

The Hogan Lovells logo consists of the words "Hogan" and "Lovells" stacked vertically in a black serif font, set against a solid yellow square background.

Hogan
Lovells



White paper

TV regulation in a digital age

2018

Copyright © 2018

The information contained herein is the property of Analysys Mason Limited and Hogan Lovells and is provided on condition that it will not be reproduced, copied, lent or disclosed, directly or indirectly, nor used for any purpose other than that for which it was specifically furnished.

This report was sponsored by Google, and prepared independently by Analysys Mason and Hogan Lovells.

Hogan Lovells (Paris) LLP
17 avenue Matignon
75008 Paris
France

Tel: +33 1 53 67 47 47

winston.maxwell@hoganlovells.com

Analysys Mason Limited
North West Wing, Bush House
Aldwych
London WC2B 4PJ
UK

Tel: +44 20 7395 9000

london@analysismason.com

www.analysismason.com

Registered in England No. 5177472



Winston Maxwell
Partner, Paris
Hogan Lovells



David Abecassis
Partner
Analysys Mason



Michael Kende
Senior Advisor
Analysys Mason

Contents

04	Executive summary
06	Introduction and background
09	The difference between ‘audiovisual media service providers’ and ‘Internet intermediaries’
10	The historical justification for ‘traditional’ audiovisual regulation
11	Sharing videos on the Internet
14	Resulting fundamental differences between the regulation of online video and TV
18	New challenges
18	The blurring of lines between ‘TV’ and ‘the Internet’
21	The importance of innovation in video content online beyond AVMS
22	The relevance of audiovisual policy objectives in this changing landscape
25	The limits of audiovisual regulation for Internet intermediaries
25	The Internet’s self-regulatory nature
27	The relevance of self-regulation in the context of VSPs
29	Preserving a three-layer model to reconcile TV and Internet regulation
32	Conclusion: delivery technology evolves, editorial responsibility does not

Executive summary

Television¹ today uses multiple delivery mechanisms, some of them Internet-based. The frontier between television-like content and Internet content is blurring, with consumers increasingly watching new forms of video content online.

To keep pace, regulators are considering how to refit television regulation for a digital age. In this white paper we propose a **three-layer model** for thinking about television regulation. We argue that telecoms operators who provide Internet access, Internet intermediaries (in this case video sharing platforms) and audiovisual content producers and distributors represent three different layers of online audiovisual services, and that these layers are subject to different constraints and different levels of control, justifying **different regulatory approaches**.

Figure 1: Three-layer model of online audiovisual services [Source: Hogan Lovells, Analysys Mason, 2018]

Layer 3 Audiovisual content producers and distributors ('AVMS providers')		
Professionally produced and distributed videos	Select, organise and offer channels or catalogues to the public	AVMS Directive applies to linear and on-demand AVMS service providers
Layer 2 Internet intermediaries that store information ('hosting providers')		
Facilitate storage and sharing of video content generated by users	No systematic "knowledge or control" over information provided by users	Liability safe harbour, "notice and action" (art. 14 ECD), no general obligation to monitor content (art. 15 ECD) Voluntary codes of conduct
Layer 1 Telecoms operators ('mere conduits')		
Internet access providers permit delivery of signals in OTT environment	Transmission of signals unbundled from content	EU Open Internet Regulation Art. 12 ("mere conduit"), art. 13 ("caching") and art. 15 ECD Art. 31 Universal Service Directive ("must carry")

“

Scarcity justified the range and depth of regulatory obligations.

”

Traditional television was built around scarcity. In exchange for one of very few broadcast licences and associated radio spectrum, and therefore privileged access to audiences and advertising revenue, broadcasters were expected to shoulder regulatory obligations. Scarcity, and the licensing of spectrum by governments, justified the range and depth of these regulatory obligations.

The online environment, unlike traditional TV, is characterized by diversity of creation, and by abundance. As a result, obligations related to diversity of programming are less important than they were when channels were scarce. Likewise, as broadcasters are no longer protected from competition by their exclusive broadcasting license, imposing cross-subsidies between types of content becomes more difficult to justify.

As the environment for television regulation changes, we argue that television regulation should continue to focus on the entity with editorial responsibility for selecting audiovisual content, and that existing regulatory tools such as net neutrality and notice-and-takedown rules should continue to apply to Internet intermediaries.

The layers in our three-layer model should remain separate, to avoid the Internet becoming a patchwork of national broadcasting networks, each network regulated by its own national media regulator. This kind of ‘balkanisation’ of the Internet would destroy many of the benefits that the Internet has brought to freedom of expression and innovation globally.

Introduction and background

European institutions and Member States are currently reviewing the Audiovisual Media Services Directive (AVMSD), one of the main instruments of policy harmonisation within the European single market for the audiovisual sector. Historically, EU-level regulation focused on traditional audiovisual providers, primarily TV channels, on the grounds that they had editorial control over the content being shown to viewers. In 2007, the former Television Without Frontiers Directive became the Audiovisual Media Services Directive, and its scope was extended to providers of online services that were “TV-like”, and that had editorial control over the content.

The AVMSD articulates a number of policy objectives, including the protection of minors, the prominence of European works and the balance between advertising and content. These objectives remain an important part of the harmonisation of European audiovisual policy. As part of the review initiated by the European Commission (EC), it has been proposed that the scope of the AVMSD be further expanded to include a new type of provider – video-sharing platforms (VSPs). These platforms, which include popular services such as Dailymotion, Vimeo and YouTube, enable creators (with editorial control) to make videos available online to users. Users can access the content through a range of devices (smartphones, tablets, computers and TVs), through search functions or through personalised, automated recommendations. The EC’s proposals would encourage VSPs to adopt self- or co-regulatory measures to help fight certain types of harmful audiovisual content.

“

When the Internet first emerged, lawmakers’ first reaction was to apply television-like rules.

”



Including Internet intermediaries in the AVMS directive creates a dangerous precedent.



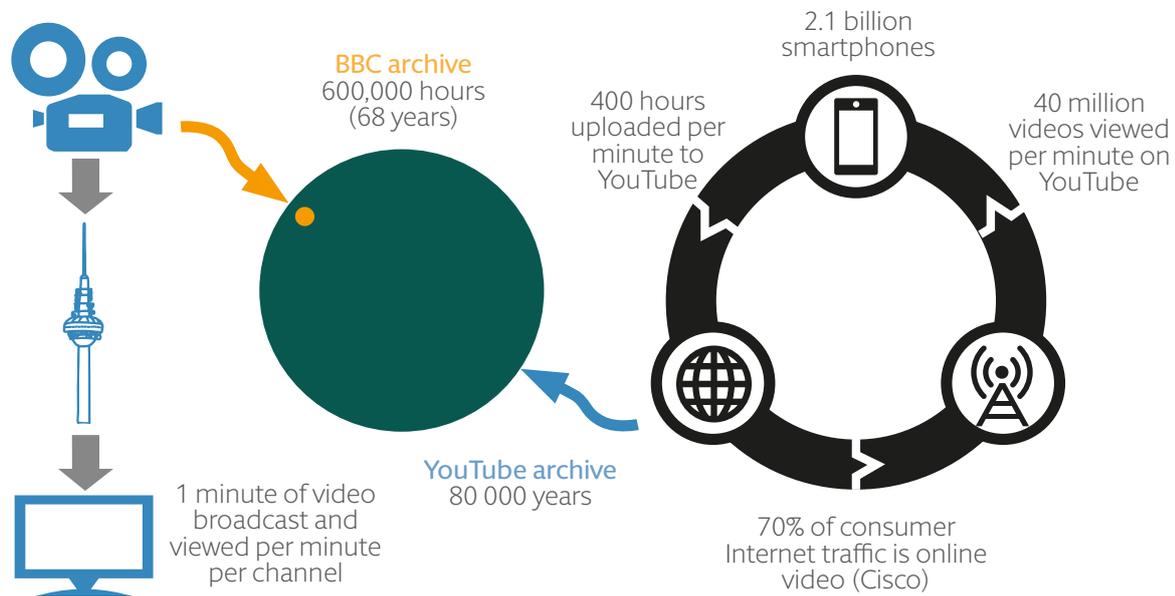
In this white paper we argue that, as regards regulation, there is little justification to consider VSPs as being on a par with providers of audiovisual media services (“AVMS providers”). Although VSPs do enable content producers to make content available that, in some cases, falls under the definition of audiovisual media service, the party responsible for complying with the AVMSD is the content provider. Furthermore, much of the content hosted by VSPs, including user-generated content (UGC), does not fall under the definition of AVMS. VSPs act as hosting providers: they organise the content and its metadata to make it discoverable to users, but do not make explicit editorial choices regarding the content that is hosted on the platform. VSPs do, however, comply with a ‘notice and take-down’ process, whereby content that is illegal is taken offline as soon as the VSPs are notified. As confirmed by the European Court of Human Rights, VSPs have become an essential vector for freedom of expression.²

This white paper explains why the regulation of audiovisual service providers and the regulation of Internet intermediaries such as VSPs has historically been differentiated, and why a separation remains relevant and necessary today. We reinforce the importance of a layered approach to Internet regulation.

