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**“Is the cornerstone loose? Critical analysis of the functioning of the
‘country of origin’ principle in the Audiovisual Media Services
Directive, taking into account the rapid changes in the audiovisual
industry and the recent challenges brought by Brexit”**

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All the views and opinions expressed are those of the author.

1. Introduction

The landscape of European audiovisual media, which once primarily fell within the purview of states and their institutions, has undergone major changes in the past, driven by liberalisation of ownership, emerging technologies and other factors.¹ In the last decades, these changes have greatly accelerated, largely because of the emergence of a novel ecosystem of broadcasting on the internet and new devices, with consequent phenomena of convergence.² The nature of broadcasting, the viewing habits of consumers, and the business models in the broadcasting field have all evolved to be unrecognisable from what they were even a few decades years ago.³

What has not changed accordingly, however, is the regulatory framework governing audiovisual media services. Though the rising regulatory influence in this area of first the European Communities and later the European Union has defined the domain in which rules for audiovisual media services touching the single market are established, these rules are currently unsuitable to accommodate the breakneck pace at which every aspect of audiovisual media broadcasting is being transformed.⁴

The 2010 Audiovisual Media Services Directive (AVMSD) is the current iteration of EU legislation for harmonising legislation on audiovisual media services.⁵ Like other Directives, the AVMSD was implemented in EU Member States by national broadcasting acts.⁶ The country of origin principle, which dictates that each EU Member State is responsible for ensuring the compliance with the law of audiovisual media services transmitted by media service providers

¹ Jan Oster, *European and International Media Law* (Cambridge University Press, 2016), 4.

² Peggy Valcke et al, 'Audiovisual Media Services in the EU: Next Generation Approach or Old Wine in New Barrels?' (2008) 71 *Communications & Strategies* 103, 103-104.

³ Mira Burri-Nenova, 'The new Audiovisual Media Services Directive: Television *Without* Frontiers, Television *Without* Cultural Diversity' (2007) 44 *Common Market Law Review* 1689, 1690.

⁴ See Indrek Ibrus, Ulrike Rohn, 'Sharing killed the AVMSD star: the impossibility of European audiovisual media regulation in the era of the sharing economy' (2016) 5(2) *Internet Policy Review*.

⁵ 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, as corrected by OJ L 263.

⁶ Oster (2016), 2.

under its jurisdiction, is central to the functioning of the AVMSD.⁷ Proposals currently in progress to reform this Directive to bring its provisions more in line with present times also retain a country of origin principle in their text.⁸ The continued reliance of the Directive on this principle may increasingly become an issue as the consumption of audiovisual media services changes from the traditional, ‘linear’ broadcasting to modern, scattered ‘on-demand’ services.⁹

This paper critically examines the ‘cornerstone’ of the AVMSD, the country of origin principle, in relation to the broad changes that are occurring in the field. It also seeks to investigate the potential impact that the planned exit of the UK from the EU (‘Brexit’) – perhaps the most important development in this area for several years, but also potentially the biggest threat to the functioning of the European audiovisual market¹⁰ – will have on the EU audiovisual media services industry, and particularly on the country of origin principle. The first section is dedicated to introducing the country of origin provision in the current AVMSD by explaining its origins and functioning, and examining the differences between the current AVMSD provision and the provision contained in the proposed revision of the AVMSD. The second section looks at the changes emerging in the audiovisual industry. It starts by describing the changing landscape of audiovisual media. Then, it examines how the ongoing evolution of audiovisual media is impacting the functioning and effectiveness of the country of origin principle to determine whether this principle remains fit for purpose in the current era of audiovisual media. The third section approaches COO issues from a different angle, by looking at how Brexit will potentially affect the country of origin principle. After a brief introduction of Brexit, three possible scenarios will be considered, namely ‘soft Brexit’, ‘hard Brexit’ and ‘no deal’ scenarios. The effect of each scenario on the audiovisual media landscape in the EU, as well as the consequent ramifications on the country of origin principle must be considered, as each scenario will have different repercussions on the business landscape, and consequently also on the regulatory sphere.

⁷ AVMSD, Art 2.1. Note that the language changed between the two Directives, to reflect a broader definition of ‘media service providers’ from the previous conception of ‘broadcasters’ as covered by EU rules.

⁸ European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (AVMSD Proposal)*, COM/2016/0287 final - 2016/0151 (COD), 5.

⁹ *Ibid*, 2.

¹⁰ Vince Cable, ‘Brexit is a threat to broadcasting’, *Broadcast Now UK*, November 30, 2017.

2. The Country of Origin Principle in the Audiovisual Media Services Directive

This section examines the country of origin principle contained in the AVMS Directive. A brief history of EU regulation of the audiovisual field is traced. The key features of past audiovisual media services markets are also explained, to aid understanding of why the country of origin principle was deemed appropriate for regulating this area of European law, and what factors led to changes in this area. Then, the AVMSD's country of origin principle is examined, through consideration of its features and their effects. Finally, the proposals for reform are introduced, and the proposed amendments to the country of origin principle contained therein are described.

