



The beginnings of audiovisual consumer law – conceptual growing pains when integrating the consumer of audiovisual services into media and consumer law

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1. Introduction

“[A]udiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services.”¹

The importance of audiovisual services for democratic participation, freedom of expression, political and cultural diversity and education has traditionally been a reason for governments to submit audiovisual markets to strict scrutiny and regulation.² The role of the user in that context has commonly been not so much that of a consumer, but that of a citizen, as the “hero figure of democracy”.³ As a consumer, the user tended to evoke rather ambivalent feelings in the breasts of policymakers and academics alike. The market for audiovisual services was generally considered too important to be left to consumers, with their primary focus on their own interests and cheap prices: “while broadcasting is designed to benefit viewers and listeners, they neither know what they want nor where their interests lie.”⁴ Even if viewers knew what they wanted or were interested in, for a long time this would have been to no avail because of the prevailing character of broadcasting services as a “push medium”. In “free-to-air” broadcasting, audiovisual services are not sold to

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¹ Recital 5 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95/1 (15.04.2010)

² Helberger, N. (2008). *The Media-Literate Viewer*. In: van Eijk, N.A.N.M and Hugenholtz, P.B. (eds.). *Dommering-bundel: Opstellen over informatierecht aangeboden aan prof. mr. E.J. Dommering*. Amsterdam: Otto Cramwinckel Uitgever 2008, p. 135-148.

³ Scammel, M. (2000). *The Internet and Civic Engagement: The age of the Citizen-Consumer*. *Political Communication* 17, p. 351-355, 352.

⁴ Cited in Peacock, A. (1989). *The Future of Public Service Broadcasting*. In: Veljanovski, C. (ed). *Freedom in Broadcasting*. London: Institute of Economic Affairs (IEA), p. 53.

consumers; instead it is the attention of the audience that is sold to advertisers. Strictly speaking, for a long time the consumer of audiovisual services did not even exist.

The prevailing conception of the user as a citizen and “non-consumer”, in combination with the special importance of audiovisual services may explain the particular character of audiovisual law. Existing audiovisual law is characterized by a set of rules which address the suppliers of audiovisual services. These rules aim to ensure a high standard of quality, diversity and accessibility of the fare that is ultimately offered to an audience of citizens. Virtually absent are rules that would give viewers as consumers of audiovisual services any rights against suppliers, or other means of holding the market accountable. The dominant “paternalistic” stance of the regulator has been frequently subjected to criticism,⁵ yet it has continued to determine media law and policy.

With the increasing commercialization of audiovisual media markets, and the arrival of business models that actually “sell” digital content to consumers, the audience matured and is turning into “audiovisual consumers”. Viewers are more and more challenged to make active choices in a commercialized and interactive programme landscape. With the changing role of the audiovisual viewer, also the perception of the viewer in audiovisual law and policy is changing. The recently amended Audiovisual Media Services Directive recognizes a new role for viewers, as consumers of audiovisual services. Since market developments are giving viewers more choice, viewers, as consumers, are also being “empowered”, under the terms of the directive, to take the protection of their interests and concerns vis-à-vis the providers of audiovisual services into their own hands.⁶ With that power comes also a new responsibility for audiovisual viewers to stand up for their rights and interests, as well as the cultural, social and democratic importance of audiovisual services.

The situation raises a number of difficult issues for the legal position of viewers, as audiovisual consumers. Traditional audiovisual law tended to ignore the commercial relationship between providers of audiovisual services and the audience. General consumer and contract law has not been tailored to consider the particular cultural, social and democratic value of viewers’ access to, and use of audiovisual content. Occasionally, the application of general consumer law to audiovisual services is even explicitly excluded because of the precedence of sector specific audiovisual law. The changing role of the viewer challenges the existing legal approach. It calls for a process of rethinking the legal position of the audiovisual consumer, and for a more prominent role of “audiovisual consumer law”. This article is a first attempt in this direction.

⁵ In this sense, for example, Wentzel, D. (2002). *Medien im Systemvergleich. Eine ordnungsökonomische Analyse des deutschen und amerikanischen Fernsehmarktes*. Schriften zu Ordnungsfragen der Wirtschaft. Stuttgart: Lucius & Lucius; Noam, E. (1988). *Der Einfluß von Marktstruktur und Eintrittsschranken auf die Vielfalt der Fernsehprogramme*. In Mestmäcker (ed.), *Offene Rundfunkordnung*. Gütersloh: Bertelsmann Stiftung; Owen, B.M. (1975). *Economics and Freedom of Expression: Media Structure and the First Amendment*. Cambridge: Ballinger, p. 27. Coase, R.H. (1966). *The Economics of Broadcasting and Government Policy*. *American Economic Review* 56, p. 440- 446.

⁶ Recitals 47, 58 Audiovisual Media Services Directive. See also Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information service industry, 20 December 2006, Rec. 2006/952/EC.

The article will first describe the shift from viewer to audiovisual consumer, and the resulting implications for media law and policy. The point of departure are the rules and policies at the level of the European Union and the Council of Europe – two institutions that have shaped national media laws and policies to a considerable extent. It will then describe some of the main concerns of audiovisual consumers, and to what extent existing audiovisual law is prepared to accommodate them. In a next step, the article will focus on one particular aspect of consumer protection. This is the new disclosure requirement that Art. 5 of the Audiovisual Media Services Directive introduced recently. The provision is modeled on similar provisions in consumer law and provides an excellent case study of the conceptual challenges when incorporating the audiovisual consumer into audiovisual and media law.

2. The audiovisual consumer in traditional media law

The attitude of traditional law towards the viewer can at best be described as patronizing. The interests of viewers are “institutionally rather than legally protected through the Parliamentary Commission and the political process.”⁷ The main goal of audiovisual law in Europe is to ensure that the programmes that reach the viewer are sufficiently diverse, of a certain quality, and that they do not expose viewers to harm. Programmes must not be offensive and may not contain any incitement to hatred based on race, sex, religion or nationality. They need to respect the particular vulnerabilities of special categories of viewers, too, notably minors and the disabled.

