warnings or fines (e.g. in Austria, a fine of up to EUR 4,000, in Slovakia, a fine of up to EUR 1,000 for a repeated violation) in case of non compliance with this obligation. In addition to two warnings for non-compliance with the registration requirement, **the Slovak CBR** imposed one sanction in to a programme provided by an OD service in a case concerning the protection of minors (inappropriate labeling).

³⁸ EPRA Comparative Background Document for the plenary session (EPRA/2010/06):
http://epa3-production.s3.amazonaws.com/attachments/files/619/original/Complaints_sanctions_final.pdf?1323685404

Summary and Conclusions:

The first impression that comes to mind upon "revisiting" the issue of scope is that, quite surprisingly, the situation has not dramatically changed within one year.

AVMS Transposition: two years after the deadline, the transposition process is almost, but not fully achieved. Slovenia and Gibraltar have now transposed the AVMS Directive. Bosnia and Herzegovina also adopted by-laws transposing the provisions of AVMSD into the national regulatory framework. Poland has not yet transposed the provisions concerning on-demand services. The AVMSD has not yet been incorporated in Annex XI of the EEA Agreement.

Registration/notification requirement: Six more NRAs have introduced a registration requirement for on-demand audiovisual media services: the CRA in Bosnia and Herzegovina, the APEK in Slovenia, the Latvian NEPLP, the CvdM in the Netherlands, the NMHH in Hungary, and Finland - thus confirming the progress of this widespread practice. As a rule, on-demand services are notified to broadcasting regulators, though there are a few exceptions. Generally, RAs were granted powers to enforce the registration requirement where necessary; though the Slovakian CBR was the only NRA who reported that two providers had been sanctioned for non-compliance with the registration requirement.

Diversity of respective national markets: The tables on the new types of media services provided by traditional broadcasters and other operators and the number of registered services allow a glimpse into the great diversity of the respective national markets but also into the rapid development of new media services.

Guidance: three more NRAs have developed some form of interpretative guidance since 2011, the Czech RRTV, Belgium-CSA, and the Dutch CvdM. Most of the guidance provided so far by NRAs is rather basic, focusing mostly on formalities for the registration process and on a succinct explanation of the main rules which are applicable to the services.

As of today, only Ofcom (UK), the CvdM (NL) and the CSA of the French speaking Community of Belgium have developed comprehensive, though non-enforceable, interpretative guidance on the scope in order to indicate how they intend to apply in practice the seven cumulative criteria underpinning the definition of an audiovisual media service. The guidance developed in the Netherlands and Belgium (French speaking Community) will be presented during the plenary session.

Implementation and first cases: there seems to be a widespread consensus on the fact that the criteria of editorial responsibility and principal purpose seem decisive when it comes to qualifying AVMS in practice. So far, not many RAs seem to have undertaken some practical assessment of the services to find out whether they fall within the scope. However, it is interesting to note that the opinions of NRAs with regard to the legal qualification of certain specific services seem to differ greatly. Views are at variance concerning download-to-own (DTO) services, download-to-rent (DTR) services and EPGs.

The majority of the first cases which were reported in the survey revolve around the two concepts of editorial responsibility and principal purpose. The number of reported cases seems surprisingly low; they emanate mostly from the UK - where several important scope determinations and appeals on scope recently took place, they will be presented during the plenary session by ATVOD - first cases were also reported from other countries such as France, Slovakia and the Netherlands.

The year 2011 was a year of transition in most of the countries with regard to the implementation of the regulation of on-demand media services. It seems that the transition period will extend to the first half of 2012 for many countries. The pace of implementation is certainly slower than the development of media markets. Or is the regulation of on-demand audiovisual media services a case of "much ado about nothing"?