Changes in the field of audiovisual media are driven primarily by technological developments, as are changes in the regulatory framework that surrounds it. However, the regulatory framework is constantly in a state of attempting to catch up with the more rapidly-evolving technology and the associated business models. Audiovisual media has existed since the early-20th Century, but its spread and reach grew greatly after World War II.¹¹ In the EU, the initial period of audiovisual media can be divided into two broad parts. A period from the 1950s into the 1980s saw the monopolisation of television broadcasting by governments and government-backed companies, with the broadcasting technology based on terrestrial transmission via radio waves and cable transmission.¹² Challenges to the monopolies brought at the European Court of Justice in the *Sacchi* case, saw the Court conceive television broadcasting as 'services' rather than 'goods' for the purposes of the Treaty of Rome.¹³ The Court also found that monopolies of services could be justified by considerations of public interest of a non-economic nature, as long as trade between Member States was not discriminatorily impacted, which shaped the conception of audiovisual

¹¹ Marshall T Poe, *A History of Communications: Media and Society from the Evolution of Speech to the Internet* (Cambridge University Press, 2010).

¹² Oster (2016), 3.

¹³ Case 155/73 *Sacchi* [1974] ECR 411.

media in the EU/EC context, the development of the market, and the competence of European institutions over media matters.¹⁴

The period from the 1980s to the 2000s was marked by liberalisation of the market from the initial monopolies and the growth of cross-border broadcasting.¹⁵ The latter was also backed by increasing usage of satellite television, which made it possible for television signals to be more easily sent and received over great distances and across borders.¹⁶ In another crucial case at the ECJ, *Debauve*,¹⁷ which was decided as trans-frontier transmission was at its beginning stages, the Court held that Member States were free to impose restrictions on transnational cable broadcasting in a non-discriminatory way, with effect of including this form of broadcasting in the Treaty rules on services.¹⁸

As cross-border broadcasting grew between Member States, issues of audiovisual media regulation were increasingly coming to the attention of European institutions. Potential issues could now have an impact on the single market since they were no longer confined to each country, but had instead developed a transnational character requiring a transnational response.¹⁹ EU regulation of this area followed soon after in the pursuit of harmonised rules that would facilitate the single market, with the Television Without Frontiers Directive (TWFD) eventually being introduced in 1989, entering into force in 1991.²⁰ This predecessor to the AVMSD already featured a country of origin principle, mandating in Article 2 that:

“Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction, or by broadcasters who, while not being under the jurisdiction of any Member State, make use of a frequency or a satellite capacity granted by, or a satellite up-link situated in, that Member State comply

¹⁴ Maria Michalis, ‘Focal Points of European Media Policy from Inception till Present: *Plus ça change?*’ in Karen Donders, Caroline Pauwels, Jan Loisen, *The Palgrave Handbook of European Media Law* (Palgrave Macmillan, 2014), 131.

¹⁵ Michalis (2014), 133; Oster (2016), 3.

¹⁶ Michalis (2014), 131.

¹⁷ Case 52/79 *Debauve* [1980] ECR 834.

¹⁸ Oster (2016), 24.

¹⁹ *Ibid*, 20.

²⁰ Council Directive 89/552/EEC of 3 Oct. 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities (Television Without Frontiers Directive), O.J. 1989, L 298/23, Art 25.

with the law applicable to broadcasts intended for the public in that Member State”.²¹

The second part of the same Article requires Member States to ensure freedom of reception and not restrict the retransmission of television broadcasts from other Member States, subject to some limited restrictions.²² Despite providing a minimum standard of harmonised protection, the TWFD left it open to Member States to offer higher standards of protection to be complied with by broadcasters under their jurisdiction.²³ Member States were left a wide margin of discretion as to their internal regulation of audiovisual media, both by the Directive and in the case law of the ECJ.²⁴ In cases such as *De Agostini*,²⁵ the Court held under the TFW framework that Member States could not restrict the broadcasts from other Member states on the basis that this violated stricter provisions on advertising that they had introduced.²⁶ In the circumstances of the case, Sweden had imposed a ban on advertising directed at children, while *De Agostini* and others were retransmitting in the Swedish market broadcasts from other Member States which allowed such advertising.²⁷ The Court found here that it was possible for Sweden to have stricter national rules on advertising, but that these must not interfere with the functioning of the single market.²⁸

In the years after its entry into force, due largely to technological developments in the field of audiovisual media and the resulting changes in the nature of the audiovisual media industry, the TWF Directive became increasingly viewed as outdated, and in need of changes to accommodate new technologies.²⁹ In response to the growing concerns around the adequacy of the original Directive, a new Audiovisual Media Services Directive was introduced, which entered into force

²¹ Ibid, Art 2.1.

²² Ibid, Art 2.2.

²³ Irini Katsirea, ‘The Television Without Frontiers Directive’ in Karen Donders, Caroline Pauwels, Jan Loisen, *The Palgrave Handbook of European Media Law* (Palgrave Macmillan, 2014), 197.

²⁴ Christine Janssens, *The Principle of Mutual Recognition in EU Law* (OUP, 2013), 75.

²⁵ Joined Cases C-34/95, C-35/95, and C-36/95 *De Agostini* [1997] ECR I-3843.

²⁶ Alberto Criscuolo, ‘The ‘TV Without Frontiers’ Directive and the Legal Regulation of Publicity in the European Community’ (1998) *E L Rev* 357, 362.

²⁷ [1997] ECR I-3843, [11]-[18].

