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2. Current national developments

Ronan Ó Fathaigh, IViR

The purpose of this chapter is to provide an overview of recent and ongoing developments concerning regional audiovisual media in Europe. The overview focuses in particular on legal and policy initiatives taken by governments and regulators throughout Europe to strengthen regional audiovisual media. In addition, this chapter also highlights a number of relevant judicial developments. As detailed below, governments have been quite active in implementing legislative and policy reform in recent years.

However, it is important to first outline the general context in which European regional audiovisual media currently exists. For instance, following the closure of 25 local and regional stations in Sweden in April 2014, the Secretary General of the European Association of Regional Television described it as part of a “very disturbing trend in Europe,” and “clearly shows that we need to bring the threat to regional broadcasting, in the end democracy, to the attention of the EU.”²⁹

Similarly, a recent study for the Swiss Federal Office of Communications, which examined local and regional television in Europe, began by noting that its initial assessment prompted “a degree of pessimism.”³⁰ Indeed, the study noted that local and regional television services are “by far the most affected” by the global financial crisis, resulting in some “catastrophic situations.”³¹ However, the study did conclude with “an optimistic conclusion and prospects in the future.”³² Further, a background document of the European Platform of Regulatory Authorities remarked that local and regional television stations “generally cannot cover their costs themselves and are dependent on public support.”³³

²⁹ European Association of Regional Television, “Swedish commercial television closing all regional stations”, 15 April 2014, <http://www.circom-regional.eu/news1-2/698-swedish-commercial-television-closing-all-regional-stations>.

³⁰ Wagner-Hatfield consulting group, ‘Perspectives de développement de la télévision régionale’ (‘Prospects for regional television’), June 2015, p. 2. Brief summary available in English at: <https://www.bakom.admin.ch/bakom/en/homepage/electronic-media/zahlen-und-fakten/studies/regional-tv--the-challenges.html>.

³¹ Wagner-Hatfield study, Brief summary, *op. cit.* p. 2.

³² Wagner-Hatfield study, Brief Summary, *op. cit.* p. 15.

³³ See European Platform of Regulatory Authorities, “Ad hoc Working Group 3: Local/Regional TV: Financing Models - Background Comparative Document”, *op. cit.* .



2.1. United Kingdom: creating a regional audiovisual framework

While the introductory remarks highlighted the difficulties facing regional audiovisual media in Europe generally, it is perhaps important to begin with an example of an initiative to create a regional audiovisual sector that had hardly existed a few years ago. This occurred recently in the United Kingdom, following the introduction of important legislation. The legislation was designed to enable the establishment of a new legal framework to put one element of regional audiovisual media, namely local television, “on a strong and sustainable footing for the first time.”³⁴

The initiative began in 2011, with the publication of the UK government’s policy paper, “*A new framework for local TV in the UK*”, which noted that “only a tiny handful of independent services have attempted to provide commercially sustainable local TV focused solely on particular cities or smaller geographic areas.”³⁵ The UK government’s plans comprised three key components to establishing a commercially viable local audiovisual media sector: (a) reserve sufficient spectrum for local broadcasting; (b) create a new licensing regime for local broadcasting; and (c) secure electronic programme guide prominence for local broadcasting.³⁶

Following a period of consultation, three significant pieces of legislation came into force in 2012: first, the Local Digital Television Programme Services Order,³⁷ which set out the framework for licensing local television. Second, the Wireless Telegraphy Act 2006 (Directions to OFCOM) Order was passed,³⁸ which required the communications regulator Ofcom to reserve spectrum for local television broadcasting. Third, the Code of Practice for Electronic Programme Guides (Addition of Programme Services) Order was passed,³⁹ which was designed to give prominence to local television services on the electronic programme guide (EPG). Of particular note, the UK government was of the view that EPG prominence was “appropriate to reflect the public service nature of the content that will be provided; as well as being crucial to assisting the commercial viability of the new local licensees (i.e. greater visibility on EPGs is likely to boost viewing figures, which in turn generates increased advertising revenue).”⁴⁰ It also considered that EPG prominence would “be important in terms of attracting viewers which in turn leads to financial viability and gives local TV a ‘foothold’ in the broadcasting market.”⁴¹

In addition to the creation of a legislative framework for local television, crucial funding was also made available. First, £25 million (EUR 31 million) of licence fee funds were made available for the initial capital costs for setting up local television,⁴² which the European Commission approved

³⁴ Department for Culture, Media and Sport, “A new framework for local TV in the UK”, July 2011, p. 4, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/72920/Local-TV-Framework_July2011.pdf.

³⁵ Department for Culture, Media and Sport, “A new framework for local TV in the UK”, cit., p. 11.

³⁶ Department for Culture, Media and Sport, “A new framework for local TV in the UK”, cit., p. 33.

³⁷ The Local Digital Television Programme Services Order 2012, <http://www.legislation.gov.uk/uksi/2012/292/contents/made>.

³⁸ The Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2012, <http://www.legislation.gov.uk/uksi/2012/293/contents/made>.

³⁹ The Code of Practice for Electronic Programme Guides (Addition of Programme Services) Order 2011, <http://www.legislation.gov.uk/uksi/2011/3003/contents/made>.

⁴⁰ Explanatory Memorandum to the Code of Practice for Electronic Programme Guides (Addition of Programme Services) Order 2011, para. 8.3, http://www.legislation.gov.uk/uksi/2011/3003/pdfs/uksem_20113003_en.pdf.

