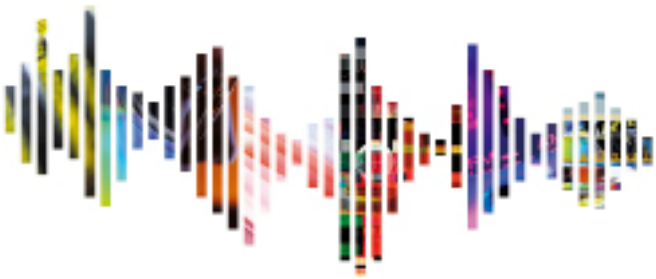
Conseil supérieur de l'audiovisuel



CONFERENCE

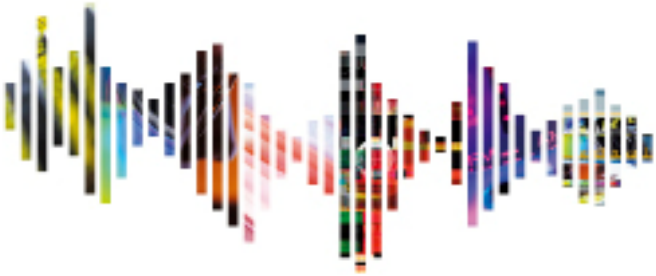
The new frontiers of broadcasting

21 September 2007 – Brussels

PANEL 1

What scope should application of the Decree have?

WORKING PAPER



1. INTRODUCTION – REGULATING FOR THE SAKE OF REGULATING?

Human sciences researchers often counter Utopian, mercantile views by recalling that the inventions that include the new communication technologies are not subject to technical determinism. The historian Roger Chartier said nothing different when he commented on the position of editors of on-line publications who claimed that the new technologies were without a doubt synonymous with democratisation: "*(…) The technology does not mean anything in itself; it is not in itself either dictatorial or democratic. (…) In itself, technology is neutral. It is the result of conflict or tension, the conflict and tension of events taking place in a political arena, an arena that is generally – but not always - democratic, the place of the relationship between the citizen and the authorities, whether they are political or even more so if they are economic.*"[1] He was stressing that these technologies were not invented for their own sake; rather, they come into being and develop according to the needs of society and the market.

The same is true of audiovisual regulation. Once the media evolve, their regulation changes, not as a result of pure "determinism", but because of their grounding in what is involved in the new technologies, the content they make it possible to carry, and the methods of consumption that they bring about. They also are in accordance with the needs of society and the market.

Consequently, reconsidering the material scope of the exercise of regulation – and, following on from it, regulation of the audiovisual scene – in the light of the major changes affecting the sector at the present time make it necessary to identify its current profile in the French-speaking Community and compare it with the regulation choices in operation at the European level and with the technological and market developments that will guide its future.

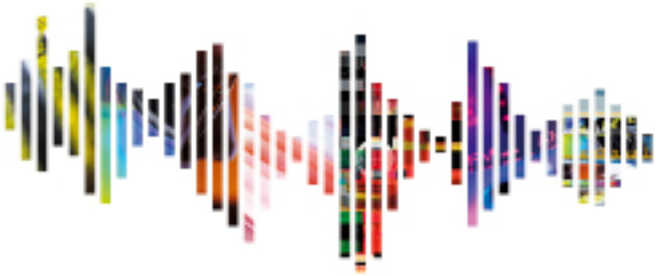
2. LEGISLATION

2.1. From exceptions to the freedom of expression to taking account of competition

When broadcasting began there was a conflict between the freedom of expression and the technical demands imposed by Hertzian broadcasting. The freedom of expression guaranteed by Article 10 of the European Human Rights Convention[2] is limited by infringement of the rights of others. But because, technically, frequencies are a rare and volatile commodity, and because their unregulated use would end in anarchy, the

[1] A. Dubied, M. Hanot et M. Lits, « Rencontre avec Roger Chartier », in *Médiatiques*, n°21, 2000 (http://www.comu.ucl.ac.be/reci/orm/Mediatique/chartier.htm).

[2] Loi du 13 mai 1955 portant approbation de la Convention européenne des Droits de l'homme et des libertés fondamentales signée à Rome le 4 novembre 1950.



freedom of expression which *"includes the freedom of opinion and the freedom to receive or communicate information or ideas with no possibility of interference from the public authorities and disregarding frontiers"* has an exception in respect of the audiovisual sector – the States may subject broadcasting companies to a scheme of authorisation.