²⁸ Ibid, p21-23.

²⁹ Burri-Nenova (2007), 1692; Vance Little, ‘Audiovisual Media Services Directive: Europe’s modernization of broadcast services regulations’ (2008) *U. Ill. J.L. Tech. & Pol’y* 223, 223.

in 2010.³⁰ This Directive consolidated the 1989 Directive and its 1997 and 2007 amendments into a single text.³¹ The preambular recitals to the AVMSD highlight the important role of the country of origin principle within the Directive, naming it as the “core” of the Directive, and “essential for the creation of a single market”.³² Some of the benefits stemming from the country of origin’s presence in the Directive are also underscored there, such as the legal certainty obtained by media service providers, the new business models that could be developed, and the free flow of information and broadcast programmes that can be achieved through the Directive.³³ It is further affirmed in the recitals that only one Member State is to have jurisdiction over an audiovisual media service provider.³⁴ The verification by the originating Member State is, per the recitals, sufficient to ensure the free movement of broadcasts, without a secondary control in the receiving Member State.³⁵

Article 2 of the AVMSD contains the country of origin principle in its current form, which features some changes from the preceding version and reads as follows:

“Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.”³⁶

The Article then sets out criteria for media service providers to fall under the jurisdiction of a Member State.³⁷ Media service providers can fall under the jurisdiction of a Member State if they are established in that Member State – by virtue of their head office and editorial decisions being based in that Member State, or, if the head office and editorial decisions are split among two or more Member States, by location of the majority of the workforce.³⁸ Media service providers headquartered in Member States, but with decision-making in a third country, or vice-

³⁰ Audiovisual Media Services Directive, Art 35.

³¹ Ivana Katsarova, ‘European Parliament Briefing: The Audiovisual Media Services Directive’, *European Parliament*, June 27, 2017.

³² AVMSD, Recital 33.

³³ *Ibid.*

³⁴ *Ibid.*, Recitals 34-35.

³⁵ *Ibid.*, Recital 36.

³⁶ *Ibid.*, Art 2.1.

³⁷ *Ibid.*, Art 2.2.

³⁸ *Ibid.*, Art 2.3(a)-(b).

versa, are also considered as established in that Member State, as long as a significant portion of the workforce operates in the Member State.³⁹ If the above criteria do not apply, but the media service provider uses either a satellite link-up in a Member State or satellite capacity belonging to that Member State, it will still fall under that Member State's jurisdiction.⁴⁰ If none of the above provisions allow jurisdiction to be determined, Articles 49-55 of the Treaty on the Functioning of the European Union (TFEU) serve as a final port of call for jurisdiction to be established.⁴¹

Thus, the current country of origin rule retains largely the same principles as the TWFD version, but it defines more clearly the jurisdictional remit of each Member State by setting out the various circumstances in which a media service provider falls under a Member State's jurisdiction. These circumstances already formed part of the *acquis communautaire*, since they were developed in the case law of the Court of Justice, though their inclusion in the Directive gives them statutory basis.⁴² Member States are allowed to derogate from the rules laid out in the Directive if overriding domestic concerns are present, for instance by temporarily suspending the retransmission of televised broadcasts.⁴³ However, the Directive limits this to exceptional and specific circumstances, as the country of origin's initial control is deemed on a general basis to be sufficient to make the services suitable for all Member States, provided that the harmonised standards of the Directive are met.⁴⁴ An additional change is the expansion of the scope of the Directive to cover on-demand services, which had previously been outside of the EU's scope of regulation.⁴⁵

As such, then, the AVMSD requires media service providers, including on-demand media service providers to comply only with the rules imposed in the country of origin, rather than having to comply with a plurality of media rules and regulations in each of the Member States in which their services are received.⁴⁶ Although the limitation of compliance requirements

³⁹ Ibid, Art 2.3(c).

⁴⁰ Ibid, Art 2.4.

⁴¹ Ibid, Art 2.5.

⁴² Case C-23/93 *TV10* [1994] ECR I-4824; Case C-56/96 *VT4* [1997] ECR I-3159.

⁴³ Oster (2016), 145.

⁴⁴ Audiovisual Media Services Directive, Recital 36.

⁴⁵ Michalis (2014), 138.

⁴⁶ Rachael Craufurd Smith, 'Determining Regulatory Competence for Audiovisual Media Services in the European Union' (2011) 3(2) *Journal of Media Law* 263, 263.

facilitates the output of media services by ensuring that less resources are expended on meeting these, there are also significant issues of policy incoherence that can arise as a result of this setup as different Member States adopt different rules to regulate the same areas.⁴⁷ The situation where a media service establishes itself in a Member State with lax rules to circumvent the stricter rules in the Member State(s) to which its services are directed has proven particularly troublesome in this regard.⁴⁸ The Court of Justice had long wrestled with these issues in a rich body of case law, in which it sought to distinguish situations where the broadcaster was intentionally seeking to circumvent stricter standards in certain Member States by establishing itself in a different Member State, from those in which the establishment was organic and without nefarious intentions.⁴⁹ These issues are reflected in the text of the Directive where the measures available to Member States are concerned.⁵⁰

