CHALLENGES FOR AUDIOVISUAL REGULATION

How is media policy and regulation developing in a world moving from broadcasting to audiovisual content on many platforms? **JOAN BARATA** presents the agenda

In a little more than a decade, we will look back on the first century of independent regulation of the broadcasting sector. As part of the so-called New Deal, and under the leadership of US President Franklin D Roosevelt, a congressional statute of 1934 created the Federal Communications Commission (FCC) as an independent agency in charge of regulating interstate communications (although its competencies were basically focused on radio licensing), replacing the Federal Radio Commission. The FCC is nowadays considered one of the most important independent communications regulatory agencies and many countries look at its decisions and functioning as an example to follow.

In Europe, independent regulation of what was called the broadcasting sector started much later, during the last quarter of the 20th century. In this case, independent regulation is linked to the gradual liberalisation and opening of broadcasting markets in traditionally state-monopolised markets. Such privatisation took place in parallel with other economic sectors such as the distribution of energy, telecoms, transportation etc. Independent authorities were created to guarantee proper regulation and the protection of public interest in sectors where state operators were also in place.

Independent regulators are entrusted with the responsibility of interpreting and applying legal provisions according to high technical and professional skills. As legislation can only set general principles but is not generally able to anticipate all the issues which can be raised in highly complex economic sectors, regulators have the difficult task of creating 'ad-hoc norms' – that is, to transform general legal principles into appropriate and enforceable binding resolutions.

Audiovisual regulation and regulators show specific trends. From a strictly legal point of view, and due to common constitutional constraints, audiovisual legislation still remains a mostly national matter, particularly when it comes to the establishment and application of limits to freedom of expression, or the regulation of areas such as pluralism, protection of cultural and linguistic

diversity or promotion of local producers.[1]

This being said, there are some regional examples of setting common supra-national regulatory criteria in the area of audiovisual communication, such as the Council of Europe Convention on Transfrontier Television)[2] and the European Union's Audiovisual Media Services Directive (AVMSD), with discussion on its reform now ongoing. Both institutions have articulated a series of general principles about traditionally important areas of audiovisual media regulation, such as hate speech, protection of minors, and advertising and other forms of commercial communication.

In the case of the European Union (EU), such provisions directly apply to national legislators and regulators, although member states are still given important leeway to interpret them. In any case, it is important to note that these common principles have been in place since 1989 (although the AVMSD has been the object of successive reforms, of course). Moreover, the AVMSD needs also to be seen within the broader context of the initiative of the so-called digital single market.[3]

Last but not least, audiovisual regulation is also affected by international standards in the area of freedom of expression and freedom of information. Article 19 of the International Covenant on Civil and Political Rights contains a few principles, particularly in the area of proportionality of restrictions to freedom of expression, that need to be taken into account and respected by national legislators and regulators.[4] Plus, regional instruments like the European Convention on Human Rights (article 10), the African Charter on Human and People's Rights (article 9) or the American Convention on Human Rights (article 13) replicate and in some cases further develop the universal protection provided by the covenant.

It is important to note the case law established in such areas, particularly by the European Court of Human Rights and the Inter-American Court of Human Rights. Both systems have adopted decisions of particular importance and applicability concerning the task of audiovisual media regulators.[5] These universal and regional principles have been boosted, in a way, by the emergence of the internet as a transfrontier platform for communication.

The role of the internet as a universal platform represents an interesting challenge for national regulators, as audiovisual content has started to be provided through actors that operate beyond state borders. Traditional regulatory problems of the 1980s and 1990s consisted of (mostly) national television channels reaching other audiences by using satellite transmission technologies and breaking regulatory rules and principles in the country of reception. This has become far more complex, as new platforms are not built on the basis, or from the original perspective of, serving national markets.

Therefore, international legal regulatory approaches to tackle the possible issues about content distributed via such platforms are now under discussion, particularly regarding hate speech or dissemination of violent extremist messages. Plus, the presence and the role of new private intermediaries, which have completely altered the audiovisual content value chain and the structure and functioning of the market (or markets), also add a particular component of complexity to the analysis.

This is the general context of a needed debate on the challenges that audiovisual regulators are currently facing. It has to be noted, however, that in many countries regulation is still a very recent matter, and therefore these new challenges add to more traditional problems in this sphere, particularly in areas such as the proper safeguard of independence or financial sustainability of these entities.[6]

These issues are discussed below.

