

Indrek Ibrus

The EU digital single market as a mission impossible: audio-visual policy conflicts for Estonia

**Article (Accepted version)
(Refereed)**

Ibrus, Indrek (2016) The EU digital single market as a mission impossible: audio-visual policy conflicts for Estonia. *International Journal of Digital Television*, 7 (1). pp. 23-38. ISSN 2040-4182
DOI: [10.1386/jdtv.7.1.23_1](https://doi.org/10.1386/jdtv.7.1.23_1)

© 2016 Intellect

This version available at: <http://eprints.lse.ac.uk/67205/>
Available in LSE Research Online: July 2015

LSE has developed LSE Research Online so that users may access research output of the School. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LSE Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain. You may freely distribute the URL (<http://eprints.lse.ac.uk>) of the LSE Research Online website.

This document is the author's final accepted version of the journal article. There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

The EU Digital Single Market as a Mission Impossible: Audio-visual policy conflicts for Estonia

Indrek Ibrus, Tallinn University, Estonia

Email: indrek.ibrus@tlu.ee

Keywords: European Union, Digital Single Market, media policy, media convergence, AVMSD, Estonia, Russian propaganda

Abstract

The EU Commission has started to update its Audiovisual Media Services Directive as part of its larger push to implement its Digital Single Market Strategy. It is expected that this will not be just a light fix for some of the ‘bugs’ in the regulation, but a major overhaul motivated by the significant changes in media systems related mostly to media convergence and globalisation. In this context this paper offers a small country’s view of these processes. It demonstrates in detail how Estonia, a very small country on the EU periphery, is challenged by the need to develop its positions with regard to the complex processes at the EU level. It discusses the ‘impossible conflicts’ that it encounters when trying to articulate its media policies and EU strategies. It also describes the complexities of developing media policy in a country where different government institutions are shaped by different ideological frameworks, and therefore have different policy goals; and how cultural policy goals tend to be sacrificed when they are in conflict with various techno-economic imperatives.

Introduction

This article is about the limited degrees of freedom of a very small EU country to drive its audiovisual policy and about the dilemmas it encounters at a time of convergence, globalisation and turbulent international affairs. The fact that media convergence and the associated internationalisation make it increasingly more difficult to effectively regulate national or regional media markets is a widely discussed phenomenon (e.g. Jassem, 2010; Latzer, 2014). What has also been established is the understanding that European media policy is increasingly driven by economic imperatives and less by cultural goals such as

diversity or enlightenment (e.g. Celsing, 2010; Jõesaar, 2015). Further, the specific limitations on media markets in Europe's small member states have been evidenced in a series of works (e.g. Lowe and Nissen, 2011; Puppis, 2009; Trappel, 2014). However, what this article aims to demonstrate is the difficulties experienced by small peripheral European states in regard to the combination of all the aforementioned aspects – convergence and small size within the EU single market, as well as the broader globalisation of media markets – plus the new situation related to international security (i.e. threats of Russian aggression towards Eastern European countries materialised in propagandistic media content aimed at the population within these countries). The difficult challenges presented to these smaller countries (this case study being about Estonia) by a combination of these aspects comprise the topic of this article. At the current stage, these challenges have become especially visible as the EU is preparing to enforce its Digital Single Market (DSM) strategy (European Commission, 2015) and, in this connection, also update the Audiovisual Media Services Directive (AVMSD, European Commission, 2010). Therefore, the specific case in this article reports on Estonia's inner struggles resulting from the need to develop its positions in regard to these EU-level regulatory efforts. The article analyses in detail the nature of the discussions and arguments involving the different governmental offices and agencies that have eventually led to the articulation of official government positions with regard to these EU-level processes. The article aims to explicate the uncertainties and 'impossibilities' that the policymakers in such countries tend to meet.

Context

Estonia's internal market is very small – with 1.3 million inhabitants, the advertising market totalled only € 88 million in 2014 (TNS Emor, 2015). Furthermore, the advertising market is fragmenting with money gradually leaving TV and dispersing across the penumbra of online platforms, thereby often leaving the national media system. Therefore, especially after the advertising market crashed during the recession, it is increasingly obvious that the market fails to support the commercial TV industry (Ibrus, 2015c). Relatedly, one of main media policy questions is how to keep the commercial broadcasters afloat and to empower the Public Service Broadcaster to curate the national cultural space. Furthermore, when it comes to the independent content producers, a new policy aim has been established in the last few years to focus on their capability to export their productions and services (Ibrus, 2015a). That

is, the overall aim of the country's cultural policy is to strengthen national media in the context of globalisation.

However, this cultural policy goal may not be in harmony with Estonia's other policy goals within the EU. To analyse these contradictions, let me first provide a survey of which institutions in Estonia are responsible for media-related policymaking and for establishing EU-related strategy. In the first place, there are the two ministries – the Ministry of Culture and the Ministry of Economic Affairs and Communications. Officially it is the Ministry of Culture that is responsible for cultural policymaking, including audiovisual affairs. Yet, the Ministry of Economic Affairs and Communications is responsible for closely related techno-economic issues, such as telecommunications, broader 'information society' development, as well as advertising regulation. Furthermore, the Technical Regulatory Authority, which in Estonia also performs the functions of an independent media regulator, operates in the administrative area of the Ministry of Economic Affairs and Communications. All this means that the two ministries are set to co-regulate the media domain – one based on cultural policy rationales, the other on technical and economic rationales.