⁴¹ Explanatory Memorandum to the Code of Practice for Electronic Programme Guides (Addition of Programme Services) Order 2011, cit., para. 8.3.

⁴² BBC, “Local television funding agreement”, 26 July 2013, http://www.bbc.co.uk/bbctrust/our_work/strategy/licence_fee/local_tv_contribution.html.



under the state-aid rules.⁴³ The BBC also agreed to acquire content worth GBP 5 million per year from local television, until March 2017.⁴⁴

As of March 2016, 34 local television stations across the UK are licensed by Ofcom, including in Belfast, Birmingham, Brighton & Hove, Bristol, Cardiff, Edinburgh, Glasgow, Grimsby, Leeds, Liverpool, London, Manchester, Newcastle, Norwich, Nottingham, Oxford, Plymouth, Preston, Sheffield, Southampton, and Swansea.⁴⁵ The vast majority of these broadcasters did not exist before 2011.

2.1.1. Independent production exemptions

Moreover, under the United Kingdom's Broadcasting (Local Digital Television Programme Services and Independent Productions) (Amendment) Order 2012,⁴⁶ the requirement⁴⁷ to commission 10% of output from independent production companies was removed for local broadcasters.⁴⁸ This order also permitted independent producers to hold up to 100% ownership of a local broadcaster, provided the provision of a local television service is not the main activity of the producer.⁴⁹ This was designed to let independent producers bid for local television licences without forfeiting their independent status.⁵⁰

2.1.2. Media-ownership rules

It is also worth noting that in 2011 the Media Ownership (Radio and Cross Media) Order was passed in the United Kingdom,⁵¹ designed to deregulate the rules on ownership of local newspapers, radio and television licences. The UK government argued that "one of the barriers preventing

⁴³ European Commission, State aid SA.33980 (2012/N) – United Kingdom: Local Television in the UK, 5 December 2012, http://ec.europa.eu/competition/state_aid/cases/244689/244689_1425664_116_2.pdf.

⁴⁴ BBC, "Acquisition of Local Content", 10 May 2012 (revised 14 February 2014), http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/bbc_local_content_acquisition_february2014.pdf.

⁴⁵ Ofcom, "Applying for an L-DTPS Licence", <http://licensing.ofcom.org.uk/tv-broadcast-licences/local/apply/>. See also Ofcom, "Local TV broadcasters", <http://licensing.ofcom.org.uk/tv-broadcast-licences/current-licensees/local-tv/>.

⁴⁶ The Broadcasting (Local Digital Television Programme Services and Independent Productions) (Amendment) Order 2012, <http://www.legislation.gov.uk/uksi/2012/1842/contents/made>.

⁴⁷ The Communication Act 2003, section 309(1), provides that "The regulatory regime for every digital television programme service that is not comprised in a licensed public service channel includes the conditions that OFCOM consider appropriate for securing that, in each year, not less than 10 per cent. of the total amount of time allocated to the broadcasting of qualifying programmes included in the service is allocated to the broadcasting of a range and diversity of independent productions", <http://www.legislation.gov.uk/ukpga/2003/21/section/309>.

⁴⁸ The Broadcasting (Local Digital Television Programme Services and Independent Productions) (Amendment) Order 2012, Article 4, http://www.legislation.gov.uk/uksi/2012/1842/pdfs/uksi_20121842_en.pdf. Notably, the requirement under Article 17 of the AVMS Directive (2010/13/EU) to reserve 10% of transmission time to "European works created by producers who are independent of broadcasters" does not apply to broadcasts intended for "local audiences" (Article 18), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>.

⁴⁹ The Broadcasting (Local Digital Television Programme Services and Independent Productions) (Amendment) Order 2012, cit., Articles 5-8.

⁵⁰ Department for Culture, Media and Sport, "Policy Paper: 2010 to 2015 government policy: media and creative industries", 8 May 2015, <https://www.gov.uk/government/publications/2010-to-2015-government-policy-media-and-creative-industries/2010-to-2015-government-policy-media-and-creative-industries>.

⁵¹ The Media Ownership (Radio and Cross Media) Order 2011 (S.I. 2011/1503), <http://www.legislation.gov.uk/uksi/2011/1503/note/made>.



commercially sustainable local television to emerge in the UK is the restrictions around media ownership.” The result of the reformed media ownership rules was that local media companies were “free to affiliate to develop cost effective local television service models benefiting from syndication of resources, journalists and technical expertise.”⁵²

2.2. Flexibility and funding

2.2.1. Switzerland

While the developments mentioned above are an example of the creation of a regional audiovisual sector that had not previously existed, there have also been significant reforms in countries seeking to reform, rather than create, regional audiovisual media. In this regard, developments in Switzerland are quite relevant, with the implementation of a number of major reforms applying to existing regional audiovisual media. First, in January 2013, the Radio and Television Ordinance was amended, removing broadcasting restrictions on regional television broadcasters, and allowing them to broadcast programmes outside their allocated coverage areas.⁵³

Second, in September 2014, the Swiss parliament amended the Radio and Television Act, introducing a new broadcasting charge that households and businesses must pay regardless of whether they possess a reception device or not.⁵⁴ Importantly, between 4% and 6% of the new charge was to be allocated to local and regional broadcasters. In June 2015 the amendments were put to the Swiss people in a referendum, the outcome of which was the acceptance of the proposed amendments, thus adopting the amendment to the Radio and Television Act.⁵⁵ The new provisions came into force on 1 July 2016. Notably, regional broadcasters supported by the new fee are required to subtitle certain programmes, to ensure access for those with hearing difficulties. However, the costs incurred will be covered in full by the new fee.