This is how the States manage the frequencies at their disposal. Depending on the country and its socio-political traditions, they are more or less intensely involved in the expensive economic development of the broadcasting technology that these rare resources allow, while at the same time they ensure access to them by the largest possible audience. And, since radio and particularly television are powerful instruments of information that do not require any special knowledge to be understood, they also at the same time and in different ways laid down a framework, at a time that was marked by memories of the war and influenced by the international tension that followed it, so that the information being broadcast was subject to all possible precautions in order to protect the exercise of democracy.

In western Europe, the broadcasting models set up took the form of public-owned monopolies. The State watched over the broadcasting sector that it had organised. The statutes of the INR, and later the RTB (1960), in addition to the allocation of frequencies, were intended to ensure pluralism, more particularly by allowing the various currents of thought access to the airwaves, and to preserve fundamental rights. Other preoccupations emerged, however – the right to impartial information, reformulated in 1960 as the principle of objectivity; independence, in 1930 mainly translated into the autonomy (which was relative at the time) of the public-owned establishment and reinforced when the statutes were revised in 1960 and government supervision of the company's management committee was lifted, resulting in the *de facto* disappearance of all prior censorship of news broadcasts.

This initial regulation, focused on the issue of the allocation of frequencies, was therefore grounded on the principles arising from the tension between freedom of expression and the rights of others. It was embodied, in measures that were both positive (encouragement) and negative (prohibition), in fundamental principles that were designed to preserve individual and collective freedoms, principles that were derived from the notion of general interest, taking into account the force of expression of the audiovisual media (management of the frequency spectrum, observance of pluralism, the right to objective information, the independence of the broadcaster) and in rules dictated by the need to preserve specific national cultural features (language balance).

During the 1980s, the audiovisual sector entered a period of turbulence, called "deregulation", during which new means of distribution (cable and satellite) and new (private) players came onto the scene, resulting in both the internationalisation of broadcasting and the multiplication of the channels for its distribution and a radical change in the role and the regulatory choices of the States, particularly as the legislative

framework was expanded in 1989 at the European level with the Television Without Frontiers Directive. This is centred on the free circulation of programmes, encouragement for the production and distribution of programmes in Europe, and the preservation of objectives of public interest (protection of minors, consumers, human dignity and the integrity of works).

The coexistence of private and public editors makes it necessary to take into consideration a number of issues inherent in competition and the market. At both the European and national levels, economic concerns did not always mean the disappearance of the "traditional values" of the initial regulation of the audiovisual scene. These are still current, and continue to be directed at preserving the public interest. They have been adapted to a society, to editors and to media content that have changed, they are now embodied in principles that are more explicit in terms of human dignity, the protection of minors, the right to information, and diversity. The principle of the economy of the frequencies has dropped into the background, but is still of use in ensuring the equitable and diversified use of the spectrum in every case where frequencies remain the universal means of access to broadcasting or where other means of distribution with limited capacity, such as cable, are being used.

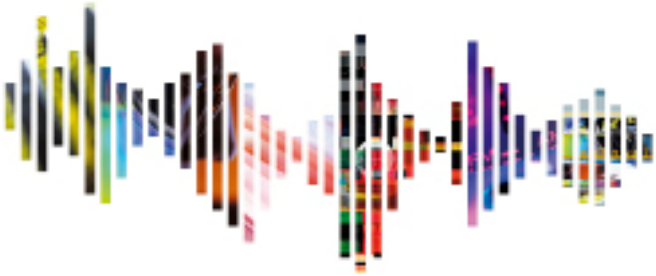
The increasing complexity of the audiovisual scene has been accompanied in most places by the creation of regulatory bodies whose missions and autonomy are increasing constantly.

2.2. In the French-speaking Community

Influenced from the start of its existence by the permeability of its frontiers, the French-speaking Community has incorporated these changes into its corpus of regulations.

