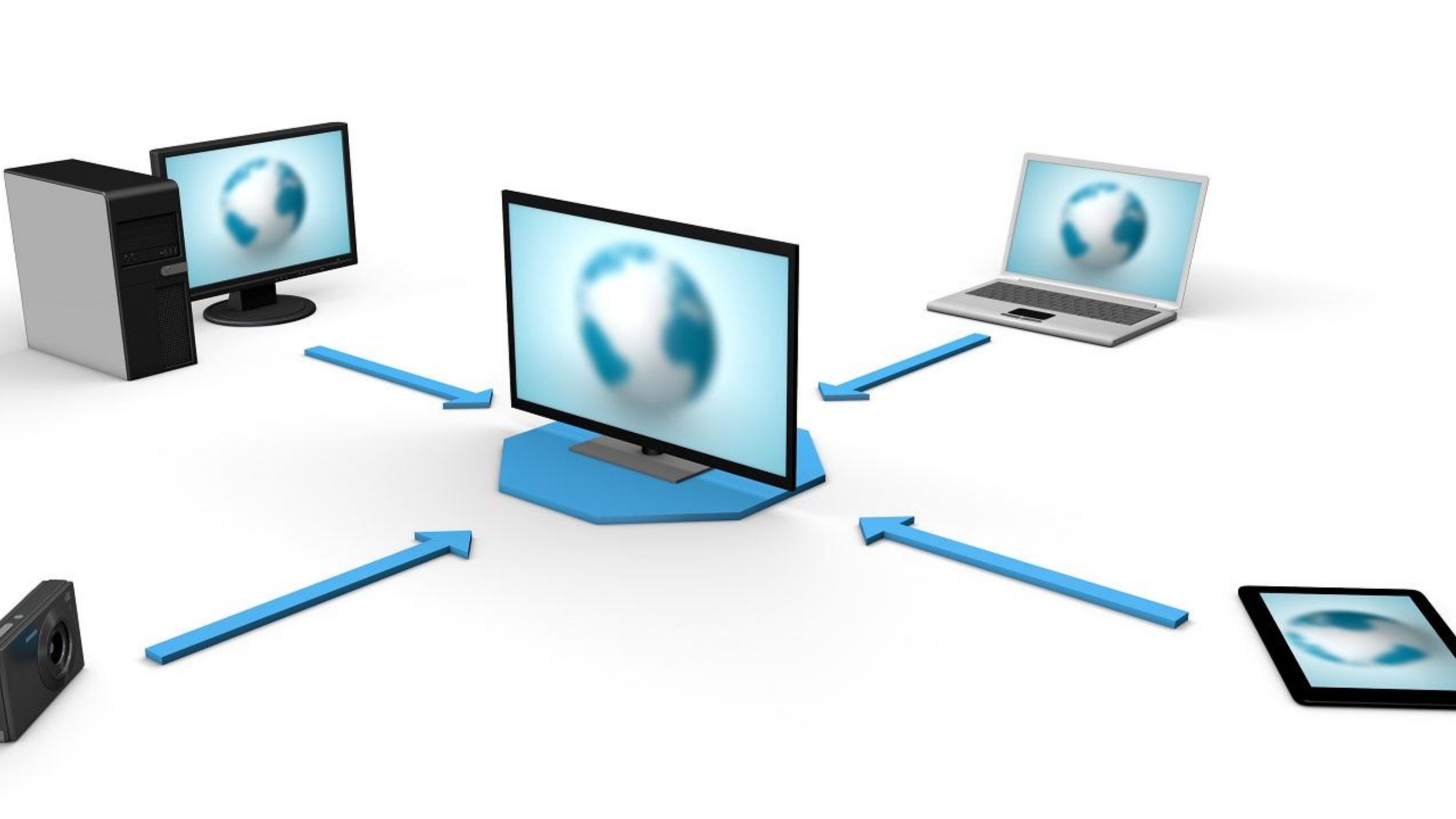




European Standards and Models of Regulation



ICT regulation: Basic principles

- ICT law deals with limited resources like the frequency spectrum and the numbering plan and equitable and efficient division of these between users.
- Rules are needed as they are limited resources and as they only have a value if set in a system

Areas of ICT to be regulated

- Strategy for a secure information society
- Data protection
- E-commerce
- Consumer protection
- Electronic communications regulation
- Fight against cybercrime

Modern ICT regulation

- Functional separation between service/network
- Consumer protection against personal data breaches and spam
- Easier to change operators
- Encouragement of competition