Consequently, any amendments which suggest that a VSP, in its capacity as a hosting provider, should be responsible for the obligations of content providers should be rejected. Self-regulatory mechanisms that complement “notice and take-down” provisions under the E-Commerce Directive can be effective and proportionate in addressing audiovisual policy questions at the level of VSPs, while also preserving the essential nature of the Internet and resulting freedom of expression.

The starting point for our argument is illustrated in Figure 2 below: video content on the Internet is plentiful, varied, easily accessible and consumed in a variety of ways. In contrast, traditional TV content was the preserve of a few channels, controlled by a very small number of editors / distributors and financed through a complex mechanism where popular content cross-subsidised socially important content.

Figure 2: Illustration of the differences in scale and nature of online video vs. television and TV-like audiovisual media services [Source: Analysys Mason, Hogan Lovells, 2018]



The current version of the BBC television archive would take one person 68 years to view. The archive continues to grow at a linear rate, which can be monitored in real time. In contrast, online video is much more abundant, with a diversity of content catering for all types and scales of interest.

Among others, the 2+ billion smartphone owners worldwide can quickly capture videos and upload these to VSPs, where they can be accessed by viewers through the Internet. The current YouTube archive alone would take 80 000 years to view, and continues to grow at an exponential rate which cannot be monitored.

While television is linear, from broadcaster to viewer, online video can be thought of as more circular, with creators of video also viewing videos, often with the same smartphone.



The difference between ‘audiovisual media service providers’ and ‘Internet intermediaries’

The AVMSD regulates entities that have editorial responsibility for choosing and assembling videos into organised packages. The selection and organisation of videos are reflected in the concept of editorial responsibility:

“‘editorial responsibility’ means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services.” (Directive 2010/13/EU, art. 1(c)).

The AVMSD divides audiovisual service providers into two categories:

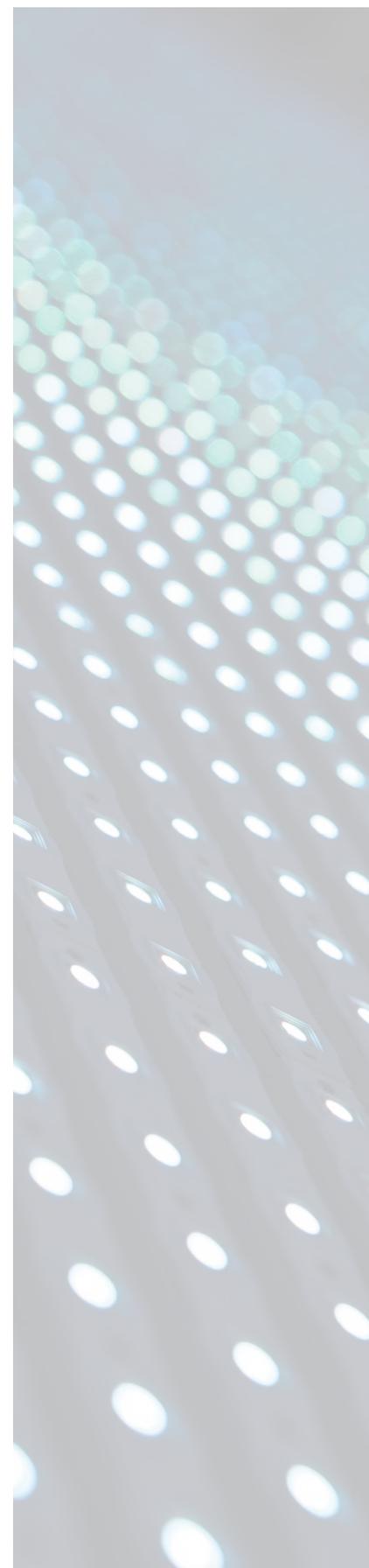
- providers of **linear TV services** – traditional television channels, subject to the highest level of regulatory constraint
- providers of **on-demand services** – offer a selection of videos organised into a catalogue; subject to a lower level of regulatory constraint.

In each case, the service provider’s role is to **select and organise** videos, either into a linear TV channel, or into a video-on-demand (VOD) catalogue.

The proposed revisions to the AVMSD maintain these classifications, but expand the category of on-demand audiovisual media service providers to expressly include entities that select and organise short videos.

Audiovisual media service providers rely on **technical intermediaries** to transport, store and make signals available to viewers. These intermediaries may include satellite providers such as Eutelsat, terrestrial broadcasting service providers such as TDF, cable operators such as Numéricâble, Internet access providers such as Orange, content delivery networks such as Akamai, or video hosting providers such as YouTube, Vimeo and Dailymotion.

In some cases, the audiovisual media service provider will contract with one or more technical intermediaries – for example a satellite network – to ensure delivery of the content all the way to the viewer’s television. In other cases, the content will be stored in a server far away from the user, and the user’s Internet access provider will retrieve the content and deliver it to the user’s



“

Licences for broadcasting spectrum made regulation straightforward.

”

terminal. Because of the different forms of digital delivery, it is important that AVMS regulations apply to the entity with editorial responsibility for the content, and that the role of technical intermediaries be used only as a back-up in case the first level of regulation fails. Examples of “back-up” measures applicable to technical intermediaries include:

- ex-post measures ordered by a court or regulatory authority to block certain illegal audiovisual content (e.g. the order requiring Eutelsat to cease carrying Al Manaar, a Lebanese channel)
- ‘notice and take-down’ measures requiring hosting providers to remove certain content upon receipt of notice
- self- and co-regulatory measures applied by hosting providers to help video content providers learn about and comply with AVMS rules.

The historical justification for ‘traditional’ audiovisual regulation

Over-the-air broadcasters traditionally required a broadcasting licence, which included the right to use scarce spectrum resources, often free of charge. These broadcasting licences made regulation straightforward: in exchange for the almost-free use of spectrum, lawmakers could impose a broad range of obligations on the broadcaster. Only a limited number of TV broadcasters could be licensed to provide TV or radio services, which limited the choices for viewers while increasing the viewership of any particular broadcast. The government imposed content rules on the licence holders to ensure adequate diversity in points of view.

Spectrum licences limit the number of broadcasters. Regulation is therefore required to ensure diverse points of view in broadcast content, and to counterbalance monopoly rents

The spectrum licence provided a form of exclusive right, protecting the broadcaster from competition. The free use of valuable spectrum, combined with protection from competition, permitted commercial broadcasters to generate higher-than-normal profits. To compensate, lawmakers imposed a broad range of regulatory obligations on broadcasters, including public service obligations and cross-subsidies.

The bundling of signal delivery with content access can create high switching costs for viewers

Another factor justifying TV regulation is the bundling of audiovisual content with transmission of the signal. In over-the-air, satellite and cable TV, a subscriber typically pays for the right to see the content **and** for the transmission service (or is entitled to both in the case of an entirely free service). The two services are aggregated, meaning that the provider of the service not only grants access to the content, but also delivers the content to the viewer's TV set. The aggregation of content with the delivery mechanism means that viewers can be locked in to a given programme selection because it is inconvenient to change delivery networks. This explains why “must carry”, retransmission rules, electronic programme guide regulations, and conditional access regulations exist.