The amending legislation also sought to simplify the licence-award procedure for local and regional broadcasters, with provisions that it would no longer be “compulsory to verify that the diversity of opinions and of the offering is not threatened in the coverage areas concerned. However, if several candidatures are equivalent, the licence will be awarded to the broadcaster which contributes the most to media diversity.”⁵⁶

Then, in November 2014, further legislative amendments were made to provide “more flexibility” for regional broadcasters in Switzerland.⁵⁷ First, the obligation on some local broadcasters

⁵² Department for Culture, Media and Sport, “The Media Ownership (Radio and Crossmedia) Order 2011: Impact Assessment”, p. 8, http://www.legislation.gov.uk/ukia/2011/539/pdfs/ukia_20110539_en.pdf.

⁵³ Federal Office of Communications, “Regional TV programme services can now be broadcast throughout Switzerland”, 23 January 2013, <https://www.bakom.admin.ch/bakom/fr/page-daccueil/medias-electroniques/politique-des-medias/actualites-et-contextes/les-programmes-tv-regionaux-peuvent-etre-diffusees-dans-toute-la.html>.

⁵⁴ Zeller F., “Parliament adopts universal broadcasting charge”, IRIS 2014-10/6, <http://merlin.obs.coe.int/iris/2014/10/article6.en.html>.

⁵⁵ Zeller F., “Close referendum result on universal broadcasting charge”, IRIS 2015-7/15, <http://merlin.obs.coe.int/iris/2015/7/article5.en.html>.

⁵⁶ Federal Office of Communications, “New RTVA: improvements in conditions for regional broadcasters”, <https://www.bakom.admin.ch/bakom/fr/page-daccueil/medias-electroniques/politique-des-medias/nouvelle-lrtv--ameliorations-des-conditions-pour-les-diffuseurs.html>.

⁵⁷ Federal Office of Communications, “More flexibility for the regional radio and TV stations”, 5 November 2014, <https://www.bakom.admin.ch/bakom/fr/page-daccueil/l-ofcom/informations-aux-medias/communiques-de-presse.msg-id-55099.html>.



to broadcast a window of programmes directed at the area they cover was abolished. Local broadcasters could now choose whether to do so. Second, a number of obligations were relaxed, including regarding the promotion of the Swiss cinema industry and the adaptation of broadcasts for the hard of hearing and the visually impaired. Following these amendments, in December 2015 the Swiss Federal Office of Communications published a study on regional television.⁵⁸ The purpose of the study was to propose options to ensure a “solid financial basis for, and a good public response to, regional television”.⁵⁹ The study made a number of recommendations for possible options, including two measures which “appear indispensable for the survival of the section”, namely: (a) channel numbering for linear services; and (b) findability of programme services for the non-linear services.⁶⁰

2.2.2. Spain

Furthermore, mirroring Switzerland, in 2012 the Spanish parliament amended⁶¹ the General Audiovisual Communication Law 7/2010,⁶² introducing a new legal framework for regional public service broadcasters, which allows regional public service broadcasters greater flexibility in the provision of their audiovisual media services. According to this amendment, the Autonomous Communities may opt for direct or indirect management of their public service broadcasters through various models, including public-private partnership. If an Autonomous Community chooses not to provide public service broadcasting, it may then call for tenders for the award of the available licenses to private service providers. Moreover, an Autonomous Community may transfer its public service broadcaster to a third party, in accordance with its specific legislation.⁶³

If an Autonomous Community opts for a model of indirect management, or any other instruments of public-private partnership for the provision of a public service audiovisual media service, then it may participate in the capital of the broadcaster providing this service.

The amendment allows arrangements between regional public service broadcasters for joint production or editing of content to improve the efficiency of their business. It also introduces obligations on regional public service broadcasters, such as a maximum limit of expenditure for the financial year in question, and the obligation to submit an annual report.

See also Aubry P., “More flexibility for regional radio and TV stations”, IRIS 2015-1/9, <http://merlin.obs.coe.int/iris/2015/1/article9.en.html>.

⁵⁸ Federal Office of Communications, “Regional TV: the challenges”, 8 December 2015, <https://www.bakom.admin.ch/bakom/fr/page-daccueil/l-ofcom/informations-aux-medias/communiqués-de-presse/msg-id-59830.html>.

⁵⁹ Wagner-Hatfield study, ‘Brief summary’, cit., p. 2.

⁶⁰ Wagner-Hatfield study, ‘Brief summary’, cit., p. 12.

⁶¹ Ley 6/2012, de 1 de agosto, de modificación de la Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, para flexibilizar los modos de gestión de los servicios públicos de comunicación audiovisual autonómicos, http://noticias.juridicas.com/base_datos/Admin/l6-2012.html.

⁶² Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, http://noticias.juridicas.com/base_datos/Admin/l7-2010.html.

⁶³ Cabrera Blázquez F.J., “Audiovisual Act Amended”, IRIS 2012-8/20, <http://merlin.obs.coe.int/iris/2012/8/article20.en.html>.