FROM BROADCASTING REGULATION TO AUDIOVISUAL REGULATION

Broadcasting regulation was originally established to organise the use of a scarce resource: the electromagnetic spectrum. Therefore, the role of regulators (theoretically at least, and within the context of pluralistic democracies) was to find the best way to accommodate a series of different players on a limited platform. In exchange, broadcasters had to accept conditions or restrictions to their activities according to the public interest. Regulators were in charge of the supervision of the effective compliance with such conditions. This idea is still formally in place in many countries and in the US it still justifies a higher level of intervention by the FCC on over-the-air broadcasting than for other distribution platforms.

But as Eli Noam at Columbia Business School pointed out several years ago, the true reasons behind the fact that broadcasting is and will be regulated, in any distribution technology, have to be found in a mix of typically national interests which, to a greater or lesser degree, state authorities around the world aim to monitor. These are avoiding excessively violent content or racist speech, controlling media ownership, preserving national imagery and identity, and other less democratic reasons, in some parts of the world, like maintaining religious orthodoxy or controlling political dissent.[7]

> **In many countries regulation is still very recent so new challenges add to traditional problems.**

So audiovisual regulation exists due to a general understanding of the need to avoid the negative effects of the dissemination of certain forms of content and, more broadly, to preserve a certain idea of the relationship between the media sector, government institutions and the citizens. These general principles may be governed either by rules originated at the national level or at the regional or even the international level. We have also seen that while national and regional legal norms establish the directives which will guide different forms of regulatory intervention, international standards

> **European institutions are increasingly interested in controlling hate speech.**

are particularly notable as they put in place mostly negative limits that will need to be respected in order to avoid an overbroad restriction on the rights to freedom of expression and freedom of information.

The reform of the so-called Television without Frontiers Directive into the new AVMSD in the EU in 2007 clearly reflects a complex approach to the aims of regulation by first, expanding the traditional notion of broadcasting to what is now called audiovisual content, either traditional (linear) or on-demand, which can be considered mass media inasmuch as programmes "are intended for reception by and which could have a clear impact on, a significant proportion of the general public" (recital 21). The next paragraph identifies mass media with their function "to inform, entertain and educate the general public".

But second, the association between traditional broadcasting and regulation is still high on the agenda of European legislators as recital 24 makes it clear that in the case of on-demand audiovisual services, regulation will only be applicable if they are "television-like" and therefore "compete for the same audience as television broadcasts".[8] The idea of editorial control also remains as an essential pre-condition to fall under the scope of the directive. As an occasional paper drafted by the Australian Communications and Media Authority in 2011 pointed out, despite the fact that distribution technologies may have become irrelevant to justify the existence of audiovisual media regulation, and Europe has broadened its scope to cover on-demand programmes, traditional broadcasting remains the focus of regulatory intervention in a comparative analysis of most important examples around the globe.[9]

Putting aside problems of interpretation and enforcement,[10] the change introduced by the AVMDS formally entrusted European regulators with a complex, cross-platform and multi-format responsibility, consisting of applying a certain set of values to a panoply of audiovisual content. This change also forced an increased transnational regulatory dialogue through platforms like the European Platform of Regulatory Authorities (EPRA, which by the way extends much further than the boundaries of the EU) and is also one of the reasons why in 2014 the European Regulators Group for Audiovisual Media Services (ERGA, the official platform of regulators in the EU), was set up.[11]

This European broad model of regulation of audiovisual media services has been seen as innovative but also (depending on the perspective) interventionist and not realistic. It has not so far influenced the adoption of similar models in other major regional areas. But it should also be noted that some countries have adopted an authoritarian approach to online content monitoring and transferred to audiovisual regulatory authorities the power to exercise tight control or even censorship over such content. This controversial approach has been criticised by international organisations and questioned by regional courts and should be seen as completely different to the European perspective.[12]

The notion of on-demand audiovisual content adopted by the European legislator in 2007 is certainly broad but limited at the same time (due to the need to reach consensus from very different approaches to the issue), and in fact expels from the scope of audiovisual regulation several modalities of content shared using some online platforms. The reason is either lack of editorial control (and therefore the consequent need to apply the clear liability exemptions included in the so-called E-Commerce Directive')[13] or the location of platforms outside the territorial reach of European regulators. This is why, in the years following the adoption of the last version of the directive, it was criticised for having aimed at extending its scope to protect certain rights and principles in the world of on-demand audiovisual content, but at the same not being able to cover the most common mechanism for the distribution of such content, that is, the sharing economy and its (non-editorialised) online platforms.[14]

The content available on social media and sharing platforms, directly posted by private users and only controlled ex post in the absence of any organised editorial responsibility, is raising particular concern in areas such as the protection of intellectual property and more recently, the prevention of the dissemination of hate speech or forms of violent extremism. This is an area where the intervention of national courts is indeed possible (and not without complex jurisdictional problems in many cases), but regulators generally play a limited role by only promoting responsibility and ethical behaviour.