Sharing videos on the Internet

Video content on the Internet differs in fundamental ways from traditional TV content, as illustrated in Figure 3 below.

Figure 3: Contrasting traditional TV regulation and the principles underpinning the Internet [Source: Analysys Mason, Hogan Lovells, 2018]

Goals and means of traditional TV regulation 	Characteristics of video on the Internet 
<p>Historically, regulation was linked to the broadcaster's spectrum licence, as a means to impose a wide range of obligations, and justified by limited capacity and the “push” of TV channels into families' homes (limited agency from users).</p> <p>Spectrum licensing limits competition, creating above-normal profits, channelled into obligations (e.g. local motion picture production).</p> <p>Broadcasting services generally bundle content with the signal transmission services (cable network, satellite, over-the-air, set-top box). In the absence of competition, this created a need for must-carry rules, EPG and conditional access regulation.</p> <p>TV regulations typically aim at:</p> <ul style="list-style-type: none"> – protecting viewers from harmful or misleading content, including advertising – cross-subsidising other sectors (e.g. local motion picture production) – ensuring universal TV distribution – guaranteeing plurality and diversity – educating citizens to contribute to a well-functioning democracy. 	<p>In general, the Internet is characterised by a number of features that have led to its rapid adoption by 3.5 billion people and almost unlimited content and applications:</p> <ul style="list-style-type: none"> – Innovation is permission-less: anyone can create a website or application and make it available to anyone else, without requiring permission from anyone. – The Internet is intrinsically borderless for delivery of content, including online services which, when made available in one country, are, by and large, available in any other country (subject to national content restrictions or limitations linked to licensing of IP rights). – Any consumer with access to the Internet can intrinsically access any content or service, subject again to any national or commercial restrictions (open access). <p>As a result, any producer of content can make it available to any consumer of content, potentially via a third-party distributor or platform.</p> <p>Anyone can also develop a platform, and make content available to any user. Content creators do not have to negotiate with anyone for their content to be universally available.</p>

“

Virtually unlimited amounts of UGC content, albeit with much lower production values and smaller audiences.

”

”

Internet video remains fundamentally different from traditional TV

Internet video content presents different characteristics from traditional TV content, and is exploited according to different business models. This needs to be accounted for when designing new regulations aimed at harmonising the treatment of both types of content.

Traditional TV content is characterised by high production values that require costly equipment, studios and talent. Content is produced for a large audience that uses relatively few distribution channels, based on set formats (comedy series, nightly news or movies). The cost of production, and the relatively small number of distribution channels, make such content relatively scarce.

Conversely, the cost of producing purely online content can be almost negligible, thanks to the ubiquity of smartphones with video cameras and editing capability. Typically, UGC is created with no revenue goals, and there are no bounds on its format or subject matter, other than the limits of imagination. The result is virtually unlimited amounts of content, albeit with much lower production values and smaller audiences than traditional TV content. Much online video content falls in between these extremes. For example, some online-only content is produced professionally (e.g. by multi-channel networks (MCNs)), with higher production values than UGC but still at a much lower cost than traditional TV content. Other types of content cannot be qualified as “professional”, but are distributed on platforms that have some form of monetisation (for example, gaming videos on Twitch are supported by advertising and subscriptions).

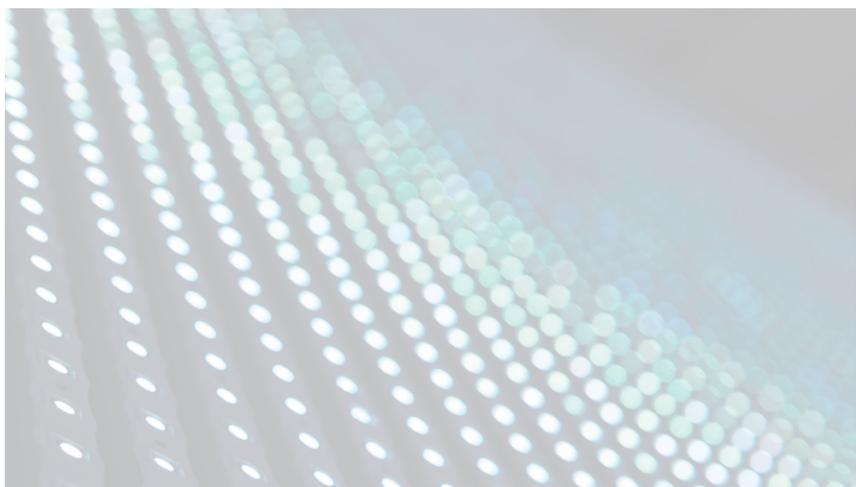
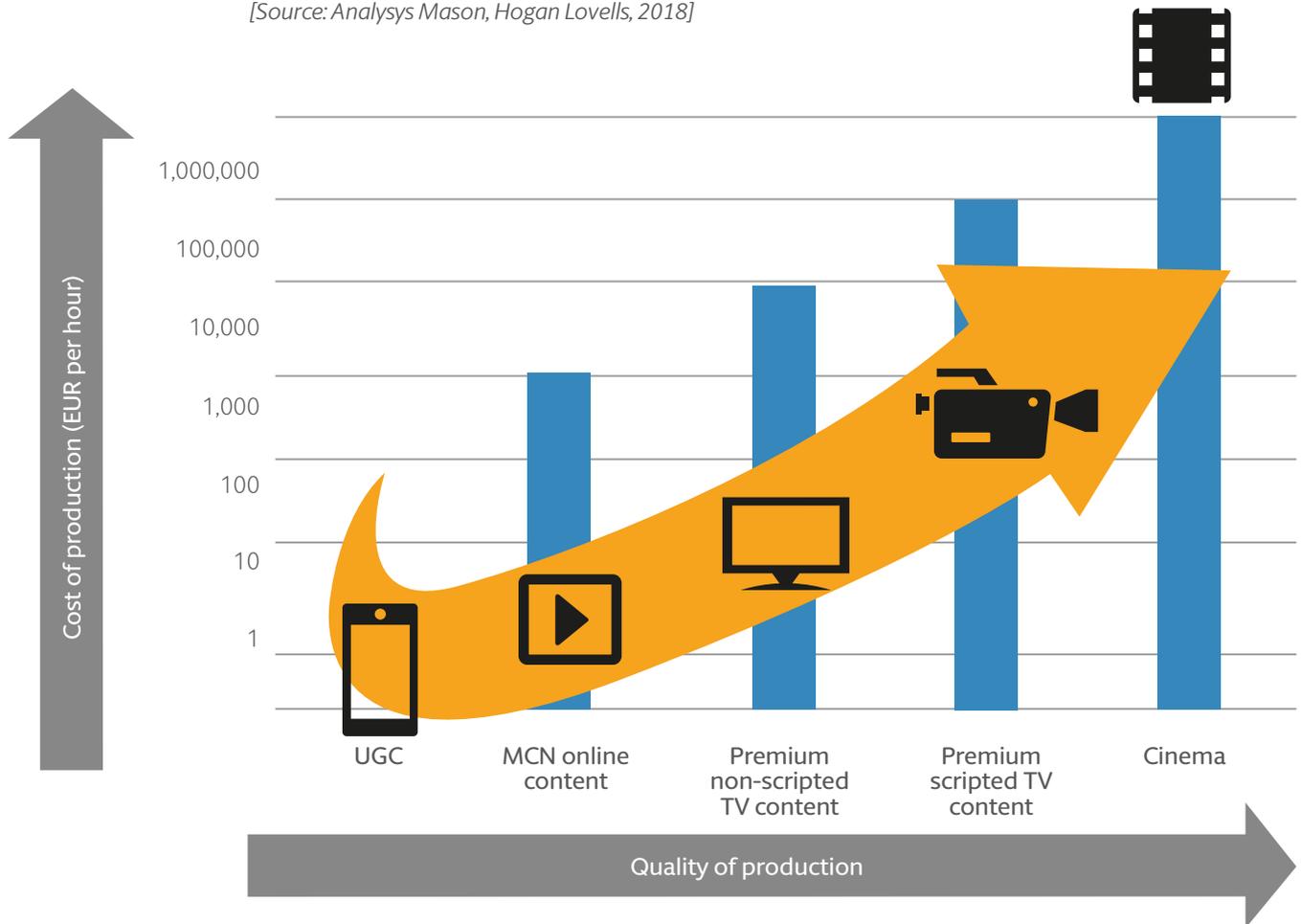


Figure 4: Contrasting traditional TV regulation and the principles underpinning the Internet
 [Source: Analysys Mason, Hogan Lovells, 2018]



Distribution costs are also structured very differently between traditional TV and Internet video. Distributors of traditional audiovisual content – TV or radio broadcasters – face high costs to license content, for equipment to broadcast the content, and in some cases to access broadcast networks (some of which have limited capacity). As a result of these high costs, there are only a small number of content distributors.

