

## Electronic press: ‘Press-like’ or ‘television-like’?

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### ABSTRACT

A notable development of recent times has been the exponential increase of video content available on newspaper websites. The technological convergence between press and broadcasting throws into sharp relief the historically disparate regulation of the two sectors. As long as no political consensus on regulatory convergence can be reached, the question of how to distinguish between text-based and video-based media in the online domain will remain relevant. In recent times, this question has surfaced in the context of the classification of newspaper publishers’ video sites as on-demand audiovisual media services (AVMS). This article examines the contrasting positions of the UK and Austrian regulatory authorities concerning the regulation of video material on the websites of print publications. The author argues that Ofcom’s approach makes it hard to predict the mixture that would bring a hybrid service within the scope of regulation. By contrast, the Austrian approach offers a pragmatic solution to a problem that is only beginning to emerge.

**KEYWORDS:** electronic press regulation, audiovisual media services directive, convergence, comparative law, Ofcom, ATVOD, KommAustria

### INTRODUCTION

Media convergence enables citizens to use the same devices so as to access a diverse range of content that was formerly tied to specific platforms. It also presents a policy challenge as regulators struggle to accommodate new technological and market realities within existing governance structures. An aspect of convergence that has so far received scant attention is that between broadcasting and the press. Newspapers are not just ‘news’ printed on ‘paper’, but are also understood as news content available on websites carrying videos that are reminiscent of television. A notable development of recent times has been the exponential increase of video content available on newspaper websites, often produced by major newspapers as well as news agencies such as Reuters and the AP, which were once specialized in print only.<sup>1</sup>

The technological convergence between press and broadcasting throws into sharp relief the historically disparate regulation of the two sectors. The press is largely unfettered from burdensome regulation and only has to comply with general laws.

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1 J Pavlik, *Media in the Digital Age* (Columbia University Press 2008) 84ff.

Broadcasting on the other hand has a range of obligations imposed on it, including duties of impartiality and advertising restrictions. Broadcasters tend to apply the same standards online and offline.<sup>2</sup> To the extent to which standards differ, broadcasters' online presence, and in particular the videos made available therein, will in any case comply with the offline standards, having mostly had their premiere on conventional television. Instances in which broadcasters bypass broadcasting regulation by streaming material online that could not be shown in a broadcast are isolated.<sup>3</sup> And although there is some evidence that a relaxation of content standards increases the popularity of online news videos, as a rule, those videos that are repurposed from broadcast platforms are more likely to adhere to such standards.<sup>4</sup> This cannot be taken for granted in the case of the electronic press. Many press councils have extended their codes to online publications.<sup>5</sup> However, rules governing newspapers do not cover, for instance, questions relating to taste and offense. Newspapers such as the *New York Times* tend to show more shocking and violent material online than in their print editions.<sup>6</sup>

The divergent regulation of the two sectors has historically been justified on grounds of spectrum scarcity, of the natural tendency of broadcasting markets to concentrations of power and of the unique pervasiveness of broadcasting. The technological justification for the disparate treatment of press and broadcasting has collapsed with the advent of digitalization, while the economic and cultural arguments are also highly contestable. The growing convergence between the two sectors in the online domain begs the question whether their divergent regulation is still appropriate or whether convergence of media content regulation in the form of broadcasting deregulation or, conversely, of a tightening of press standards is desirable. In the UK, the phone-hacking scandal prompted demands for a more stringent press regulation regime. Whereas Leveson mostly evaded the issue of convergence, the House of Lords Select Committee on Communications as well as the Australian Convergence Review recently recommended a relaxation of standards for all convergent, non-Public Service Broadcasting news media.<sup>7</sup> The Convergence Review proposals foundered on political opposition, and the Select Committee's ones have not materialized so far either.

As long as no political consensus on regulatory convergence can be reached, the question of how to satisfactorily distinguish between text-based and video-based media in the online domain will remain relevant. In recent times, this question has surfaced in the context of the classification of newspaper publishers' video sites as

2 D Tambini, D Leonardi and C Marsden, *Codifying Cyberspace: Communications Self-regulation in the Age of Internet Convergence* (Routledge 2008) 113; see e.g. BBC, Editorial Guidelines at <<http://bbc.co.uk/editorialguidelines/>>. Unless otherwise stated, all URLs were last accessed 6 March 2015.

3 See for such examples *ibid* 114; H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 643 n 104.

4 L Peer and T Ksiazek, 'You Tube and the Challenge to Journalism: New Standards for News Videos Online' (2011) 12 (1) *Journalism Studies* 45.

5 Tambini Leonardi and Marsden (n 2) 71.

6 *ibid* 114.

7 Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (TSO, London 2012); House of Lords Select Committee on Communications, 'Media Convergence' 2nd Report of session 2012–13 (TSO, London 2013); Government of Australia, 'Convergence Review: Final Report' (Department of Broadband, Communications and the Digital Economy, Canberra 2012).

on-demand audiovisual media services (AVMS). This issue has generated great controversy, the press sector being loath to face regulatory burdens, and is considered as a particularly challenging area by national regulatory authorities.<sup>8</sup> This article will examine, first, the regulatory framework of the Audiovisual Media Services Directive (AVMSD) and the extent to which this can apply to the electronic press.<sup>9</sup> Subsequently, it will discuss the contrasting positions of the UK and Austrian regulatory authorities concerning the regulation of video material on the websites of print publications. It will focus, in particular, on the criteria employed by these authorities so as to draw the regulatory boundary between newspaper websites that deserve to be regulated as AVMS and those that do not.

## THE EU LEGAL FRAMEWORK FOR ONLINE NEWSPAPERS:

### THE AVMSD

The AVMSD, the successor to the Television without Frontiers Directive (TwFD),<sup>10</sup> is the most important regulatory instrument for the audiovisual sector in Europe. It was adopted in 2007 after a lengthy legislative process with the aim of extending the scope of the TwFD beyond traditional television to the so-called 'on-demand' or 'non-linear' AVMS. A main rationale behind the adoption of the AVMSD was the creation of a level playing field between linear and non-linear services.<sup>11</sup> Nonetheless, the AVMSD only pays lip service to the principle of technological neutrality, while effectively divorcing itself from it by endorsing a system of graduated regulation. On-demand AVMS are subjected to a lighter regulatory regime compared to linear services on the ground that they 'are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society'.<sup>12</sup> The AVMSD takes the position that greater choice entails greater responsibility, only to place this responsibility squarely

8 E Machet, 'Plenary session – Content regulation and new Media: Exploring Regulatory Boundaries between Traditional and new Media' Background document to 33rd EPRA meeting, Ohrid, 26–27 May 2011; 'Plenary Session 1 – New Media and Regulation: Towards a Paradigm Shift?', Background document to 35th EPRA meeting, Portorož, 31 May–1 June 2012; G de Bueger, 'Supervising On-demand Audiovisual Media Services: Best Practices and Methodology', Background document to 38th EPRA meeting, Vilnius, 2–4 October 2013 at <<http://epra.org/meetings>>; ENPA, 'Press Release: Newspaper Publishers Across Europe Speak out against Growing calls for EU Press Regulation' 24 May 2013 at <<http://enpa.be>>; BDZV, 'Gemeinsame Stellungnahme zum Grünbuch über die Vorbereitung auf die vollständige Konvergenz der audiovisuellen Welt, COM (2013) 231 final' 30 September 2013 at <<http://ec.europa.eu>>.

9 European Parliament and Council Directive 2010/13/EC of 10 March 2010 on the coordination of certain provisions laid down by law, regulation and administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1 (hereinafter referred to as AVMSD).

10 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23. For further aspects of the TwFD and of the AVMSD see I Katsirea, *Public Broadcasting and European Law. A Comparative Examination of Public Service Obligations in Six Member States* (Kluwer 2008); 'The Television without Frontiers Directive' in K Donders (ed), *Palgrave Handbook on European Media Policy* (Palgrave Macmillan 2014), 297; T Gibbons and I Katsirea, 'Commercial Influences on Programme Content: The German and UK Approaches to Transposing the EU Rules on Product Placement' (2012) 4(2) *Journal of Media Law* 159.