The Decree adopted on 12 December 1977 endorsed the Community nature of the RTB, which became the RTBF. It included provisions of public interest that already existed, and an amendment on 30 March 1983 added a further point concerning works and authors from within the French-speaking Community. A Decree adopted on 8 September 1981 laid down the conditions for the recognition of local radio stations – these cover fundamental rights (observance of the law, morality, security of the State, etc), principles of general interest (independence, frequency used, etc) and "local " specific cultural features (local news and events, own production). On 5 July 1985, the French-speaking Community made provision for authorising local and Community television channels, by stressing the local and cultural specific features of their programming (own production, activities involving the participation of the population, promotion of the cultural heritage of the French-speaking Community, etc).

The Decree on the audiovisual sector adopted on 17 July 1987 put all these approaches together and included some new ones, connected with making allowance for private-sector players. Criteria of an economic nature now stood alongside the principles of



public interest and specific cultural features[3]. Lastly, the Decree gave rise to a first audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* – CSA), whose members were players in the sector. It had consultative status.

This Decree has been reworked a number of times, in attempts to constantly keep up with the reality, complexity and internationalisation of the audiovisual scene. The CSA, with a different composition, was given the role of regulating the sector by a Decree adopted on 24 July 1997. A new RTBF Decree was adopted at the same time, on 14 July 1997. The public-sector model became a mixed economy model. Publicity was allowed, and the support of the State was henceforth linked to a management contract.

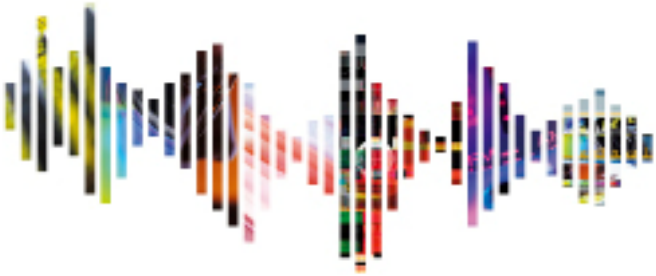
The Decree adopted on 27 February 2003 favoured an approach for each separate aspect (editor, distributor, operator). Rights and obligations were set out for each category of player. The principles balanced between what is authorised and what is protected were based on the responsibility of the editor, who must be able to be identified. The CSA was reinforced in its mission as regulator of the broadcasting sector.

While it is true that the increasingly numerous versions of modes of audiovisual communication do not call into question the objectives of the regulations, the latter do need to take the former into consideration. To take just one example – the current evolution in the editorial function – new use could lead to reference to criteria that had no relevance previously, such as control or creation of content by users.

3. ALL ABOUT BROADCASTING

3.1. Definitions resulting from the distribution of responsibilities in the federal State

[3] Ainsi, l'article 41 veille à préserver un certain pluralisme économique : toute personne physique ou morale qui détient directement ou indirectement plus de 24% du capital d'une télévision privée ne peut détenir directement ou indirectement plus de 24% d'une autre télévision privée ou de plus de cinq radios privées. Une personne physique ou morale ne peut avoir en propriété ou contrôler directement ou indirectement plus de cinq radios privées (art. 32). Sur le versant spécificités culturelles, les télévisions privées doivent assurer 20% de production propre et mettre en valeur le patrimoine de la Communauté française. Le droit à l'information est garanti tant pour les télévisions privées que pour les télévisions locales par l'adoption d'un règlement d'ordre intérieur relatif à l'objectivité dans l'information, qu'elles doivent s'engager à respecter.



In Belgium, broadcasting (both radio and television)[4], as a cultural matter, has been the responsibility of the Communities since 1970. Broadcasting is not however defined either in the Constitution or in the special legislation on institutional reform. It had become a habit – upheld by the Conseil d'Etat in 1971 in an opinion on draft legislation on radio communications[5] – to refer to international sources and, in particular, to the conventions of the International Telecommunication Union (ITU)[6]. Two criteria were decisive in this respect – one concerning destination (*"destined to be received by the general public")* and one concerning technology (*"by radio waves"*).

The Belgian Constitutional Court (which replaced in May 2007 the Court of Arbitration, which had been created in 1980 at the time of the gradual transformation of Belgium into a federal State) laid down an outline for the concept of broadcasting by the gradual use of a range of indicators that it adapted in keeping with developments in technology and the markets[7].