Conversely, online video can be distributed very cheaply through large-scale online platforms that build onto existing systems (e.g. Netflix makes extensive use of Amazon Web Services). Based on the inherent characteristics of the Internet (see Highlight 1 below) there are potentially unlimited channels to distribute content, as anyone can create such channels, from simple websites to complex platforms.

“

There is no scarcity or lack of diversity on the Internet.

”

Control over online video content by distributors is much more limited than in TV

As described above, traditional TV distributors control the content that they make available – either producing it themselves, or purchasing rights to distribute third-party content – and then ‘push’ it out to viewers. In turn, the distributor puts requirements on the content producer. This results in regulations focused on the editor as the party who can control the selection of appropriate content. This approach is made possible by the medium itself: traditional TV content can easily be monitored, because it is linear and scheduled – one minute created is one minute consumed. It is clear to the provider what content is accessible to viewers at any point in time: it has been previously created and/or selected on a video-by-video basis by the broadcaster. The broadcaster therefore carries editorial responsibility.

The creators of VOD catalogues also have editorial responsibility, because they purchase rights and organise the audiovisual content they purchase into catalogues. Because of the selection

and organisational role of VOD providers, the AVMSD imposes certain audiovisual-related obligations on them. By contrast, the vast majority of video content available via VSPs is generated and controlled by individual users (within the rules of the distribution channels they choose to use) and falls entirely outside the scope of audiovisual regulation.

Resulting fundamental differences between the regulation of online video and TV

These characteristics of online video have changed the audiovisual landscape and shifted the focus of regulation. While diversity of programming was an important social goal to impose on broadcasting licensees in the face of a scarcity of channels, there is no such scarcity or lack of diversity on the Internet. Likewise, some of the goals of public service broadcasters can be met with Internet programming: companies such as the BBC, for instance, have created popular online platforms to make their content available over the Internet. This is illustrated in Figure 5 opposite.

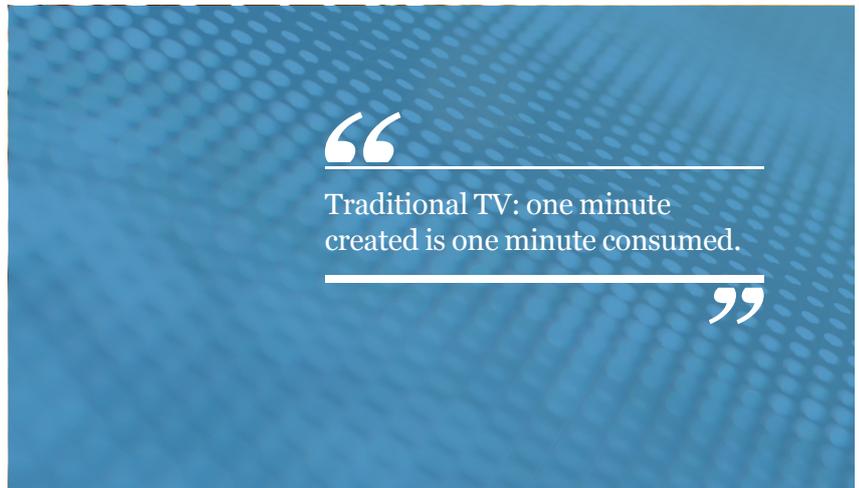
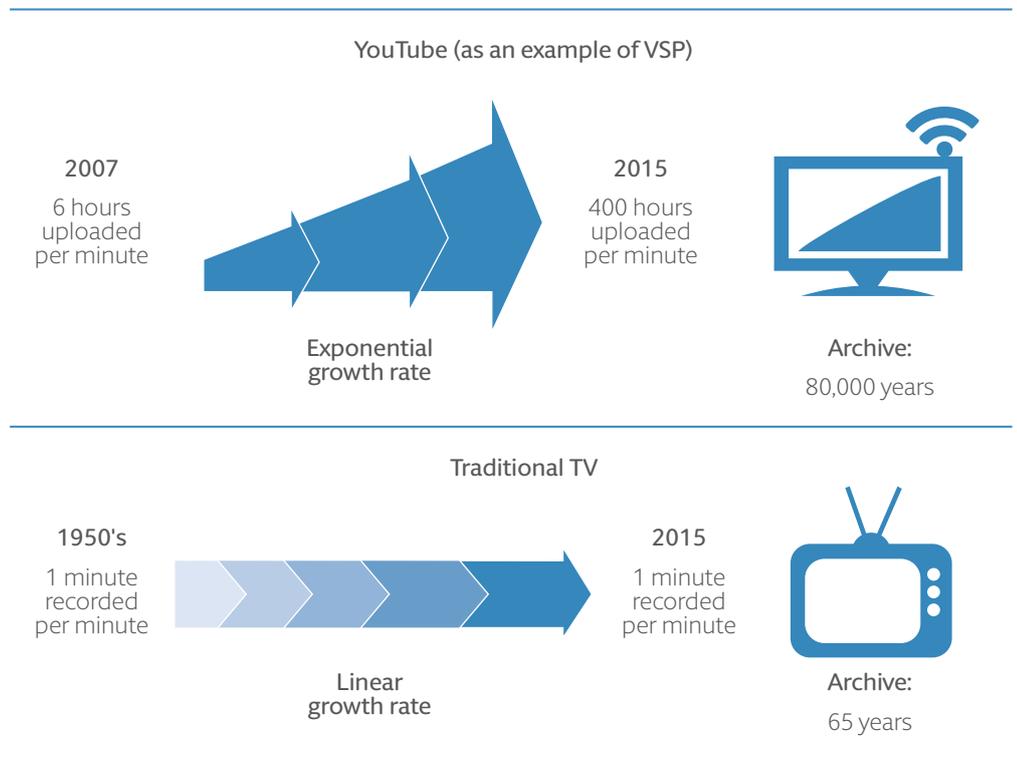