11 See AVMSD, rec 10, 80.

12 *ibid* rec 58.

on the viewers and make the burden seem more bearable by assuming that viewers are increasingly media literate. This emancipatory trend is not to be inhibited by greater content regulation, but to be fostered by means of suitable national measures.<sup>13</sup> The extent to which the image of the media savvy, all-powerful viewer is realistic and can fully justify the Directive's partial abdication of responsibility as regards on-demand services has been questioned in academic writing, but will not be explored further in the context of this article.<sup>14</sup>

The principle of graduated regulation is not the only aspect of the AVMSD that signifies a departure from the principle of technological neutrality. The exclusion of radio and of the press from the Directive's scope—due to the resistance of these sectors against European regulation—also signals a break with this principle. It is the second of these exclusions that is of interest for our purposes. Recital 28 of the AVMSD states that 'The scope of this Directive should not cover electronic versions of newspapers and magazines.' It is doubtful whether this statement suffices to completely exclude audiovisual material made available on the website of a print publication from the AVMSD remit. The exclusion has only made its way in a recital, not in the Directive's main text. Recitals set out the reasons for the enactment of a Directive. They are legally non-binding but can guide the Directive's interpretation by the courts. The European Parliament proposed to exclude electronic press explicitly from the definition of an AVMS in Article 1(a).<sup>15</sup> However, the Commission rejected this proposal on the ground that 'the criterion of "principal purpose" already excludes electronic versions of newspapers and magazines from the scope of the Directive as clearly stated in Recital 15'.<sup>16</sup>

The 'principal purpose' criterion is one of the seven cumulative criteria that an on-demand AVMS needs to meet in accordance with Article 1(1)(a)(i) AVMSD.<sup>17</sup> First, it must be a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU). Second, the service must be provided under the editorial responsibility of a media service provider. Third, the provision of audiovisual content must be the principal purpose of the service. Fourth, the service must consist in the provision of programmes. Fifth, the service must be intended to inform, entertain or educate. Sixth, the service must be addressed to the general

13 AVMSD, rec 47.

14 See N Helberger, 'From Eyeball to Media Literate Viewer – Toying with Audience Empowerment in the Audiovisual Media Service Directive' (2008) 6 Entertainment Law Review 128.

15 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, A6-0399/2006 (Hieronymi Report) (COM (2005)646), 22 November 2006.

16 European Commission, Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM (2007)170 final, 29 March 2007.

17 See R Chavannes and O Castendyk, 'Art 1 AVMSD, paras 24ff' in O Castendyk, E Dommering and A Scheuer (eds), *European Media Law* (Kluwer 2008). Please note that this is not the only method of counting the criteria that an on-demand AVMS should meet. Other methods come up with a different number of criteria by grouping some elements together or also taking some requirements from the recitals into account.

public, ie it must have a mass media character. Seventh, the service must be provided by electronic communication networks.

The 'principal purpose' criterion seeks to exclude all services 'where any audiovisual content is merely incidental to the service and not its principal purpose'.<sup>18</sup> The Directive mentions websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service as well as gambling services, on-line games and search engines as examples of such services that should be excluded from its scope.<sup>19</sup>

The requirement that an AVMS must consist in the provision of programmes also has a bearing on the classification of on-line newspapers. A 'programme' is defined in Article 1(1)(b) AVMSD as 'a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting'.

The Directive mentions feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama as examples of programmes. The attribute of comparability to television broadcasting is further elaborated upon in recital 24. This recital explains that AVMS are television-like when 'they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive'. The recital goes on to clarify, however, that the notion of a 'programme' should not be understood in a static but in a dynamic way, taking into account developments in television broadcasting, so as to 'prevent disparities as regards free movement and competition'.

This raises the question whether the principal purpose and the programme criteria in conjunction with recitals 24, 28 mean that the electronic press falls in toto out with the Directive's ambit. The delineation of the Directive's scope and the definition of an AVMS have been the subject of intense academic and political debate in the course of the negotiations that led to the revision of the TwFD.<sup>20</sup> The following section will try to clarify the position of the electronic press within the Directive's regulatory framework. By examining the implementation of the AVMSD in the UK and Austria, it will seek to answer the question whether the audiovisual material on the websites of print publications can be regulated as an AVMS.

### THE IMPLEMENTATION OF THE AVMSD IN THE UNITED KINGDOM

In the UK, the regulation of on-demand AVMS has been delegated to ATVOD, the Authority for Television on Demand. In March 2010, Ofcom, the UK communications regulator, designated ATVOD, a previously self-regulatory body, as the co-regulator for on-demand programme services (ODPS). The first characteristic of an

18 AVMSD, rec 22.

19 *ibid.*

20 See A Roßnagel, 'Der künftige Anwendungsbereich der Fernsehrichtlinie. Welche Medien können erfasst werden?' in Institute of European Media Law (EMR), *The Future of the 'Television without Frontiers' Directive* (Nomos 2005) 35; W Schulz, *Zum Vorschlag für eine Richtlinie über audiovisuelle Mediendienste*, Arbeitspapiere des Hans-Bredow-Instituts Nr. 17 (Verlag Hans-Bredow-Institut 2006).

on-demand programme service, and the one most relevant for our purposes, is that it is a service whose 'principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services'.<sup>21</sup> ATVOD has the power to establish whether a service falls within the ODPS definition, to require the notification of an on-demand service and to ensure that it complies with statutory obligations, including editorial content rules on material likely to incite hatred, material harmful for minors and on commercial references.<sup>22</sup> Determinations made by ATVOD may be the subject of appeal to Ofcom.<sup>23</sup> Service providers are obliged to pay an annual fee to ATVOD in relation to each notified service. The tariff for regulatory fees is the subject of a yearly public consultation and needs to be approved by Ofcom.<sup>24</sup>

The regulation of audiovisual material made available on the website of a print publication was the subject of some of the first appeals made to Ofcom against ATVOD scope determinations. In the following, we will concentrate on the *Sun Video* case, but also draw insights from other ATVOD determinations and Ofcom appeal decisions. *Sun Video* was one of eight determinations made by ATVOD in cases involving audiovisual material on newspaper/magazine websites.<sup>25</sup> ATVOD argued that the video section of the Sun's website constituted an ODPS given that the video content was aggregated on a discreet section of the website, which was presented as a consumer destination in its own right, and the programmes could be made sense of without reference to the newspaper offering and were comparable to the form and content of TV programmes. Newsgroup Newspapers appealed ATVOD's determination in *Sun Video* to Ofcom. In December 2011, Ofcom overturned the determination and upheld the appeal.<sup>26</sup> After Ofcom's appeal ATVOD withdrew the other seven determinations.

Ofcom's decision in *Sun Video* provides a thorough examination of section 368A(1) of the Act in light of the fact that the case raised 'important and difficult questions under complex new legislation and for which no precedents exist'.<sup>27</sup> Ofcom set aside ATVOD's determination on the ground that it placed too much emphasis on the video section of the Sun's website without taking sufficient account of the totality of what was provided on the website. Moreover, Ofcom criticized ATVOD for not sufficiently considering the written content of the Sun's website and

21 Communications Act 2003, s 368 A(1)(a).

22 See ATVOD, Statutory rules and non-binding guidance for providers of on-demand programme services (ODPS), 3 May 2012, <[http://atvod.co.uk/uploads/files/ATVOD\\_Rules\\_and\\_Guidance\\_Ed\\_2.0\\_May\\_2012.pdf](http://atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf)>.

23 See Ofcom, Procedures for the handling of appeals of ATVOD decisions in relation to what constitutes an On-Demand Programme Services [sic], 15 August 2012, <<http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>>.

24 ATVOD, 'Regulated services. Regulatory fees' at <<http://atvod.co.uk/regulated-services/regulatory-fees>>.

25 Elle TV; Sunday Times Video Library; News of the World Video; Sun Video; Telegraph TV; Guardian Video; The Guardian YouTube Channel; FT Video; The Independent Video at <<http://atvod.co.uk/complaints/determinations>>.

26 Ofcom Decision, Appeal by NewsGroup Newspapers Limited against a notice of determination by ATVOD that the provider of the service 'Sun Video' has contravened s 368BA of the Communications Act 2003, 21 December 2011 at <[http://atvod.co.uk/uploads/files/Ofcom\\_Decision\\_-\\_SUN\\_VIDEO\\_211211.pdf](http://atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf)>.