Despite the increased clarity of the jurisdictional rules in the Audiovisual Media Services Directive in comparison to the Television Without Frontiers Directive, multiple jurisdictional issues remained, as evidenced by case law under the Directive and by scholarship.⁵¹ Terms such as ‘editorial control’, ‘editorial responsibility’, and ‘effective control’, all of which constitute essential elements in the Directive’s rules on jurisdiction can in many cases lead to a lack of clarity, as different levels of each may exist in various business models.⁵² Furthermore, one of the main criticisms of the country of origin principle has been that the ‘one-stop regulatory shop’ means that the content of services will be reflective of the cultural demands and sensitivities of only the Member State having jurisdiction.⁵³ In practice, this could lead to problems for Member States seeking to protect their viewers.⁵⁴ This is reflected in the *De Agostini* case, as the stricter Swedish rules that stemmed from Sweden’s conception of protecting minor viewers were held to not be applicable to a broadcaster falling under the UK’s jurisdiction, which had a different,

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ As an example of the former situation see *TV10* [1994] ECR I-4824.

⁵⁰ Audiovisual Media Service Directive, Art 4.3(b).

⁵¹ Craufurd Smith (2011), 264.

⁵² Ibid, 266-267.

⁵³ Ibid, 270.

⁵⁴ Anna Herold, ‘Country of Origin Principle in the EU Market for Audiovisual Media Services: Consumer’s Friend or Foe?’ (2008) 31 *Journal of Consumer Policy* 5, 5.

laxer conception.⁵⁵ However, in other cases, where thresholds of ‘incitement to hatred’ were met, for instance, the Court of Justice more recently found that measures against a broadcaster established in another Member State were not precluded, except where they would prevent the retransmission *per se*.⁵⁶

In May 2016, the European Commission adopted a proposal for a new directive that would amend the AVMSD.⁵⁷ It had been invited to do so by the Council of the European Union, which saw an urgent need for a review of the Directive by the Commission in light of “rapid technological and market changes”.⁵⁸ The position of the country of origin principle as a ‘cornerstone’ of the proposed Directive is reflected in the EC documentation of the proposal.⁵⁹ Indeed, the aim of the proposal in relation to the principle is to maintain it, with simplified rules over jurisdiction, more clarification on cooperation procedures between Member States, and an obligation on Member States to inform about providers that fall under their jurisdiction.⁶⁰ The proposal also states that the country of origin principle has “enabled the development and free circulation of audiovisual media services across the EU, with legal certainty and resulted in lower compliance costs for providers and more choice for consumers”, but that scope for simplification of the rules exists.⁶¹ As a result, the main proposed changes to Article 2 do not significantly alter the country of origin principle, as they only concern paragraphs 3 and 5 of that Article.⁶²

The AVMSD revision then made its way through the various institutional layers of the EU on the basis of the proposal. The European Parliament initially suggested over one thousand amendments to the EC proposal.⁶³ In spite of this, the European Commission and Parliament

⁵⁵ [1997] ECR I-3843, [62].

⁵⁶ Joined Cases C-244/10 and C-245/10 *METV* [2011] ECR I-08777.

⁵⁷ EC Proposal.

⁵⁸ Council of the European Union, *Council conclusions on European Audiovisual Policy in the Digital Era, Education, Youth, Culture and Sport Council meeting*, November 25, 2014, 2-3.

⁵⁹ European Commission, *Revision of the Audiovisual Media Services Directive (AVMSD)*, May 25, 2016 <<https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>> accessed 13/04/2018.

⁶⁰ *Ibid.*

⁶¹ AVMSD Proposal, 5.

⁶² *Ibid.*, 23.

⁶³ Katsarova (2017), 14. Around 1400 amendments were proposed in total by the Culture and Education Committee of the European Parliament.

managed to reach a political agreement on the new text in June 2018, and the CULT Committee of the Council soon followed suit.⁶⁴ The new text largely retains the EC proposals on the country of origin principle, but adds some additional derogation and urgency procedures for EU Member States.⁶⁵

However, due to the nature of the EU legislative processes, the new rules will take more time to actually come into effect, as the text will need to go through the full House and the Council of EU ministers before coming into force.⁶⁶ Therefore, it is more useful to proceed to the examinations of the country of origin principle's continuing adequacy by focusing primarily on the provisions contained in the current AVMSD, which are already operating, and only sparingly make reference to the revised AVMSD.

3. Country of origin in the 2018 audiovisual media economy: still suitable?

Technological change is the great driver of the audiovisual field. New business models emerge with every major technological development in the field, while old business models are forced to either change or fall by the wayside.⁶⁷ This innovation process, which Schumpeter termed 'creative destruction',⁶⁸ led in the past century to the rise and eventual fall of several technologies such as terrestrial transmission and cable transmission, with other technologies taking their place.⁶⁹ However, only very few technological developments have brought about as broad and as deep a paradigm shift in the audiovisual field as has been effected by the rise of the internet in the past few decades.⁷⁰ Some phenomena associated with the impact of the internet certainly have repercussive effects on the AVMSD generally, and its governing country of origin principle specifically. Some of these phenomena and their impact on media regulation must

⁶⁴ European Parliament Press Release, *CULT Committee endorses the agreement on new audiovisual media rules*, July 11, 2018.

⁶⁵ See European Commission, *Fact Sheet: Digital Single Market: updated audiovisual rules*, June 7, 2018, 2.