Regarding contemporary EU affairs, it is also the Ministry of Economic Affairs and Communications that is responsible for the EU Digital Single Market strategy, which is understood to include the Audiovisual Media Services Directive. Furthermore, within Estonia's European Union Policy¹ audiovisual affairs are part of the competition policy section, which is also a responsibility of the Ministry of Economic Affairs and Communications. The latter has become a special source of tension over the last decade since audiovisual policy issues at the European level are largely discussed from the perspective of broader market regulation (where Estonia's general view favours liberalisation), while cultural policy goals are deemed to be secondary. Here the broader context is that, on the one hand, Estonia has earned international recognition for its wealth of public online services (for instance Chakravorti et al., 2015) and, on the other hand, Estonia has also turned this into its core theme in international affairs and European Union policy – the universal provision of digital public services, cybersecurity, internet freedom, network architecture, sharing economy, startup culture, etc., are the themes that it uses to present itself as being in the know. Therefore, the ideology that pervades its official positions in Brussels is one emphasising

¹ See: <https://riigikantselei.ee/en/european-union>

internet freedom, global free trade for all kinds of goods and general market liberalisation. Relatedly, the cultural policy rhetoric on ‘protecting’ Europe’s cultural diversity is usually avoided if not critically approached by Estonia’s representatives of digital affairs. ‘Protectionism’ has clear negative implications in this discourse.

The same approach is also generally supported by Estonia’s Government Office, which coordinates all the country’s actions and strategising in relation to EU affairs. The Government Office is effectively the prime minister’s office and therefore one should be aware that for the last 10 years the prime ministers of Estonia have come from the Reform Party, which for the most part represents a neoliberal ideology. Most importantly, Andrus Ansip, Estonia’s previous prime minister, has become the European Commission’s vice-president directly responsible for the Digital Single Market strategy. Relatedly, it has become Estonia’s unofficial agenda to ‘support’ Ansip in his efforts to make the digital single market strategy happen. Therefore, a broad market-driven and explicitly neo-liberal rhetoric dominates both the domestic consultations as well as Estonia’s official positions in Brussels and elsewhere in the EU. The discourse of the Government Office representatives generally downplays the specifics of cultural policy and the references to it are minimised – generally with the argument that ‘cultural diversity’ is already referred to in EU treaties and therefore is ‘a given’ and requires no further mention. However, this discourse minimisation has resulted in Estonia not pursuing any significant agenda on improving the cultural diversity within the EU and its member states.

It can be argued that this is related to the size of the country and its media market; i.e. the country is very small, and therefore, although the broader discourse on media policy is driven by economic arguments, it is generally not about prioritising the growth of its economic capacity – the media sector’s ability to export. Although a ‘cash rebate’ programme is newly in place, which is designed to facilitate growth in the provision of production services, there is no tradition of defending the interests of its media industries when it comes to the country’s economic policies, because to date these industries have been economically insignificant, especially in regard to export income. Therefore, instead of being about fighting for better opportunities for its own media industries, the arguments about ‘enabling a free market’ in Europe, have focused on enabling access to services provided in other countries for Estonian consumers. This also comprises the context of the discussions on the practices of geo-blocking access to content in the digital single market. That is, since the

Estonian market is small and not very profitable for global online services such as Netflix, Hulu, Amazon Prime, etc., they are normally not legally available on its territory. This has been met with consumer frustration that also feeds policy goals. The fact that Ansip's rhetoric on the DSM strategy initially focused mainly on forbidding geo-blocking results from his own personal experience and that of his compatriots.

It can be argued that this 'Estonian experience' has also been translated into how Estonia's civil servants dealing with economic affairs view the relationships between the EU and the rest of the world and its industries. Regarding the international trade of digital goods and services, the Estonian position is effectively a fear that too much regional regulation could discourage global players from providing their services in Europe; i.e. that access may suffer, and the range of services available to the European consumer may decrease. For instance, if Netflix's offer is perceived as 'better' by the consumers, this is regarded as an absolutely self-evident fact that can lead to only one possible policy goal – to facilitate access to it. The questions about why and how is it better or is it 'good enough' in regard to various cultural policy goals are generally not asked.

Related arguments touch upon the startup culture. According to popular knowledge in Estonia the number of startups per capita is the highest in Europe and this is due to a range of policy initiatives based on the general cultural enthusiasm related to 'digital business.' The dominant discourse view is that 'anything is possible' in the internet economy. Scalable businesses can spring up anywhere and therefore a) regulation is bad as it may curb innovation and b) there is less concern for existing oligopolies since the belief is that markets tend to disrupt those every now and again. What is ignored is the specific tendency in media markets to always strive towards oligopolistic structures and the rather universal fitness of these structures once they mature. And, as we have demonstrated (Ibrus and Ojamaa, 2014) it is nearly impossible, specifically for audiovisual industry startups, to make it big at least in the Nordic-Baltic region – the growth opportunities are limited due to the various path dependencies and other mechanisms that have locked in the market structures.

Cases and methods

The context of the socioeconomic aspects and discursive constellations described above is relevant in order to interpret the closely intertwined processes of Estonia's articulation of

three policy documents related to audiovisual media regulation in the EU. These are the following: Estonia's response to the European Commission's communication on the Digital Single Market strategy (Summer 2015); Estonia's response to the European Commission's public consultation regarding the Audiovisual Media Services Directive (Summer and Autumn 2015); the compilation of "Estonia's European Union Policy 2015–2019" framework document (Spring-Autumn 2015). I will briefly describe the rationales for these three documents below.