In so doing, audiovisual law addresses in particular the citizen in the viewer. As citizens, viewers enjoy a number of important fundamental rights, such as the right to freedom of expression, the right to privacy or to the protection of a plural media offer (Art. 11 Charter Fundamental Rights European Union). They are subject to specific cultural and social information policies. It is the task of the media, and ultimately the media regulator, to serve the citizen and help her to benefit from constitutional freedoms. The media are carriers of political, cultural and social messages, and an important element in the process of forming individual and collective opinions. The consumer in the viewer plays a role, too, though far less central than the citizen.⁸ The rules that probably come closest to consumer protection in the traditional sense are the various restrictions on advertising and (unfair) commercial practices. Both the former Television Without Frontiers Directive and its follow-up, the recently amended Audiovisual Media Services Directive, include a number of provisions regarding advertising, sponsoring and product placement.⁹ An interesting example of a hybrid provision that addresses both the consumer and the citizen is the obligation to separate editorial content from commercial messages.¹⁰ The primary goal of the rule is to protect the editorial independence of the media and the ability of viewers to judge for themselves whether external influences have shaped a program. The separation

⁷ Barendt, E. (1993). *Broadcasting Law. A Comparative Study*. Oxford: Clarendon Press, p. 49.

⁸ In comparison, in the former “Television without Frontiers” Directive, the notion “consumer” appears only twice and is mainly used in the context of rules on advertising.

⁹ See Arts. 9-11, 19-25 of the Audiovisual Media Services Directive.

¹⁰ Art. 9 (1) a of the Audiovisual Media Services Directive.

principle, however, also entails an element of consumer protection,¹¹ namely to avoid consumers being misled by “editorially camouflaged advertisement”.¹² Having said that, all these rules address the user not as a consumer of audiovisual services, but more generally as a viewer who is also a consumer of goods and services that are advertised on TV.

Due to modern technical and market developments, the traditional approach in audiovisual law is losing its steering power. Digitization brought with it more capacity, more sophisticated content control technologies, like Digital Rights Management and Conditional Access systems, and more possibilities for suppliers to communicate on a large scale directly with their users via return channels, to establish direct commercial relationships and to offer a choice of personalized and diversified services. Viewers turned into consumers. Modern business models for the delivery of audiovisual content invite audiovisual consumers to actively exercise choice over the content, time, place and other conditions of access. Examples are pay-TV, on demand, pay-per-view and similar business models. But even in free-to-air broadcasting, the realization is dawning that broadcasting is not and never was for free, unlike common beliefs and popular arguments in media law and policy may have it.¹³ Viewers pay in the form of attention,¹⁴ taxes, loss in autonomy¹⁵ and, increasingly, personal data, as the new currency of the digital economy.

While modern digitized audiovisual markets offer amazing opportunities and improved services for audiovisual consumers, they can also confront viewers, as audiovisual consumers, with a range of problems and obstacles in their new relationship with the suppliers of services. One of the most frequently mentioned problems of audiovisual consumers is the lack of transparency, notably transparency about the terms and conditions of a service, but also about the presence of technological restrictions.¹⁶ The arrival of electronic access controls and DRMs triggers concerns about usability, compatibility but also the territorial ubiquity of services.¹⁷ Privacy considerations are another important consumer concern,¹⁸ as are

¹¹ Kabel, J. (2008). Art. 17 TWFD. In: Castendyk, O., Dommering, E. and Scheuer, A. (eds.). *European Media Law*. Den Haag: Kluwer Law International, p. 621-640, 622.

¹² Schaar, O. (2008). *Television Advertising, Sponsorship and Teleshopping*. In: Castendyk, O., Dommering, E. and Scheuer, A. (eds.). *European Media Law*. Den Haag: Kluwer Law International, p. 489-540, 492 and 500.

¹³ See e.g. European Parliament, Committee on Legal Affairs and Citizens' Rights, Report on the proposal for a European Parliament and Council Directive on the legal protection of services based on, or consisting of, conditional access, Brussels, 21 April 1998, A4-0136/98, Recital 15a, speaking of a “right of the viewer to have access to free-to-air channels”.

¹⁴ Arguably in commercial broadcasting, users pay a higher fee through being exposed to more advertisement than in public television (“attention economy”).

¹⁵ For example as a result of electronically enforced usage restrictions in exchange for lower pricing or as a precondition of access, see. Helberger, N. (2005). *Controlling Access to Content. Regulating Conditional Access for Digital Broadcasting*. Den Haag: Kluwer Law International, p. 36 subq.

¹⁶ Dufft, N. et al. (2006). *Digital Video Usage and DRM. Results from a European Consumer Survey*. Berlin: INDICARE. Online available at http://www.indicare.org/tiki-download_file.php?fileId=170 (last visited April 28, 2011). Europe Economics, *Digital content services for consumers: assessment of problems experienced by consumers (Lot 1), Report 3 Assessment of consumers' experience and possible problems, Final Report*, London: 2011 (not yet published).

¹⁷ Helberger, N., Dufft, N., van Gompel, S., Kerényi, K., Krings, B., Lambers, R., Orwat, C and Riehm, U. (2004). *Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations. State-of-the-Art Report*. Amsterdam: INDICARE; Helberger, N. (2007). *Refusal to Serve Consumers because of their Nationality or Residence - Distortions in the*

restrictions to their freedom of choice, through technical lock-in situations, large-scale program bundling practices or the duration of subscription contracts.¹⁹

These are concerns of the audiovisual consumer that traditional audiovisual law is not equipped to address. Focused primarily on the supply side, and the conditions of production and dissemination of programs to an undefined number of “eyeballs”, traditional audiovisual law has no direct means of assisting audiovisual consumers in their commercial dealings with suppliers of audiovisual services, through rules that would allow viewers to hold broadcasters accountable for the quality and accessibility of programming.²⁰ For example, though providers are obliged to separate editorial content from advertisement, viewers have no legal standing in relation to the provider of the service to complain if it does not follow that rule. Neither can the hearing impaired complain about the inaccessibility of a program, even if the law obliges suppliers to make their services accessible. In other words, there are no direct rights or remedies of the viewer against the supplier. Instead, it is the task of the government and specifically the National Regulatory Authorities for the audiovisual sector to safeguard the viewers’ rights and interests.