⁶⁶ *Ibid.*

⁶⁷ Paul Murschetz, 'Connected television: Media convergence, industry structure and corporate strategies' 40(1) *Annals of the International Communication Association* 69–93, 75.

⁶⁸ Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Harper & Brothers, 1942), 83.

⁶⁹ See Poe (2010).

⁷⁰ Oster (2016), 4.

therefore be considered here against the backdrop of the AVMSD, as their influence cannot be ignored.⁷¹

One of the key concepts that has come to be associated with the growing influence of the internet on the audiovisual field is that of ‘convergence’ of networks and media.⁷² A number of distinct phenomena can be understood under the umbrella term of convergence. A first aspect of convergence is that the internet has allowed all broadcasters – and media-related corporations in general – to disseminate their information via the same medium, the internet, which had previously not been possible.⁷³ Due to this ‘platform convergence’ many traditional broadcasters now face competition from new players in the field, which have used their innovative business models to disrupt previously accepted notions of media and bring new services to their customers.⁷⁴ The services offered by Netflix constitute a crucial example of the changing media landscape as the company operates a subscription-based business model, with various media being offered on an ‘on-demand’ basis to customers.⁷⁵ The country of origin principle, as currently enshrined in the AVMSD does not suffice to regulate a company such as Netflix, which is based in the Netherlands – where media regulation is relatively lax – and offers its internet-based services across a number of countries with stronger regulations.⁷⁶ Such ‘forum shopping’ is contrary to the goals of the AVMSD, as the aim of the Directive is to harmonise EU law in this area. If a global media service provider can easily circumvent the rules and regulations of one country by establishing itself in another country, with little recourse for that other country on the established basis of mutual recognition of rules, this would have problematic implications from a rule of law perspective and could make the EU audiovisual media market regulations unsustainable in the long-term.⁷⁷

Another implication of the convergence caused by the internet is that numerous service providers which would traditionally not have been recognised as ‘audiovisual’ media service providers

⁷¹ Michalis (2014), 128-129.

⁷² Michael Wagner, ‘Revisiting the Country-of-Origin Principle in the AVMS Directive’ (2014) 6(2) *JML* 286; Oster (2016), 4.

⁷³ Oster (2016), 4.

⁷⁴ Wagner (2014), 286-287

⁷⁵ *Ibid*, 287.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*, 291.

have increasingly begun to offer on their websites services that have an audiovisual character, which blurs distinctions between traditionally separate service providers such as the press and audiovisual media.⁷⁸ If such service providers could make use of similar forum shopping as has been identified as a cause for concern in the case of Netflix, there could be important repercussions stemming from whether these can be regulated, as they are an important vehicle for providing audiovisual content of all types.⁷⁹ Between these factors and the current divergent regulatory rules for linear media broadcasting and on-demand services, situations of unfair competition could emerge, with the former competing with the latter on an uneven playing field. The revised AVMSD seeks to address this by expanding the coverage of AVMSD rules to video-sharing platforms and on-demand media.⁸⁰

The internet has established itself as the greatest vehicle for the dissemination of mass media and information to the widest possible audiences.⁸¹ However, with this enormous potential for the spread of information comes enormous potential for the spread of mis-information. Some actors have grasped this nefarious potential far earlier than others, and have employed the new medium as a highly effective tool for the pursuit of political aims through the spread of propaganda.⁸² As will be shown, this is facilitated by the country of origin principle, since it leaves one Member State to regulate media service providers under its jurisdiction, often leaving the targeted Member State with little recourse. Actors hailing from the Russian Federation have seen in the internet an opportunity for waging well-documented propaganda campaigns in Eastern European countries, and particularly in the Baltic States through the incitement of hatred and the spread of disinformation.⁸³ The aim of these campaigns is to manipulate public opinion, especially among Russian-speaking minority groups, with the eventual goal of breaking the Baltic States from the

⁷⁸ Oster (2016), 4; Katsarova (2017), 2.

⁷⁹ Antonios Vlassis, 'The review of the Audiovisual Media Services Directive. Many political voices for one digital Europe?' (2017) 2 *Politique européenne* 102, 111.

⁸⁰ European Commission, *Fact Sheet: Digital Single Market: updated audiovisual rules*, June 7, 2018, 1-2.

⁸¹ Wagner (2014), 191.

⁸² Andris Mellkauls, 'The Audiovisual Media Services Directive and Propaganda' in *Resisting foreign state propaganda in the new information environment: the case of the EU, Russia, and the eastern partnership countries*, Foundation for European Progressive Studies (2016).

⁸³ Paul Goble, 'A Russian propaganda site incites breaking up Baltic countries', *Estonian World* March 24, 2017; DW Editors, 'Baltics battle Russia in online disinformation war', *Deutsche Welle*, October 8, 2017.