The Estonian position on DSM was formulated as a government resolution² in response to Latvia, as the country holding the presidency of the Council of the European Union in the first half of 2015. The EU Commission had published its communication on DSM on May 6th (European Commission, 2015) and the presidency then requested the positions of all member countries, in order for them to be combined and discussed in different Council of the EU meetings and eventually approved at the Council of the EU meeting attended by the heads of states.

The Estonian position on AVMSD was also formulated as a governmental resolution (European Commission, 2015)³ but this was in response to the Commission's public consultations that were part of its broader REFIT analysis assessing the existing and future functionalities of AVMSD. The REFIT that consists of a multitude of sub-analyses was launched in the spring of 2015 and the results should be published in mid-2016.

The framework document called "Estonia's European Union Policy 2015–2019"⁴ is produced every four years after the parliamentary elections with the expectation that the new government will achieve the goals articulated in the strategy document during the subsequent four years. The document is formalised again by a government resolution, after being approved by the parliament. Regarding the historical context, it should be emphasised that all three documents were discussed at a time when Estonia had just elected a new parliament and a government (a broad coalition consisting of centre-right liberals, conservatives and social democrats), which means that the document was drafted at a time when there was actually

² <https://dhs.riigikantselei.ee/avalikteave.nsf/documents/NT002357AA/%24file/15-01129-3.pdf>

³ <https://dhs.riigikantselei.ee/avalikteave.nsf/documents/NT002549DE/%24file/15-01433-6.pdf>

⁴ The new document is not formally accepted yet. See the previous one here: https://riigikantselei.ee/sites/default/files/content-editors/Failid/eesti_el_poliitika_eng.pdf

little political leadership, at least in the Ministry of Culture. Therefore, the document was drafted mostly by civil servants from various ministries and approved as such by the politicians.

But what research method did I use to make many of the assessments in the introduction and the following sections? This paper is based on two methods – documentary analysis on the one hand and participatory observation on the other. Both are related to the fact that, in addition to my academic roles, during the last two and a half years, I have served as an advisor for audiovisual affairs at the Estonian Ministry of Culture and have therefore represented Estonia in EU Council’s Audiovisual Working Group. I also participated in drafting all the documents referred to above, and in the related negotiations between the different relevant governmental institutions. In connection with these roles I had access to all the relevant documents, e-mails and meetings. I took notes at these meetings. Since no consent was asked from the participants for the data to be used in academic research, all the sources have been rendered anonymous and the statements have been generalised. The collected data has still been used in the research since the processes were effectively participatory (many societal institutions were invited to contribute their opinions and participate in discussions) and the results were effectively made public in the various phases of the processes.

European content production and market facilitation

In the following analysis I will focus on two main discussions that were the main sources of disagreement between the different factions of Estonian officialdom. The first is how to facilitate the demand for European audiovisual productions in the digital single market and therefore increase production of European works. How to motivate the production and mediation of European works has been one of the main rationales of AVMSD and, it can be argued, one of its successes. Historically, American dominance in the international export markets for film and television content has been facilitated by its huge monolingual domestic market that has enabled a rich generic variety in production and good average returns from the home market, which in combination has enabled significant flexibility in export strategies. Historically, Europe, which is a conglomerate of fragmented small national markets, could

not compete with the flexibility and related market power of the North-American distributors. But AVMSD (and the directives and conventions that preceded it), with its provisions that required 50% of the programmes of all European broadcasters to originate from Europe and 10% of content to be commissioned from independent producers, has to some extent neutralised the limitations imposed by European market fragmentation. I have argued (Ibrus, 2015b) that the increasing export of European content, not only within Europe but also internationally (Scandinavian drama series, UK TV formats, etc.), has originally been expedited by the provisions of AVMSD. This directive has functioned as a market coordination mechanism that has facilitated the growth of demand for original European content and also has encouraged European producers to invest in development, innovation and quality, which in turn has resulted in further demand in Europe and elsewhere. Therefore, based on this success, it is expected that these provisions of the AVMSD will continue to be of central importance in the future.

Yet, these expectations are challenged by convergence. It appears that the main stakeholders both in Estonia and internationally agree that regulations for different audiovisual content transmission or distribution technologies or platforms will need to be harmonised, and therefore, AVMSD will also have to start dealing with various internet-enabled platforms other than broadcasting on equal terms. This is not the case in the existing AVMSD: online ‘newspapers’ are exempted from AVSMD and the regulations for non-linear video services are much more lenient than for broadcasting. The argumentation for regulatory convergence, used by the Ministry of Culture, emphasised that the sector has already converged when it comes to all aspects of the value chain – consumption, distribution, production. Most media service providers utilise various cross-media strategies and diversify their services across different transmission or distribution technologies; most content travels across multiple platforms; and most users access media services and content on a variety of channels or platforms. In this situation, trying to sustain different regulatory regimes for different technologies would create unnecessary complications for all the parties and unfair conditions for the players that are focused mainly on specific technologies such as linear broadcasting; hence, the perception that regulations also need to converge. However, that would also mean the end of the existing regulatory tradition.