3. A sector in transition: towards audiovisual consumer law

3.1 A new conception of the viewer

The Audiovisual Media Services Directive could be said to have revolutionized the traditional conception of the viewer in audiovisual law and policy. It replaced the notion of the helpless viewer, unable to decide what is in her own best interest, with the self-confident audiovisual consumer. Enabled by modern market developments, the audiovisual consumer is better prepared to take the protection of her interests and concerns into her own hands, particularly in relation to interactive business models. According to the directive:

“On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive.”²¹

The directive acknowledges that the need for and character of legislative protection of the interests of the audiovisual viewers changes as a result of their more direct relationship with the providers of audiovisual services. In situations in which viewers choose and acquire their programming in a more commercialized and interactive

Internal Market for E-commerce Transactions. Briefing Note for the European Parliament's Committee on Internal Market and Consumer Protection. Amsterdam: Institute for Information Law.

¹⁸ Loos, Helberger, Guibault, Mak et.al, 2011.

¹⁹ Europe Economics (2011); Helberger, 2005, p. 38.

²⁰ Holznapel, B. and Jungfleisch, C. (2007). The protection of viewer rights in Europe. In: Baldi, P. and Hasebrink, U. (eds.). Broadcasters and Citizens in Europe. Trends in Media accountability and Viewer Participation, Bristol: Intellect Books. p. 54-74; Thomas, G. (1970). The Listener’s Right to Hear in Broadcasting. Stanford Law Review, 22, p. 863, 864 and subsq. (for the US). Helberger, 2005, p. 281.

²¹ Recital 58 of the Audiovisual Media Services Directive.

programme landscape they enjoy, arguably, a new power, as consumers, to influence the programme output.²² More audiovisual content is offered by more commercial organizations. Suppliers must expect to be held accountable by consumers for the content that they offer. Accordingly, one could argue that choice and competitive pressure empower the viewer, in her capacity as consumer, to express specific preferences and to demand programmes that respond to her personal as well as civic interests.²³ This also means, however, that the changing role of the viewer no longer justifies the traditional strict, paternalistic interference of the regulator. Instead, it calls for initiatives to support viewers, where necessary, in their dealings with suppliers of audiovisual services.

The heightened emphasis of the directive on viewers that take the protection of their interests into their own hands is closely linked to a new prototype of the viewer: the “media literate viewer”. The Audiovisual Media Services Directive defines “media literacy” as the “skills, knowledge and understanding that allow consumers to use media effectively and safely”.²⁴ Media literacy enables viewers to “exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communication technologies”.²⁵ In other words, today’s viewers are expected to choose audiovisual services in accordance with their own personal needs, and to take responsibility for their own choices. What is more, by making the “right” choices, viewers are expected to not only serve their own interests, but also to promote wider public policy objectives.

According to the European Commission, media literacy is both a corner stone of full and active citizenship²⁶ as well as part of a strategy to boost competitive and prosperous information markets in the sense of the Lisbon agenda.²⁷ To that extent, it is probably no coincidence that the new concept of the “media literate viewer” echoes the notion of the “average consumer” as sovereign market actor, an idea which has shaped large parts of the more recent European consumer law.²⁸ The average consumer is “reasonably well informed and reasonably observant and circumspect”²⁹

²² See also Scammel, 2000, p. 354.

²³ Scammel, 2000, p. 351-354. Keum, H., Devanathan, N., Deshpande, S., Nelson, M.R. and Shah, D.V. (2004). The Citizen-Consumer: Media Effects at the Intersection of Consumer and Civic Culture. *Political Communication*, 21, p. 369-377, p. 370 subsq. Critical: Bennet, W.L. (2000). Communication and Civic Engagement in Comparative Perspective. *Political Communication*, 17, p. 307-312, 308-309.

²⁴ Audiovisual Media Services Directive, Recital 37. See also, and in more detail, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European approach to media literacy in the digital environment, Brussels, 20 December 2007, COM(2007) 833 final (European Commission 2007).

²⁵ Recital 37 of the Audiovisual Media Services Directive.

²⁶ European Commission, “Media literacy: do people really understand how to make the most of blogs, search engines or interactive TV?”, Press Release IP/07/1970, 20.12.2007, available online at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1970&format=HTML&aged=0&language=EN&guiLanguage=en>

²⁷ European Commission, 2007, p. 2.

²⁸ Rinke, J.G.J. Europees consumentenrecht. In: Hondius, E.H. and Rijken, G.J. (eds). *Handboek consumentenrecht. Een overzicht van de rechtspositie van de consument*. Zutphen: Paris, p. 31, 36.

²⁹ European Court of Justice, Case C-210/96, Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung, 16 July 1998, E.C.R. 1998 I-04657, para. 31; European Court of Justice, Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH, 6 July 1995, ECR 1995 I-01923, para. 24. See Recital 18 of Directive 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No.

and because of that well equipped to address her own needs and preferences. Such needs and preferences can be economic or non-economic, self-centered or altruistic, consumption-oriented or civic-minded.³⁰ And like the media literate viewer, the average consumer plays a prominent role as active driver of competitive and diverse markets that reflect the heterogeneous preferences of Europe's citizens.³¹ Common to both the concept of the media literate viewer and the sovereign consumer is thus that they are considered important stepping stones for deregulation, a policy of encouraging self-regulation and empowering consumers/citizens/viewers to play their assigned roles in the European knowledge economy.

3.2 Experimenting with new tools: audiovisual consumer information

In response to the changing role of viewers, the Audiovisual Media Services Directive adopted a provision that probably comes as close to classical forms of consumer protection as audiovisual law has ever come. Article 5 of the Audiovisual Media Services Directive introduced a new disclosure requirement for suppliers of audiovisual content vis-à-vis audiovisual consumers. According to Art. 5 of the directive, audiovisual media service providers shall provide viewers with information about the provider's name, geographical and electronic address and competent regulatory authority. This must be done in a way that is "easily, directly and permanently accessible to the recipients".