27 *ibid* para 4.

its relationship to the AV material. On the basis of its own review of the evidence available both at the time of ATVOD's determination and at the time of the appeal, Ofcom reached the conclusion that the video section of the Sun's website did not have the principal purpose of providing audiovisual material.

Ofcom considered that an on-demand programme service would be more likely to have its own homepage or to be catalogued and accessed via a separate section of the relevant website, to be presented or styled as a television channel, to have substantial duration/complete programmes that can be watched independently rather than 'bite-sized' clips, to have no or a limited number of access/content links between the audiovisual material and other content, to have more prominent audiovisual than written material. These characteristics are non-determinative.<sup>28</sup> Therefore, a service having the required principal purpose would not need to display all of them; the presence of some of them could possibly suffice. In Ofcom's view, the video section of the Sun website did not meet these criteria given that it did not have its own homepage, it was not presented as a consumer destination in its own right, its audiovisual material lacked independence and was of short duration, there were access and content links between the audiovisual material and other content of the website, and finally, the accompanying written material was more prominent. Given its negative finding on the principal purpose, Ofcom did not need to consider the second requirement of section 368A(1)(a) of the Act, ie the comparability of the video section to the form and content of television programmes.

Ofcom's decision in *Sun Video* leaves no doubt that there is some room for the video sections of online newspapers and magazines to be considered on-demand AVMS if they are sufficiently substantial and self-standing.<sup>29</sup> This ambivalence in Ofcom's legal treatment of newspapers' and magazines' video sections is also reflected in ATVOD's 'Guidance on who needs to notify'. This Guidance, also known as 'Scope Guidance', advises on the criteria that are applied by ATVOD when deciding whether a service falls under the definition of an ODPS. The Guidance was the subject of a public consultation, which closed on 17 December 2013. It has been subsequently revised so as to better reflect ATVOD's experience since 2010.<sup>30</sup>

The new Scope Guidance contains a non-exhaustive list giving some introductory examples of services that are likely to be considered as ODPS such as catch-up services for broadcast television channels and television programme archive services. It further includes two lists of factors to be taken into account so as to decide, first, whether a service is TV-like, and, secondly, whether it has the principal purpose of providing TV-like content.<sup>31</sup> ATVOD explicitly mentions that the factors in the second of these lists are not determinative, but the same presumably applies also to the

28 *ibid* para 82.

29 See Ofcom, *Sun Video*, paras 78, 79. This view is also taken by Schulz (n 20) 12; D Mac Síthigh, 'Co-Regulation, Video-on-Demand and the Legal Status of Audio-Visual Media' (2011) 2(1) *International Journal of Digital Television* 51; contra Chavannes and Castendyk (n 17) para 28; open-ended P Valcke and K Lefever, *Media Law in the European Union* (Kluwer 2012).

30 ATVOD, *Guidance on who needs to notify. Application and Scope of the Regulations for Video on Demand (VOD) services*, edn 3.3, 23 May 2013, s 3, <[http://atvod.co.uk/uploads/files/Guidance\\_on\\_who\\_needs\\_to\\_notify\\_Ed\\_3.3\\_May\\_2013.pdf](http://atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed_3.3_May_2013.pdf)>.

31 ATVOD, *Guidance on who needs to notify. Application and Scope of the Regulations for Video on Demand (VOD) services*, edn 4.0, 5 February 2014, <<http://atvod.co.uk/uploads/files/>

first list. These factors are derived from Ofcom Appeal decisions in a number of cases. It is the second of these lists that is particularly interesting for our purposes. The factors included therein emphasize: the existence of a point of entry to a service with its own independent identity; the grouping together of videos in a distinct area; the degree and nature of any linkage between the video on demand, and in particular the TV-like, content and other content; the question which of these types of content is the primary means of conveying the information sought to be conveyed; the prominence, quantity and proportion and relevance to the consumer of the TV-like programmes.

Representatives of the newspaper industry raised strong concerns that the revised Scope Guidance sought to reopen the debate over regulation of their websites. They expressed their opposition to any statutory regulation of their content and sought clarification that 'newspaper websites do not fall under ATVOD's jurisdiction'.<sup>32</sup> ATVOD clarified that the revision did not intend to change the interpretation of the Regulations so as to bring services within their remit that were previously outside, but only to provide greater clarity.<sup>33</sup> At the same time, ATVOD did not agree that the AVMSD aimed to totally exclude from regulation all online services which also contained the electronic version of a newspaper or magazine. Nor did it consider that the discussion concerning the classification of electronic press was closed by the Ofcom decision in the *Sun Video* case. Ofcom only held that at the relevant time the video section did not have the required principal purpose. It did not, however, rule out that the service might in future develop in a way that brings it within the scope of regulation.

### THE IMPLEMENTATION OF THE AVMSD IN AUSTRIA

In Austria, AVMS are regulated by the Austrian Communications Authority (*Kommunikationsbehörde Austria*, KommAustria). KommAustria was established in 2001 as the regulatory authority for broadcasting in Austria. In 2010, KommAustria was transformed to an independent panel authority with the powers of a court. KommAustria comprises five members, which are independent and not bound by any instructions, and receives administrative support from the Austrian Regulatory Authority for Broadcasting and Telecommunications (*Rundfunk und Telekom Regulierungs-GmbH*, RTR). Until 31 December 2013, KommAustria's decisions in matters of broadcasting regulation were reviewed by the Federal Communications Senate (*Bundeskommunikationssenat*, BKS). Since 1 January 2014 the BKS has been dissolved, and the Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG) assumed its function as the appellate authority against KommAustria's decisions.<sup>34</sup>

The focus in this section will be on KommAustria's decisions in relation to the regulation of the electronic press. The first of these decisions concerned a regional

Guidance\_on\_who\_needs\_to\_notify\_Ed\_4.0\_Feb\_2014.pdf> (referred to in the following as 'Guidance on who needs to notify').

32 ATVOD, 'Statement on the adoption of new guidance on the scope of the regulations relating to video on demand services' 5 February 2014, para 3.9ff, <[http://atvod.co.uk/uploads/files/Statement\\_on\\_New\\_Scope\\_Guidance\\_FINAL.pdf](http://atvod.co.uk/uploads/files/Statement_on_New_Scope_Guidance_FINAL.pdf)>.

33 *ibid* para 4.9.

34 Bundeskanzleramt Österreich, 'Rundfunkbehörden. Kommunikationsbehörde Austria' <<http://bundeskanzleramt.at>>.

daily newspaper published in Austria, the *Tiroler Tageszeitung*. On 9 October 2012, KommAustria held that the newspaper's video section constituted an AVMS that would have to be notified to the regulatory authority.<sup>35</sup> The *Tiroler Tageszeitung* operated a website, which contained the newspaper's online edition. The videos in the website's 'Video' section contained edited reports between 30 s and a few minutes in length, which could be searched by category, chronologically or by way of a full-text search. Some of the videos could also be accessed via links within articles in other parts of the website, while others had no direct connection to the website's text material. The video section had the same design and general navigation system as the remainder of the website.

The respondent argued that the videos only constituted a subordinate element of the overall website, complementing its text-based offering. Therefore, the provision of programmes was not the principal purpose of the website. Moreover, the videos in question did not constitute 'programmes' in the sense of Article 2(30) of the Audiovisual Media Services Act and were not 'television-like' in view of their short duration. The Act defines a programme as:

an individual, self-contained part of a television channel or an on-demand audiovisual media service which consists of a set of moving images with or without sound which is limited in terms of time and constitutes an item within a programme schedule or a catalogue prepared by a media service provider.<sup>36</sup>

Even though the Act replicates the AVMSD's definition of an AVMS, it deviates from it as far as the definition of a programme is concerned since it makes no reference to the comparability of its form and content to those of television broadcasting.<sup>37</sup> However, KommAustria, having considered relevant legislative materials and academic writings, argued that the Act's definition had to be interpreted in conformity with the AVMSD.<sup>38</sup> It came to the conclusion that the said videos were TV-like since they aimed to inform, entertain or educate, and they were comparable in form and content to programmes broadcast on television. A minimum duration was not required.