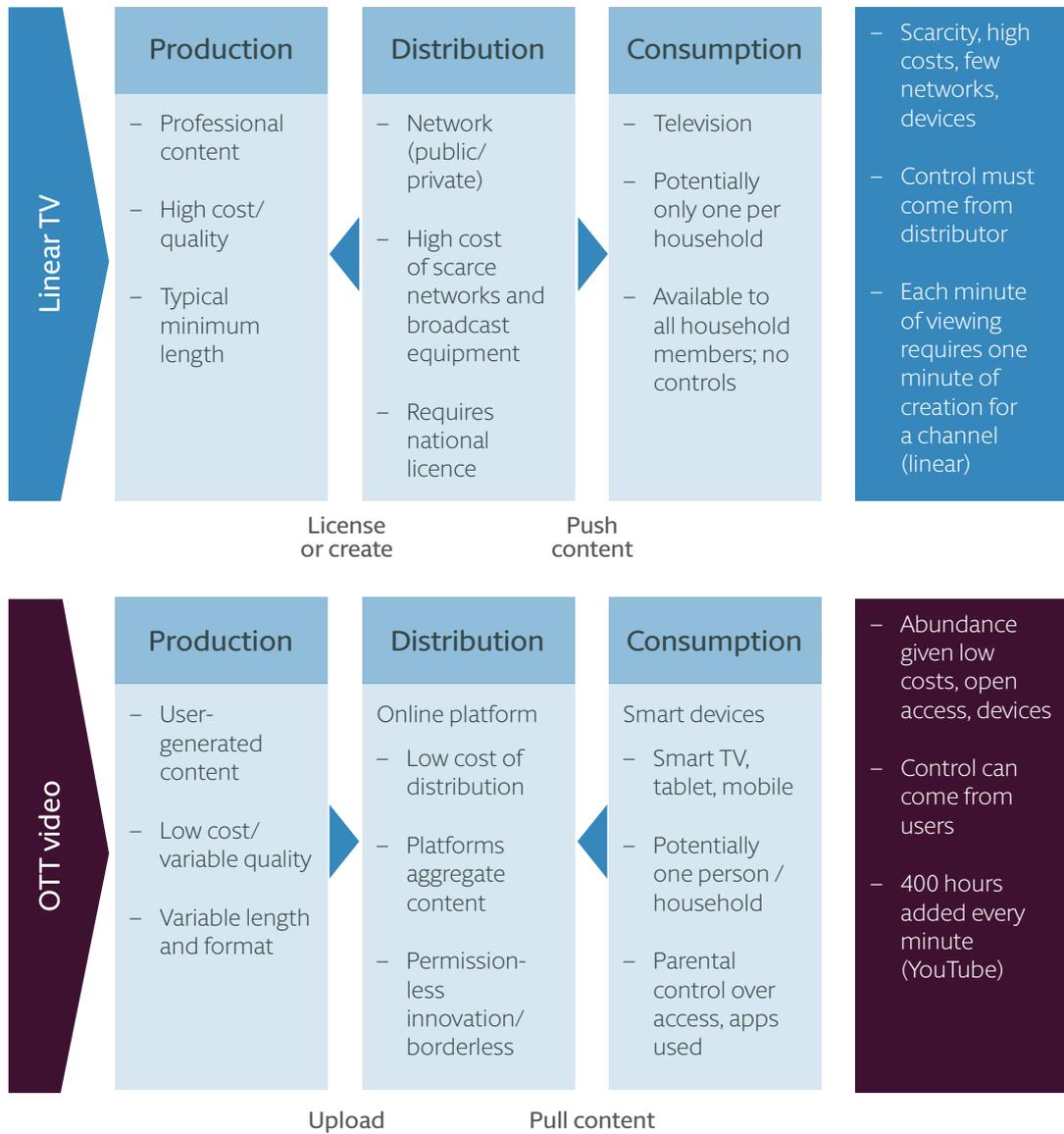
Figure 5: Comparison of supply growth for TV and VSPs [Source: Analysys Mason, Hogan Lovells, 2018]

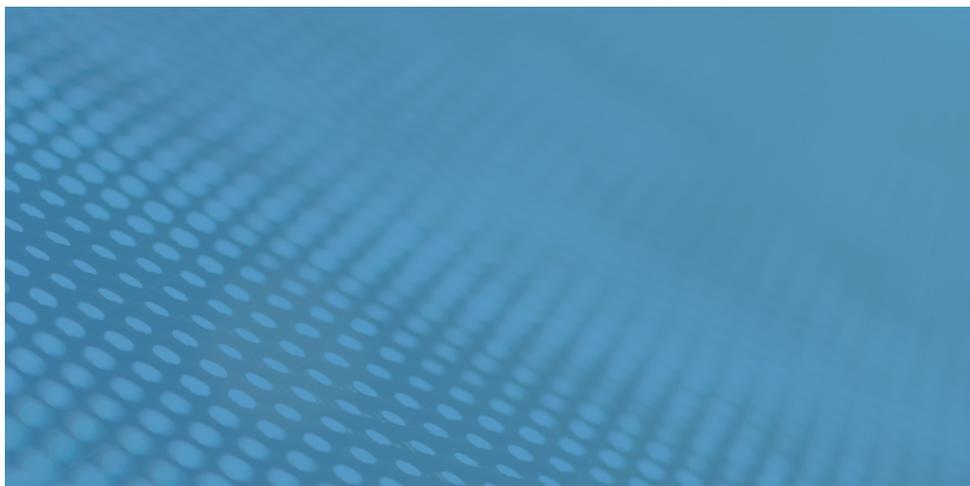


Conversely, VSP providers typically do not create content, nor are they able to carry out explicit reviews of all the content that users upload on their servers; for example, every day users upload more than 4.75 billion pieces of content on Facebook, and more than 500 million pieces of content on Twitter.

Figure 6 below illustrates the difference between linear TV, for which broadcast regulations were originally created, and today’s over-the-top (OTT) online viewing experience.

Figure 6: Key differences between the value chains for linear TV and OTT video [Source: Analysys Mason, Hogan Lovells, 2018]





Internet regulations to date and early court decisions have focused on protecting freedom of speech within the borderless and end-to-end architecture of the Internet

Internet policy and regulation are typically focused on preserving the layered and end-to-end architecture of the Internet. Net neutrality rules ensure that providers of Internet access services do not interfere with the content that flows on the network. Europe’s E Commerce Directive (ECD)³ and the United States’ Communications Decency Act and Digital Millennium Copyright Act also provide limited regulation of Internet intermediaries, guaranteeing that they will not be obligated to monitor content, and that they will not be held liable as publishers if they remove illegal

content promptly upon notice. Wherever possible, Internet regulation tries to preserve the cross-border character of the Internet, and to use “multi-stakeholder” solutions to solve regulatory problems. One of the reasons for this Internet-specific approach to regulation is to avoid the Internet becoming a patchwork of national networks, each regulated by the national media regulator. This kind of balkanisation of the Internet would destroy many of the benefits that the Internet has brought to freedom of expression and innovation globally.

New challenges

The blurring of lines between 'TV' and 'the Internet'

The audiovisual landscape has evolved in major ways since the early regulatory approaches discussed in the previous section. On the supply side, the ways in which audiovisual programming is commissioned, aggregated, distributed and sold have changed. On the demand side, people are finding, accessing and consuming audiovisual content in new ways.

Highlight 1: From scarcity to (almost) infinity

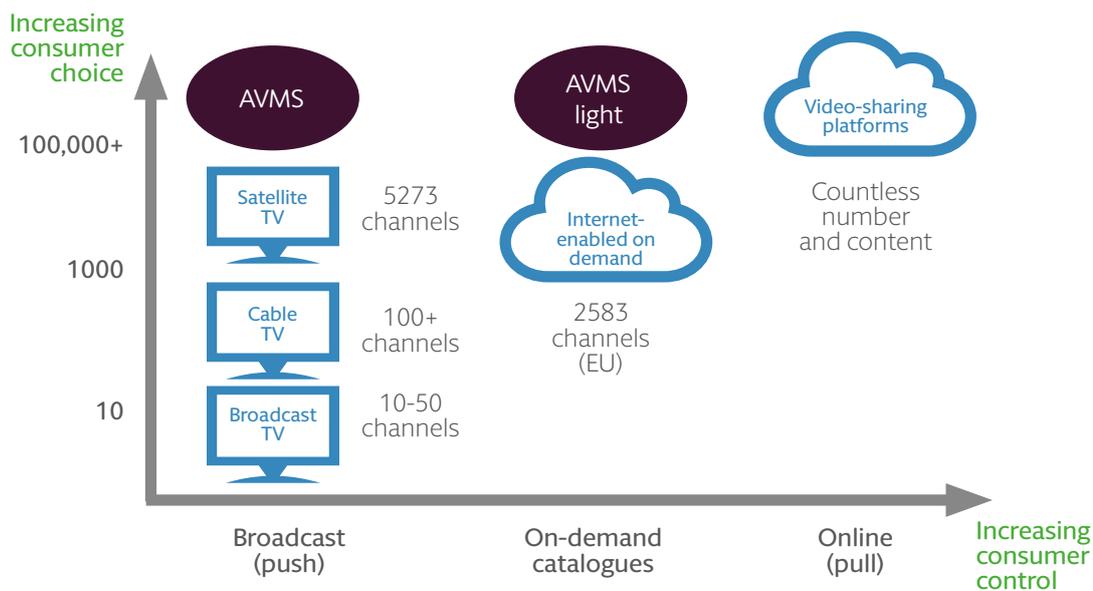
As broadcast technology evolved over the years, the choices available to users began to increase. Originally there were just a few over-the-air channels, but their number grew as more analogue cable networks became available (in the countries that had networks, such as the Netherlands and Germany). Eventually, thousands of channels became available via satellite TV (though viewers needed expensive equipment to access these channels). Throughout, however, consumer control was limited to choosing between the channels that were pushed out to viewers.