A big step forward is now being proposed in the context of the new revision process of the AVMSD. According to the proposals already made public by the European Commission,[15] the new norm will be to cover and regulate certain aspects of the services provided by 'video sharing platforms', which are defined according to the following parameters:

"1 The service consists of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform does not have editorial responsibility.

2 The organisation of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing.

3 The principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public in order to inform, entertain or educate.

4 The service is made available by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC."

This acknowledgment of the impact on the formation of the public opinion by content uploaded on such platforms is accompanied by the introduction of a series of provisions that will affect and generate some level of regulatory control over them. These provisions entrust states with the task to take appropriate measures to "protect minors from content which may impair their physical, mental or moral development", and to "protect all citizens from containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin".
The new provisions need to be understood within the context of an increased interest by European institutions to control hate speech on any communications platform[16] and to encourage the adoption of stronger internal policies by private entities to properly handle cases of illegal speech.[17]

If such changes are finally introduced, national legislators and regulators (as well as ERGA as a collective body in charge of coordinating and finding common regulatory language and responses) will need to develop new and adequate regulatory criteria as well as start unprecedented forms of dialogue with private intermediaries, which could

be legally entrusted with a sort of private regulatory power. Additionally, regulators will be formally placed at the crossroads of editorial responsibility in audiovisual regulation, with the need to respect the liability exemptions that are still valid in e-commerce regulations, and more broadly, the principle of proportionality, in the online world.

And regulators will need to avoid the temptation of 'privatising' – transferring to private hands the imposition of limits that otherwise would not be acceptable in terms of freedom of expression, legal certainty, transparency and due process. This debate has important legal arguments and angles, provided already by the European Court on Human Rights (in the Delfi As vs Estonia and Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt vs Hungary cases on private liability for comments on online news portals)[18] and the European Court of Justice (in the context of Google case on removal of links by search engines).[19] The United Nations Rapporteur on Freedom of Expression and Freedom of Opinion has also made public a report that warns about the consequences for free speech of imposing excessive responsibilities and burdens on private intermediaries.[20]

CONVERGENCE HAS BECOME A MORE COMPLEX ISSUE

The convergence of regulators and regulations is sort of an old issue. The creation of regulators covering both telecoms (or electronic communications) and broadcasting services came to a head in the early 2000s (with British regulator Ofcom in 2003, through the convergence of several entities, probably the outstanding example). This is not the place for an extensive analysis of the implications and results of such processes of convergence, but it can be said that the assumption by one single entity of different technological and intertwined angles of the provision of a service is at least a positive factor in terms of enhancing the consistency of regulatory intervention.

In the past 15 years, convergence among electronic communications, media and content and information technologies has only increased. New markets and business models have emerged and, in particular, the value chain for the provision of audiovisual content has become more complex. This convergence has brought new regulatory problems: if we think for example of net neutrality, it has implications not only from a strictly technological point of view but it can also have repercussions in the way content is consumed or in the safeguard of the right to access to information. Moreover, the creation a digital single market within the EU also reflects a vision of a future common territory with consistent and harmonised rules (and law enforcement agencies) for the access of digital goods and the provision of services through electronic networks.

Regulators therefore need to progressively achieve the capacity to intervene in the different components and phases of the provision of audiovisual services, particularly regarding those areas where the protection of consumers and citizens is most needed. This also means achieving a higher level of expertise and technical capacity to properly and comprehensively understand the issues they may have to tackle. It may also bring the need for more broadly defined powers as well as a greater degree of flexibility by focusing regulatory activities on outcomes rather than rules, as Ofcom's Monica Arino discussed recently in Intermedia.[21]

In this new context, basic principles governing regulation should not be forgotten, particularly the idea of subsidiarity and proportionality when imposing restrictions on the performance of economic activities in a free market as well as on the exercise of the universal right to freedom of expression and freedom of information.

Last but not least, the coordination and interplay with competition authorities may also increase (even more) in importance.[22] In other words, audiovisual regulation will need to move from the traditional areas of licensing and content

SHARING KILLED THE AVMSD STAR

In the paper, 'Sharing killed the AVMSD star: the impossibility of European audiovisual media regulation in the era of the sharing economy',[14] authors Indrek Ibrus and Ulrike Rohn focus on the challenges that the 'sharing economy' presents to updating the European Union's (EU) Audiovisual Media Service Directive (AVMSD), and argue that "the convergence of media markets and the emergence of video-sharing platforms may make the existing regulative tradition obsolete".