As regards the principal purpose of the service, KommAustria argued that it would be misguided to examine the entire range of services offered by a service provider. Instead, it was necessary to determine on the basis of quantitative criteria whether the provision of audiovisual content was the principal purpose of a service. For KommAustria, the crucial question in this context was whether the audiovisual offering in question—leaving other services offered by the same provider aside—

35 Bundesgesetz über audiovisuelle Mediendienste (Audiovisuelle Mediendienste-Gesetz, AMD-G) of 31 July 2001, last modified by the 84. Federal Law of 23 May 2013, BGBl. I Nr. 84/2013, art 2(3), (4); art 9(2).

36 AMD-G, art 2(30), as translated by FJC Blásquez, 'On-demand Services: Made in the Likeness of TV?' in S Nikoltchev, *What is an On-Demand Service?*, IRIS plus 2013-4 (European Audiovisual Observatory 2013) 18.

37 Cf AVMSD, art 1(1)(b).

38 KommAustria, *Tiroler Tageszeitung*, KOA 1.950/12-048, 9 October 2012, 10, <<https://www.rtr.at/en/m/KOA195012048>>; MR Kogler, 'Fernsehähnliches TV-On Demand. Was ist (k)ein "Audiovisueller Mediendienst auf Abruf?" (2011) 4 Medien und Recht 228, 232.

performed an independent function. A provider could not escape regulation by arguing that only an extremely small part of its entire service was devoted to audiovisual material when this material was indeed independent. The presentation of this material in a subdomain or in a separate homepage was not decisive, but could at best be taken into account when assessing the domain's independence. These considerations led KommAustria to conclude that the video section constituted an AVMS given that it could be used independently of the other website content.

The owner of the *Tiroler Tageszeitung* appealed to the BKS to contest this outcome. In its ruling of 13 December 2012, the BKS upheld KommAustria's decision.<sup>39</sup> The BKS held that there was no difference between the videos that were available on the appellant's website and similar programmes shown on linear TV. The law did not prescribe a minimum duration of programmes. Besides, many of the videos lasted more than a couple of minutes so that there was no material difference from traditional television. The BKS also agreed with KommAustria's 'independent function' test and with its findings concerning the principal purpose of the website. It observed that the videos in question were stored in a subdomain that was exclusively devoted to audiovisual material and that could be consumed without recourse to any textual content. The audiovisual material did not merely serve to complement the text-based elements of the website but could be consumed independently.

More recently, KommAustria had one more opportunity to consider audiovisual material made available on the website of a print publication.<sup>40</sup> The website in question was the online portal for three women magazines. In accordance with the provider's submissions, the main purpose of the website was the provision of daily updated news in the form of edited text- and still image-based contributions. In future audiovisual material would be placed under a separate subdomain, which would be accessible via the main homepage. The videos in question would supplement the text and still images, and would be up to 5 min in length. It was expected that about 50–150 videos would be offered on the website at any given point in time. The provider argued that the audiovisual material was very limited in comparison to the around 800 text- and image-based pieces on the website. It considered that the video content would only have a complementary character and asked KommAustria to determine that the planned service would not be regulated as an AVMS. KommAustria held, as in the *Tiroler Tageszeitung* case, that emphasis should be placed on the specific service in question, not on the entire range of services offered by a provider online, and applied the 'independent function' test to the planned offering. It concluded that the planned 'Video' subdomain constituted an independent section of the website whose content could be consumed independently of the other web offering.

The providers also raised the argument that the planned service could be compared to a service, which KommAustria had in an earlier decision found to lie outside

39 Bundeskommunikationssenat, *Tiroler Tageszeitung*, GZ 611.191/0005-BKS/2012, 13 December 2012, <<https://www.bundeskanzleramt.at/DocView.axd?CobId=49930>>.

40 KommAustria, *Styria Multimedia*, KOA 1.950/13-044, 17 June 2013, <<https://www.rtr.at/en/m/KOA195013044>>.

the scope of regulation.<sup>41</sup> The service in question, the webportal [www.cultvisual.tv](http://www.cultvisual.tv), provides information free of charge about cultural events in Austria by way of text, still images and some videos. At the time when KommAustria reached its decision, only four out of 16 events that were featured on the cultvisual website also contained audiovisual material. This material was between 3:50 and 7:09 min long, while the accompanying text was about half a page long and was supplemented in most cases by between 17 and 55 photos. KommAustria held that the principal purpose criterion was not fulfilled in this case given that the text and photo elements by far outweighed the site's audiovisual content. Also, the videos were only meant to give a snapshot of the content and quality of the presented cultural events, were not self-standing and could not be watched independently of the adjoined articles. KommAustria considered that this was the main difference between the two cases in question. It therefore came to the conclusion that the planned video section of the women magazines' portal would have to be classified as an AVMS.

Having outlined the Austrian regulators' approach to the regulation of electronic press under the AVMSD, the final section will compare this approach to Ofcom's position. It will consider which of these approaches is more conducive to legal certainty by clearly spelling out the circumstances in which an electronic newspaper could have the principal purpose of providing audiovisual material. The enhancement of legal certainty was one of the main considerations for the adoption of a basic tier of coordinated rules for all AVMS under the revised AVMSD.<sup>42</sup>

## THE UK AND AUSTRIAN POSITIONS COMPARED

### The presentation of audiovisual material

The first two criteria identified by Ofcom in *Sun Video* are formal. First, the service would need to be accessed via its own homepage or via a separate section of the relevant website and, secondly, the audiovisual material would need to be styled as a television channel. The first criterion aims to secure a certain spatial separation between audiovisual and other content, and can readily be circumvented by integrating such material within the overall website. Ofcom accepted that the video section was a collation of audiovisual material in one place and that this was 'a characteristic that might be expected of a service whose principal purpose was providing audio visual material'.<sup>43</sup> However, it concluded that this was not sufficient indication of the required principal purpose in this case given that this very material was actually also available in different parts of the site and was to a great extent linked to the site's written content. Moreover, Ofcom stressed the fact that the home page, not the video section, was the initial destination of most users of the site.<sup>44</sup> The Austrian regulators, by contrast, attach little importance to the existence of a separate homepage or even subdomain or to the existence of audiovisual material also in other parts of the website.

41 Bundeskommunikationssenat, *Cultvisual*, KOA 1.950/12-042, 24 September 2012, <<https://www.rtr.at/en/m/KOA195012042>>.

42 AVMSD, rec 4, 11, 33, 50.

43 Ofcom, *Sun Video*, para 121.

44 *ibid* para 108.

Indeed, it is not entirely clear why the availability of the audiovisual material also in other parts of the website should undermine the principal purpose of the video section. Nor is it clear why the video section would need to be endowed with its own homepage so as to more readily qualify as an independent service having the required principal purpose. ATVOD's Notification Guidance draws a distinction between:

- (a) an online newspaper offering video reports which supplement and sit alongside text based news stories, and (b) an online newspaper giving over a distinct section of *its* website to TV like programmes which have no clear and direct link to the broader 'newspaper' offering and which could exist as a stand-alone service.<sup>45</sup>

Consequently, a distinct area does not need to be equated to a separate homepage. To be sure, Ofcom qualifies the requirement of a separate homepage by saying that it is not determinative, and that a website could 'provide a number of distinct services under cover of a single homepage'.<sup>46</sup> Indeed both ATVOD and Ofcom classified the services providing on-demand content on the Sky Anytime Platform as ODPS despite the fact that they did not possess discreet homepages.<sup>47</sup> These findings can be contrasted to the *Everton TV* case, which concerned the TV section of the Everton football Club's website. The fact that the homepage of the Everton website appeared to be the main initial destination for users suggested, in Ofcom's view, that the TV section was not an independent service.<sup>48</sup>

In any event, the question whether the video section constituted a separate service in its own right to which the statutory criteria could have been applied was clearly a decisive one in *Sun Video*. Ofcom rebuked ATVOD for placing 'too much focus' on the video section 'without looking enough at the whole of what was provided on the website ...'.<sup>49</sup> Later on we will discuss the more substantive grounds on which Ofcom rejected ATVOD's determination. However, before doing so, it is necessary to consider Ofcom's second formal criterion: the presentation of the audiovisual material as a television channel.