Over the last ten years, the Internet has added an important dimension to the delivery of audiovisual content, with on-demand OTT

services. These services add significant choice, along with a measure of control for users, who can pick a show and control how they view it. In 2007, the AVMSD broadened the scope of the previous Television Without Frontiers Directive of 1989 to include these on-demand services, although some provisions are not applicable. For example, the amount of advertising per hour cannot be controlled in the same way as on linear TV.

Finally, video accessed on VSPs increases consumer choice and control, with a countless number of platforms hosting a virtually infinite amount of content from which the consumer can choose.

Figure 7: Consumer choice and control [Source: Analysys Mason, Hogan Lovells, 2018]



Some of the video services that people access online constitute an audiovisual media service under the AVMSD, and some do not. The Directive very clearly defines AVMS as services that exert editorial responsibility, and a degree of effective control, on the content they provide:

“(25) The concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the concept of ‘effective control’, when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the

Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (16).

(26) For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.”

This definition therefore excludes services that act as conduits for content for which editorial responsibility and effective control lies with third parties. This is the case for most online video platforms that allow users to make videos available to third parties.

The AVMS “ex-post REFIT” process conducted by the EC in May 2016 highlighted the difficulty that Member States and the courts have faced in precisely defining editorial responsibility and effective control, particularly in cases involving short-form on-demand video. In the Sunvideo decision,⁴ for example, the UK regulator Ofcom concluded that audiovisual content accessible online on newspaper websites could not be defined as an audiovisual media service. Ofcom came to this conclusion by establishing that the service did not have the requisite “principal purpose”. In another similar process, the Swedish Broadcasting Commission concluded that this type of content on newspaper websites could be classified as an audiovisual media service. In the New Media Online case,⁵ the European Court of Justice made it clear that the AVMSD applies to services that have editorial responsibility and effective control over content that competes for the same audiences as TV broadcasting, irrespective of whether video content is the main offering of the service provider.

The French regulator CSA held that a channel of professionally produced videos available on YouTube should be considered as a regulated audiovisual service.⁶ In Germany, State Media Authorities have recently started to require live streaming channels to apply for a regular broadcasting licence. The State Media Authorities classify those live streaming channels provided over platforms like Twitch and YouTube as regular broadcasting services under German regulation.⁷

The courts’ and regulators’ approach is consistent with the policy objectives pursued by the Directive, and recognises important features of the audiovisual sector such as the ‘push’, mass-market nature of the medium, the integration between production and distribution of TV content through the commissioning and rights acquisition process, and the professional and commercial nature of the services. Editorial responsibility is key to the regulatory treatment of a given service.

“

Editorial responsibility
is key.

”

The importance of innovation in video content online beyond AVMS

Court and regulatory decisions show that more and more video content is deemed ‘TV-like’ and is regulated under existing AVMSD rules. The number of professionally produced channels on the Internet has increased. Some channels have attracted well-known producers, actors or writers, and are good examples of non-linear TV channels that broadcast relatively high-quality content and have been able to compete on the same playing field with programming from traditional broadcasters.

Most of these OTT channels are regulated as on-demand audiovisual media services under the AVMSD due to their editorial role, and this will continue to be the case.

However, the vast majority of online video content does not fall under the definition of an audiovisual media service, and is effectively user-generated content that is hosted by Internet intermediaries. It is often short-form, non-professional video content with low production costs and production values. It is uploaded by users of the platform, and consumed by other users. This content is not created in a formal business setting, and is not subject to rules specific to audiovisual media services.

This type of video content and the platforms on which it is shared online contribute to the expression of diverse views, plurality and freedom of expression. This is made possible by a very open, broadly ‘permission-less’ environment where the platforms provide technical tools for creators, but interfere as little as possible with the video-sharing process. This ‘permission-less’ approach supports freedom of expression and other democratic principles, including in countries where they may be less protected or implemented than in the EU.



Highlight 2: VSPs support freedom of expression

In a recent case involving YouTube⁸, the European Court of Human Rights underlined the importance of video-sharing platforms, and of YouTube in particular, in supporting freedom of expression:

“52. Moreover, as to the importance of Internet sites in the exercise of freedom of expression, the Court reiterates that “in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general” (see Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2), nos. 3002/03 and 23676/03, § 27, ECHR 2009). User-generated expressive activity on the Internet provides

an unprecedented platform for the exercise of freedom of expression (see Delfi AS v. Estonia [GC], no. 64569/09, § 110, ECHR 2015). In this connection, the Court observes that YouTube is a video-hosting website on which users can upload, view and share videos and is undoubtedly an important means of exercising the freedom to receive and impart information and ideas. In particular, as the applicants rightly noted, political content ignored by the traditional media is often shared via YouTube, thus fostering the emergence of citizen journalism. From that perspective the Court accepts that YouTube is a unique platform on account of its characteristics, its accessibility and above all its potential impact, and that no alternatives were available to the applicants⁹.”

The relevance of audiovisual policy objectives in this changing landscape

As demand for online video content continues to grow, it is important to take a careful look at the intended aim of audiovisual regulation, and the policy objectives and ‘public goals’ that it promotes. At the same time, it is necessary to consider how those objectives can be achieved in a mixed TV/online ecosystem without disrupting the specific desirable characteristics of the Internet (as enshrined in the Open Internet Regulation¹⁰ and the ECD).

In December 2015, the European Regulators Group for Audiovisual Media Services (ERGA) issued a report which addresses whether the public policy goals of the AVMSD have been effectively delivered.¹¹ A majority of the Member States that responded to ERGA’s questionnaire (16 out of 24 respondents) **considered that the goals of the Directive have for the most part been achieved by its current scope.**

However, some respondents to ERGA’s questionnaire raised concerns in specific areas where they believe the goals may not have been fully achieved or where the goals may be challenged in the near future. These include:



“

Walled-garden ecosystems present a risk for diversity.

”

”

- **Fair competition in the internal market:** There is a competitive imbalance between players that are included in the Directive’s scope and those that are excluded.
- **Promotion of European content creation:** New intermediaries that fall outside the scope of the current AVMSD and that play a greater role in accessibility of audiovisual content than traditional stakeholders are not required to make financial contributions towards European content creation.
- **Cultural diversity:** ERGA states that “the development of algorithm-based recommendation tools, and ‘walled garden’ ecosystems present on some consumer devices, could represent a risk for diversity”, though there is uncertainty about how the market will evolve and these developments could equally provide new distribution routes for content providers.
- **Protection of minors:** ERGA states that “Statutory regulations on editorially responsible providers alone is not sufficient in itself to guarantee effective protection of minors without considering the role that other actors play, in particular the growing importance [of] technical protection tools provided by certain intermediaries.”¹¹



“

The EC wants to apply a light-handed approach to VSPs.

”

”

These points, whilst valid representations of the concerns expressed by audiovisual regulators around the EU, fall short of arguing that new intermediaries currently outside the scope of the AVMSD should be brought within it.