In decisions delivered in 1990 and 1991[8], the Court noted that the Communities' responsibility covered not only aspects concerning content but also technical aspects specific to broadcasting, with the exception of the general policing of the airwaves. In a decision delivered in October 2000[9], the Court confirmed the Community's responsibility by referring this time not to the technical aspects *"which are specific to broadcasting"*, but to those which were *"ancillary"* to broadcasting. It also specified that the Communities' responsibility regarding broadcasting was not linked to a specific mode of broadcasting or transmission (technologically neutral approach) and swept away the reference to the ITU conventions.

In a decision delivered in June 1998[10], the Court excluded from *"the activity of broadcasting"* those communication services supplying items of information by

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[4] Selon le Conseil d'Etat, le terme « télévision » n'ajoute aucun sens additionnel au concept de « radiodiffusion », qui comprend déjà des émissions aussi bien de sons que d'images ; le législateur n'a ajouté « et télévision » que pour des raisons de langage courant (Projet de loi relatif aux radiocommunications, Avis du Conseil d'Etat, Doc. Parl. Ch. Repr., sess. Extr. 1979, n° 201/1, p.4.). Le Conseil d'Etat l'avait déjà souligné lors de l'examen de la loi du 28 mai 1960 organique des Instituts de la radiodiffusion- télévision.extraordinary session 1979, no. 201/1, p.4.).

[5] Projet de loi relatif aux radiocommunications, Avis du 11 décembre 1978, Doc. Parl., Ch. Repr, Sess. Extr. 1979, 201 1°.

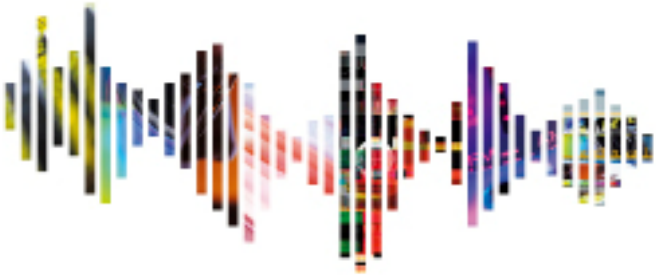
[6] Cette dernière définit la notion de service de radiodiffusion comme étant « *le service de radiocommunication dont les émissions sont destinées à être reçues par le public en général et qui peut comprendre des émissions sonores, des émissions de télévision et autres genres d'émissions* ». La radiocommunication y est définie « *comme la télécommunication par ondes radioélectriques » et la télécommunication comme : « toute transmission , émission ou réception de signes, de signaux, d'écrits, d'images, de sons ou de renseignements de toute autre, par fil, radioélectricité, optique ou autres systèmes électromagnétiques* ».

[7] Voir F. Jongen, « Répartition des compétences et radiodiffusion : et un, et deux, et trois zéros ? », note sous C.A., 6 novembre 2002, in *A&M*, 2003, pp.127-129.

[8] C.A., 25 janvier, 7-90, point 2.B.3 et C.A., 7 février, 1/91, point B.5.

[9] Arrêt n°109/2000 du 31 octobre 2000.

[10] Arrêt n°76/98 du 24 juin 1998.



individual request or other services such as fax services, electronic databanks and other similar services. The criterion of sharing among the Community and federal responsibilities was whether or not an individual request was made.

This frontier was shifted by the decision delivered in October 2000, when the Court took as its basis the criterion of the absence of point-to-point communication. The Court held firstly that "*a broadcasting programme was intended for all or part of the general public, even if the broadcast was made in response to an individual request*". It went on to specify that "*neither a communication from a broadcaster to an individual receiver (point-to-point), whether this was on the initiative of a broadcasting station, a viewer or a listener, nor a service providing individualised information on demand, count as broadcasting*".[11] Lastly, it explained that, to be covered by the normative responsibility of the Communities, a service offered by means of broadcasting had to be part of the distribution activity. This activity mainly meant primary broadcasting, whether by means of coded signals or not, of programmes intended for reception directly by the public. Distribution activities did not however cease to exist because the viewer or listener was offered a wider range of choices as a result of technological developments.

In 2002, the limit was shifted again. Point-to-point was explicitly included in broadcasting: "*It should be noted in this respect that certain techniques, such as that used for a communication from a broadcaster to an individual receiver (point-to-point), may nowadays be used equally for the reception of conventionally broadcast programmes as for the reception of broadcasts falling within the scope of other modes of telecommunication. As a result, the programmes broadcast using this technology do not necessarily fall outside the scope of the Community responsibility, and the technology used are not necessarily covered by this responsibility.*"[12] At the time, the Court referred to a combination of two criteria – a service that provides individualised information[13] and features a form of confidentiality does not count as broadcasting[14].