The relevant parts of Ofcom's decision largely turned around the question whether the audiovisual material was branded as a service separate from the online newspaper, and, more specifically, whether it was at some point marketed as *Sun Video*, as was claimed by ATVOD and disputed by Newsgroup. Ofcom accepted that there was some evidence of such marketing in the past, but held that it was not enough to render the video section an ODPS.<sup>50</sup> It agreed with News Group's submissions that the overall site was designed as a primarily text-based experience and that most users would have been unlikely to consider it as anything other than the

45 ATVOD, 'Guidance on who needs to notify', para 3.13.

46 Ofcom, *Sun Video*, n 57; See also Ofcom, *Everton TV*, 26 June 2013, paras 48, 49 at <[http://www.atvod.co.uk/uploads/files/Everton\\_TV\\_Ofcom\\_Appeal\\_Decision.pdf](http://www.atvod.co.uk/uploads/files/Everton_TV_Ofcom_Appeal_Decision.pdf)>.

47 See ATVOD, *Comedy Central on Sky Anytime; MTV on Sky Anytime; Nickelodeon on Sky Anytime*, 3 October 2012, <<http://www.atvod.co.uk>>, which focus on the allocation of editorial responsibility.

48 Ofcom, *Everton TV*, paras 51ff.

49 Ofcom, *Sun Video*, para 5.

50 See Ofcom, *Everton TV*, paras 62ff where the label 'Everton TV' was also considered an insufficient criterion.

online version of The Sun newspaper, especially in view of the presentation of the homepage and of the existence of the masthead on every page.<sup>51</sup>

Ofcom's grounds for disputing the video section's TV-like presentation and style are overly formalistic. First, by shifting the focus from the video section to the entirety of the website, Ofcom easily arrived at the conclusion that the feel and look of the site was that of an online newspaper. Second, Ofcom's findings concerning the existence of the masthead on every page sit uneasily with its suggestion that names, labels and logos are not determinative, as well as with its abovementioned assumption that a single website could embrace a number of distinct services.<sup>52</sup> If this is the case, why should it matter that these services bear the same masthead? It would be unreasonable to deny the classification of a pocket of TV-like territory as a distinct service on the ground that it bears the same insignia as the remainder of the website.

The same emphasis on the similarity of the TV section's layout and styling with that of the rest of the website was also placed in the *Everton TV* case.<sup>53</sup> These findings set clear pointers as to how to avoid the classification of a sub-service as an ODPS by ensuring its integration in the overall website. However, they risk stifling a more principled discussion about what kind of hybrid services should fall within the scope of the definition. The Austrian authorities, by contrast, accepted that the *Tiroler Tageszeitung* video section fulfilled the 'TV-likeness' and 'principal purpose' tests without focusing on its styling and presentation, but only on its content and on the fact that it targeted the same audience as traditional television.

### **The interrelation between audiovisual material and written text**

Having examined the two formal criteria for establishing the principal purpose of a service, we will now turn to the three substantive criteria introduced by Ofcom: the duration of the audiovisual material, its independence and its prominence compared to the written material. Interestingly, neither the duration of the videos nor their extent compared to the written text matter according to the Austrian regulators unless if they are quite peripheral as in the *Cultvisual* case. The only decisive criterion in their view is the videos' functional independence from the written text.

As regards the duration of the audiovisual material, Ofcom explained that this was not a determinative criterion in itself. In other words, a service displaying material of short duration can still be considered to have the required principal purpose if its overall characteristics justify this conclusion.<sup>54</sup> Indeed, in the *BBC Top Gear YouTube* and *BBC Food YouTube* cases, the short duration of the clips on these services did not alter the fact that their principal purpose was the provision of audiovisual material.<sup>55</sup> However, in the present case, Ofcom considered the generally limited duration of the audiovisual material—mostly between 1 and 3 min long—to be one of the factors indicating that the video section did not have the required principal purpose.

51 Ofcom, *Sun Video*, paras 117ff; 137ff.

52 *ibid* para 90, point c.

53 Ofcom, *Everton TV*, paras 56ff.

54 Ofcom, *Sun Video*, n 60.

55 Ofcom, *Top Gear YouTube*, paras 39, 41; *BBC Food YouTube*, paras 39, 41.

ATVOD, on the other hand, argued that there was a significant amount of audiovisual content—including certain ‘soft adult videos’—of substantial duration, ie lasting more than ‘a very small number of minutes’, while certain videos run at over 13 min.<sup>56</sup> Ofcom disputed ATVOD’s contention on the ground that there was not enough evidence to support it. Leaving this factual disagreement aside, it is not clear which is the benchmark against which Ofcom measured the duration of clips on the video section. Ofcom has repeatedly stressed that the typical duration of content depends on the genre in question, and that ‘short form content may be more likely to be typical in some genres, such as children’s programming and adult content programming’.<sup>57</sup>

No attempt has, however, been made to attribute the clips available on the video section to specific genres. Presumably, they could in their vast majority—bar the abovementioned soft adult content—be characterized as ‘news’ in a broad sense, spanning the entire spectrum from ‘serious’, ‘hard’ news to ‘soft news’ and ‘infotainment’. News clips on the Sun video section would hence have to be compared to news programmes on linear television. However, which would be the right comparator: individual news items or entire news bulletins? Let’s assume for a moment that it is the duration of single news items on linear television against which the clips on the video section would have to be measured. The average duration of news items on BBC1 and BBC2 is under 3 min, so that Ofcom’s measurements show a length of news items in the video section comparable to that found in television programme services.<sup>58</sup> The fact that news items on linear television are not standalones, but are commonly bundled within longer news bulletins might militate against such a comparison. However, the prevailing logic of news is that of ‘fragments of information with little apparent overall coherence apart from that imposed by the bulletin format’.<sup>59</sup> Also, as already mentioned, the concept of a television programme needs to be interpreted in a dynamic way.<sup>60</sup> The ‘BBC 60 second news’ is an established news format, which might become more commonplace in future.

The next substantive criterion that was examined by Ofcom is the independence of the audiovisual material provided in the Sun Video service from the other content in the electronic version of the Sun newspaper.

The focal question asked by the Austrian authorities is the comprehensibility of the video content without the aid of accompanying articles. No emphasis is put by them on the existence of links between the former and the latter. ATVOD, by contrast, did examine the interlinkage between the two types of content, but took the view that there were ‘few links between the audiovisual material and the electronic newspaper articles’ and that the former could be viewed and made sense of without

56 Ofcom, *Sun Video*, para 44, point c, n 25.

57 Ofcom, *Channel Flip*, 14 December 2012, para 59, <[http://www.atvod.co.uk/uploads/files/Channel\\_Flip\\_appeal\\_decision.pdf](http://www.atvod.co.uk/uploads/files/Channel_Flip_appeal_decision.pdf)>; see also Ofcom, *Top Gear YouTube*, para 41; *BBC Food YouTube*, para 41.

58 See J Eldridge (ed), *Glasgow Media Group Reader, Volume 1. News Content, Language and Visuals* (Routledge 1995) 76.

59 *ibid* 75.

60 AVMSD, rec 24.

reference to the latter.<sup>61</sup> Ofcom found that the 'earlier position' at the time when ATVOD considered the Sun website was different from the 'current position' at the time when Ofcom viewed the website for the purpose of determining News Group's appeal. Ofcom agreed with ATVOD that at the earlier point in time not every piece of audiovisual material was linked to written content and that 'in some respects, the video section of the Sun's website was closer than it is *now* to being a service having the required *principal* purpose'.<sup>62</sup>

As regards the 'current position', Ofcom held that most of the audiovisual material on the 'All today's video' subsection lacked independence. It was linked to a written text and related directly to it in that it was either the source of this text, or provided the same content in audiovisual form or was an enhancement to it.<sup>63</sup> Ofcom went even as far as to suggest that in many cases the audiovisual material needed the written text so as to be fully understood while the opposite was not the case.<sup>64</sup>

The independence of the audiovisual from the text-based material on the website is a core element of Ofcom's assessment whether an online newspaper should be subject to the regulatory framework for video on demand (VOD). It is in some respects more concrete and readily verifiable than the previous criteria given that the existence or not of access and content links can easily be ascertained. Nonetheless, the conclusions drawn by Ofcom about the relationship between the audiovisual material and the text-based content of the electronic newspaper are problematic. Ofcom observes that in none of the cases under examination was the audiovisual material itself the only subject of the written text article. In other words the article was about more than just the video and was not simply the platform for its provision.<sup>65</sup> This observation allows Ofcom to draw the conclusion that the video clips were subservient to the written content and an ancillary part of the electronic newspaper.