Standardisation

- Standardisation should be primarily market driven.
- National organs may make standards and/or implement existing ones (ITU, EU or other international standards) e.g. for digitalisation
- Publication of standards and invitation of public comment before adoption
- Any decision to make the implementation of standards mandatory should follow a full public consultation.
- Interoperability and compatibility of equipment (reception, decoding, access etc.), EU Directive 2002/22, 2009/136
- Global standards make the market attractive (incentive for investment)

Audiovisual Media Services

- Under the editorial responsibility of a media service provider
- The principal purpose of which is the provision of programmes
 - in order to inform, entertain or educate
 - to the general public
 - by electronic communications networks
- Either a television broadcast or an on-demand audiovisual media service as

Programme

- 'Programme' means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broad casting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

Editorial responsibility

- 'Editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

European/International best practice

- Standards in different fields are generally accepted in Europe as well as other parts of the world and have become models for legal reform
- Referred to as “European (international) best practice” or “European (international) standards”
- Specific rules should take into consideration similarities and differences between countries
- There is not always 100% agreement, but there are a number of generally accepted norms and principles

EU Law

- For EU Member States, the relevance of EU law is different than that of European/International Best Practice
- The EU is an organisation *sui generis*
- The legal system created is *sui generis* – *supranationality*
- EU law is binding on Member States and on its subjects
- EU law can have direct effect and supremacy over national law
- Relevant EU law must be applied by all institutions, at all levels

EU Legal Acts

- Regulations: Binding on all Member State in the form issued by the EU
 - Directives: Binding as to the aim to be achieved but must be implemented in national law
 - Decisions
 - Recommendations
- *For all EU law, Member States should act pursuant to the principle of sincere cooperation*

Direct Effect

- Can be used by individuals in national courts (authorities)
- Requires that the act is clear, no period for implementation, gives rights to individuals
- Enforced only against Member States (vertical direct effect, cf. horizontal direct effect)

Different types of EU law

- Directly applicable EU law (treaties, regulations)
- Harmonisation/ approximation of laws
- EU legal acts to be incorporated into national law (directives, etc)
- ▶ General principles
- ▶ International principles
- ▶ European Convention on Human Rights

The purpose of harmonisation

- Free movement within Europe (EU free movements as well as relations with neighbouring countries)
- Beneficial to businesses, consumers
- The Audiovisual Media Services Directive has as one central aim to achieve harmonisation so that there can be free movement

Mutual recognition

Acceptance of tests and certificates from other Member States

For audiovisual media services: acceptance of the same basic rules, what is approved in one state is suitable also in another

- Case 120/78 Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)

Institutions of Member States

- Institutions and administrative structures remain Member State competence *but* institutions must meet certain standards and fulfil certain tasks – Institutional autonomy
- *Mutual Trust*

Preliminary rulings

- On the interpretation of EU law
- When it is relevant for the outcome of a case in a national court
- Final instance court (in the actual case) **shall** ask for a preliminary ruling – other courts can
- The ECJ does not solve the case but answers the questions – the national court solves the case
- The ECJ does not deal with facts, evidence etc.

Competition Law: Why is it relevant?



- For market economies – to ensure the market works
- Competition law is the area of law that safeguards that the market can function properly
- In a market economy, business matters should be decided by the market, but in some cases this is not possible and competition law rectifies such market failures
- *Digitalisation may at least for a transitory period lead to more competition law issues*

What is Competition Law?



- Rules against agreements between undertakings (cartels)
- Rules against abuse of dominant position
- Rules on prior approval of mergers
- Rules on state aid, state owned undertakings and undertakings given special rights

- The risk of monopolisation
- Access issues (essential facility) - Interoperability
- Sharing of infrastructure and/or centralised systems
- *The maximum competition* even if limited infrastructure (cf. telecommunications, utilities) – the role of the regulator, special obligations for operators in a dominant position (regardless of ownership)

- Importance of limiting risk of monopolisation of content
- Ownership restrictions (cross-ownership between different media – between transmission and content etc.), disclosure
- Different aims for infrastructure and for programming, different risks of monopoly
- Avoiding possibilities of abuse of dominance is more important than ownership as such

Ownership of Transmission Facilities (multiplexes)



- Programme content providers must as much as possible be able to select a network and operator
- In many countries multiplexes or some of them are State owned or owned by the Public Sector Broadcaster
- Regulatory intervention may be needed to ensure fair conditions: pricing issues (for multiplexes) etc.