In a Decision delivered in 2004[15], the Court, taking into account the convergence of the broadcasting and telecommunications sectors, and in particular the possibility of the common use of certain transmission infrastructures leading to a "de-specialisation" of the infrastructure and the networks and to the creation of new services, draws a distinction between broadcasting (which includes television) and other forms of

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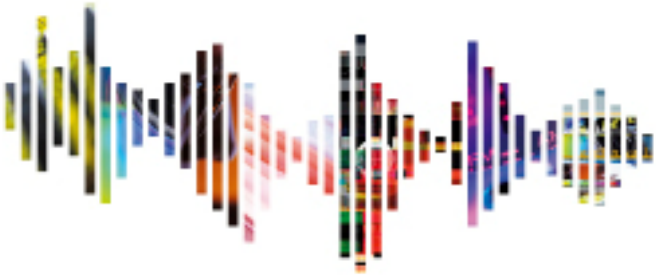
[11] *Ibid.*, point B.5.4.

[12] Arrêt n°156/2002 du 6 novembre 2002, point B.4.2.

[13] *Ibid.*, point B.4.4 : « *Un programme de radiodiffusion est destiné, dans le chef de celui qui l'émet, au public en général ou à une partie de celui-ci, et n'a aucun caractère de confidentialité, même si l'émission se fait sur demande individuelle et quelle que soit sa technique de diffusion, en ce compris celle dite point to point qui précédemment n'était pas utilisée pour la radiodiffusion. En revanche, un service qui fournit de l'information individualisée et caractérisée par une forme de confidentialité ne relève pas de la radiodiffusion* ».

[14] Cet arrêt n'évacue pas pour autant toutes les questions d'interprétation : la Cour a manqué de préciser si ces critères étaient cumulatifs ou alternatifs. Voir à ce sujet, F. Jongen, « Répartition des compétences et radiodiffusion… *op. cit., loc. cit.* et R. Queck, Q. Coppieters 'T Wallant, P. Valcke, « L'arrêt de la Cour d'arbitrage du 14 juillet 2004… *op. cit., loc. cit.*

[15] Arrêt n°132/2004 du 14 juillet 2004, points B.10.1 et B.10.2.



telecommunication in that a broadcast programme circulates public information and is directed, from the viewpoint of the party broadcasting, at all or part of the public and is not of a confidential nature. In contrast, those services which supplied individualised information featuring a certain form of confidentiality did not fall within the scope of broadcasting but were the responsibility of the federal legislator. Thus is seems henceforth to consider that the two criteria (absence of confidentiality and of individualised information) were cumulative. According to the Court, the essential feature of broadcasting (including television) was the fact of supplying public information to the general public as a whole. In an evolutive interpretation of the concept of broadcasting, this also includes broadcasts in response to individual demand.[16]

Consequently, alongside conventional broadcasting (radio and television), quasi video on demand, video on demand, web TV, and radio on the Internet fall within the concept of broadcasting.

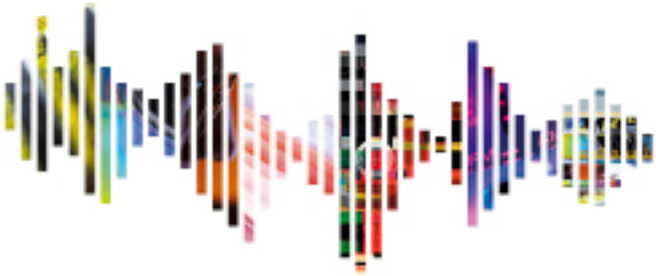
3.2. Regulations and regulation in the French-speaking Community

The Decree on broadcasting adopted on 27 February 2003 defined its field of application *ratione materiae* in its Article 2(1) as follows: *"without prejudice to specific provisions applicable to the RTBF, the present Decree shall apply to all broadcasting activities"*. No definition is given of what constitutes a broadcasting activity.