EU, which would make them more vulnerable to Russian influences.⁸⁴ These persistent campaigns have proven very difficult to regulate, let alone eradicate, as they are perpetrated on multiple platforms by a variety of actors, which may include government-sponsored traditional broadcasters, but also aligned private actors with influential voices.⁸⁵ Since content transmitted between Member States is viewed as complying with standards sufficient for all Member States, and secondary control is excluded, regulatory authorities face significant difficulty in responding to such concerted campaigns.⁸⁶ Even where steps are taken to combat these, media regulators struggle to respond in a timely fashion.⁸⁷ Some minor successes have been achieved, such as the approval by the European Commission of Lithuania's radio and television commission's decisions to ban an especially abhorrent Russian TV station.⁸⁸ However, these are limited, and often temporary measures – in Lithuania's case the ban was for three months⁸⁹ - and do little to stem the flow of propaganda and misinformation that these campaigns rely on, especially in cases where the country with jurisdiction over these broadcasters has laxer laws than the receiving country, which limits the receiving country to the slow and burdensome procedures that are required by the AVMSD.⁹⁰ As such misinformation is specifically targeted towards undermining the values and democratic institutions of the EU, it is particularly important that this issue is tackled.⁹¹

Fortunately, increased dissemination of propaganda has certainly not been the only, or even main, way in which the internet has changed the spread of information. It has also been the

⁸⁴ Aleksander Król, 'Russian Information Warfare in the Baltic States — Resources and Aims' *The Warsaw Institute Review*, July 20, 2017; Emma Graham-Harrison, 'Lithuania fears Russian propaganda is prelude to eventual invasion', *The Guardian*, April 3, 2017.

⁸⁵ Jolanta Darczewska, 'The anatomy of Russian information warfare the Crimean operation, a case study' (2014) *Centre for Eastern Studies*, 25-26.

⁸⁶ Mellkauls (2016), 75-76.

⁸⁷ UK Office of Communications, *Update on the RT Service – New Broadcasting Investigations and Approach to Fit & Proper*, April 18, 2018 <https://www.ofcom.org.uk/_data/assets/pdf_file/0012/113043/rt-investigations.pdf> accessed 23/04/2018.

⁸⁸ European Commission, 'The decision to suspend broadcast of the Russian language channel "RTR Planeta" in Lithuania complies with EU rules', February 17, 2017.

⁸⁹ Jonas Rusche, 'European Commission approves three-month ban of Russian TV station "RTR Planeta"', *European Centre for Press & Media Freedom*, March 14, 2017.

⁹⁰ The AVMSD allows Member States to derogate from the freedom of reception in limited circumstances, outlined in Art 3, or impose its stricter rules via procedures outlined in Art 4.

⁹¹ European Commission, *Tackling online disinformation: a European Approach*, April 26, 2018, 15.

catalyst for a broader phenomenon termed as the ‘sharing’ economy.⁹² One of the most significant changes here is the growing role of user-generated content as a vehicle for the creation of new audiovisual media.⁹³ Through video-sharing platforms such as YouTube, Twitch, Vimeo, Dailymotion and many others,⁹⁴ users are able to share videos of their own creation (and, at times, not of their own creation, leading to unsurprising copyright infringement issues⁹⁵). Much of the content produced on these websites certainly does not match AVMSD standards for defining media service providers and should therefore not raise great regulatory questions. However, professionalised content, with more serious editorial work and consistent scheduling of programmes is becoming increasingly common on these websites.⁹⁶ Both editorial work and programming are heavily emphasised in the AVMSD as criteria for placing media service providers under the jurisdiction of the Directive.⁹⁷ This professionalisation of content has come to the attention of the relevant regulatory bodies of the EU, with signals on their part suggesting that some of the users of video-sharing services might eventually be included under the AVMSD as on-demand media service providers, provided their content matches the editorial and programming standards of the Directive.⁹⁸ Currently, these video-sharing platforms fall outside of the scope of the AVMS Directive, with other rules applying to them.⁹⁹ If they were to eventually fall under AVMSD rules, the user-driven character of the content could be problematic from a jurisdiction perspective, as each Member State would suddenly have innumerable new ‘media service providers’ to cover. The regulatory authorities would then have to keep track of the content of each of these new individual broadcasters to ensure that the content they produce is up to par. This is likely to be an impossibility in practical terms, but it

⁹² Ibrus (2016).

⁹³ Ibid, 3.

⁹⁴ For a basic who’s who of video-sharing platforms see ‘7 Free Video Sharing Sites to Watch & Upload Videos’, *Freemake Blog* <<http://www.freemake.com/blog/top-7-free-video-sharing-sites/>> accessed 18/04/2018.

⁹⁵ Kris Erickson, Martin Kretschmer, ‘‘This video is unavailable’’: analyzing copyright takedown of user-generated content on YouTube’ *InfoJustice*, Mar 27, 2018.

⁹⁶ Joanne Morreale, ‘From homemade to store bought: *Annoying Orange* and the professionalization of YouTube’ (2014) 14(1) *Journal of Consumer Culture* 113, 125-126.

⁹⁷ AVMSD, Art 2.

⁹⁸ Katsarova (2017), 10.