2.2.3. Germany

Finally, there have also been legislative developments in Germany, in particular at state level in terms of introducing flexibility and funding. For example, in July 2014, the Saxony parliament amended the Private Broadcasting Act with the aim of improving the business environment for local television.⁶⁴ Importantly, the amendments included allowing the regulator *Sächsische Landesmedienanstalt* (Saxony Media Council) to support the authorised operators of regional audiovisual media programmes in creating/facilitating the infrastructure necessary for the dissemination of its program. Following these amendments, in July 2015, the Saxony Media Council established a EUR 600,000 fund to assist regional audiovisual media with infrastructure development.⁶⁵

2.3. Consolidation and efficiency

2.3.1. The Netherlands

There are also instances of countries engaging in the structural reform of regional audiovisual media in order to reduce costs and increase efficiency. A recent example is that of the Netherlands, where it was proposed to reduce the public funding of regional broadcasters by 1 January 2017.⁶⁶ The reforms began in 2014, when the Media Act was amended, with the responsibility for the funding of regional broadcasters being transferred from the provincial authorities to central government.⁶⁷ Prior to this, when each province was obliged to fund at least one regional broadcaster, there were instances of provinces reducing funding to broadcasters and broadcasters initiating legal action over these reductions.⁶⁸

However, under the 2014 reforms, funding for regional broadcasters was administered by the media regulator, the *Commissariaat voor de Media*, with each of the 13 regional broadcasters required to apply for a licence every five years.⁶⁹ In September 2015, the Dutch government sent further proposals to parliament on reforming regional broadcasting, through the establishment of a new regional public broadcasting organisation, and a EUR 17 million reduction in government funding by 1 January 2017. This followed consultation between the government and the umbrella

⁶⁴ <http://www.slm-online.de/11007/sitzung-des-medienrates-der-slm-vom-16-07-2014>.

⁶⁵ Wagner-Hatfield study, 'Brief summary', cit., p. 5.

⁶⁶ Ministry of Education, Culture and Science, "Media Act: rules for broadcasters and programming", <https://www.government.nl/topics/the-media-and-broadcasting/contents/media-act-rules-for-broadcasters-and-programming>.

⁶⁷ Regulation of the State Secretary for Education, Culture and Science, 11 June 2014, no. WJZ/634652 (10487) containing rules on the content and presentation of the financial statements of the regional public media institutions and amend the Media Regulations 2008 (*Regeling van de Staatssecretaris van Onderwijs, Cultuur en Wetenschap van 11 juni 2014, nr. WJZ/634652 (10487), houdende regels voor de inhoud en inrichting van de jaarrekening van de regionale publieke media-instellingen en wijziging van de Mediaregeling 2008*), Article 9a, <https://zoek.officielebekendmakingen.nl/stcrt-2014-17844.html>. See 7.5 below.

⁶⁸ Oostveen M., "Decision on Lowering Funding for Regional Broadcasters Annulled", IRIS 2012-4/34, <http://merlin.obs.coe.int/iris/2012/4/article34.en.html>. See also, Oostveen M., "Decision of the Council of State on Budget Cuts for Dutch Regional Broadcaster", IRIS 2013-4/22, <http://merlin.obs.coe.int/iris/2013/4/article22.en.html>.

⁶⁹ Regulation of the State Secretary for Education, Culture and Science, 11 June 2014, no. WJZ/634652 (10487), cit, Article 9a.



organisation of the regional broadcasters (*Stichting Regionale Omroep Overleg en Samenwerking*) (ROOS).⁷⁰

In March 2016 the proposed amendments to the Media Act were adopted.⁷¹ First, a new organisation will be established, called the *Regionale Publieke Omroep* (Regional Public Broadcasters - RPO), which will collectively represent the regional broadcasters. For ten years the RPO will be granted an exclusive “concession” (*concessie*) by the Minister for Education, Culture and Science for the realisation of public broadcasting on a regional level, and will act as a single unified organisation responsible for public broadcasting at a regional level.

In order to obtain this concession the RPO needs to submit a “concession policy plan” to the Minister, and resubmit again after five years. The plan must contain a detailed report on the ways in which the RPO wishes to shape public broadcasting on a regional level in the upcoming years. The plan needs to cover quantitative and qualitative goals. It must specify the content of regional programmes in general terms, the intended audience of programmes, and the resources the RPO needs to achieve these goals. It must also specify some organisational requirements, such as the nature and number of channels that is required and the frequencies needed to achieve this.⁷² This means that the broadcasters will no longer have to submit individual plans to the Media Authority. Based on this plan, the Minister and the RPO come to a “performance agreement” which contains the quantitative and qualitative goals the RPO should achieve, and the possible sanctions to be imposed should these goals not be achieved. It is explicitly mentioned that the performance agreement does not relate to the content of specific regional programming: the performance agreement is directed at the programming in general.

Overall, the reforms are designed so that only one organisation is required to apply for an agreement, so the individual regional audiovisual media providers are no longer required to submit individual applications, as before. The reforms have been described by the European Association of Regional Television as a “milestone.”⁷³

2.3.2. Portugal

In a somewhat similar manner to the Netherlands, Portugal has also implemented some recent structural changes to regional audiovisual media. This includes, in 2015, abolishing the Office for Media (*Gabinete para os Meios de Comunicação Social* - GMCS). This body was in charge of advising the Government on the design, implementation and evaluation of public policies for the media, and of ensuring the allocation and supervision of state incentives for the sector. However, both Law Decrees nos. 22/2015 and 23/2015⁷⁴ provide that managing incentives and support for local and regional media should be transferred to the Commissions of Regional Coordination and

⁷⁰ ROOS, <https://www.rijksoverheid.nl/onderwerpen/media-en-publieke-omroep/nieuws/2015/09/07/efficientere-regionale-omroep-blijft-herkenbaar-in-de-regio>.

⁷¹ Law of 16 March 2016 amending the Media Act 2008 in relation to the future-proofing of the public media service, https://www.eerstekamer.nl/behandeling/20160330/publicatie_wet_3/document3/f=vk2sf5wyjkz8.pdf.