While this Decree took into account the evolution relevant at the time it was adopted, since then, infrastructures that until then had mainly been used for voice or for data transfer have become accessible for video, which has made it possible to launch new broadcasting formats. The CSA took some of these (pay-per-view or on-demand services or programmes; mobile and xDSL platforms; streamed radio broadcasting on Internet networks) into account for application of the Decree, by referring to the principle of technological neutrality and to the criteria defined by the Constitutional Court, but at the same time it noted the need to revise the provisions in order to ensure both the equality of treatment of the players in similar situations and the proportionate nature of the conditions and measures imposed on them. The few adjustments made by means of Decrees since 2003 have not been sufficient to keep up with the sector's evolution.

The RTBF's contract for the next five years, negotiated by the Government and the RTBF in the course of 2006, has anticipated the revision of the Television Without Frontiers Directive, more particularly by making provision for a distinction to be drawn between linear and non-linear audiovisual media services (AMS for short) and by applying differentiated obligations to them. To ensure the legislative foundation –

[16] Toute question d'interprétation n'est pas pour autant évacuée : que faut-il entendre par « informations publiques », « certaine forme de confidentialité » et par « programme de radiodiffusion » ?



and without otherwise taking account of the state of negotiations on the revision of the European text and developments in terms of formats and modes for broadcasting services and programmes – the Parliament of the French-speaking Community adopted an amended RTBF Decree and Decree on broadcasting on 17 July 2007.

In the absence of ideal regulatory provisions, certain services and programmes and new modes of access are currently in an area of uncertainty as to their legal status. This is more particularly the case of podcasting, web TV, the Internet sites of television channels and newspapers that have audiovisual content, etc.

3.3. The European texts and their revision

The European Union draws a distinction between *"television broadcasting services"*, which are subject to the TWF Directive[17], and *"information society services"*, which are governed by the E-Commerce Directive[18]. Quasi on-demand video services are included in the notion of television broadcasting services[19].

A political agreement was reached on 24 May 2007 between the European Parliament and Council on re-examination of the TWF Directive, commonly called the Audiovisual Media Services (AMS) Directive[20]. The essential innovation of the future Directive is that it takes into account on-demand services to which only some of the provisions of the future Directive will apply.

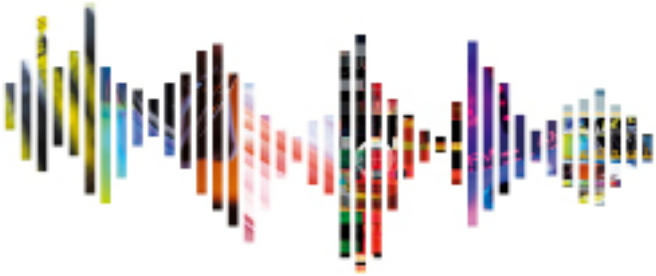
This "two-layer" Directive modulates the regulations according to the level of control exercised by the user. The first level of regulations will apply to all audiovisual media services; these include rules concerning jurisdiction and free circulation, the identification of suppliers of services, the ban on incitement to hatred, access for people with a visual or hearing handicap, media chronology, the content of commercial communications, sponsorship, and product placement. The second level depends on the features that are specific to television broadcasting (access to events of major

[17] Directive 89/552 adaptée en 1997.

[18] Directive 2000/31/CE du Parlement européen et du Conseil du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce électronique, dans le marché intérieur dite directive sur le commerce électronique ou « e-commerce ».

[19] Voir l'annexe V de la directive « Transparence » et l'arrêt de la Cour de Justice des Communautés européennes du 2 juin 2005 « Mediakabel » (CJCE, 2 juin 2005, Mediakabel, C-89/04). Pour la Cour, le critère déterminant d'un service de radiodiffusion télévisuelle est celui de l'émission de programmes télévisés « *destinés au public* » et non la technique de transmission. Le point de vue du prestataire du service doit être privilégié dans l'analyse de la notion. Le juge européen rappelait en outre qu'une interprétation restrictive de la notion de « service de radiodiffusion télévisuelle » porterait atteinte aux objectifs poursuivis par la directive TVSF. Voir également arrêt du 10 septembre 1996, Commission/Belgique, C11-95, points 15 à 25.