⁹⁹ AVMSD Proposal, 3.

could also have a harmful impact on the free exchange of information by individuals and freedom of speech if over-regulation occurs.¹⁰⁰

The rise of new forms of media has consistently overturned prevalent practices, business models, and conceptions in the past by forcing old guards to compete with new ways of doing things.¹⁰¹ On the positive side, this has brought new services and other benefits to users. More negatively, however, the regulatory framework is always in a state of attempting to catch up with novel developments. With the country of origin principle of the AVMSD, this is doubly the case, as each Member State imposes its own rules over broadcasters in its jurisdiction to achieve policy goals that match primarily the needs of its own citizens, compliance with which must be recognised by all other Member States. As evidenced by the above discussion, the groundbreaking developments in media associated with the internet make the country of origin principle outdated to appropriately regulate the dissemination of harmful information, but also the new business models that have arisen as part of this new mediasphere.¹⁰² The European Commission, however, appears intent on retaining the country of origin principle for the foreseeable future due to the legal certainty it is purported to offer, which may lead to continued problems in the future.¹⁰³

In terms of practical changes to the country of origin principle, allowing simplified or fast-track procedures for derogation in the case of certain forms of repeated hate speech and propaganda could perhaps prevent some of the effectiveness of hate speech by stemming its flow much quicker. Calls for revised rules on derogation were present in the EC consultations which preceded the proposal for a revised AVMSD, giving some weight to the sentiment that such changes may be necessary to ensure the future functioning of the country of origin principle.¹⁰⁴ The agreed text for the AVMSD revision is encouraging in this regard, as it provides EU Member States with derogation and urgency procedures in cases of serious risks to public health,

¹⁰⁰ Ibrus (2016), 3.

¹⁰¹ Organisation for Economic Co-operation and Development (OECD), *Competition Issues in Television and Broadcasting*, 2013, 5.

¹⁰² Ibrus (2016), 8.

¹⁰³ AVMSD Proposal, 5.

¹⁰⁴ European Commission, *Synopsis report of the Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century*, May 25, 2016, 8.

public provocation to commit terrorist offences, or public security concerns.¹⁰⁵ Since the political will to execute major changes to the country of origin appears to be lacking, smaller changes of this type may be a better way to counter some of the issues that have emerged in the current framework.

4. The Country of Origin Principle and Brexit: Any Tunnels for the British Channels?

In June 2016, a majority of the UK electorate voted by a narrow margin in favour of leaving the European Union, in a decision which came to be known as ‘Brexit’.¹⁰⁶ In March of the following year, the British Prime Minister Theresa May opted to invoke Article 50 of the Treaty on European Union (TEU), whereby EU Member States may withdraw from the EU, thus giving effect to the will of the UK electorate.¹⁰⁷ Article 50 gives the parties two years after it is invoked to come to an agreement on terms for the withdrawal, unless this term is unanimously extended.¹⁰⁸ Currently, a transition period agreed between the UK and the EU gives the UK until December 31, 2020 to implement many of the changes that Brexit will require.¹⁰⁹ However, EU officials have stated that an extension to the actual Article 50 terms is not on the cards, barring major political changes in the UK.¹¹⁰ Due to these short terms, Brexit has come to dominate discussions around the near future of the EU and Britain in almost all areas, as this unprecedented decision has generated much uncertainty in terms of how the relationship will be governed. The audiovisual media field is no exception, and Brexit may be particularly influential

¹⁰⁵ European Commission, *Fact Sheet: Digital Single Market: updated audiovisual rules*, June 7, 2018, 2.

¹⁰⁶ UK, *EU Referendum*, June 23, 2016.

¹⁰⁷ Treaty on European Union (2007), Art 50.1, which reads: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”; TEU Art 50.2; *Letter from Theresa May to Council President Donald Tusk*, March 29, 2017,

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf> accessed 19/04/2018 [hereinafter “May Letter”]

¹⁰⁸ TEU, Art 50.3.

¹⁰⁹ European Commission, *Draft Withdrawal Agreement*, March 19, 2018, Article 121.

¹¹⁰ Daniel Boffey, ‘Article 50 extension would need major shift in UK politics, say EU officials’, *The Guardian*, July 22, 2018.

in this area, because of a major concentration of broadcasters in the UK.¹¹¹ Brexit's impact on this field must therefore be examined in detail.

Due to various factors – a large population, a skilled workforce, strong infrastructure, but also relatively lax broadcasting rules – the UK has become a major hub for television channels, many of which serve markets abroad.¹¹² However, much of the UK's success in this area can also be traced back to the single market provisions under the TWFD and AVMSD, which allowed channels based in the UK to operate across Europe and target larger audiences.¹¹³ The working of country of origin principle in the AVMSD – the cornerstone of the Directives – is therefore highly relevant to any discussion of Brexit's impact on this area.¹¹⁴ The discussion in this section will proceed on the basis of three scenarios: the unlikely, but terrifying prospect of no agreement being reached between the EU and the UK, otherwise known as the 'no deal' scenario; a 'hard Brexit' scenario which would see the UK leave important aspects of the single market behind; and, finally, a 'soft Brexit' scenario whereby the UK de facto remains in the EU single market but loses its decision-making capabilities. It also considers how the evolving political situation in the UK affects each of these scenarios.

The 'no deal' scenario stems directly from the letter sent by PM Theresa May to the European Council's president Donald Tusk to invoke TEU Article 50. The letter states the following:

“If ... we leave the European Union without an agreement the default position is that we would have to trade on World Trade Organization terms.”¹¹⁵

The letter also notes that this not a desirable outcome,¹¹⁶ a position shared in the EU.¹¹⁷ Reverting to WTO rules, which only provide negative harmonisation to prevent discrimination, would be a ludicrous step backwards in a market as integrated as the EU-UK audiovisual media

¹¹¹ Alison Harcourt, 'What a Brexit would mean for Europe's television channels', *The UK in a Changing Europe*, June 3, 2016, 2.