As mentioned briefly in the introduction, the central logic of AVMSD is that in order to provide a ‘media service’ one would need to apply for a license (from the regulatory

authority of one of the member states). However, the E-Commerce Directive (European Commission, 2000) maintains that business in the internet should not be based on member states issuing relevant licenses – i.e. the right to provide any kind of service online should be made available and free to all. The presumption here is that this freedom promotes innovation and equal opportunities for startup companies in any field of the digital economy. But this would also mean that audiovisual media services provided in the internet would not require a license. But, if there is a need for convergent technology-neutral regulation would that mean that broadcasting should also be liberalised? This was the core dispute for Estonian policymakers in the different governmental institutions. The representatives of the Ministry of Economic Affairs suggested that it might be the right time for liberalising the broadcasting market; while the people from the Ministry of Culture sought ways to make online players accountable to regulatory authorities and observe both the AVMSD and the national legislation of the countries where the services are provided and/or consumed. It was eventually agreed that perhaps some sort of ‘registration’ for internet companies should be instituted.

But what kind of registration should it be and who should do the registering? The Ministry of Culture suggested a new approach to accommodate both views. In line with prior suggestions, for instance, by Tambini (2012) the proposal was made that the new regulatory regime for the convergent media era should be based on size. As Tambini (ibid.) put it, “The principle should be that the size of the enterprise, and its importance in opinion formation, rather than medium of delivery, should determine the framework for responsibility and accountability. Larger enterprises should be subject to more public-interest regulation and accountability enforcement.” Relatedly, the suggestion from the Ministry of Culture was that the smallest media service providers (in terms of audience and therefore socio-cultural impact) would be exempt from most of the provisions of AVMSD, including the obligation for either registering or obtaining licenses. But as the audience for the services increased, new rules and obligations would be applied – with the high demand for globally dominant media brands also expected to dominate the digital single market. Such an approach would be based on the principles of internet freedom – anybody can set up a business and communicate freely online, but as the impact of the service increases, it would be justified to turn them accountable in the public interest. For instance, if Netflix turns out to dominate the DSM, all aspects of its business conduct would need to become more transparent and standardised for

all the market players (including national regulators). It would also need to start highlighting works from all the member countries, as well as start investing in new content from all the regions of the EU. The issue of how such service providers could be made to contribute to new content production is an unresolved and widely disputed question in Europe. Different ideas have been floated starting from VAT being paid in the countries where the consumption (of online content) occurs with the countries re-investing this money by supporting new content production. There are also new ideas regarding the institution of a new European tax for this purpose, or making the big players invest funds to commission new content that would equal a certain percentage of their turnover.

The view of Estonian Ministry of Economic Affairs and Communications was that none of these is really acceptable since they could all have a detrimental effect on the provision of audiovisual services in Europe – i.e. the large American brands could potentially retreat from Europe and thereby limit the freedom of choice of European consumers. The other main argument against extending the logic of the existing AVMSD to non-linear internationally provided VOD-services was that the content of digital catalogues cannot be regulated similarly to linear broadcast programmes. Mostly because these catalogues may be structured and used in very different ways. For instance, the provision of the video content related to current affairs by the internationally notorious Estonian portal Delfi is updated daily. At the same time, Netflix organises its catalogue of professionally produced material based on dynamically changing genre-categories (Madrigal, 2014) and YouTube is mostly a video-sharing service, whereas the content offered to users is based on their search queries and previous activities on its website. In this context, trying to make sure that 50% of YouTube content is of ‘European origin’ or 10% is commissioned from independent providers would not make much sense. Therefore, the attempts to regulate catalogues are becoming unpopular in European policy circles and discussions on making service providers invest based on turnover are being introduced. However, as already discussed, the Ministry of Economic Affairs disapproved of this. Therefore, their suggestion for compensating the potential loss of private investments into the distribution and commissioning of European works was to simply increase the funding for the European Commission’s MEDIA programme – an EU programme funding audiovisual production. Yet, the problem with this proposal is that this would prevent the market (consisting of thousands of agents) from being able to coordinate supply and demand, as well as innovation practices leading to diversity.

Instead the entire sector in Europe would become even more dependent on public support with small juries gathering in Brussels to decide unilaterally on ever greater chunks of content supply in Europe. This would eventually not contribute to real diversity in the market and ignore grassroots knowledge on the audience demand for specific kinds of content in different parts of Europe and in different audience segments. After extensive disputes, the following was agreed upon and eventually turned into government statement: an entirely new ‘combination of measures and regulations’ should be developed to secure original content provision in Europe. This abstract statement is another way to say that Estonia could not agree internally on a new comprehensive strategy. The confusion caused by the new regulatory challenges for all the governmental institutions was so great that they agreed to leave it up to the EC to make more concrete proposals.

Still, the Ministry of Culture achieved a small victory when Estonia officially stated one more thing. It pointed out there was a need to analyse the potential for the further concentration of media content provision in the DSM and its subsequent effects on cultural diversity in Europe. Thereby Estonia discussed potential development not part of AVMSD, but with effects that could be neutralised by AVMSD. This development is the EC plan to minimise the ‘unjustified geoblocking’ practice by media service providers – i.e. the practice of only enabling access to a media service from the national territories for which they control the copyrights or have licenses. This potential development was not received well by AV-industry representatives anywhere in Europe since territory-by-territory sales of rights has enabled them to fund filmmaking more effectively. As a reaction to industry criticism, the EC representatives have recently explained that their aim is only to enable content ‘portability’ (i.e. if the right to consume certain content or access a service was obtained in one member state, the consumer would get the right to consume that same service/content in any other member state). However, many analysts point out that such practices when implemented may still resemble a form of ‘passive sales’ and therefore undermine the content production industry’s business models.