Disclosure requirements are a classic, and probably one of the most popular tools for empowering consumers as active and autonomous market actors.³² Information asymmetries are considered important sources of market failure, also in audiovisual content markets.³³ For users (as consumers) it is often difficult if not impossible to anticipate the characteristics and value of a piece of media content before they have had the chance to experience it (experience good).³⁴ And while some information, e.g.

2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive") (Text with EEA relevance), OJ L 149 (11 June 2005).

³⁰ See e.g. Wilhelmsson, T. (2001). The Consumer's right to Knowledge and the Press. In: Wilhelmsson, T., Tuominen, S and Tuomola, H. (eds.). *Consumer Law in the Information Society*, The Hague: Kluwer Law International, p. 367, 379; Bourgoignie, T. (1992). Characteristics of Consumer Law. *Journal of Consumer Policy*, 14, p. 293, 303.

³¹ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *EU Consumer Policy Strategy 2007-2013 Empowering Consumers, Enhancing Their Welfare, Effectively Protecting them*, at 2-6, COM(2007)99 final, 13 March 2007.

³² Howells, G. (2005). The potential and limits of consumer empowerment by information. *Journal of Law and Society*, 32, p. 349, 352 subseq.; Nordhausen, A. (2005). In: Howells, G., Janssen, A. and Schulze, R. (eds.). *The Role of Information Requirements and the Relationship to Party Autonomy*. Aldershot: Ashgate; p. 93-114. Fritsch, M., Wein, T. and Ewers, H.-J. (1999). *Marktversagen und Wirtschaftspolitik*. 3rd edition. Munich: Verlag Vahlen, p. 294-295; Rehberger, M. (2007). *Der Staatliche Umgang mit Information – Das europäische Informationsmodell im Lichte von Behavioural Economics*. In Ott, C. and Schäfer, H.-B. (eds). *Ökonomische Analyse der europäischen Zivilrechtsentwicklung*. Tübingen: Mohr-Siebeck, p. 298-371.

³³ Kops, M. (2002). Mängel einer marktlichen Bereitstellung. In: Schulz, W., Held, T. and Kops, M. (2002). *Perspektiven der Gewährleistung freier öffentlicher Kommunikation*. Baden-Baden: Nomos, p. 185, arguing that the case of market failure may be stronger for some types of content (e.g. news or political commentary) than others (e.g. films and entertainment).

³⁴ Shapiro, C. & Varian, H. (1999). *Information Rules. A Strategic Guide to the Network Economy*. Boston: Harvard Business Press, p. 5, 22. Nelson, P. (1970). Information and Consumer Behavior. *Journal of Political Economy*, 78, p. 311-329. Van de Donk, W.B.H.J., Broeders, D.W.J., Hoefhagel,

title or length of a film, might be relatively easy to find, other pieces of information, such as journalistic or artistic quality are difficult to judge for most users, even after they have consumed a digital content product or service.³⁵ The need for pre-transactional information about digital content goods or services is further re-enforced by the close link between digital content and the technical format in which it is provided. Aspects of technical standards and compatibility of a piece of digital content with consumers' equipment are critical for the question of whether users can actually access and play a particular piece of media content.³⁶ The technological aspects, too, can be particularly difficult for users to see and grasp before they experience them.

It is important to realize that the inability of viewers to make well-informed programme decisions can affect not only economic, but also ideological competition in the so-called "market place of ideas".³⁷ Not only do users need "information about information" in order to be able to choose the "best" offers from all the information available on the market place, but this information has to be delivered in a manageable format that allows comparison. Otherwise, the risk is that users will not be aware of the contents that are relevant and valuable in advancing the goals that are commonly associated with media policy, such as media diversity, democratic participation and cultural exchange. To that extent, empowering consumers through information would need to serve the double goal of bracing consumers in their relationship to the suppliers of audiovisual services in the context of economic as well as ideological competition.

This is the background against which Art. 5 of the Audiovisual Media Services Directive must be seen. The following section shall examine to what extent Art. 5 of the Audiovisual Media Services Directive can live up to the expectations it created.

3.3 Stuck in the experimental stage

Curiously, in the course of the drafting of the Audiovisual Media Services Directive, the transparency obligation triggered no or only little discussion. Only very few amendments were suggested to the original provision that was proposed by the European Commission.³⁸ For example, it was suggested that service providers should also provide the postal and electronic address of the regulatory authority,³⁹ the name

F.J.P.M. (2005). Trends in het Medialandschap. Report of the Scientific Council for Government Policy (WRR). Den Haag.

³⁵ Kops, 2002, p. 186 subseq.

³⁶ This is of course particularly true for the case of on-demand content and pay-TV which are commonly subject to the application of technical protection measures.

³⁷ See e.g. Napoli, P. (1999b), The Market Place of Ideas Metaphor in Communications Regulation, *Journal of Communication*, 1999-49, p. 151-169.

³⁸ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities {SEC(2005) 1625} {SEC(2005) 1626}, COM/2005/0646 final - COD 2005/0260.

³⁹ Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities COM(2005) 646 final – 2005/0260 (COD), Brussels, 14 September 2006, section 4.10.

of the service's legal representative and the name of the editor responsible for content.⁴⁰ A somewhat further reaching and potentially interesting proposal to inform users "about the ways in which editorial responsibility for the content is exercised and by whom",⁴¹ also did not make it into the final version of the directive. Most striking perhaps was the persistent absence of a more fundamental discussion of what the concrete information needs of audiovisual consumers are, and specifically which where the information asymmetries that the directive was seeking to address, and for which purposes. Obviously, the question of which information to provide users with is closely linked to the purpose the provision was meant to serve in the first place. In this context, at least two interpretations are possible.