When proposing revisions to the AVMSD, the EC took a prudent approach by focusing on two main issues:

- First, the category of on-demand AVMS provider would be expanded to include entities that select and organise short videos. Previously the videos had to be ‘TV-like’ to fall within the scope of the AVMS Directive. This modification may extend AVMS regulation to a larger number of content ‘channels’ available on VSPs.
- Second, the Directive would apply some obligations to VSPs, i.e. Internet intermediaries that are not providers of audiovisual media services. The EC underlines that its proposals are not intended to interfere with the liability ‘safe harbour’ for hosting providers, or with the principle that hosting providers should have no general obligation to monitor content, both of which are protected by the ECD. Instead, the EC wants to apply a light-handed approach, requiring that VSPs “put in place, preferably through co-regulation, appropriate measures to: i) protect minors from harmful content; and ii) protect all citizens from incitement to violence or hatred.”¹²

Importantly, the EC’s proposals suggest that the other objectives pursued by the AVMSD should not apply to VSPs. This highlights a fundamental consideration which should remain central to any discussions on the regulation of Internet intermediaries: namely to approach the role of hosting providers with care, to preserve the scope and incentive for innovation, and the ‘permission-less’ character of the Internet.

The limits of audiovisual regulation for Internet intermediaries

The Internet's self-regulatory nature

Policy makers have generally emphasised the need for 'light-touch' Internet regulation.

The ECD emphasises self-regulatory solutions:

“Member States and Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties of deciding freely whether to adhere to such codes.” (Recital 49).

The AVMSD does the same:

“[...] experience has shown that both co-regulation and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves. Thus self-regulation constitutes a

type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves.” (Recital 44)

The OECD Recommendation on Principles for Internet Policy Making¹³ emphasises both the need to preserve the liability safe harbour and the need to emphasise voluntary codes of conduct:

“Limit Internet intermediary liability: Appropriate limitations of liability for Internet intermediaries have, and continue to play, a fundamental role, in particular with regard to third party content.

Foster voluntarily developed codes of conduct: [...] codes of conduct should encourage and facilitate voluntary co-operative efforts by the private sector to respect the freedoms of expression, association and assembly

online, and to address illegal activity, including fraudulent, malicious, misleading and unfair practices taking place over the Internet.”

These principles are also reflected in the Council of Europe’s draft Recommendation on Internet intermediaries.¹⁴

In its Better Regulation “Toolbox”, the EC emphasises that self-regulation and co-regulation can deliver the policy objectives faster or in a more cost-effective manner than mandatory requirements. They also allow greater flexibility to adapt to technological change (e.g. in the ICT-related areas of activity) and market sensitivities.¹⁵

Highlight 3: ERGA recognises the positive impact of codes of conduct

Intermediaries have taken, through voluntary codes of conduct, major steps to tackle concerns raised by the audiovisual industries and policy makers, as ERGA highlighted in its findings:

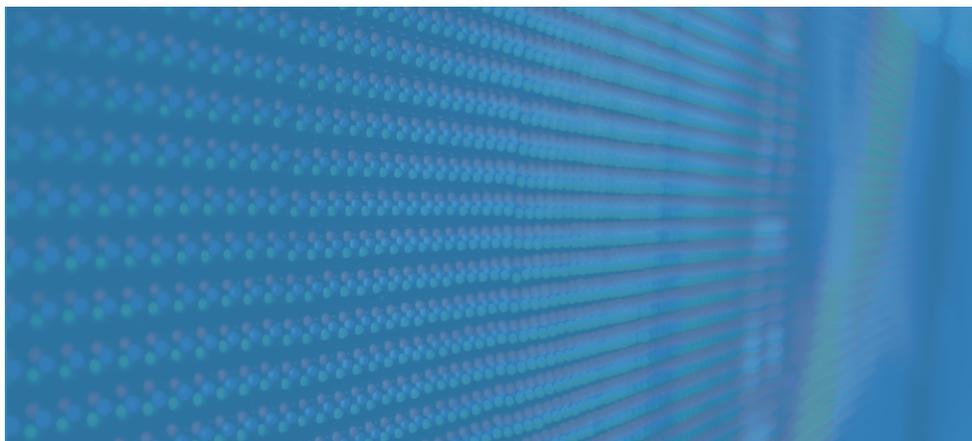
“Major online video-sharing websites (YouTube, DailyMotion) and social networks have generally introduced community standards. These are often reflected in their terms of service, acceptable use policies, online safety information centres and/or community guidelines. The standards and protections may vary by brand, type of content delivered (e.g. professional and/or user generated) type of service, or age group that the product is addressed to. They primarily rely on tools which enable users to report content to the platform which, depending on the severity of the breach of its standards, may place it behind an access control system or remove it. Providers often also offer tools and information within their products to enable users to report and learn about what they can do to protect themselves or others using the same service.

“Rating tools: A self-rating tool developed by NICAM and the British Board of Film Classification (BBFC) “You Rate It” is currently being tested on the Italian user generated content platform “16 mm”. It enables users that upload content to classify based on a system which assesses how harmful the content is.”

A range of networks at both European and national level enable the industry to share best practice in relation to protecting users (especially minors) online. EU-level examples include the Safer Internet Programme, and a series of partner initiatives, such as the ‘CEO coalition’, aimed at making the Internet safer for children. Many more networks of this kind exist in individual Member States.

ERGA also concludes that:

“Policy makers will need to create an environment in which the relevant intermediaries have incentives to provide consumers with appropriate protection tools and clear information. The development of consistent tools – which are efficient, easy to use, affordable and work with well understood and common systems of categorisation and classification – should be encouraged.”



The relevance of self-regulation in the context of VSPs

The ‘open’ nature of VSPs and the benefits that stem from this open character limit these platforms’ control over content. In order to enable a high degree of freedom and plurality of expression through user-generated content, the ex-ante control that VSPs can realistically exert on the content they host is tenuous at best and mostly indirect.

For example, VSPs can and do provide guidelines against hate speech and other forms of abuse, and provide tools for viewers to notify the platforms of a breach of these guidelines. They then act on these reports to remove offending content. Likewise, most large platforms supplement these ‘notice and take-down’ mechanisms with tools to help ensure that the same content is not reloaded on the platforms using the same or a different account.

The E-Commerce Directive does not prohibit self- or co-regulatory measures, as long as those measures do not impose liability on hosting providers going beyond the ‘notice and take-down’ framework identified in the Directive.

Some stakeholders have argued that voluntary approaches may not always be effective: the Council of Europe recently stated that ‘community guidelines’ are ineffective against hate speech.¹⁶ However, there is a clear balance to be struck between ensuring compliance and preserving freedom of creation and expression.

In some cases, such as the protection of minors against harmful content, it may be relatively easy to strike this balance. The incentives of large mass-market platform providers are generally well aligned with the public



objective, because platforms can compete on the demand side by emphasising that they offer a safe environment for children. VSPs generally put into place rating systems that permit users to quickly identify content inappropriate for children.

In other cases, the violation may be more difficult to detect, even by users, as for instance in the case of product placement. Given that neither human viewers nor algorithms would be able to determine whether product placement has taken place, the regulator would have to enter into a dialogue with the content provider. For their part, platforms can and do provide content providers with tools to enable them to disclose sponsorship and product placement, but the primary responsibility should always lie with the content providers.

Preserving a three-layer model to reconcile TV and Internet regulation

The specificities of much Internet content, including video content hosted by VSPs, points to the need for careful assessment of which public policy objectives require regulatory intervention, and how this intervention should be applied.

It is helpful to consider these questions within the layered model that has emerged, more or less explicitly, over the last 15 years. The three-layered model considers how the Internet affects networks, commerce, data and content. Layer 1 includes the telecoms operators and their networks. Layer 2 includes hosting providers, and currently also contains most of the platforms that facilitate the provision of content and services online. Layer 3 comprises the application and content providers themselves, including AVMS providers.

Layer 1 represents the regulatory environment applicable to telecoms operators and Internet access providers. They are subject to the Open Internet Regulation and Article 12 of the ECD, which means that they are considered as “mere conduits”. Layer 1 operators may not generally take action to enforce audiovisual policy rules, the only exception being an obligation to carry certain public service channels (the “must carry” obligation), where a telecoms operator transmits television channels.¹⁷ As a last resort, courts may order Layer 1 operators to block certain content, including audiovisual content, when other remedies have failed. The Layer 1 regulatory landscape is summarised in Figure 8 below.