⁷² Selier B., “Amendments to Media Act concerning regional broadcasting”, IRIS 2016-5, <http://merlin.obs.coe.int/iris/2016/5/article25.fr.html>.

⁷³ European Association of Regional Television, “The Netherlands: New Milestone Reached in Regional PBS Reform”, 15 March 2016, <http://www.circom-regional.eu/media-news-hidmn/905-the-netherlands-new-milestone-reached-in-regional-pbs-reform>.

⁷⁴ Decreto-Lei n.º 24/2015, and Decreto-Lei n.º 25/2015, <https://dre.pt/application/file/66432648>.



Development (regional bodies). The reforms were “based on the idea that a more rigorous evaluation will result from the proximity between the decision-makers and beneficiaries.”⁷⁵

2.4. Advertising and regional windows

2.4.1. Germany

An issue of particular importance for regional audiovisual media is that of advertising, and in particular national broadcasters advertising on a regional basis. This issue has been particularly acute in jurisdictions such as Germany, where in December 2014, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) held that it was not a breach of broadcasting law for advertising spots to be transmitted on a regional basis on a national television channel.⁷⁶ The ruling followed an announcement by the “ProSieben” television channel that it intended to offer regional advertising spots to advertising customers for whom national TV advertising was unattractive. The lower-instance *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG Berlin), in a decision of 26 September 2013,⁷⁷ ruled that it was not entitled to do so. It considered advertising to be part of the programme, which meant that the holder of a licence to broadcast a national programme was only allowed to transmit advertising on a country-wide basis.

However, the BVerwG held that “editorial content was covered by the broadcasting licence, not advertising. As such, the broadcaster was free to decide whether and how to broadcast advertising, as long as it adhered to advertising regulations.”⁷⁸ Notably, “the BVerwG also examined the objectives of the *Rundfunkstaatsvertrag* (RStV), and noted that the suggestion that such provisions could be a sensible way of protecting the financial future of local or regional media did not appear in the RStV.”⁷⁹

A second issue which has been brought before the courts has been that of regional windows, and again, the example of Germany is useful. Under section 25(4) of the RStV, the two commercial TV stations with the widest national reach are obliged to broadcast regional window programmes. The purpose of this provision is to prevent the development of an overly dominant influence on public opinion and to ensure diversity. One of the broadcasters subject to this rule, Sat.1, made a complaint over its obligation to broadcast a Hessian regional programme operated by the external provider TV Illa GmbH. The regional window broadcast by Sat.1 is the programme “17:30 Sat.1”, the five editions of which are produced by different companies. TV Illa has produced the Hessian regional programme since 2004. Sat.1 initiated legal proceedings concerning the constitutionality of the relevant rule of the RStV, stating that it was questionable whether the rule was compatible with the principle of freedom of broadcasting, enshrined in Article 5(1) of the *Grundgesetz* (Basic

⁷⁵ Lameiras M. & Sousa H., “Presidency of the Council of Ministers will advise the Government on media issues”, IRIS 2015-6/31, <http://merlin.obs.coe.int/iris/2015/6/article31.en.html>.

⁷⁶ Ruling of the Federal Administrative Court of 17 December 2014 (case no. 6 C 32.13), <http://www.bverwg.de/entscheidungen/entscheidung.php?ent=171214U6C32.13.0>. See Matzneller P., ‘Federal Administrative Court permits regional advertising by national TV broadcaster,’ IRIS 2015-3/8, <http://merlin.obs.coe.int/iris/2015/3/article8.en.html>.

⁷⁷ Case no. 27 K 231.12.

⁷⁸ Matzneller P., “Federal Administrative Court permits regional advertising by national TV broadcaster”, *op. cit.*

⁷⁹ *Ibid.*



Law⁸⁰).⁸¹ The *Verwaltungsgericht Kassel* (Kassel Administrative Court) rejected the application in a judgment of 1 December 2015.⁸² However, the Court did allow an appeal to the *Hessisches Verwaltungsgerichtshof* (Hessian Administrative Court), owing to its fundamental importance, and it is yet to be seen whether the issue will be decided definitely by the higher courts in Germany.

2.4.2. Russian Federation

Finally, there have been important developments in the Russian Federation recently, concerning the impact of advertising bans on regional media.⁸³ In July 2014 President Putin signed into law several federal statutes that amended certain important regulations of television advertising, including the Federal Statute “On amendments to Article 14 of the Federal Statute On Advertising” (Федеральный закон О внесении изменений в статью 14 Федерального закона "О рекламе").⁸⁴ The statute prohibits commercials on encoded and/or pay-TV channels if these channels do not hold a terrestrial broadcasting licence or are not on the list of must-carry programmes. The ban was set to enter into force on 1 January 2015. Notably, the OSCE Representative on Freedom of the Media expressed her concern about the new legislation, including that amendments would “negatively affect media plurality with the coming digital switchover, when hundreds of regional broadcasters will lose their terrestrial licences and, under the amendment, there will be no economic rationale to broadcast in cable systems or even online.”⁸⁵

However, in February 2015, the president signed into law a bill adopted by the State Duma on 27 January 2015,⁸⁶ which lifted the ban on commercials for pay cable and satellite television channels that do not broadcast (or rebroadcast) foreign content.⁸⁷ From then on, pay-TV channels are again able to run commercials, but only if their share of foreign shows, films and other programming does not exceed 25 per cent of total content. Compliance with these regulations will be monitored by the Federal Antimonopoly Service (FAS) that traditionally oversees compliance with the advertising law.⁸⁸

⁸⁰ The Basic Law for the Federal Republic of Germany (Grundgesetz) is the German constitution, and is superior to all other sources of domestic law,

https://e-justice.europa.eu/content_member_state_law-6-de-en.do?member=1.