[20] Proposition de directive du Parlement européen et du Conseil modifiant la directive 89/552/CEE du Conseil visant à la coordination de certaines dispositions législatives, réglementaires et administratives des États membres relatives à l'exercice d'activités de radiodiffusion télévisuelle (telle qu'issue de la position commune du Parlement et du Conseil européens du 24 mai 2007).



interest and to short extracts, quotas for European works and the works of independent producers, insertions and content specific to television advertising and tele-shopping, the protection of minors and the right to reply) and to on-demand services (protection of minors, promotion of and access to European works).

According to the text of the common position adopted by the European Parliament and Council, the definition of an audiovisual media service comprises six cumulative criteria:

1. the main criterion of the broadcasting activity constitutes the essential element;
2. the criterion of the economic nature of the activity within the meaning of the EC Treaty excludes private correspondence;
3. the audiovisual nature (animated images) of the service means the exclusion of sound broadcasting and the electronic versions of newspapers and journals;
4. the purpose of broadcasting (to inform, entertain, or educate) excludes more particularly webcams covering vehicle traffic;
5. the criterion of destination specifies that the service must be directed at the general public;
6. lastly, the service must be transmitted by electronic communication networks, which excludes the cinema and DVD rental.

Where there is an overlap with the E-Commerce Directive, the more detailed rules contained in the proposed AMS Directive would take precedence. On the other hand, in areas not covered by the AMS Directive (such as issues concerning the liability of intermediate service providers), the rules contained in the E-Commerce Directive would apply.

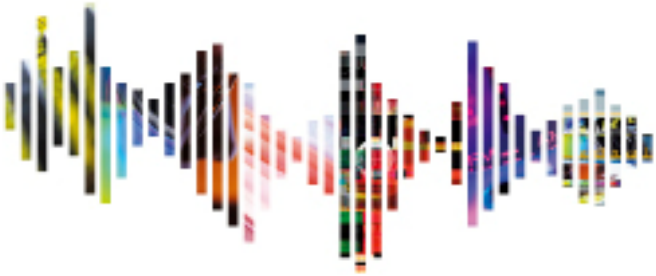
It should be recalled that the member States have the liberty to make provision for stricter or more detailed measures.

4. CONCLUSIONS

THE NEW FRONTIERS OF BROADCASTING

The issue of the scope of the new frontiers of broadcasting arises for those services and programmes that share few or no points of reference with conventional broadcasting models, or which seem to be more inspired by models taken from other sectors.

Apart from the shared principle of technological neutrality, the Constitutional Court and the European legislator are proposing approaches that, although the sources of their inspiration are different, are nonetheless complementary. For the Constitutional Court, broadcasting covers any service that distributes public information, directed from the viewpoint of the party distributing it to all or part of the public, which is not confidential. For the European legislator, an audiovisual media service is defined by a



range of indications such as principal audiovisual content, its economic nature, its purpose, its destination, and its mode of transmission.

The criteria of "distribution to all or part of the public" and "destination" both refer to public (mass) communication; those of "non-confidentiality" and "economic aspect" result in the same exclusions in an indirect manner, with the exception of blogs, for which the European Commission retains the non-economic nature of the activity[21].

The "audiovisual" criterion used in the draft AMS Directive which leads to the exclusion of sound broadcasting is not included in the considerations of the regulations adopted by the French-speaking Community to date. In the Belgian context, broadcasting has always included both radio and television.

The criterion of "principal (audiovisual) content of the activity" which is primordial in the European approach has no equivalent in Belgian law. It makes it possible, among the many new multimedia practices, to single out those that have the audiovisual sector as their reference. It should make it possible to appreciate cases that are as different as, for example, the sites of *La Libre Belgique*, *Le Vif/L'Express*, *Behealth TV*, *MR TV*, and *RTC Télé Liège*. Assessment will not be easy (how should "principal" be distinguished from "ancillary"?), but making the definition more specific could diminish its meaning.

The criterion of "purpose" makes good sense, if we take conventional radio and television broadcasting as the benchmark. It has not so far, however, in Belgian and Community law been deemed worthwhile laying down the added value of the services subject to the regulations as a condition for the existence of broadcasting. Whatever the case, in a technological context where virtually everything can become the subject of broadcasting, the issue of editorial "content" is undeniably of assistance in identifying the interest and intention of what is being broadcast.

The "technical" criterion specifies that the broadcast must be made using electronic communications networks, thereby excluding the cinema and DVD rental from its scope. This criterion does not raise any real problems.