In this context, Estonia recalled that any media market has a tendency to evolve towards an oligopolistic structure. This is due to many factors including the economies of scope and scale logics; network externalities securing the market lock-in; the dominance of a very small number of players in the internet economy, etc. But it is also due to a few large American players (Netflix, Amazon, Hulu, Google Play, etc.) having close relationships with

the dominant American film and TV content distributors (Warner Bros., Sony, etc.) and, therefore, being able to broker comprehensive and occasionally exclusive deals with them. This is another reason why the perception has increased that Jeremy Tunstall's book *The Media Were American* (2008) may have been a bit too optimistic – the American dominance in the EU's new digital single market is looming (see also Cunningham and Silver, 2013). And the problem is not specifically about the American origins of these new services, but simply about the nature of their existing business conduct that do not seem to be oriented to facilitating cultural diversity in Europe (Grece et al., 2015). Further, in the era of 'attention economy' (Goldhaber, 1997) their dominance is expected not to empower the national media systems of the member states – i.e. players such as the public service media institutions of smaller member states will not be well placed to compete for licenses (Netflix has openly admitted to preferring exclusive global licenses - see Spangler, 2015) or to compete for audience attention with the global players and their deep pockets. It was especially the latter concern that motivated the Estonian Ministry of Culture to fight for Estonia's official position to include the concern for potential media concentration and its subsequent negative effects on cultural diversity in Europe. Since the government position was eventually articulated as a need to study the potential effects, the other government factions did not resist despite being explicitly unconcerned about the effects that the market structure had on culture. Yet, Estonia stopped short of articulating what 'market concentration' would mean in the DSM. Does it refer to a specific size of a media service provider in either a national market or the EU single market? And the various size-thresholds that would make media companies subject to the more demanding provisions of the new AVMSD also remained unarticulated. The reason for this openness was the inability of the small team of Estonian experts to work on and assess these thresholds. Therefore, they only proposed the size-based regulation as an abstract concept and an instrument against potential market concentration in the single market and left it to the EC to figure out the specifics.

Country of origin and national security

Although Estonia suggested to the EC that regulatory convergence and equal terms should apply to different forms of media when it came to consumer protection issues (protection of minors, advertising of alcohol, tobacco and other problematic substances, etc.), what is

specific to the Estonian expectations (and that of the other Baltic states and Poland) for the new AVMSD is that the design should also support the national security of the member states. This is a significant and historically specific aspect. AVMSD was designed as an instrument to facilitate the internal market for audiovisual services in the EU and its central imperative is to warrant the free flow of information and freedom of speech within Europe. It is for this reason that the directive makes it very hard to legally restrict the retransmission of television channels from other member states (Article 3). However, in recent years the Baltic states have felt the need to restrict the retransmission of Russian television channels that have acquired licenses from another member states (often the UK, Luxembourg, and Sweden). The view of the Baltic states has been that the Russian state-owned television channels deliberately transmit hate speech and propaganda content aimed at destabilizing their societies by influencing their significant Russian-speaking minorities. Although recent research shows that the impact of Russian media on the world perception of the Russian-speaking audiences in the Baltics is minimal (Dougherty and Kaljurand, 2015), the understanding is that Russia's newly aggressive foreign policy is aiming to make these minorities hostile to their local governments and thereby increase Russia's influence in their near abroad. In light of the events in Ukraine many also fear similar Russian aggression in other countries. Therefore, it is understood that media is an increasingly important component of Russia's 'hybrid warfare' (Pomerantsev, 2014) and hence it is important to prepare for it by implementing media policy including the AVMSD.

The fact that the existing directive does not suit the new geopolitical circumstances has been repeatedly demonstrated by the Baltic states recently. Latvia and Lithuania stopped the retransmission of a few Russian TV channels (NTV Mir, RTR Planeta, Rossya RTR) in the spring of 2014, at the height of the emergent war in Ukraine. Since they did so without following the procedures of AVMSD, they later needed to justify their actions to the EC, and against all odds were not fined as all the parties understood their rationales for doing so. Subsequently, Lithuania tested the length of time required for the legally correct process for restricting retransmission (TV-channel RTR Planeta) to take effect and showed that it took almost a year. All Baltic countries have systematically stated that these processes need to be much swifter in times of crisis and therefore AVMSD must be updated in order to achieve this.

What changes does Estonia envisage in AVMSD? Interestingly, again the key is the

country of origin principle, but also includes other core concepts of the directive – i.e. how to define an ‘audiovisual media service’? As Article 1 of AVMSD prescribes, an ‘audiovisual media service’ is under the ‘editorial responsibility’ of a ‘media service provider’. Here ‘editorial responsibility’ means the exercise of effective control over both the selection of the programmes and their organisation. ‘Media service provider’ refers to the natural or legal person who has editorial responsibility for the choice of the audiovisual content provided by the audiovisual media service and determines the manner in which it is organised. Paragraph 3 of Article 3 of the directive says that a media service provider is deemed to be established in a member state when its main editorial office is in that member state, and most of the editorial decisions are taken in that member state. Altogether this means that a media service acquires a jurisdiction, a ‘country of origin’ within the EU, only if it has an actual editorial office in one of the member states and when that office executes real editorial control over the content of the broadcast programming or the catalogue of on-demand video content. Yet, this core logic of the AVMSD is undermined by the paragraph 4 of Article 2, which says that channels can also get a jurisdiction in a member state if they use a satellite up-link situated in that member state or when they use satellite capacity appertaining to that member state. This means that based on these technical criteria it is possible to get a formal jurisdiction in the EU without having an actual editorial office in an EU member state. And this is what many TV channels from third countries including Russia have achieved. Either by using these technical criteria or by actually applying for a licence in countries such as United Kingdom that grant licenses more easily and later never monitor their content (the UK independent regulator Ofcom only tries cases or checks content after complaints). An example: the Baltic Media Alliance Ltd (BMA) that holds licenses for several TV channels targeting the Baltic states is formally established in the UK and registered at an office in Queens House, 180 Tottenham Court Road, London. More than 200 other companies are registered in that same office. BMA also broadcasts the most popular Russian-language TV channel in Estonia – PBK (First Baltic Channel – share 17.5%) – with most of its programming produced in Russia (effectively a version of Russia’s First Channel [Первый Канал] with some add-ons, such as news produced in Estonia). Hypothetically, if PBK were to systematically broadcast misinformation and hate speech about the Estonian authorities, the Estonian independent media regulator would be unable to legally stop the retransmissions quickly since the channel is licensed in the UK and the entire process would take nearly a year.