As the Audiovisual Media Services Directive explains, "[b]ecause of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services."⁴² In the subsequent sentence, the directive concludes that "[i]t is therefore important for Member States to ensure that users have easy and direct access at any time to information about the media service provider." This argument seems to reflect earlier demands from the Council of Europe. The Council of Europe called upon member states already in 1994 to make sure that viewers "have access on an equitable and impartial basis to certain basic information on the media so as to enable them to form an opinion on the value to be given to information, ideas and opinions disseminated by the media."⁴³ Unlike the European Commission, however, the Council of Europe concluded that what viewers needed was first and foremost information about the structures, third party interests and resources behind a particular provider, at least to the extent that they were likely to exercise influence on the programming policy of the service.⁴⁴

Obviously, the Council of Europe considers other pieces of information crucial in empowering viewers to assess media content upon its value and interest to the user. Quite possibly, however, neither the information suggested by Art. 5 of the Audiovisual Services Directive nor by the Council of Europe is actually the information that viewers in practice will base their evaluation and selection decision on. Arguably, information about the experience of the author, director or producer of a piece of audiovisual content, whether she adhered to certain (acknowledged) quality standards or codes of conduct, the quality of the contribution itself, but also information about the impact of these authors' work, for example by displaying the number and content of comments, could have been equally if not more useful to this

⁴⁰ Amendments 33, 34 and 35 of Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Culture and Education on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member states concerning the pursuit of television broadcasting activities (COM(2005)0646-6-0443/2005-2005/0260(COD)), October 2006.

⁴¹ Committee on Culture and Education on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)), PE 376.676v04-00, A6-0399/2006, 23 November 2006, Amendment 42.

⁴² Recital 45 of the Audiovisual Media Services Directive.

⁴³ Council of Europe, Recommendation No. R(94)13 of the Committee of Ministers to Member States on Measures to Promote Media Transparency, 22 November 1994.

⁴⁴ Ibid.

end.⁴⁵ It would clearly go beyond the scope of this article to explore which information exactly viewers need to assess media content upon its (editorial) value. The point is that neither the European Commission nor the Council of Europe launched into a more profound investigation of the actual information needs of the audience. Yet, both entities made suggestions about the types of information viewers need to receive. This strategy is probably not only ineffective, as experience from consumer law and policy might have taught the Council of Europe and the Commission.⁴⁶ It could also add even more useless information to the information load of audiovisual viewers and thereby be potentially detrimental to their interests.

A more likely interpretation of Article 5 of the Audiovisual Media Services Directive is that its aim is to empower the audiovisual consumer in her commercial dealings with the suppliers of audiovisual content, similar to the way the disclosure requirements in general consumer law must enable consumers as active market participants. This does not take away that the audiovisual consumer is also or equally interested in the opinion forming aspect of audiovisual services (next to merely consumption/entertainment oriented considerations). Support for this interpretation can be derived from the fact that Art. 5 Audiovisual Media Services Directive quite literally copies the text of Art. 5 of the E-Commerce Directive.⁴⁷

Strikingly, unlike the corresponding provision in the E-Commerce Directive, and respectively general consumer and contract law, Art. 5 of the Audiovisual Media Services Directive does not require providers to inform consumers about the price they need to pay for an audiovisual service. As mentioned earlier, even in the case of advertisement or publicly funded broadcasters, users do pay a price for viewing. Research demonstrated moreover that the need to pay for television influences users' choices and exposure more than the number of channels available to users.⁴⁸ To that extent, one could argue that in order to truly empower users to make diverse programming decisions, users would also need to receive information about pricing and other possible conditions of access and delivery.⁴⁹

⁴⁵ See Helberger, N., Leurdijk, A. and de Munck, S. (2010). User Generated Diversity: Some Reflections on How to Improve the Quality of Amateur Productions. *Communications & Strategies*, 77, p. 55-77. For example, the User Created News Site AgoraVox publishes for each citizen journalist a short biography and detailed statistics about the number of published articles, posted comments, received comments, acts of moderation as well as an overview of all previous articles. This way, a reader can get a fair impression of the expertise, background and dedication of an author.

⁴⁶ Compare Golan, E., Kuchler, F. and Mitchell, L. with contributions by C. Greene and A. Jessup (2001). *Economics of Food Labelling*. *Journal of Consumer Policy*, 24, p. 117-184.

⁴⁷ Art. 5 of the E-Commerce Directive requires service providers to provide consumers with information about the name of the service provider, the geographic address at which the service provider is established, the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register; where the activity is subject to an authorization scheme, the particulars of the relevant supervisory authority; etc.

⁴⁸ Cooper, R. and Tang, T. (2009). Predicting Audience Exposure to Television in Today's Media Environment: An Empirical Integration of Active-Audience and Structural Theories. *Journal of Broadcasting & Electronic Media*, 53(3), 400-418.

⁴⁹ See Cooper and Tang, 2009.

This leads to the next question, namely to what extent audiovisual consumers could turn to the provisions of general contract and consumer law to require suppliers of audiovisual services to provide them with the relevant information. As the following section will show, this question is still far from being settled.

3.4 Musings about the interaction between sector specific and general consumer protection law

At present, there is considerable legal uncertainty about the interaction between audiovisual law (as sector specific law) and general consumer law.⁵⁰ A discussion of this question is rendered more difficult by the fact that audiovisual law is public law, and it is essentially the task of National Regulatory Authorities to see to it that the interests of audiovisual viewers are respected. By contrast, the goal of general consumer and contract law is to empower and protect consumers in their relationship with suppliers, a relationship that is governed by private law. Another complicating factor is the special cultural, democratic and social importance of audiovisual consumers and the dual role of the user as both citizen and consumer. Having said that, the idea of empowering consumers, through consumer law tools, to take their protection in their own hands and to make the audiovisual market more responsive to the actual needs and interests of audiovisual consumers, and society as a whole, is potentially attractive from a media policy point of view. As demonstrated in the previous sections, the existing top-down regulatory approaches are becoming less effective as the terms and conditions of access to broadcasting are increasingly determined bottom-up.⁵¹ Forms of “audiovisual consumer law” could be a response to the loss of control over the broadcasting offer because of private ordering in the form of subscription contracts, programme bundling, information asymmetries, etc.⁵²

General contract and consumer law lays down ample (indirect) information requirements.⁵³ In situations in which the trader does not supply the consumer with the necessary information concerning the contractual terms, or not in a sufficiently clear and understandable way (“plain, intelligible language”, according to Art. 5 of the Unfair Terms Directive), this could amount to unfairness. As a consequence, the contract could be considered invalid, the unfairness could give rise to a claim to damages or lead to the terms being interpreted in favor of the consumer.⁵⁴ Failure to inform consumers about certain essential characteristics that may influence their reasonable expectations can also give rise to a claim of non-conformity under

⁵⁰ Loos, M., Guibault, L. and Helberger, N., 2011, p. 57.