They say that although the sharing economy has had a lot of attention, "very rarely has this concept been discussed in the context of media services". Sharing economies in media can be either of consumption (eg. through peer to peer networks or social networks) or production (eg. people collaborating in free content) and it is the consumption side that is more controversial – especially when it is 'consumers' sharing copyrighted content rather than 'citizens' sharing knowledge. But media companies are increasingly turning away from going after pirates to embracing 'freemium', sharing models in pursuit of revenue, say by seeding some video on YouTube.

And it is platforms such as YouTube where content is becoming concentrated, ie. through network effects, which could pose problems for cultural diversity. "Market concentration with all its associated threats represents a classic challenge for media policymaking anywhere in the world," the authors say, before discussing how the sharing economy could impact Europe and its audiovisual regulation, which has been successful in stimulating European content in the face of US dominance. But with the move to 'level out' linear and non-linear media can the same be done?

It is the sharing model of YouTube and other sharing platforms that is about to undermine the extension of the AVMSD model to non-linear media platforms (and so not promoting more European content), they say, although there will be an attempt to distinguish between sharing and 'curated' platforms, but YouTube is becoming more like Netflix through aggregating content into channels.

The authors also discuss the rise of market concentration that could be an unwanted effect of Europe's single digital market drive for cross-border access to content, as smaller national broadcasters may not be able to compete in the online, on-demand video market.

It's a provocative paper of relevance outside of Europe too – even in the US.

Marc Beishon

monitoring under pre-established rules to the terrain of ex post, flexible and principled intervention to find in each case the adequate way to protect classic values such as pluralism, competition, freedom to access content and protection of vulnerable audiences.

SELF- AND CO-REGULATION AS EMERGING AND ALTERNATIVE MECHANISMS

Elaborating a full theory on the meaning and implications of the notions of self- and co-regulation would require another article (or even a book). Both have become fashionable and unavoidable concepts within any debate about new rules for audiovisual content. There is an emerging argument among some experts that sees statutory regulation as outdated, inadequate and too intrusive, while these new mechanisms are presented as a better solution. Regulators need at least to find a way to reinforce their activities with the support of new and updated self- and co-regulatory mechanisms.

Self-regulation cannot be created in a void. International bodies promote it to avoid excessive statutory intervention, particularly in authoritarian or democratic-immature countries where authorities do not have much self-restraint in this area.[23] However, self-regulation requires the previous existence of solid professional and ethical standards and therefore, though preferable, it might be even more difficult to achieve than good and proportionate statutory regulation. The debate in the UK about the failure of important existing self-regulatory schemes for print media is a good reminder of this.[24]

Co-regulation is a notion that can refer to different modalities of regulatory cooperation between the public and the private sector.[25] In the area of audiovisual regulation, this model was for example adopted in the UK to articulate a proportionate and light regulatory approach to on-demand audiovisual media services, yet after a short time it was discarded.[26]

In any case, both the current and the new proposed version of the AVMSD, for example, encourage the progressive adoption of self- and co-regulatory schemes as mechanisms to improve flexibility and effectiveness in the development and application of the principles established by the norm, as well as a modality to increase the commitment of private players.[27]

In the context of the new video digital market, such mechanisms are indeed of particular importance and regulators will need to adopt measures in two main areas: first, to encourage the adoption and effective functioning of them, and second, to guarantee that the public interest remains properly protected. Self- and co-regulation are particularly suited to a new context where private actors (many of them playing the role of intermediaries) have the capacity to effectively monitor or oversee the content that is being distributed through their services, infrastructures or applications. In addition to this, the emergence of transnational actors and markets, in contrast with the limited territorial jurisdiction of regulators, also makes these mechanisms more relevant than in the past.

> **Regulators in many regions definitely need to improve their status when it comes to independence.**

THE URGENT NEED FOR ROBUST AND INDEPENDENT REGULATORS

Regulators in many regions in the world are still facing strong pressures and definitely need to improve their status (both on paper and in reality) when it comes to independence from political interests, financial autonomy, transparency and proper accountability. This is needed more than ever if we want regulators to be able to make the steps I have discussed. Independence of regulators is clearly bound to a series of external factors, including the quality of the legal framework as well as the maturity of the political and institutional environment. Financial autonomy and professionalism are also very important factors in this context and audiovisual regulators need support from other regulatory and policy players as well.