⁸¹ Beckendorf I., “Obligation for commercial TV stations to broadcast a regional programme”, IRIS 2016-3/7, <http://merlin.obs.coe.int/iris/2016/3/article7.en.html>.

⁸² Case 1 K 618/13.KS, 2 December 2015,

https://vg-kassel-justiz.hessen.de/irj/VG_Kassel_Internet?rid=HMdJ_15/VG_Kassel_Internet/sub/d3a/d3a1d4f4-fba3-1517-9cda-a2b417c0cf46,,,11111111-2222-3333-4444-100000005003%26overview=true.htm.

⁸³ See generally, Susanne Nikoltchev (ed.), *IRIS Special: The Regulatory Framework for Audiovisual Media Service in Russia* (Strasbourg, European Audiovisual Observatory, 2010).

⁸⁴ Andrei Richter, “Advertising law changes to affect pay TV”, IRIS 2014-8/34, <http://merlin.obs.coe.int/iris/2014/8/article34.en.html>.

⁸⁵ Organization for Security and Co-operation in Europe, “Law amendments on advertising in Russia further endanger media pluralism and free flow of information, says OSCE representative”, 7 July 2014, <http://www.osce.org/fom/120942>.

⁸⁶ Федеральный закон от 3 февраля 2015 г. N 5-ФЗ “О внесении изменения в статью 14 Федерального закона “О рекламе” (Federal law of 3 February 2015 N 5-ФЗ “On amending Article 14 of the Federal law “On advertising”), <http://www.garant.ru/hotlaw/federal/605272/>. See Organization for Security and Co-operation in Europe, “Mijatović welcomes eased restrictions for commercial television channels in Russia, but reiterates call for complete lifting of ban”, 28 January 2015, <http://www.osce.org/fom/137226>.

⁸⁷ Andrei Richter, “Advertising Ban Amended to Excerpt Russian Entities”, IRIS 2015-3/27, <http://merlin.obs.coe.int/iris/2015/3/article27.en.html>.

⁸⁸ Andrei Richter, “Advertising Ban Amended to Excerpt Russian Entities”, IRIS 2015-3/27, <http://merlin.obs.coe.int/iris/2015/3/article27.en.html>.



2.5. Must carry and the digital switchover

2.5.1. Romania

The issue of must-carry is central to regional audiovisual media policy in many countries, such as Romania. Notably, in July 2015, the National Audiovisual Council adopted CNA decision no. 350/2015, which sought to clarify the procedure for implementing the must-carry system in the case of the retransmission of programme services at regional and local level, pursuant to Article 82 (2) of the Audiovisual Act.⁸⁹ According to the Audiovisual Act, distributors retransmitting programme services at regional and local level are required to include in their offer at least two regional and two local, relative to where they exist, programmes. They will be selected on the basis of descending audience order. A new article, Article 13.1, was introduced with a view to be included in the regional/local offer; the interested broadcasters have to send to the programme services distributors a written request for retransmission under the must-carry principle of the TV service.

This followed a discussion in 2014, in which a recommendation of the *Consiliul Concurenței* (Competition Council) to the CNA suggested modifications to the must-carry legislation.⁹⁰

With the digital switchover in Romania,⁹¹ it is also worth noting the recent successful award of digital multiplexes in the area of regional audiovisual media. First, in February 2015, the *Autoritatea Națională pentru Administrare și Reglementare în Comunicații* (National Authority for Management and Regulation in Communications - ANCOM), the telecom authority in Romania, successfully completed an auction of regional digital television multiplexes.⁹² A regional multiplex will provide the whole county with digital terrestrial television services, whereas a local multiplex will serve specific assignment areas. All multiplexes will be awarded for a 10-year period.

Nine regional DTT multiplexes were awarded, including Regal, which was awarded 1 regional multiplex (Râmnicu Vâlcea), Cargo Sped, which was awarded 1 regional multiplex (Sibiu), 2K Telecom, which was awarded 5 regional multiplexes (four in Bucharest and one in Ploiești), Radio M Plus, which obtained 1 regional multiplex (Iași) and Digital Video Broadcast, which won 1 regional multiplex (Satu Mare).⁹³ All licences are granted for the period 17 June 2015 to 17 June 2025. The winners of the regional multiplexes will be able to start the provision of commercial television broadcasting services after 17 June 2015, and by 1 May 2017, they will have to begin operation of at least one transmitter in each assignment area. A total of two national, 40 regional and 19 local multiplexes were auctioned through this competitive selection procedure.⁹⁴

In July 2015, five new regional and local multiplexes in Suceava, Botosani, Bacau, Buzau and Piatra Neamt (the northern and eastern parts of Romania) were awarded in the third auction held by ANCOM for Digital Terrestrial Television (DTT) multiplexes. Following the initial bids, the company

⁸⁹ Eugen Cojocariu, "Modification of the conditions for issuing and amending the retransmission notification", IRIS 2015-8/29, <http://merlin.obs.coe.int/iris/2015/8/article29.en.html>.

⁹⁰ Eugen Cojocariu, "New 'Must-Carry' List for 2014", IRIS 2014-3/39, <http://merlin.obs.coe.int/iris/2014/3/article39.en.html>.

