Press Regulation in an Era of Convergence

Irini Katsirea, Reader in International Media Law at the University of Sheffield explains the position of the electronic press under the Audiovisual Media Services Directive, and the implications of the New Media Online case for the future of media frameworks.

The regulation of the press in an era of media convergence is a thorny issue, which regulators around the world have tried to either grapple with or sweep under the carpet. The time has long passed when newspapers were just 'news' printed on 'paper'. They are still that, but also now include news content published online, on websites which can carry videos that are reminiscent of television. The technological convergence between press and broadcasting throws into sharp relief the historically disparate regulation of the two sectors, including in the UK where the press is subject to a voluntary system of self-regulation while television is subject to statutory regulation under Ofcom. This raises the question of whether technological convergence should lead to regulatory convergence. The topic was debated at length by a range of academics and practitioners during a conference last year held at Middlesex University School of Law, with generous funding by the British Academy and the Leverhulme Trust. It has also been debated at a recent Westminster Media Forum conference, and the question of how to define 'TV-like' content will be a central theme at the upcoming Media Policy Project conference on the revision of the Audiovisual Services Directive, to be held in Brussels in June 2016.

The Audiovisual Media Services Directive (AVMSD)

The regulation of online videos on newspaper and magazine websites has been a matter of much debate ever since the adoption of the Audiovisual Media Services Directive in 2010. Recital 28 of the Directive states that "the scope of this Directive should not cover electronic versions of newspapers and magazines", thereby seeking to completely exclude from its remit audiovisual material made available on the website of a traditional print publication. The press has always vehemently resisted inclusion within the scope of the AVMSD. Most recently, in the context of the latest public consultation in preparation for the Directive's modernisation (under the REFIT programme), the European Magazine Media Association (EMMA) and the European Newspaper Publishers Association (ENPA) submitted a joint response which made the following point:

> *"It is important to underline from the outset, that the press sector in Europe, in all its forms, cannot be regulated in the same way as broadcasting and other audiovisual services which are based on state licensing, prior authorisation and supervision of content by authorities, co-regulation and specific, strict commercial communications restrictions. It is therefore essential to preserve press freedom on digital platforms by keeping audivovisual content which is not the principal purpose of the service out of the scope of application of the AVMSD."*

The issue is whether such services could reach a tipping point (and therefore fall under the scope of the Directive) if they consisted of a more substantial amount of video content than they do at present (i.e. as opposed to effectively serving as an 'extra' to predominantly text and picture-based news content).

Case study: Case C-347/14 – New Media Online GmbH

One much-awaited ruling by the European Court of Justice (ECJ) has finally provided some clarity as regards the scope of the Directive. The case concerned the *Tiroler Tageszeitung*, one of the most important regional daily newspapers in Austria. The *Tiroler Tageszeitung* operated a website, which contained a separate video section. In 2012, the Austrian Communications Authority (*Kommunikationsbehörde Austria*), the regulatory authority for broadcasting in Austria, ruled that the video section on the newspaper's website constituted an on-demand audiovisual media service that was accordingly subject to the Audiovisual Media Services Directive. The newspaper argued that the videos were merely a secondary element of the overall website, complementing its text-based offering. Moreover, the videos in question were not 'TV-like', in view of their short duration. The distinction between these two positions is key to understanding whether or not the Directive can be said to apply to content of this sort.

In 2014, Austria's Supreme Administrative Court referred the questions raised by this case to the ECJ. In his Opinion on the case, Advocate General Szpunar rejected a broad interpretation of the AVMS to encompass video sections of a newspaper website on the basis that this would unduly restrict the freedom of the internet and be prone to circumvention. Two of the speakers at the Middlesex University conference – Michael Kogler from the Austrian Federal Chancellery, Department for Media Law and Jenny Metzdorf from the University of Luxembourg – discussed Szpunar's Opinion. Kogler argued that had the Advocate General focused on the issue of 'TV-like', the videos in question would have passed the comparability test. Metzdorf criticised Recital 28 of the Directive as outdated, and said that Szpunar's argument did not chime with the reality of media convergence. Indeed, in its ensuing decision, the ECJ declined to follow the Advocate General. It held, first, that short videos housed within a subdomain of a newspaper website (i.e. a discrete, stand-alone area) are comparable to television broadcasting; and, secondly, that Recital 28 should not be interpreted as excluding video sections *eo ipso* from the Directive's scope if they are embedded within a website operated by a publishing company. The Austrian Administrative Court followed the ECJ's ruling and decided on 16 December 2015 that the video offering in question had to be classified as an AVMS.

Electronic press regulation: the regulators' response

The uncertainty surrounding the interpretation of Recital 28 of the AVMSD has troubled regulators in a number of EU jurisdictions for quite some time. The regulators of Denmark , the Flemish Community of Belgium, Slovakia, Sweden and Austria have qualified such services as AVMS. Other regulators such as the Dutch *Commissariaat voor de Media* have faced considerable resistance from the Dutch newspaper industry against the classification of their video sites as on-demand services. The UK communications regulator, Ofcom, quashed a determination of its now defunct co-regulator, the Authority for Television on Demand (ATVOD), that the video section of The Sun newspaper website constituted an on-demand programme service. Although regulators claim to be objective in their application of the statutory framework, they are informed by unavowedly ideological assumptions with some favouring freedom for the electronic press from government regulation, whilst others favour greater control. Less emphasis on technical details and greater openness about the underlying rationales would facilitate a more principled policy debate about the future media framework.

What next? Implications for the future AVMSD framework

As things stand, the current AVMSD only pays lip service to the principle of technological neutrality, as it effectively abandons neutrality by espousing graduated regulation for linear and non-linear services and excludes a swathe of 'old' and 'new' media content providers from its scope. The *New Media Online* judgement calls for a reconsideration of the antiquated concept of 'TV-like' against the backdrop of the increased consumption of short-form content via a variety of devices, convergence between television and the internet, and the demise of the former's special status. Some academics have criticised the inconsistencies and the haphazardness of the current regulatory system, and argued in favour of its replacement by a new system that would not be based on the accidents of delivery, but rather would be based on content type – see here and here for more information.

A new Content Directive, based on a comprehensive notion of 'media' is desirable, but will the EU have the resolve to adopt it?

This blog gives the views of the author and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics and Political Science.

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