But from an internal point of view, regulators also need good practices to be entrusted with comprehensive responsibilities in audiovisual communication. They need to work on adopting good internal guidelines and procedures, defining clear communication and transparency policies, establishing good staff training policies, having professional involvement in adopting major policy and legislative decisions, and enacting clear and proportionate rules and practices to achieve a balanced relationship with all market players.

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REFERENCES 1 Regarding pluralism, national institutions have enshrined in many cases completely divergent approaches and use different criteria in order to effectively protect it. Therefore, despite the relatively homogenous body of law created at the regional level, for example, by the EU and the efforts of its institutions to find a common approach to this matter, pluralism still remains as an almost untouchable issue beyond the national level. See some of the efforts undertaken by the EU on this issue at: bit.ly/1UpDG0d Such efforts include an independent study on indicators on media pluralism in member states (2009) and the policy report by the Center for Media Pluralism and Media Freedom of the European University Institute (2013), among other initiatives. **2** Council of Europe (1989). European Convention on Transfrontier Television. bit.ly/2cbl1nG **3** European Commission. Audiovisual Media Services Directive. bit.ly/1WmvGOS **4** Note that general comment 34 of the United Nations Human Rights Council further develops and interprets the scope of Article 19 of the covenant by recommending the creation of independent regulators for the broadcasting sector. **5** In the African context note the Windhoek Declaration on Promoting Independent and Pluralistic Media (1991). bit.ly/1IxYr3c **6** See for example the conclusions of the review of the independence of audiovisual regulators in the EU member states using the criteria provided by the INDIREG study on regulatory independence. bit.ly/2cg3poP **7** Noam E (2007). Why TV regulation will become telecom regulation. bit.ly/2c3rrGy **8** Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 (codified version). Official Journal of the European Union. bit.ly/28PAfvX **9** ACMA (2011). International approaches to audiovisual content regulation – A comparative analysis of regulatory frameworks. bit.ly/2cpsfaI **10** See: Barata Mir J (2012). Legislators' and regulators' expectations in the field of on-demand audiovisual media services. In: The regulation of on-demand audiovisual services: Chaos or coherence? Iris Special, p95. bit.ly/2cKT1d4 See also: European Audiovisual Observatory (2016). On-demand services and the material scope of the AVMSD. IRIS Plus 2016-1. bit.ly/25Ehzd6 **11** European Commission. ERGA – audiovisual regulators. bit.ly/1Vb8frq **12** See: Akdeniz Y (2016). Media freedom on the internet: An OSCE guidebook. Chapter III. bit.ly/2cIlaxm **13** Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 (E-Commerce Directive), particularly articles 12, 13, 14 and 15. bit.ly/1xa4aFc **14** See: Ibrus I, Rohn U (2016). Sharing killed the AVMSD star: the impossibility of European audiovisual media regulation in the area of sharing economy. Internet Policy Review 5 (2). bit.ly/2c3P8yt **15** For a comprehensive description and analysis of this proposal, see: Woods L (2016). Next steps for audiovisual regulation. Intermedia 44 (2). **16** See the Council Framework Decision 2008/913JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. **17** A good example is the adoption, with the support of the European Commission, of a code of conduct on illegal online hate speech, by Facebook, Twitter, YouTube and Microsoft, in May 2016. bit.ly/25vWgXU **18** Delfi vs Estonia, decision of 16 June 2015 and Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt vs Hungary. Decision of 2 February 2016. **19** Google Spain and Google Inc. vs Agencia Española de Protección de Datos (AEPD) and Mario Costeja González. Judgment of 13 May 2014. **20** UN (2016). Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression. bit.ly/2bZpegG **21** Arino M (2016). Converging on digital. Intermedia 43 (4). **22** See: ITMedia Consulting/Luiss Dream (2016). The rise of video and the third internet revolution. Chapter 3. bit.ly/2ccTocx **23** See for example the efforts by the representative on freedom of the media at OSCE to promote self-regulation: bit.ly/2ccU95I **24** Tambini D (2011). The phone-hacking scandals indicate that industry self-regulation has failed to safeguard standards and accountability in the news media. A media commission is needed. British politics and policy at LSE. bit.ly/2cfmZ74 **25** See for example: European Audiovisual Observatory (2003). Co-regulation of the media in Europe. bit.ly/2cpwymD **26** See: Ofcom (2015). Ofcom brings regulation of 'video-on-demand' in-house. bit.ly/1RJFht0 **27** See paragraph 7, article 4 of the current text of the AVMSD. The proposal presented by the Commission refers to co-regulation mechanisms concerning the activities of video-sharing platforms as well.