The Relevant Market



- To decide if an undertaking is dominant and has the possibility to abuse this, it must be known what the relevant market is
- Product (service) market: is the product interchangeable with others?
- What is the geographical market?
- These determinations vary for different products, at different times and must always be decided in the individual case
- *Examples: Is it digital broadcasting that is the relevant market or digital terrestrial broadcasting? Is it ICT or some element of ICT provision?*



Monitoring and Regulation of New Media Services

Over-the-Top (OTT) television

- Set-top boxes delivering video content
- Over-the-top players provide audiovisual content online without themselves being electronic communications services and network providers.

Connected TV, Over-the-Top delivery of Audiovisual content

- European concerns:
 - (i) ensuring the best possible conditions for EU business in an international marketplace;
 - (ii) identifying and addressing specific additional needs to protect European values, such as the protection of minors, promotion of accessibility and European programming;
 - (iii) identifying key technologies and possible areas for European standardisation efforts;
 - (iv) determining scope and jurisdiction;
 - (v) addressing competition issues.
- This concerns all forms of interconnected devices, including internet television but not only

EU Green Paper (2013)

Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values

- *Attention is no longer focused on one screen only. In parallel to watching TV, viewers use tablets or smartphones which can provide more information about the content watched, allow interaction with friends or with the TV programme itself through social networks. "Second screen" applications on these devices offer the prospect of "social TV" which delivers a more interactive experience for the consumer and also new revenue streams for the content provider. Many of today's devices not only facilitate consumption but give consumers an easy option to create their own content.*
- The Green Paper does not presuppose any action, but the Commission may examine what action – regulation, including self-regulation – may be suitable

Co-regulation and self-regulation

- AVMSD: Member States shall encourage co-regulation and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.

Self-regulation: the principle



Why does self-regulation work?

- Trade-off: If you regulate yourself well enough, there is less need for official regulation
- Content: Allows the rules to be those seen as needed and suitable by the sector participants
- Respect: Those making the rules are peers and can be respected for their knowledge. One does not want to lose the respect of one's peers by violating the rules



e-commerce

- EU Directive 2000/31/EC :Harmonisation of certain aspects of their laws on buying and selling online (jurisdictional issues)
- Reduce regulatory burdens for businesses (country of origin principle, prohibition of prior authorisations).
- Measures to encourage consumer confidence
- Linked to e-signatures, Directive 1999/93/EC
- *AVMSD: Directive 2000/31/EC 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.*

e-commerce, cont.

- There must be a definition on what kind of services are covered by an e-commerce law as very many services may use internet but not all are such services as should be covered by the e-commerce law
- The question of service providers (intermediaries) is important and needs regulation including related issues such as caching and hosting
- The key issue is the role of the service provider in relation to the content (any control or potential control over content)

New Media and Cyber security

- New social media presents a number of different issues related to various aspects of cyber security:
 - Privacy (data) protection
 - Use of media for incitement to hatred and violence
 - Risk of increased control over media content, as part of the “war on terrorism”

Discussion questions

- 1) Silly cartoons of the President of the country and of her children are published in a main daily newspaper and on the paper's web-site. They are also discussed in a TV programme, where the person who made them shows even worse, very offensive cartoons and tells why he made them - the TV host makes no comments but just says that we shall listen to the artist. What can be the legal consequences and actions, if any!
- 2) A radio station is given a licence to provide programming for the ethnic minority in the country. They however start broadcasting pop-music and American films, saying that they want to reach young people of the ethnic minority and they are not interested in traditional culture. How can/should the regulator react!
- 3) A magazine for fashion moves only on-line as they want to use pictures that are copyright protected and as they want to show more nudity and explicit sexual images, and feel this is easier on internet than in printed media. The on-line magazine is advertised on television, including Public Broadcasting, at all hours of the day, with pictures of the kind of content they will have. Comments on possible regulatory and legal issues!

Discussion questions

- 1) A blogger uses a hidden camera to record a conversation with a university professor who expresses negative views of certain ethnicities, for example that to which the university rector belongs. The blogger puts it on her blog + sends it to the web-site of a newspaper who publishes a link to it on-line and in its print edition + sends it to a television station that shows a short excerpt in a documentary about the impact of modern media.
 - *Can any regulatory action be taken?*
- 2) EU Member State A decides to limit the reception of the following broadcasts in its territory:
 - A) Programmes that include full frontal nudity of men or women in entertainment programmes
 - B) All programmes from EU Member State D, which is known for very liberal views on nudity and sexual content, in order to avoid that unacceptable content is shown accidentally
 - C) Any re-broadcasts of Russian television broadcasts to prevent incitement to ethnic hatred between the national population and the large minority of ethnic Russian in the EU Member States
 - *Comment on these actions under EU law!*