⁵¹ Arino, M. (2007). Content Regulation and New Media: A case study of Online Video Portals. Paper presented at the EuroCPR conference, 25th - 27th March, Seville, p. 29.

⁵² Helberger 2005, p. 37 subsq. Examples that make the quality and accessibility of audiovisual content subject to private regulation are the contractual rules about programme packages, the costs of extending the package, the acceptance of advertisement, the conditions under which programmes are (not) made accessible to minors, etc.

⁵³ For an excellent discussion, see Wilhelmsson, T. (2003). Private Law Remedies against the Breach of Information Requirements of EC Law. In: Schulze, R., Ebers, M. and Grigoleit, H.-C. (eds.). Informationspflichten und Vertragsschluss im Acquis Communautaire. Tübingen: Mohr Siebeck, p. 245- 263, also pointing out that the remedies are only partly harmonized by European law. For a comparative review, Loos, M., Guibault, L. and Helberger, N. (2011), p. 47-54.

⁵⁴ Wilhelmsson, T. (2003). Private Law Remedies against Breach of Information Requirements of EC Law. In Schulze, R., Ebers, M. and Grigoleit, H.C. (eds.). Informationspflichten und Vertragsschluss im Acquis communautaire. Tübingen: Mohr, p. 259.

consumer sales law. The omission of information that consumers need to make informed transactional decisions (e.g. about the presence of DRM or limited interoperability), or the provision of false and misleading information can lead to claims under unfair commercial practice law.

The question of whether audiovisual consumers can rely on consumer and contract law to receive crucial information is still open to debate, as is the question to what extent general consumer law could be used to complain about the failure to comply with sector specific information requirements, such as those in Art. 5 of the Audiovisual Media Services Directive. At least in some member states of the European Union, general contract law and consumer law remedies are probably, at least in theory available (e.g. in Germany, Hungary, France, Poland, Spain and the UK).⁵⁵ Of particular importance for the audiovisual consumer are also the rules on unfair commercial practices.⁵⁶ To the knowledge of the author, concrete case law is still missing. The following observations are therefore somewhat speculative.

3.4.1 Explicit exclusion of the applicability of general consumer law to audiovisual services

In practice the application of general contract and consumer law to audiovisual services would still need to overcome a number of obstacles. To begin with, audiovisual services are explicitly excluded from the applicability of some areas of consumer law. For example, users of traditional “broadcasting services” cannot invoke the protection of the E-Commerce Directive (and its information requirements).⁵⁷ Broadcasting services are not information society services, at least as long as “they are not provided at individual request”.⁵⁸ Instead, these services fall under the special regime of the Audiovisual Media Services Directive.

The situation is less clear for consumers of on-demand services. According to the E-Commerce Directive, “services which are transmitted point to point, such as video on demand ... are information society services”,⁵⁹ with the consequence that the E-Commerce Directive applies. The question is if this situation is the result of the fact that the E-Commerce Directive preceded the Audiovisual Media Services Directive, and it was therefore relevant only until the Audiovisual Media Services Directive extended its scope to cover also on-demand services. Or is it indeed the intention of the legislator that consumers of on-demand audiovisual services should fall under both regimes? Both directives are unclear on this point.⁶⁰

⁵⁵ Loos, M., Guibault, L. and Helberger, N. (2011), p. 57.

⁵⁶ Loos, M., Guibault, L. and Helberger, N. (2011), p. 57 (for example in Germany, Hungary, France, Poland, Spain, UK).

⁵⁷ Recital 18 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ L 178/1 (17.07.2000).

⁵⁸ Recital 18 of the E-Commerce Directive.

⁵⁹ Recital 18 of the E-Commerce Directive.

⁶⁰ The Audiovisual Media Services Directive is not clear on this question. It only stipulates, in very general terms that Directive 2000/31/EC (E-Commerce Directive) “shall apply unless otherwise provided for in this Directive. In the event of a conflict between a provision of Directive 2000/31/EC and a provision of this Directive, the provisions of this Directive shall prevail, unless otherwise provided for in this Directive.”, Art. 4 (8) of the Audiovisual Media Services Directive.

Also the application of the provisions of the Services Directive is excluded for audiovisual services.⁶¹ It is worth noting that of all European Consumer Directives, the disclosure requirements in the Services Directive are probably the most extensive ones, and potentially also very relevant for audiovisual consumers. For example, according to Art. 22 (3) of the Services Directive, consumers may request information about eventual professional rules (editorial guidelines?), code of conducts but also multidisciplinary activities and partnerships that might be the cause of conflicts of interests (cross-ownership, other instances influencing the editorial policy?). Audiovisual consumers might also more generally benefit from the applicability of the Services Directive. According to Art. 20 of the Service Directive, for example, member states shall ensure that the general conditions of access to a service contain no discriminatory provisions relating to nationality or place of residence of the recipient. As a matter of fact, this is exactly the situation with which many consumers of audiovisual services are confronted, and which raises considerable concern with regard to the individual as well as public policy interests of audiovisual consumers.⁶²

Is it still justified to exclude audiovisual consumers from certain areas of general consumer and contract law? With the changing role of the viewer, also the justification for treating audiovisual consumers differently to other consumers is vanishing. This is the more so since audiovisual law is inapt to address the new concerns of the audiovisual consumer. At the same time, audiovisual consumers are expected to take part more actively in the market process. These are arguments in favor of reconsidering the exclusionary treatment of audiovisual services.