It is submitted that this analysis risks underestimating the interconnectedness between the two modes of communication—text and video—in the online domain as well as the powerful impact of the latter. The well-known adage 'a picture is worth a thousand words' applies with enhanced vigour to moving images, which are capable of conveying complex messages in an easily absorbable way. If, as Ofcom claims, the audiovisual material itself was the source of the text, as is often the case, could not the opposite conclusion be drawn, namely that the latter was subservient to the former? Interestingly, Ofcom in attempting to exemplify the relationship between the two media, notes initially that the audiovisual material 'amplified or enhanced what was written' only to say the exact opposite a few paragraphs later, namely that 'the written text generally provides context and gives meaning to, and enhances the information provided by, that audiovisual material . . .'.<sup>66</sup> This apparent contradiction suggests that neither the audiovisual material is subservient to the text nor the text subservient to the audiovisual material, but that the two are intertwined.

61 Ofcom, *Sun Video*, paras 20, 105.

62 *ibid* para 115.

63 *ibid* para 142.

64 *ibid* para 153.

65 *ibid* para 145.

66 *ibid* paras 142, 151.

This conclusion is consistent with insights from Media studies which suggest that different media, when combined online, do not simply lead parallel lives, nor are they subordinated the one to the other. Instead they form a parent-child relationship so that one medium comes to contain the other. Possible examples of such a close symbiosis are a video clip inserted into a text frame or a text inserted into a video window.<sup>67</sup> The same applies to video clips in a web newspaper: the clips take on a different role as they become 'subsumed into a larger, newspaper-like rhetorical whole'.<sup>68</sup> Ofcom's attempt to delve into the content of the audiovisual material and of the text-based article to which it was linked so as to establish their exact functionality seems misguided in view of their close interdependence.

Ofcom, by arguing that video content in an electronic newspaper website only satisfies the 'principal purpose' criterion if it is wholly independent from the written text, in effect removes big parts of this sector from regulatory scrutiny. Only in the event where an online newspaper dedicates a distinct section of its website to the publication of TV like programmes that are wholly unrelated to the rest of its offering, could it be classified as an ODPS. One historic example of such a case is the transmission of Channel 5 programmes on the Express and Daily Star websites in the past.<sup>69</sup> This is a rather exceptional occurrence so far, but such cross-media co-operation is likely to become more frequent in future.<sup>70</sup>

ATVOD, in its new Scope Guidance, seeks perhaps to shed a different light on the relationship between text and audiovisual material by asking about the extent to which the video content needs to be viewed in order to receive the information, education or entertainment being offered. This question seems to turn Ofcom's deliberations in *Sun Video* as well as the Austrian position on their head. One would have expected that the relevant question should be about the extent to which the text-based content needs to be read so as to receive the relevant information. If the video content can be made sense of independently, why should it matter that information on the same topic can also be obtained by reading a related article? The Guidance goes on to clarify that the relevant test is about the content, which is 'the primary means of conveying the information sought to be conveyed'. However, the same uncertainty attaches to this question in view of the close interlinkage between text and video in a hybrid medium.

The last substantive criterion that Ofcom, but not the Austrian regulators, considered is the prominence of the audiovisual compared to the written material. Ofcom diligently noted the length of the written articles as well as the duration of the audiovisual material that was embedded within it. Leaving the numbers to speak for themselves, Ofcom implied that, to name but one example, the 16-paragraph article on Amy Winehouse's last recording was more prominent than the two pieces of audiovisual material that were embedded within it, the one 3 min and 21 s long, the

67 A Fagerjord, 'Rhetorical Convergence: Earlier Media Influence on Web Media Form' Doctoral thesis, University of Oslo, 2003 cited by IJ Erdal, 'Repurposing of Content in Multi-Platform News Production. Towards a Typology of Cross-Media Journalism' (2009) 3(2) *Journalism Practice* 178, 184.

68 *ibid.*

69 I am grateful to P Johnson, Chief Executive of ATVOD, for bringing this example to my attention.

70 Z Rahvar, *Die Zukunft des deutschen Presserechts im Lichte konvergierender Medien* (Nomos 2011) 108; see the recent launch of the London Live TV Channel, which is owned by Lebedev Holdings, the same company that owns the Independent and the London Evening Standard.

other 2 min and 13 s long.<sup>71</sup> Without offering any further explanations, Ofcom arrived at the conclusion that the written content accounted for most of the prominent content on the website. This unsubstantiated conclusion leaves the question unanswered as to how to compare written with audiovisual content. Taking the sheer volume of the latter into account, one could argue that audiovisual content takes up more space and hence is more prominent.<sup>72</sup> Moreover, regulation could easily be evaded by embedding audiovisual material within a great deal of text.

### The 'step back'

Finally, Ofcom has taken what it calls a 'step back' to have more general regard to relevant provisions of the AVMSD. First, Ofcom paid particular attention to recital 11, which clarifies that it is the Directive's aim to avoid distortions of competition between linear and on-demand services by creating 'at least a basic tier of coordinated rules', as well as recitals 21 and 24, which emphasize that regulation should only cover services which compete with television broadcasting. Ofcom held that the pertinent question to ask so as to do justice to these recitals is whether viewers would consider the audiovisual material on The Sun's website as among their competing options to linear television programmes. Again without further explaining its findings, Ofcom held this unlikely to be the case. This conclusion is supported by a research report commissioned by Ofcom in 2012 so as to better understand which services are competing alternatives to linear television.<sup>73</sup>

The clearly negative verdict on the possibility of classifying video content on a newspaper website as a reasonable substitute for linear television can interestingly be contrasted to the more nuanced position taken in an earlier 2009 Essential Research study.<sup>74</sup> The 2009 study found that the users considered the video content on the Telegraph website to be *less* TV-like since it was an enhancement of a website primarily concerned with written content.<sup>75</sup> Nonetheless, this conclusion was qualified by saying that the video content 'did to some extent remind participants of TV news video watched on mainstream news programmes' since it was felt to be professionally made and to be destined for TV.<sup>76</sup> Participants' familiarity with the *Telegraph* brand meant that they were conscious of being in a newspaper environment. At the same

71 Ofcom, *Sun Video*, paras 143ff.

72 This is the reason why the quantitative approach has been rejected by other regulators such as the Dutch CvdM and the Belgian CSA. See Machet (n 8) 33rd EPRA meeting, 8; M Betzel, 'Finetuning Classification Criteria for On-Demand Audiovisual Media Services: The Dutch Approach' in IRIS Special, *The Regulation of On-demand Audiovisual Services: Chaos or Coherence?* (European Audiovisual Observatory, Strasbourg 2011), 58; P Valcke and J Ausloos, 'Audiovisual Media Services 3.0: (Re)defining the Scope of European Broadcasting Law in a Converging and Connected Media Environment' in K Donders, K Pauwels and J Loisen (eds), *The Palgrave Handbook of European Media Policy* (Palgrave Macmillan 2014) 319.

73 Ofcom, 'On-demand services: understanding consumer choices. A research report for Ofcom', prepared by Essential Research, October 2012 <<http://stakeholders.ofcom.org.uk/market-data-research/market-research/>>.

74 Essential Research, 'The regulation of video-on-demand: consumer views on what makes audiovisual services "TV-Like" – a qualitative research report' December 2009, <<http://stakeholders.ofcom.org.uk/market-data-research/market-research/>>.

75 *ibid* 39.

76 *ibid* 40.

time, this familiarity reassured them and made the experience more TV-like. Tellingly, the Telegraph website was positioned in the grey area of the spectrum of on-demand services included in the 2009 study. By contrast, the 2012 study features the Guardian video section among the services definitely not considered TV-like.<sup>77</sup>

What is the most likely explanation for this disparity in assessment of the TV-likeness of online newspapers' video content between 2009 and 2012? Viewers' expectations of what is a reasonable substitute for linear TV can undoubtedly change over time. Interestingly, the factors that were identified by participants when assessing on-demand services shifted between the first and the second study. In 2009, familiarity, mainstream viewing and the professional production and packaging of content were together with the platform on which content was accessed the most significant drivers of 'TV-like'.