⁹¹ ANCOM, "Digital switch-over in Romania", March 2015, http://www.ancom.org.ro/en/martie-2015-tranzitia-la-televiziunea-digitala-terestra-n-romnia_5372.

⁹² Cojocariu E., "Regional digital multiplexes granted", IRIS 2015-5/33, <http://merlin.obs.coe.int/iris/2015/5/article33.en.html>.

⁹³ ANCOM, "The Third Auction for Digital Terrestrial Television Multiplexes, Completed", 27 July 2015, http://www.ancom.org.ro/en/the-third-auction-for-digital-terrestrial-television-multiplexes-completed_5400.

⁹⁴ Cojocariu E., "Regional digital multiplexes granted", cit.



Info Total Press S.A. acquired three multiplexes (two regional ones in Suceava and Botosani and a local one in Bacau), for which it will pay EUR 18,200, representing the total licence fee. TV Sat 2002 won one regional multiplex in Buzau, for which it will pay EUR 8,000. The multiplex in Piatra Neamt was awarded to Grup Est Security S.R.L., following a record number of 42 primary rounds, which took place between 18 and 26 May 2015, and the licence fee to be paid amounts to EUR 41,600.⁹⁵

2.5.2. Russian Federation

In contrast, the Russian Federation⁹⁶ passed an Ordinance in August 2015,⁹⁷ extending the complete digital terrestrial broadcasting switchover until 2018.⁹⁸ Notably, this followed a 2013 Decree, which “effectively chang[ed] the composition of the country’s first DTT multiplex.”⁹⁹ This multiplex will now no longer carry a regional channel and will be entirely federal, with the 10th slot allocated to the TV company “TV Tsentr” (TV Center). The regional TV channel that was originally to be created, as part of the first multiplex by the state-run communications company Russian Television and Radio Broadcasting Network (RTRS), is now to be replaced by regional multiplexes in the provinces. The decree tasked the main state broadcaster VGTRK with establishing regional channels on the basis of its provincial bureaux with the possible input of bona fide regional companies. RTRS will provide dissemination of the signal of the regional multiplexes. By the same decree the president also tasked the government with the licensing of such regional multiplexes.¹⁰⁰

2.5.3. France

In a way similar to the legal proceedings in Germany concerning regional windows, there have also been legal proceedings in France concerning must-carry obligations. Notably, in March 2016, the Constitutional Council issued a ruling on the constitutionality of the second paragraph of Article 34(2) of the Act of 30 September 1986,¹⁰¹ which requires cable operators and Internet access providers (IAPs) using the landline network to carry local public television services (local programmes on general channels, cable channels showing local news, and local channels) for their

⁹⁵ Cojocariu E., “New digital terrestrial television multiplexes granted”, IRIS 2015-7/28, <http://merlin.obs.coe.int/iris/2015/7/article28.en.html>.

⁹⁶ See generally, Vorontsova A. and Leontyeva X., “Focus on the Audiovisual Industry in the Russian Federation”, European Audiovisual Observatory, Strasbourg, 2016, <http://www.obs.coe.int/documents/205595/552774/RU+Focus+audiovisual+industry+2015+EN.pdf/03151b29-c010-4456-b967-1e3e267072df>.

⁹⁷ О внесении изменений в постановление Правительства Российской Федерации от 3 декабря 2009 г. № 985 (Ordinance of the Government of the Russian Federation of 29 August 2015, No. 911, “On amending Ordinance of the Government of the Russian Federation of 3 December 2009, No. 985”).

⁹⁸ Richter A., “Government extends plan for digital switch-over”, IRIS 2015-9/23, <http://merlin.obs.coe.int/iris/2015/9/article23.en.html>.

⁹⁹ Richter A., “Decree on Must-Carry Channels Amended Again”, IRIS 2013-6/31, <http://merlin.obs.coe.int/iris/2013/6/article31.en.html>.

¹⁰⁰ Richter A., “Decree on Must-Carry Channels Amended Again”, cit.

¹⁰¹ Conseil constitutionnel, Décision QPC n° 2015-529, 23 mars 2016, Sociétés Iliad et a (Constitutional Council, QPC decision no. 2015-529, 23 March 2016, the company Iliad and others), <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2015-529-qpc/decision-n-2015-529-qpc-du-23-mars-2016.147152.html>.



subscribers.¹⁰² Cable operators and IAPs are also required to bear the cost of transport and distribution from the place of editing, inherent in this obligation.

Two companies, Iliad and Free, had been required by the audiovisual regulator (*Conseil Supérieur de l'Audiovisuel* - CSA) to bear the cost of carrying and broadcasting programmes from a local broadcaster in the municipality of Nice, Azur TV. The companies requested a ruling on the constitutionality of Article 34(2), arguing that by requiring them to carry the programmes without making arrangements or laying down a framework for the obligation, particularly with regard to determining the conditions for sharing the corresponding cost, the contested provisions of Article 34(2) infringed upon their freedom to conduct business and the freedom to enter into a contract.

