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## Towards a more flexible, incentive-based framework for European Media regulation

by [Nico van Eijk](#)

Tuesday, March 01, 2016  Nico van Eijk  0

The existing model of European media regulation, as laid down in the Audiovisual Media Services- directive (AVMS), has passed its expiration date. We now live on borrowed time.

With this in mind, my colleague Wolfgang Schulz and I wrote a study on the future of European audiovisual regulation, also called the [Hermes-study](#). As Wikipedia puts it so nicely, Hermes is the god of transitions and boundaries. He is also the god of communications (and commerce).

In the study we propose that future regulation will have to be based on the following pillars to ensure the necessary flexibility:

- Principles rather than strict rules: The general advantages of principles are flexibility, but also scalability and adaptability, giving the member states an

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opportunity to experiment with different types of rules and, ideally, lead member states to learn from each other's regulatory experiences. At the same time, clear principles offer strong guidance and provide a safeguard for a sufficient consistent European approach.

- **Technological neutral and functional approach:** Since it is especially the technological environment that changes rapidly, regulation should not be triggered by specific features of technology but should follow a functional approach. Technology-focused regulations would not only bear the risk of impeding innovation in technology – such regulations could easily fail to meet the purpose of media regulation. To take an example, the regulation of platforms should not depend on an operator to control the physical infrastructure but only on the importance of the distribution of audiovisual media services, on the necessity for regulation and, therefore, the market conditions.
- **Learning aptitude:** Regulation in this dynamic field should be subject to regular evaluation and – if necessary – to adjustments of the regulatory framework. In some cases, it might be sufficient to rely on an interpretive notice by the European Commission and/or the European Regulators Group for Audiovisual Media Services (ERGA).
- **Rulemaking by regulators:** Regulatory theory teaches that – in cases such as media regulation – the legal framework should enable the regulators to not only decide on individual subject areas such as licenses or the enforcement of rules, but also provide an opportunity to enact by-laws to specify the legal framework. Cooperation between regulators can provide a sufficient system of checks and balances to safeguard a consistent approach. It is at this level that risk and evidence based elements can be introduced.

An incentive-based regulation in this way has to set incentives for content providers to provide desirable content that holds a public value instead of focusing exclusively on types of content that appear to be most profitable. Such incentives could be the already mentioned must-carry-obligations for carriers, a safeguarding for signal integrity, as well as findability rules. Furthermore, it would be possible to offer other incentives such as financial exoneration, more flexible advertisement rules, and – under certain circumstances – advantages regarding distribution. An incentive-based regulation framework ties these privileges to certain types of content, for instance public value services. Content providers can then decide on their own to produce content that meets the criteria of certain content types in order to benefit from the corresponding benefits. This type of regulation has several benefits:

- Regulators do not have to put so much cost and effort into implementing the regulations since industry acts voluntarily,
- regulators do not have to force their will on content providers, making the regulatory process less conflict-laden,
- leaving the definition of requirements to the Member States creates an EU-wide coherent system that leaves room for a Member States' peculiarities in the same time.

But, of course, such a framework requires a careful balance between the



privileges granted for a type of content as well as the cost on behalf of the content providers who offer content that meets the criteria of the respective category. Also, regulators cannot stay passive, but will have to evaluate the providers' self-categorisation from time to time.

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A flexible incentive-based regulatory framework will have to leave some leeway for member states to address the specific situations present in the respective country. On the EU-level, it would be possible to establish a framework that takes into account the common regulatory aims and values, building upon these as basic principles to facilitate a coherent media regulation throughout the member states. This EU framework predefines certain types of content that are tied to certain privileges. However, to give the member states the needed leeway and flexibility to address the individual situation within their own sphere, it should be left to the national regulation to define the requirements to qualify for a category.

By adjusting media regulation to these principles, the regulatory structure would be flipped. Instead of providing regulatory rules based on the individual types of services – e.g. providing distinct sets of rules for linear and non-linear media – a general set of rules would apply to all audiovisual media to meet the risks provided by all kinds of media. Specialised rule sets for certain media would only be issued where necessary. This could streamline and harmonise media regulation not only across various types of media – especially linear and non-linear – but also lead to harmonisation of regulation between the member states.

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What has become obvious is that a regulatory view cannot be narrowed down to a single field of regulation. In this regard, many regulatory fields are intertwined and/or responsive in one way or another. We can see that fundamental rights – as in the Charter and Convention of European human rights –, copyright law, responsibility and liability rules, e-commerce regulation, consumer protection, telco regulation, fair trade regulation, competition law, and antitrust law – interrelate to a certain degree. To achieve some aims of media regulation, not only the dedicated framework comes into play: sometimes issues have to be addressed by other regulatory frameworks. For instance, in order to regulate access to infrastructure, tele-communication regulation will have to be considered. Another example can be seen in a merger of or cooperation between content providers and the implications of antitrust law, which might be different from the implication of media regulation. Consequently, regulation needs to take a 360°-view and consider the implication of other regulatory fields. The development of interfaces between various fields of regulation requires increased attention.

*For more information, please see the study "[The Future of European Audiovisual Regulation](#)". This was also the topic of the Future Media Lounge session, "[A media framework for the 21st century: is regulatory convergence necessary?](#)" which took place on 16 February 2016 in the European Parliament.*

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