Figure 8: Layer 1 regulatory landscape [Source: Hogan Lovells, Analysys Mason, 2018]

Layer 1 Telecoms operators ('mere conduits')		
Internet access providers permit delivery of signals in OTT environment	Transmission of signals unbundled from content	EU Open Internet Regulation Art. 12 ("mere conduit"), art. 13 ("caching") and art. 15 ECD Art. 31 Universal Service Directive ("must carry")

Layer 2 of the model represents the regulatory environment applicable to hosting providers, including VSPs. Hosting providers benefit from a liability safe harbour, as long as they act promptly to remove illegal content once they receive notice.¹⁸ Hosting providers may not be subject to a general obligation to monitor the content that they host.¹⁹ Courts may, however, order specific and targeted measures, where justified.

Hosting providers are encouraged to develop voluntary codes of conduct.²⁰ These voluntary measures may contribute to enforcement of audiovisual policy objectives.

The Layer 2 regulatory landscape is summarised in Figure 9 below:

Figure 9: Layer 2 regulatory landscape [Source: Hogan Lovells, Analysys Mason, 2018]

Layer 2 Internet intermediaries that store information ('hosting providers')		
Facilitate storage and sharing of video content generated by users	No systematic "knowledge or control" over information provided by users	Liability safe harbour, "notice and action" (art. 14 ECD), no general obligation to monitor content (art. 15 ECD) Voluntary codes of conduct

Layer 3 of the model represents the regulatory environment applicable to linear or on-demand AVMS providers. AVMS providers have editorial control over video content, which they organise into linear channels, or into non-linear catalogues. These are presented to the public.

AVMS providers must respect a number of audiovisual policy objectives. These objectives include the protection of children, fair advertising practices, and in some cases the contribution to public service obligations, such as promotion of culture and balanced public debate. These obligations are adapted as necessary for linear channel providers and on-demand providers. The AVMSD also seeks to create a single European market for audiovisual services, based on the 'country of origin' rule which permits an AVMS provider to serve the entire EU market as long as the provider complies with the rules of the EU country in which it was established. The Layer 3 regulatory landscape is summarised in Figure 10 below.

Figure 10: Layer 3 regulatory landscape [Source: Hogan Lovells, Analysys Mason, 2018]

Layer 3 Audiovisual content producers and distributors ('AVMS providers')		
Professionally produced and distributed videos	Select, organise and offer channels or catalogues to the public	AVMS Directive applies to linear and on-demand AVMS service providers

In conclusion, to preserve the current balance between effective content regulation and an open Internet ecosystem, TV regulation should respect the three-layer model presented in Figure 11 overleaf.

Figure 11: Layer 3 regulatory landscape [Source: Hogan Lovells, Analysys Mason, 2018]

Layer 3 Audiovisual content producers and distributors ('AVMS providers')		
Professionally produced and distributed videos	Select, organise and offer channels or catalogues to the public	AVMS Directive applies to linear and on-demand AVMS service providers
Layer 2 Internet intermediaries that store information ('hosting providers')		
Facilitate storage and sharing of video content generated by users	No systematic "knowledge or control" over information provided by users	Liability safe harbour, "notice and action" (art. 14 ECD), no general obligation to monitor content (art. 15 ECD) Voluntary codes of conduct
Layer 1 Telecoms operators ('mere conduits')		
Internet access providers permit delivery of signals in OTT environment	Transmission of signals unbundled from content	EU Open Internet Regulation Art. 12 ("mere conduit"), art. 13 ("caching") and art. 15 ECD Art. 31 Universal Service Directive ("must carry")

Content regulation at Layer 1 is a last resort, and can only be undertaken based on a targeted court order requiring the blocking of specific content, as recognised by the recent Open Internet Regulation. Content regulation, including regulation of audiovisual services, should focus on Layer 3. Layer 2 intermediaries should be encouraged, through voluntary codes of conduct, to educate users, including Layer 3 content providers, and provide them with tools to comply with their Layer 3 obligations.

Regulation of Internet intermediaries, whether at Layer 2 or Layer 1, should respect the principles of the ECD and Open Internet Regulation. In practice, the principal manner of enforcing content policies at Layer 2 is through 'notice and action' and/or voluntary codes of conduct. Any form of regulatory obligation at Layer 2 that required an Internet intermediary to pre-emptively review or monitor content supplied by Internet users would violate the ECD and severely harm cross-border innovation and expression.

If 'notice and action' at Layer 2 does not lead to sufficient enforcement of Layer 3 content regulation, mandatory blocking can be considered ex post, but this should result from a court decision.

Finally, it is important to ensure that regulation is as predictable and harmonised as possible, both Europe-wide and to the extent possible more broadly.

Conclusion:

delivery technology evolves, editorial responsibility does not



Over the history of television, the range of technical intermediaries used to deliver signals has changed dramatically. In addition to broadcasting towers, satellite networks and cable networks, dozens of new intermediaries now contribute to the storage, formatting and delivery of broadcasting content to users. New technical intermediaries emerge regularly.

To reflect the role of new technical intermediaries in facilitating access to content of all kinds, audiovisual regulation has ceased focusing on the “pipes”, and has focused instead on entities that have editorial responsibility over the selection and organisation of audiovisual content. Focusing on editorial responsibility permits regulation to be technologically neutral, and stand the test of time.

VSPs do not generally have editorial responsibility. Instead, most of them act as technical intermediaries – hosting providers – subject to the liability safe harbour under the E Commerce Directive. In addition to complying with “notice and take-down” requests, VSPs deploy self-regulatory measures to help limit access to certain harmful content, including content that violates audiovisual policy rules.

Courts have recognized VSPs as unprecedented platforms for freedom of expression. The vast majority of content available on VSPs is provided by users, and the content lacks most of the characteristics of professional, TV-like,

“

VSPs deploy self-regulatory measures to help limit access to certain harmful content.

”



programmes. Some regulated audiovisual content is available via VSPs, but in this case the regulatory obligations fall on the provider of the content, not on the VSPs that store the content.

As the environment for accessing audiovisual content gets more complex, the distinction between technical intermediaries on the one hand, and entities with editorial responsibility on the other, should remain central to any policy debate. Current discussions on AVMSD reform have shown that mixing up the two concepts may lead to proposals that can gravely harm the layered character of the Internet ecosystem, as well as the EU 'acquis' for Internet regulation under the E Commerce Directive.

References

1. We use Television and TV interchangeably throughout this paper.
2. European Court of Human Rights, *Cengiz v. Turkey*, cases n° 48226/10 and 14027/11, 1 December 2015.
3. Directive 2000/31/CE of the European Parliament and of the Council of 8 June 2000.
4. Decisions nos 12/00777, 778, 779 and 780 (e.g. <http://www.radioochtv.se/CaseDecisions/206404.pdf>).
5. Court of Justice of the European Union, *New Media Online C-347/14* of 21 October 2015, paras 19–24.
6. See <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Service-Les-Recettes-Pompettes-by-Poulpe-sur-YouTube-qualification-et-mise-en-garde-de-l-editeur>.
7. See <https://www.engadget.com/2017/03/25/germany-wants-to-regulate-livestreams/>
8. European Court of Human Rights, *Cengiz v. Turkey*, cases n° 48226/10 and 14027/11, 1 December 2015.
9. Emphasis added.
10. Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015.
11. *ERGA report on material jurisdiction in a converged environment*, ERGA, 18 December 2015.
12. Commission Explanatory Memorandum of 25 May 2016, p.13.
13. The Organisation for Economic Co-operation and Development.
14. Draft Recommendation CM/Rec (2017x)xx of the Committee of Ministers to Member States on Internet intermediaries.
15. European Commission, Better Regulation “Toolbox”, May 2015, p.88.
16. See <https://rm.coe.int/1680665ba7>
17. Art. 31 of Directive 2002/22/EC (Universal Service Directive).
18. ‘Notice and action’, art. 14 ECD.
19. Art. 15 ECD.
20. Art. 16 ECD.

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Rio de Janeiro
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar
Warsaw
Washington, D.C.
Zagreb

Our offices
Associated offices

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2018. All rights reserved. 11836_EUn_0318