3.4.2 Practical and legal obstacles when applying consumer and contract law to audiovisual services

With regard to other fields of law, their applicability to audiovisual services has not been explicitly excluded. Still, there are practical or legal reasons why the provisions are poorly prepared to accommodate the needs of the audiovisual viewer. The applicability of the provisions on consumer sales to audiovisual services, for example, is unclear due to the intangible nature of these services and the lack of a direct commercial (sales) relationship.⁶³ Having said that, as a comparative study into the legal situation in ten European member states demonstrated, the intangible nature of audiovisual services need not be an insurmountable obstacle to the analogous application of consumer sales law.⁶⁴ Probably more problematic when applying consumer sales law to audiovisual services is the proper balancing between the preferences and protection-worthy (constitutional) interests of consumers, and the editorial freedom of providers of audiovisual services.⁶⁵ The duty to inform

⁶¹ Recital 24 and Art. 2 (2) (g) of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (“Service Directive”), OJ L 376, (27.12.2006).

⁶² Helberger, N. (2007). Refusal to Serve Consumers because of their Nationality or Residence - Distortions in the Internal Market for E-commerce Transactions. Briefing Note for the European Parliament's Committee on Internal Market and Consumer Protection. Amsterdam: Institute for Information Law.

⁶³ Loos, M., Guibault, L. and Helberger, N. (2011), p. 26 subsq. (with an extensive discussion, and comparative overview of the legal situation in ten European member states).

⁶⁴ Ibid.

⁶⁵ Wilhelmsson, 2001; Meyer, A. (1997). Die Haftung für fehlerhafte Aussagen in wissenschaftlichen Werken. Zeitschrift für Urheber- und Medienrecht (ZUM), 1, p.26-34; Höckelmann, E. (1996). Die

audiovisual consumers would have to reconcile the need for transparency with the fundamental freedoms of the suppliers and editors of audiovisual services, including the confidentiality of the sources of information of the media and editorial secrecy and independency.⁶⁶ The way in which these rights and interests would need to be balanced most likely also depends on the type of information at stake. Disclosure of information about the name and address of a supplier touches less upon editorial freedoms and fundamental rights than disclosure of editorial policies and organizational structures.

To the extent that the application of general consumer protection law requires the existence of a contract between consumer and supplier, for instance in the case of the provisions about fairness in (pre-)contractual dealings, the lack of such a contract at least in the context of traditional broadcasting services is surely an obstacle. This is different of course for on-demand and subscription services. But even in the case of on-demand services, the question remains if the Unfair Contract Terms Directive applies, and if so how contract law could take into account the special interests and need for protection of audiovisual consumers. For example, information about the duration of an on-demand or subscription contract can not only affect the economic interests of an audiovisual consumer. It can also affect interests in being able to benefit from media diversity. The duration of the contract, the technical format or the size of the programme bundle forms a particular obstacle to the consumers' willingness or ability to switch between services.⁶⁷ Accordingly, audiovisual consumers might need to receive additional information about the possibility to reduce a programme bundle, or the compatibility of a settop box with competing services.

3.4.3 Audiovisual consumers and the Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive is one of the few consumer protection regulations that the Audiovisual Media Services Directive declares directly applicable.⁶⁸ It is also one of the few pieces of general (applicable to all markets, and not a particular sector only) consumer protection legislation that includes a provision that specifically addresses the interests of audiovisual consumers.⁶⁹ The Unfair

Gewährleistungshaftung für Verlagserzeugnisse. UFITA, 131, p. 49-94.203. Kabel, J. (2008). Audiovisual Media Services and the Unfair Commercial Practices Directive. IRIS Plus. Strasbourg: European Audiovisual Observatory, p. 1-8, suggesting that attempts to answer this question would quickly hit a blank wall.

⁶⁶ Council of Europe, Recommendation No. R(94) 13 of the Committee of Ministers to Member States on Measures to Promote Media Transparency, 22 November 1994.

⁶⁷ Helberger, 2005, p. 38-39. Working Group for the assessment of measures to ensure increased freedom of choice for television viewers (2011). TV, mangfold og valgfrihet Rapport fra en arbeidsgruppe nedsatt av Kulturministeren til å vurdere behovet for ulike tiltak som kan tilrettelegge for og sikre økt valgfrihet og mangfold for TV-seerne. Oslo February 2011, available online at http://www.regjeringen.no/upload/KUD/Medier/Rapporter/Arbeidsgruppen_Sonneland_2011_TVmangfold_og_valgfrihet.pdf (with English summary).

⁶⁸ Recital 82 of the Audiovisual Media Services Directive.

⁶⁹ According to No. 11 of Annex I to the Unfair Commercial Practices Directive a practice is considered unfair if it uses "editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 90/552/EEC."

Commercial Practices Directive essentially protects the interests of consumers to make well-informed and autonomous transactional decisions.⁷⁰

The failure to supply consumers with information they need to make informed transactional decisions could constitute a misleading omission in the sense of Art. 7 of the Unfair Commercial Practices Directive. Could the Unfair Commercial Practices Directive complement the rather incomplete Art. 5 of the Audiovisual Media Services Directive?

Which information?

Article 7 of the Unfair Commercial Practices Directive concerns any “material information that the average consumer needs... to take an informed transactional decision”. Information concerning price, special terms and conditions, interoperability, soft- and hardware requirements, application of technical restrictions, etc. most likely falls under the directive.⁷¹ The same is probably true for information about content, category, duration, etc. of a piece of media content or a programme. Less clear, however, is whether the directive would also cover situations in which consumers depended on information about organizational structure, editorial policies, etc. in other words information audiovisual consumers need to assess the character and (journalistic) quality of the content.

The question is if this latter category of information is needed to decide whether to subscribe to a service, download a film or documentary, or if this is information that helps users to decide whether to trust or not to trust content, and let it influence their opinion or understanding. The answer to that question probably also depends on the type of media content in question (animal documentary, animee, soap, news, political discussion programme) and in which capacity the audiovisual consumer acts: as citizen, consumer, media literate viewer.

Even if consumers based their actual purchasing decision on such editorial information, it is far from clear if this information would fall under the scope of the directive. The Unfair Commercial Practices Directive made clear that its primary goal was to protect the economic interests of consumers,⁷² not matters of taste, decency, pluralism, cultural matters, etc.⁷³ Having said that, and given the dual character of audiovisual services as both economic and cultural services, the question is how realistic the distinction still is, and if it is possible to maintain it in practice, at least as far as audiovisual services are concerned. As Wilhelmsson points out, much will depend on how broadly judges will interpret the notion of “economic interests”.⁷⁴

Choosing the right benchmark

⁷⁰ Compare Kabel, 2008, p. 3.