Therefore, Estonia proposed to the EC that the ways to obtain a EU jurisdiction as well as later potentially invalidate it should be streamlined in the new AVMSD. Motivated by security issues, Estonia suggested that the country of origin should only refer to instances where there is indeed an actual editorial office with real control over the programme or the catalogue of the particular service in a member state. This would mean no jurisdiction for third-country services on technical grounds. However, the paradox is that, in the context of internet freedom issues, Estonia argued that the ‘country of origin’ and obligation to acquire licenses may be outdated and not fit for the new era. Therefore it left open the possibility for larger internet players to simply register their services in the EU, follow the broad provisions of the AVMSD, but otherwise carry out as normal – i.e. service EU consumers to the fullest extent even though its ‘content management office’ may be far from Europe. Yet, in relation to security issues, the opposite proposal was made – to simplify and thereby strengthen the country of origin statute – to force the main players to have actual editorial offices within EU borders. Of course, the first rationale is for online services and the second for broadcasting, but since the of IPTV, which means the technological convergence of the two, this old distinction has become obsolete and regulatory convergence is perceived as a way to respond to this. But would this convergence also mean that Netflix or Hulu, for instance, would now have to establish an ‘editorial office’ in one of the member states? Or if not, would the other option be to have everybody transmitting freely and geopolitical propaganda and destabilisation efforts would be tolerated? Or will internet/information/media freedom be undermined by ‘psychological defence’ (Jermalavicius and Parmak, 2012) strategies in times of perceived ‘hybrid warfare’. The paradox for small peripheral EU countries such as Estonia at this particular historical moment is that such conflicting rationales exist. From the perspective of these countries, when there is only one main regulatory instrument (AVMSD) that should deal with various perceived ‘threats’ coming from third countries – not only the potential dumping of large quantities of US content, but also all kinds of Russian propaganda – the term ‘protectionism’ acquires an entirely new meaning.

It is against this backdrop, where Estonia sees itself as a destination for cultural/information flows and very rarely as a ‘country of origin’ for content travelling to Europe, that it has also articulated a need for ‘countries of destination’ to be given additional legal powers. This would become handy in instances where a ‘foreign’ media service does not follow local advertising regulations and therefore has an unfair advantage in the particular

national market. Or when hate speech is systematically transmitted. Yet, the counterargument often used in Estonia's internal discussion is that strengthening the rights of the 'country of destination' is a slippery slope that could lead to the free provision of services in the digital single market being undermined. And it would also provide a handy tool for potentially crypto-authoritarian regimes (Hungary has been referenced) to silence critical international media. Therefore, what Estonia agreed to propose is simply that a streamlined protocol should be established by AVMSD for countries of destination to negotiate the nature of a particular media service with their 'origin countries'. However, this is another essential indicator of the dilemmas facing a very small liberally minded country in the context of the processes of media globalisation and convergence when trying to achieve specific (but largely conflicting) economic, cultural and security objectives with a single regulatory framework.

Conclusion

This article effectively tells two stories. Firstly, the story of the complexity behind how policies, official government positions and national strategies are shaped. Government is rarely a monolithic apparatus executing the will of the elected politicians or the imperatives of their party programmes. Instead, it is also affected by the infighting between different government (i.e. public service) factions, their complex negotiations and other multimodal dialogical practices. These factions can be characterised, and their conflicts shaped, by different ideological frameworks, specialised knowledge systems or reference groups (with different degrees of empowerment) and associated path dependencies or contingencies. In the specific case of the evolution of media policy in Estonia, this article identifies the ideological path dependencies in the participating governmental institutions and recognises that this is comprised partly of the ideological lock-ins that cause Estonia's cultural policy goals to be sacrificed for other goals, such as broad market liberalisation and normative globalisation in the digital services sector, which is now perceived to include audiovisual culture (see Jõesaar, 2015).

The second story this article tells is how the same or similar tendencies are enforced externally in Estonia – how complex international developments are challenging a small peripheral country such as Estonia and how much freedom it has (if any) to design its national media system and ensure its survival. In this context, the article refers to the

‘impossibility’ of this mission – i.e. to the fact that a conflict exists between many of the country’s articulated goals. On the one hand, the peripheral country desires more access and internet freedom, but on the other, it worries about media concentration in the single market and about the evolving market dominance of global players that could have a detrimental effect on the existence of its own national media system. Furthermore, there are numerous perceived threats, including cultural homogenisation on the one hand and the incitement of ethnic conflict on the other. To counter and resolve these perceived threats in the context of all the other goals and to do so within a single regulative framework is undoubtedly a perplexing challenge. This article demonstrates the related confusion and uncertainty in Estonia’s governmental institutions (see Table 1 for the illustration of these complex conflicts).