Thus the only innovative criterion that the future AMS Directive proposes – but which should be considered cumulatively with the others – is that of the "principal nature" of the service. Specifically, this criterion would make it possible to include certain Internet TV channels and podcasts in the scope of broadcasting. The Flemish Government does not seem to have drawn any different conclusions when it proposed on 11 May 2007[22] to add a specific reference to this principal criterion in its legislation.

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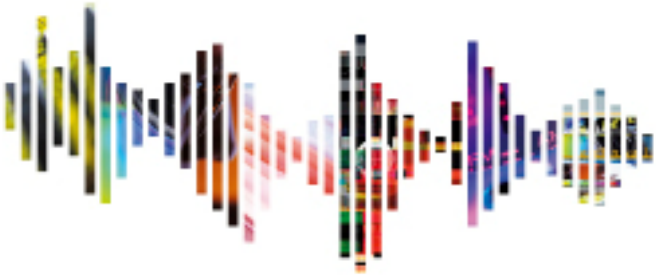
[21] MEMO/05/475 du 13 décembre 2005 de la Commission européenne.

[22] Les critères « aspect économique » et « caractère principal » ont été insérés dans la législation flamande par un décret modifiant les articles 31 et 60 des décrets relatifs à la radiodiffusion et à la télévision,



The usefulness and the effectiveness of these new measures will be reflected in their capacity to determine the editor responsible for each of the services and programmes. The future AMS Directive proposes a definition of this core concept of broadcasting – editorial responsibility is "*the exercise of effective control over both the selection of programmes and their organisation, in the form of either a chronological schedule in the case of television broadcasts or a catalogue in the case of on-demand services. Editorial responsibility does not necessarily carry with it legal liability of any kind under national law in respect of the content or the services provided*".

The evolution underpinned by the future AMS Directive is aimed at adapting to the structural and technological chances affecting the audiovisual sector. The balance of power that exists has largely limited intervention in the form of European legislation – the States' legislation remains sovereign on this common basis – taking into consideration differentiation of the ways in which the general public use audiovisual media services (by streaming or on demand).

The modular approach is not new in the French-speaking Community; public- and private-sector editors are not subject to identical rules, in the same way that radio stations do not need to observe the same obligations according to whether they are in a network or independent. This seems the most suitable approach, both to ensure a common foundation for all the services and programmes directed at a broad public, regardless of mode of access (principle of technological neutrality) and consumption (by streaming or on demand), and to take into account a fair application of the principles of proportionality, non-discrimination and transparency having regard to the impact that these services and programmes have on public opinion. The common foundation is made up of the objectives that regulation in the audiovisual sector has always pursued, grounded in principles that hold in balance the freedom of expression and the rights of others (protection of minors, human dignity, consumers, the right to information, etc).

The audiovisual market in the French-speaking Community is small but subject to serious competition and it has made provision for broadcasting services for certain rules that do not appear in the minimum common core proposed by Europe. As they stand, these rules are not suited to all the new services which, if the criteria of the future AMS Directive were to be applied, would fall within the scope of broadcasting.

Particularly in a small market, the fundamental issue arises of the responsible editor who cannot be done without, at the risk, despite a possible redefinition of the material field of competence, of not being able to apply the amended regulations.

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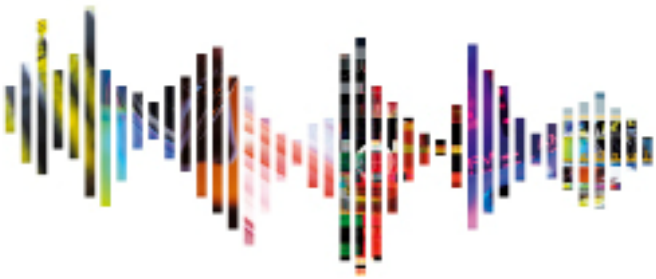
coordonnés le 25 janvier 1995, en ce qui concerne les services de radio et les services télévisés, traduction publiée au *M.B.* 06.07.2007, p. 37254.



It is therefore now necessary to re-examine the rules concerning these different services, in the light of the objectives of general interest to be achieved, creating tension between the freedom of expression and the rights of others, between competition and protection of the consumer, between free trade and cultural exception, and by the yardstick of the presumed impact that these services could have on opinion.