⁷¹ Wilhelmsson, T. (2006). Misleading Practices. In: Howells, G., Micklitz, H.-W. and Wilhelmsson, T. European Fair Trading Law. The Unfair Commercial Practices Directive. Aldershot: Ashgate, p. 123-166, 149-150.

⁷² Article 1 of the Unfair Commercial Practices Directive.

⁷³ Wilhelmsson, 2006, p. 58-63. European Commission, Green Paper on European Union Consumer Protection, Com(2001)531 final, 2.10.2001, p. 13: “National rules that purely covered general interest objectives in relation to commercial practices other than consumer protection (e.g. pluralism, the protection of culture, health and safety, decency) and national contract law requirements would be excluded.”

⁷⁴ Wilhelmsson, 2006, p. 63.

It may well be that the average audiovisual consumer is, like any other consumer primarily interested in matters of price, duration, presenter, transmission time, etc., and less in matters of editorial policy or credibility. Having said so, since audiovisual consumers are also citizens, it at least cannot be excluded that information regarding journalistic quality, cultural value, etc. is likely to affect their decisions, at least for particular types of content.⁷⁵

Another question is whether judges would need to apply a different benchmark for audiovisual consumers altogether. If one may believe the early arguments in media law and policy, it was the perceived credulity of audiovisual consumers that was one of the reasons behind the particular protective design of media law and policies, in combination with the so-called pervasiveness and intrusiveness of broadcasting,⁷⁶ as well as the impact of these services on the way people form their opinions.⁷⁷ On the other hand, the “couch potato” of the past may be making way to the new prototype consumer: the media literate viewer. This is an audiovisual consumer who is able to assess informational content in terms of quality and accuracy, to recognize advertising as such, as well as the safety of contents or illegal activities that are harmful to minors.⁷⁸ The media literate user as some form of “super-consumer” is arguably far less susceptible to misleading omission or other unfair commercial practices. If national courts took the media literate viewer as a benchmark when interpreting the Unfair Commercial Practices Directive, this might have ramifications for the level of protection viewers could expect.

Material condition

The omission of information must have caused or must have been likely to cause the average consumer to take a transactional decision that she would not have taken otherwise. There is little doubt that purchasing on-demand services or subscribing to a pay-TV service is such a transactional decision.⁷⁹ More questionable is whether the decision to watch a particular “free-to-air” programme is a transactional decision as well. Arguably, because consumers do pay for the programme through the exchange of personal data or personal attention, the decision to watch is a transactional decision. Time is money, after all, and so is personal data.

4. Relevancy of sector specific information obligations for the interpretation of general contract and consumer law

Another question is to what extent sector specific information obligations play a role when applying general contract and consumer law. For example, could a contract for on-demand services be considered invalid because an audiovisual consumer has not been sufficiently informed about the identity of the provider, according to Art. 5 of

⁷⁵ Collins, R. and Sujon, Z, (2007). UK Broadcasting Policy: The “Long Wave” Shift in Conceptions of Accountability. In: Baldi, P. and Hasebrink, U. (eds.). Broadcasters and Citizens in Europe. Trends in Media accountability and Viewer Participation. Bristol: Intellect Books, p. 34-36. Scammel, 2000, p.354.

⁷⁶ Barendt, 1993, p. 6.

⁷⁷ Recital 45 of the Audiovisual Media Services Directive.

⁷⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European approach to media literacy in the digital environment, Brussels, 20 December 2007, COM(2007) 833 final (European Commission 2007), p. 4-6.

⁷⁹ In accordance with the definition in Art. 2 (k) of the Unfair Commercial Practices Directive.

the Audiovisual Media Services Directive? Or could the failure to comply with Art. 5 of the Audiovisual Media Services Directive constitute an unfair commercial practice in the sense of the Unfair Commercial Practices Directive? The latter would obviously require that the transparency obligation in audiovisual law is (also) meant to serve the economic interests of the consumer (about this question, see section 3.3).

Interestingly, Article II.-3:103 of the Draft Common Frame of Reference suggested: “(2) Where more specific information duties are provided for specific situations, these take precedence over the general information duty under paragraph (1)”. Arguably, this could provide an argument that also the failure to provide information as requested under sector specific information law, for example, in copyright law, data protection law, media law, e-commerce and telecommunications law, could amount to claims under general contract and consumer law. This, too, is one of the implications of the metamorphosis of the “viewer” into an “audiovisual consumer”, namely the need to realize consistency between the different legal frameworks that are meant to protect her interests.

Conclusion

The audiovisual consumer is growing up. Confident, empowered, educated, she is peaking from under the wings of a paternalistic media regulator, and strains at the leash to launch herself into the audiovisual market. The traditional, patronizing approach of broadcasting law is less and less suited to assist audiovisual consumers in their interactive dealings with a range of new, commercial suppliers of audiovisual content. What is needed, in addition to the existing rules that structure the audiovisual offer, are, if at all, more horizontal rules to assist and empower audiovisual consumers in making their choices and concluding fair deals in the audiovisual market.

The recently amended Audiovisual Media Services Directive made first, cautious steps in this direction, through the adoption of a new information requirement for suppliers. This article also demonstrated, however, that the directive would have done well to learn from the vast experience with information obligations in consumer law and policy. As the provision stands now, it is not clear which purpose it is meant to serve, and whether the information that is required actually matches the information needs of the audience.

More fundamentally, the article demonstrated that the integration of the audiovisual consumer into the system of both audiovisual and consumer law is still ailed with conceptual growing pains. Traditional audiovisual law is badly equipped to serve the viewer as an actual consumer of audiovisual services. Similarly, the application of general contract and consumer law is complicated by the dual character of audiovisual services as both economic and cultural services, as well as by the peculiarities of audiovisual business models. This should not discourage academics and policymakers. What is needed are initiatives to better understand the interaction between general and sector specific contract and consumer law, and to explore where additional instances of sector specific audiovisual consumer law may be necessary.