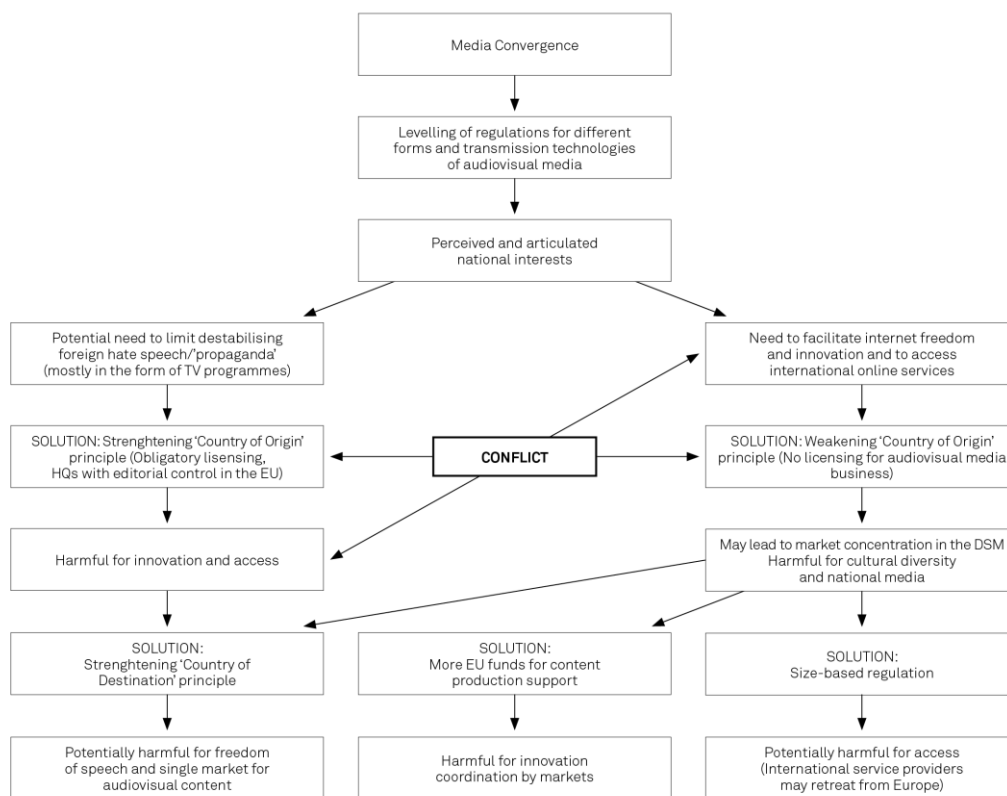


Table 1. Main EU media policy dilemmas as perceived and articulated by Estonian policy makers.

Yet, the process of updating the AVMSD and enforcing the broader DSM strategy

‘surrounding’ it will take years. And, in addition to the very small countries such as Estonia, there will many much more empowered agents around the table, all aiming to shape the regulation according to their own views and needs. Some countries are more protectionist and others more liberal; there are larger countries with economically significant audiovisual industries whose interests need to be protected and there are smaller countries interested in better access, as well as defining their rights as ‘destination countries’. But in addition to the countries, there is also the industry lobby together with its inherent infighting – content producers demanding more support for independent content; commercial broadcasters demanding a reduction in the quotas for European productions; public broadcasters arguing for regulatory protection against platforms; newspaper publishers opposed to their services being included in audiovisual regulation; online service providers warning against the regulation of the internet, etc. The EC will need to balance all these interests while also keeping in mind the broader vision of the EU audiovisual content ecosystem for the next ten or more years.

Although the maelstrom of forces at play is not very encouraging for very small countries in terms of achieving their goals, the EU mechanism still provides the odd opportunity for all countries to drive the entire apparatus. The Estonian case analysed in this article is important not only because it presents a view of the evolution of EU media policymaking from the periphery, which is often ignored (Micova, 2015), but also because Estonia will be presiding over the EU Council in the first half of 2018 when, according to many estimates, the final negotiations (the ‘trilogues’ between the EU Parliament, Commission and Council) on the new AVMSD will take place. Whether Estonia’s current vacillation, resulting from the disagreements between its governmental institutions as well as from the general confusion associated with the perceived ‘impossibility’ of the policy mission, will evolve into bold decisiveness and informed positions will also be crucial for the evolution of broader EU media policy. The observations in this article establish a context for much that will follow.