On the contrary, the 2012 study identified a more differentiated range of factors, which had to be taken into consideration, but did not rank them in order of importance. Familiarity and the platform as part of the overall viewing experience were still considered to be important. However, a number of new factors were identified as equally if not more important such as the viewer's control over the viewing experience and the length and volume of content. The length of content, in particular, has evolved from being considered less important in 2009 to being 'a telling characteristic' in 2012.

Is this finding of the 2012 Essential Research report sufficient to justify Ofcom's conclusion that viewers would not consider the Sun video section as one of their competing options for linear television? Certainly not, given that the report only gives an indication of viewers' perceptions. The report itself draws attention to the fact that its findings 'do not determine whether any particular service falls within' the ODPS definition and are hence no substitute for applying the statutory criteria.<sup>78</sup> Also, the 2012 research is meant to 'complement', not to replace the 2009 research. Consequently, the findings of the 2009 study cannot be ignored.

The disparity in participants' choices might be due to the evolution of the VOD landscape. A predominant trend is the growth in so-called multi-platform news consumption, whereby users access news on a range of devices—both digital and traditional ones—and thereby consume more news overall.<sup>79</sup> This trend might suggest that VOD content on newspaper sites is an additional but not an alternative source of news to traditional TV news. However, the observed shift in consumer attitudes might be attributable to other factors related to the methodology and the sample used. In any case, it would have been helpful if Ofcom had given a more detailed explanation why it considered the video section not to be in competition with linear television, having taken developments in television broadcasting into account.

Ofcom's negative verdict stands out in sharp relief against the Austrian regulators' resounding yes to the TV-likeness of the videos offered in the *Tiroler Tageszeitung*

77 *ibid* 36; Essential Research, (n 73) above, 68.

78 Essential Research, (n 73) above, 4.

79 N Newman and D Levy (eds), 'Reuters Institute Digital News Report 2014. Tracking the Future of News' 59, <<http://www.digitalnewsreport.org>> J Sasseen and others, 'Digital: As Mobile Grows Rapidly, the Pressures on News Intensify' in Pew Research Centre, 'The State of the News Media 2013. An Annual Report on American Journalism' <http://www.stateofthemediamedia.org/2013/digital-as-mobile-grows-rapidly-the-pressures-on-news-intensify/>.

website. This appealingly straightforward observation is, however, somewhat impressionistic, wholly unsupported by audience research.

The second and final step of Ofcom's 'step back' focuses on the reference in recital 24 AVMSD to users' reasonable expectation of regulatory protection as a key characteristic of services that fall within the scope of regulation. This led Ofcom to ask the question whether users of the Sun video section would have expected its content to be regulated under the Directive. The same dearth of analysis characterizes this part of Ofcom's response. Without further ado, Ofcom said it was unlikely that the user would have expected the audiovisual content in the video section 'to be regulated as television under the Directive'.<sup>80</sup> The only reason Ofcom gives for its verdict is that the user would likely have considered himself 'as viewing the electronic version of the Sun newspaper'.<sup>81</sup>

The presentation of the video section would indeed have left the user in no doubt about finding himself in an electronic newspaper environment. However, this does not yet answer the question whether the user would have expected regulatory protection. The Directive links the expectation of regulatory protection to 'the nature and the means of access to the service'.<sup>82</sup> On the contrary, the 2012 Essential Research report suggests at the outset that the devices participants used to access a service did not have great bearing on whether they thought a service to be TV-like and hence to expect regulatory protection. It was rather the nature of the service that weighed more on their judgement.<sup>83</sup> Rather inconsistently, it lists later on the viewing experience, ie the means of access to audiovisual content on a small screen or on a TV screen among the ten factors that inform users' impression of a service. If we consider the means of access to the Sun newspaper online, it would more likely be on a PC screen or 'on a smartphone on the bus' than 'on a big screen on the sofa'.<sup>84</sup> Depending on the weight that is attached to the access factor, this could be an argument against the users' expectation of regulatory protection. On the other hand, the probable expansion of connected TV in the near future means that the boundaries between PC screen and TV screen will be blurred and the device used to access a service will become even less relevant as a yardstick for regulatory protection.<sup>85</sup>

If the Directive solely relies on the method of access to a service to establish whether the user would reasonably expect protection, this is problematic because of technological convergence. Moreover, defining the scope of the Directive with regard to users' expectations gives rise to legal uncertainty. Ascertaining these expectations is difficult given that they are not set in stone but are also informed by the existence of the Directive.<sup>86</sup> Besides, this way of proceeding takes for granted that users not

80 Ofcom, *Sun Video*, para 179. Presumably, Ofcom uses the term 'television' as a shorthand for 'audio-visual media service', an on-demand one in this case, as it is not conceivable that the Sun video section could have been regulated as linear TV.

81 *ibid.*

82 AVMSD, rec 24.

83 Essential Research, (n 73) above, 22.

84 *ibid.* 36.

85 The Slovakian regulator, interestingly, classified the video section of an electronic newspaper as an AVMS after it became available also on connected TV.

86 D Mac Sithig, 'Internet Exceptionalism from ATVOD to Leveson' paper delivered at the WG Hart Legal Workshop, London, 24–25 June 2013, 21.

only reflect on the type of service that might be subject to regulation but that they also have some insight into the actual scope of the Directive. Both assumptions seem unwarranted, the second one particularly so in view of the complexity of the Directive's regulatory regime and of the ambiguities as regards its scope.

The question that the Directive should have asked instead is whether the user would merit regulatory protection. This question would have been a useful starting point for a more fruitful discussion about VOD content in general, and about newspaper websites in particular, and possible risks they might pose to under-age users or to the general public, *inter alia* due to the use of shocking or violent imagery. By focusing on the hypothetical users' perspective instead, the Directive introduces another element of uncertainty into the equation, and skews dialogue away from the crucial question whether its scope is circumscribed in a manner that adequately caters for users' interests.

### CONCLUSION

The approaches of the UK converged regulator, Ofcom, and of its co-regulator, ATVOD, as well as those of the Austrian authorities on the question of the regulation of newspaper websites display contrasting views, and bring the interpretative difficulties with the definition of an AVMS, in particular the criterion of 'principal purpose', to the fore.

Ofcom, in the *Sun Video* case, overturned on appeal ATVOD's determination, thus prompting it to reconsider its view. While ATVOD attempted to expand its remit by focusing on the video section of the website, Ofcom clipped ATVOD's wings and made clear that the object of assessment should be the website as a whole. However, ATVOD's desire to expand its regulatory remit does not sufficiently explain its approach in *Sun Video*. Its decision was not simply a mistake made by a co-regulator still in its infancy, as has occasionally been intimated. It was a perfectly defensible position, reflecting a belief in the need for more regulation of the online press. The conflict between ATVOD's strict regulatory approach and Ofcom's more liberal, market-oriented one was fought on novel ground, and Ofcom used *Sun Video* as a 'model case' on the basis of which to clarify the statutory criteria and to enhance legal certainty.<sup>87</sup>

But has the desired outcome been achieved? A careful examination of Ofcom's remarkably systematic analysis shows that a number of questions remain unanswered. Would the video section need to have its own homepage or does a separate subsection suffice? If names and logos do not matter, why should it make a difference whether the video section bears the newspaper masthead? These formal criteria seek to ascertain that the video section has a separate identity from the rest of the newspaper, but they are readily open to circumvention. More crucially, they fail to provide convincing pointers so as to distinguish between services that deserve to be subjected to regulation and others that can safely fall through the net. The uncertainty is even greater as regards the three substantive criteria: the duration of the audiovisual

87 See J Metzdorf, 'Regulierung der elektronischen Presse in Grossbritannien? – Ein Anwendungsbeispiel zum Erwägungsgrund 28 der AVMD-RL' in J Taeger (ed), *IT und Internet – Mit Recht gestalten* (OIWIR 2012) 497, 513.

material, its independence and its prominence compared to the written material. The ambiguity is compounded by the non-determinative nature of these factors. Ofcom's holistic approach makes it hard to predict the mixture that would bring a hybrid service within the scope of regulation.