The Constitutional Council stated that, in adopting the contested second paragraph of Article 34(2), the legislator's aim had been to ensure that the development of these local public services would be maintained and promoted. These provisions should therefore be understood as imposing upon the distributors of audiovisual services an obligation to make the services available, free of charge, which only applied in respect to subscribers located in the geographical area of the local authority editing the service. The obligation was, moreover, limited to the transport and broadcasting of the services' programmes, without any requirement to carry out connection or civil engineering work. The legislator also explicitly intended to exclude the responsibility to bear the cost of digitising programmes from the scope of the obligation. The Constitutional Council concluded that, to a limited degree, the disputed provisions infringed upon the distributors' freedom to conduct business and to enter into a contract. It also found that the obligation thus instituted pursued an objective of general interest, and did not cause an unequal discharge of public burdens. The complaints claiming disregard of this principle, and those claiming infringement of the right of ownership, were set aside. The second paragraph of Article L. 34-2 of the Act of 30 September 1986 was found to comply with the Constitution.¹⁰³

2.5.4. The Netherlands: must-carry exemptions

Finally, in the area of new media and must-carry, it is interesting to note that the Dutch Media Authority (*Commissariaat voor de Media*) recently exempted a new television service in the Netherlands from being required to carry regional broadcaster channels. The telecommunications company KPN developed a new service in the form of a mobile application (KPN Play), which includes a package of 18 linear television channels, offering catch-up and on-demand content. Under the Media Act, KPN was subject to the must-carry rules, including those which provide that packages should include two channels from regional and local public service broadcasters. However, under the Media Act the authority was able to grant an exemption from the must-carry rules, and in this instance granted an exemption to KPN until 1 January 2017. Part of the Authority's reasoning was that adherence to the must-carry rules would "result in sizable extra costs for KPN," and as such the Play app "would no longer be commercially viable."¹⁰⁴

¹⁰² Blocman A., "Obligation to carry local public television services judged compliant with Constitution", IRIS 2016-5/11, <http://merlin.obs.coe.int/iris/2016/5/article11.en.html>.

¹⁰³ Blocman A., "Obligation to carry local public television services judged compliant with Constitution", cit.

¹⁰⁴ Eskens S.J., "Dutch telecom company granted exemption from must-carry rules for new app", IRIS 2016-1/26, <http://merlin.obs.coe.int/iris/2016/1/article26.en.html>.



2.6. Italy: frequency allocation

As stated by the European Association of Regional Television, sufficient frequency allocation for regional audiovisual media is an issue of “great importance.”¹⁰⁵ In this regard, it is notable that in June 2015 the Italian communications regulator Agcom reviewed the national frequency allocation plan for local television, ensuring that providers of media services at a local level benefit from the right to be conveyed.¹⁰⁶ Pursuant to Article 6, paragraph 8, of the Act 21 February 2014, n. 9, as amended by Article 1, paragraph 147, of the Act of 23 December 2014, n. 190 (Stability Law 2015), the decision of the Italian regulatory authority makes the transmission capacity of the new networks available to local media service providers, which will be selected by the Ministry for Economic Development on the basis of regional lists.

2.7. Closures

Finally, there have unfortunately been a number of closures in the regional audiovisual media sector, of both commercial and public broadcasters. A number of notable closures include: in Sweden, the commercial broadcaster TV4 closed all 25 local and regional stations in 2014. This was seen as “a major shift in the strategies of the private broadcaster who have had regional service for over 20 years.”¹⁰⁷ Notably, advertisement will still be local but there will be no local or regional programming.¹⁰⁸ In Spain, the regional government of Valencia also closed its public television and radio service RTVV (Radio Television Valenciana).¹⁰⁹ Additionally, in Bulgaria at the end of 2013, with the introduction of digitisation, Bulgarian National Television closed four of its regional programmes “due to the lack of any private investor’s interest to develop a regional multiplex broadcasting these programmes.”¹¹⁰ They were replaced by the national programme BNT2, uniting the production of these regional centres.

2.8. Conclusion

The foregoing overview is in no way exhaustive, but seeks to offer some insights into the regulatory and policy developments concerning regional audiovisual media currently being adopted in some European countries. One of the main insights that might be gleaned is that governments and regulators throughout Europe are quite responsive to the difficulties facing regional audiovisual

¹⁰⁵ European Association of Regional Television, *The importance of regional public service media: A strategic view of the role of regional public media in Europe*, November 2014, p. 11, <http://www.circom-regional.eu/doc-download/cr-docs/1406-circom-regional-position-paper/file>.

¹⁰⁶ Di Giorgi F., “AGCOM reviews the national frequency allocation plan for local television”, IRIS 2015-8/21, <http://merlin.obs.coe.int/iris/2015/8/article21.en.html>

¹⁰⁷ European Association of Regional Television, “Swedish commercial television closing all regional stations” 15 April 2014, <http://www.circom-regional.eu/news1-2/698-swedish-commercial-television-closing-all-regional-stations>.

¹⁰⁸ European Association of Regional Television, “Swedish commercial television closing all regional stations” cit.

¹⁰⁹ European Association of Regional Television, “Public TV and radio service RTVV shut down”, 2 December 2013, <http://www.circom-regional.eu/news1-2/654-public-tv-and-radio-service-rtvv-shut-down>.

¹¹⁰ Nikolova R., “On-budget subsidies for public media”, IRIS 2016-3/6, <http://merlin.obs.coe.int/iris/2016/3/article6.en.html>.



media, and the extent and breadth of regulatory activity is quite evident. Notably, a number of themes can be identified.

First, increased flexibility for regional audiovisual media in terms of regulatory burden seems to be evident in a number of countries, including the UK, Switzerland and Spain. Second, in light of the importance of funding to a sector with significant costs; the allocation of funding for infrastructure through new arrangements, such as in the case of the Saxony Media Council, and the introduction of funding from a new broadcasting charge in Switzerland. Finally, structural reform in the organisation of regional audiovisual media, which is occurring in countries such as the Netherlands and Portugal.