References

- Celsing, A. (2010), 'Dealing with Change: Impact of Convergence on European Union Media Policy', in S.J. Drucker and G. Gumpert G (eds), *Regulating Convergence*, New York: Peter Lang, pp. 37-58.
- Chakravorti, B., Tunnard, C. and Shankar, C.R. (2015), 'The Way to Estonia: How to Reach Digital Nirvana', *Foreign Affairs*, 24.03.2015, <https://www.foreignaffairs.com/articles/global-commons/2015-03-24/way-estonia>. Accessed 10 December 2015.
- Cunningham, S. and Silver, J. (2013), *Screen Distribution and the New King Kongs of the Online World*, London: Palgrave Pivot.
- Dougherty, J. and Kaljurand, R. (2015), *Estonia's "Virtual Russian World": The Influence of Russian Media on Estonia's Russian Speakers*, Tallinn: International Centre for Defence and Security, http://www.icds.ee/fileadmin/media/icds.ee/failid/Jill_Dougherty__Riina_Kaljurand_-_Estonia_s__Virtual_Russian_World_.pdf. Accessed 10 December 2015.
- European Commission (2000), Directive on electronic commerce, 2000/31/EC, Brussels, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>. Accessed 10 December 2015.
- European Commission (2010), Audiovisual Media Services Directive, 2010/13/EU, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>. Accessed 10 December 2015.
- European Commission (2015), A Digital Single Market Strategy For Europe. Brussels, http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf. Accessed 10 December 2015.
- Goldhaber, M.H. (1997), 'The Attention Economy and the Net', *First Monday* 2, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/519/440>. Accessed 10 December 2015.
- Grece, C., Lange, A., Schneeberger, A., et al. (2015), *The development of the European market for on-demand audiovisual services*, Strasbourg: European Audiovisual Observatory, <https://ec.europa.eu/digital-agenda/en/news/development-european-market-demand-audiovisual-services>. Accessed 10 December 2015.
- Ibrus, I. (2015a), 'Audiovisual Policymaking in Estonia at Times of Convergence: An 'Innovation System' as a Policy Rationale', *Baltic Screen Media Review*, 3, pp. 102-115.
- Ibrus, I. (2015b), 'Mida arvata ühtsusest kultuuriturul', *Sirp*, 5.06.2015, <http://www.sirp.ee/s1-artiklid/c9-sotsiaalia/mida-arvata-uhtsusest-kultuuriturul>. Accessed 10 December 2015.

- Ibrus, I. (2015c), 'The replacement of media policies with (media) entrepreneurship policies: A view from Europe's periphery', *International Journal of Digital Television*, 6:3, pp. 311-318.
- Ibrus, I. and Ojamaa, M. (2014), 'What Is the Cultural Function and Value of European Transmedia Independents?', *International Journal of Communication*, 8, pp. 2283–2300.
- Jassem, H. (2010), 'Convergence Kills Media Policy: Can Freedom of Expression Be Next?', in S.J. Drucker and G. Gumpert (eds.), *Regulating Convergence*, New York: Peter Lang, pp. 21-36.
- Jermalavicius, T. and Parmak, M. (2012), *Towards a resilient society, or why Estonia does not need 'psychological defence'*, Tallinn: International Centre for Defence Studies, http://www.icds.ee/fileadmin/media/icds.ee/failid/Tomas%20Jermalavicius%20and%20Merle%20Parmak_Towards%20a%20Resilient%20Society.pdf. Accessed 10 December 2015.
- Jõesaar A. (2015), 'Undercurrents of the Estonian Broadcasting Regulation, 1992–2014', *Baltic Screen Media Review* 3, pp. 84-99. Accessed 10 December 2015.
- Latzer, M. (2014), 'Convergence, Co-evolution and Complexity in European Communications Policy', in K. Donders, C. Pauwels and J. Loisen (eds.), *The Palgrave Handbook of European Media Policy*, Basingstoke: Palgrave.
- Lowe, G.F. and Nissen, C.S. (2011), *Small Among Giants: Television Broadcasting in Smaller Countries*, Gothenburg: Nordicom.
- Madrigal, A.C. (2014), 'How Netflix Reverse Engineered Hollywood', *The Atlantic*, 2.01.2014, <http://www.theatlantic.com/technology/archive/2014/01/how-netflix-reverse-engineered-hollywood/282679/>. Accessed 10 December 2015.
- Micova, S.B. (2015), 'Editorial', *International Journal of Digital Television*, 6, pp. 253-255.
- Pomerantsev, P. (2014), *Nothing Is True and Everything Is Possible: The Surreal Heart of the New Russia*, New York: PublicAffairs.
- Puppis, M. (2009), 'Media Regulation in Small States', *International Communication Gazette*, 71, pp. 7–17.
- Spangler, T. (2015), 'Ted Sarandos: Netflix Appetite for Originals Growing Stronger', *Variety*, 13.06.2015. <http://variety.com/2015/digital/news/netflix-ted-sarandos-original-series-1201494618/>. Accessed 10 December 2015.
- Tambini, D. (2012), *The End of Press Freedom*, Oxford: The Foundation for Law, Justice and Society, <http://www.fljs.org/files/publications/Tambini.pdf>. Accessed 10 December 2015.

TNS Emor (2015), *Eesti meediareklaamituru 2014. aasta käive oli 88,05 miljonit eurot*, Tallinn: TNS Emor, <http://www.emor.ee/eesti-meediareklaamituru-2014-aasta-kaive-oli-8805-miljonit-eurot/>. Accessed 10 December 2015.

Trappel, J. (2014). 'Small States and European Media Policy', in K. Donders, C. Pauwels and J. Loisen (eds.), *The Palgrave Handbook of European Media Policy*, Basingstoke: Palgrave Macmillan, pp. 239-253.

Tunstall, J. (2008), *The media were American: U.S. mass media in decline*, New York: Oxford University Press.

Indrek Ibrus is Associate Professor at Tallinn University's Baltic Film, Media, Arts and Communication School (BFM). He is also the head of Tallinn University's Center of Excellence in Media Innovation and Digital Culture (MEDIT). Last 2,5 years he has advised Estonian Ministry of Culture on audiovisual affairs and has represented Estonia in related matters in the EU and the Council of Europe. He has published extensively on media innovation/evolution, audiovisual media industries, media semiotics, transmedia and cross-media production, mobile media. He is a co-editor of *Crossmedia Innovations: Texts, Markets, Institutions* (Peter Lang, 2012) and the editor of *Baltic Screen Media Review*. He received his PhD from London School of Economics and Political Science.