The methodology employed by the Austrian regulatory authorities and the outcome reached by them can be interestingly juxtaposed to Ofcom's approach. The answer of both KommAustria and of the BKS on the possibility of bringing the video section of an online newspaper within the regulatory scope is a resounding yes. Let us not be mistaken. As already noted, Ofcom has not ruled out this possibility either. The *Sun Video* case makes clear that online newspapers which move into more decidedly TV-like territory in future, might well tick all the boxes to be judged to offer an on-demand AVMS. This would presumably apply to video catalogues, consisting largely of full-fledged programmes that are completely autonomous of the textual elements of the newspaper webpage. The Austrian regulatory authorities, on the other hand, have put large segments of online newspapers' audiovisual material under scrutiny and have subjected them to the concomitant regulatory duties. The reasoning in the Austrian cases lacks the sophistication and detail of Ofcom's analysis, but the resultant gain in simplicity is advantageous.

Ofcom and the Austrian regulator agree on the composite definition of an AVMS. In the same way as Ofcom, KommAustria refrains from considering comparability when the principal purpose is evidently absent, as in the *Cultvisual* case. But there the similarities already come to an end. While Ofcom examines the video section in the context of the entirety of the newspaper website, KommAustria and the BKS leave other services offered by the service provider aside and focus on the video catalogue as such. The only loadstar that helps the Austrian regulators decide whether the audiovisual aspects of a hybrid service merit regulatory scrutiny is their functional independence. If the videos make sense without the accompanying articles, they will be regulated regardless of the fact that recourse to the textual elements might enrich the experience. Interestingly, the Austrian authorities have not conducted any audience research, but have extensively relied on academic authorities. Nor has regard been paid to the Directive's broader scheme and to the 'difficult "instruction manual"' offered in its recitals.<sup>88</sup> However, by reaching the conclusion that the videos in question were no different from linear TV programmes, the BKS implicitly accepted that these conditions were also fulfilled.

It is likely that 'online newspapers will have breathed a collective sigh of relief after Ofcom's decision in *Sun Video*.<sup>89</sup> This might have been a bit premature in view of the narrow, yet undeniable possibility that an enrichment of their audiovisual offering in future might lead to a reassessment of their regulatory obligations. More importantly, their sense of relief appears precipitate in view of the many unknown factors in Ofcom's elaborate equation. Austrian newspaper publishers must feel the regulatory grip tightening, but at least they do not need to wade through shifting sands.

88 Kogler (n 38) 232.

89 S Lowde and O Wells, 'ATVOD Determined to do Better' (2012) 18(4) *Computer and Telecommunications Law Review* 102, 104.

Admittedly, the uncertainty in Ofcom's test is to a great extent conditioned by the AVMSD's principal purpose criterion. In 2006, the Commissioner responsible for Information Society and Media at the time, Viviane Reding, declared that the AVMSD would 'provide the legal certainty necessary for the new audiovisual service providers to offer their services on a pan-European basis'.<sup>90</sup> She also stated that a short news bulletin video in *The Sun's* website should be viewed as ancillary to the main service, ie the text-based content, so that it would not be sufficient to bring the whole website within the AVMSD remit.<sup>91</sup> However, the 'tipping point' at which the video elements are no longer ancillary but become the principal purpose of the overall service is not clear-cut.<sup>92</sup> The Directive's emphasis on the principal purpose of a service is, contrary to the former Commissioner's assertion, a source of considerable uncertainty that could lead to over- or underregulation of elements of a service.<sup>93</sup>

Two alternative approaches are conceivable: first, the regulation only of the video content of an electronic newspaper, but not of its text components, irrespective of its predominance within the overall service or second, the submission of the entire service under the AVMSD requirements on child protection, hate speech, audiovisual commercial communication, consumer information and possibly the right of reply.<sup>94</sup> This second approach, if paired with an extension of the AVMSD reach to all commercial on-demand services, including text and audio, would enable the creation of a common floor of basic standards online. The European Parliament recently also stressed the need 'to align the rights and obligations of broadcasters with those of other market players by means of a horizontal, cross-media legal framework'.<sup>95</sup> The Austrian regulatory authorities chose, however, the first, more modest approach. This approach has the advantage of staying loyal to the AVMSD scheme while avoiding a head-on confrontation with the press sector. Undoubtedly, the press even resents the regulation of the video content of its online services under the AVMSD as opposed to the more liberal E-Commerce Directive as hitherto.<sup>96</sup> Still, it has possibly found some consolation in having been spared the subjection of its entire online presence to binding EU standards.

Even though the basic tier of AVMSD requirements is largely met or even exceeded by statutory and self-regulatory measures applicable to the printed press,

90 V Reding, 'Audiovisual Media Services Directive: The Right Instrument to Provide Legal Certainty for Europe's Media Businesses in the Next Decade' Brussels, 7 June 2006, SPEECH/06/352, <[http://www.europa.eu/rapid/press-release\\_SPEECH-06-352\\_en.htm?locale=en](http://www.europa.eu/rapid/press-release_SPEECH-06-352_en.htm?locale=en)>.

91 *ibid* 5.

92 R Viola and M Cappello, 'Regulating On-Demand Services in Italy' in IRIS Special, *The Regulation of On-demand Audiovisual Services: Chaos or Coherence?* (European Audiovisual Observatory 2011), 51.

93 R Craufurd Smith, 'Media Convergence and the Regulation of Audiovisual Content: Is the European Community's Audiovisual Media Services Directive fit for purpose?' (2007) 60(1) *Current Legal Problems* 238, 263.

94 *ibid*.

95 European Parliament, Resolution on Preparing for a Fully Converged Audiovisual World, P7\_TA-PROV(2014)0232, 12 March 2014 at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0232+0+DOC+XML+V0//EN>>.

96 VDZ and BDZV, Common submission to the Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, 24 April 2013, COM (2013) 231 final, 30 September 2013, 4, <<http://www.ec.europa.eu/digital-agenda/en/news/consultation-green-paper-preparing-fully-converged-audiovisual-world-growth-creation-and-values>>.

newspaper and magazine publishers vehemently object to an AVMSD-type regulation. They take issue with specific aspects of the AVMSD such as the prohibition of audiovisual commercial communications that promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation, claiming that they are incompatible with press freedom.<sup>97</sup> Indeed no such prohibition applies to the printed press under the relevant UK Code.<sup>98</sup> However, their main objection is to statutory regulation as such as well as to any licensing or notification requirement. They doubt that technical convergence has led to content convergence or to a convergence in the usage of linear and non-linear media. Should such a convergence have taken place though, they demand a deregulation of on-demand AVMS after the model of the externally pluralistic press.<sup>99</sup>

The expectation of the press sector to act as the role model for the regulation of on-demand services seems complacent in a converged world. It is widely recognized that the distinction between linear and non-linear services drawn in the AVMSD is progressively becoming irrelevant, and that a more consistent minimum standard, which will offer viewers greater protection, is needed.<sup>100</sup> This harmonized standard is likely to be pitched at a higher level than the current framework for on-demand services, possibly extending to matters relating to taste and offense, but at a lower level than current broadcast regulation.<sup>101</sup> At the same time, the asymmetry between print and broadcast media is also likely to become increasingly problematic in view of the heightened opportunity and demand for high-quality video content accessed online as a result of the superfast broadband roll-out.<sup>102</sup> The convergence between press, broadcasting and other video-on-demand services online is expected to lead to a certain rapprochement between the longstanding models for press and broadcasting regulation. Against this background, the Austrian approach offers a clear-cut and pragmatic solution to a problem that is only beginning to emerge.

97 AVMSD, art 9 (1) (c) ii); VDZ and BDZV, 17.

98 The CAP Code: The UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (12th edn, TSO 2010).

99 VDZ and BDZV, 4, 5.

100 Ofcom, Response to the European Commission Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, 24 April 2013, COM (2013) 231 final, 30 September 2013, 3, <http://stakeholders.ofcom.org.uk/international/responses/>.

101 See *ibid* 25, para 4.11.

102 New Zealand Law Commission, *The News Media meets 'New Media'. Rights, Responsibilities and Regulation in the Digital Age*, Law Commission report 128 (Law Commission, Wellington NZ 2013), para 12.

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