¹¹² *Ibid.*, 1-2.

¹¹³ *Ibid.*, 1.

¹¹⁴ Sally Broughton Micova, 'Why the UK's creative industries are better off in the EU' *LSE Blogs*, June 16, 2016, <<http://blogs.lse.ac.uk/euoppblog/2016/06/16/uk-creative-industries-better-off-in-the-eu/>> accessed 19/04/2018.

¹¹⁵ May Letter, 3.

¹¹⁶ *Ibid.*

¹¹⁷ Reuters, 'EU not working on 'no deal' scenario for Brexit' *Reuters*, October 10, 2017.

market.¹¹⁸ It would also be inconsistent with a 2017 UK White Paper on Brexit, which states that:

“The UK is currently the EU’s biggest broadcasting hub, hosting a large number of international broadcasting companies. In the course of the negotiations, we will focus on ensuring the ability to trade as freely as possible with the EU and supporting the continued growth of the UK’s broadcasting sector.”¹¹⁹

A ‘no deal’ scenario, then, would imply that UK-EU broadcasting would revert to WTO rules,¹²⁰ which would leave the media service providers based in the UK in a jurisdictional limbo when EU rules on free movement of services no longer apply. In the EU itself, Article 2.3(c) of the AVMSD will continue to apply if the media service provider has its head office in a Member State, or if a significant part of the workforce is based there, which should cover at least some of the broadcasters currently under the UK’s jurisdiction.¹²¹ Some broadcasters may therefore look to other countries in the EU for headquarters to ensure legal certainty for themselves, with various EU Member States vying for their establishment.¹²² If those broadcasters move to other countries in the EU from the UK, one of the positive outcomes from a regulatory perspective will be that they will continue to be covered by the AVMSD and the country of origin principle, which could somewhat benefit the functioning of the principle. In July 2018, the EU issued a communication urging all parties to prepare for this scenario, which signals that it fears that negotiations with the UK will not come to a satisfactory outcome.¹²³

A second scenario that has emerged from discussions is the so-called ‘hard’ Brexit scenario, the preferred option for many Brexit supporters in the UK.¹²⁴ This would see the UK leave the single market, with the consequence that free movement rules of the EU would no longer apply. This

¹¹⁸ Oster (2016), 147.

¹¹⁹ Department for Exiting the European Union, *Policy Paper: The United Kingdom’s exit from, and new partnership with, the European Union*, May 17, 2017, 8.35.

¹²⁰ Swati Dhingra, ‘Factsheet: no deal – the WTO option’, *The UK in a Changing Europe*, September 19, 2017.

¹²¹ AVMSD, Art 2.3(c).

¹²² Joe Mayes, ‘Brexit Limbo Leads London Broadcasters to Size Up Amsterdam Digs’ *Bloomberg*, August 8, 2017; Irish Times ‘IDA targets UK-based TV channels for Brexit move’, *via The Guardian*, February 25, 2018.

¹²³ European Commission, *Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019*, COM(2018) 556 final, 4.

¹²⁴ The Economist, ‘Most Leavers want a hard Brexit. Voters at large want a soft one’, *The Economist*, July 22, 2017.

has bearing on the AVMSD, which is based on the free movement of services.¹²⁵ Since the Directive harmonises important matters such as the protection of minors and hate speech, it is possible that a deal will be reached to allow media service providers based in the UK to continue providing their services in the EU.¹²⁶ Even if such a deal is reached to allow broadcasting, it is possible that many media service providers will view the doubling of regulation – first having to meet UK standards, and, if they provide services in EU Member States also AVMSD and national rules of the Member State per Article 2.3(c) of the Directive¹²⁷ – as problematic. This could have the effect of reducing the attractiveness of the UK as a base of operations for media service providers, which might again encourage them to move their operations outside of the UK. Media service providers that primarily target audiences in other EU Member States from their UK base might see this as an especially attractive prospect, as they would obtain increased legal certainty and ease of compliance from doing so.¹²⁸

In the third scenario – ‘soft’ Brexit – the UK would remain largely within the single market while ceding large portions of control to the EU, especially in terms of producing regulation, essentially placing the UK in a similar position to Norway.¹²⁹ Norway’s trade arrangements with the EU are regulated by the European Economic Area Agreement (EEA Agreement), which contains rules on media broadcasting in Article 36, as well as more detailed provisions in Annex XI to the Agreement.¹³⁰ Notably, restrictions on the freedom to provide services on audiovisual media are generally prohibited in the Agreement, other than those in the State of the person for whom the services are intended.¹³¹ Annex XI, however, takes up AVMSD rules while excluding

¹²⁵ [1974] ECR 411; [1980] ECR 834.

¹²⁶ Alison Harcourt, ‘How Brexit might affect EU audio-visual media services policy-making’, *LSE Blogs*, May 24, 2016, <<http://blogs.lse.ac.uk/mediapolicyproject/2016/05/24/how-brex-it-might-affect-eu-audio-visual-media-services-policy-making/>> accessed 19/04/2018; Wendy M Grossman, ‘Parenting for a Digital Future – How Brexit could affect media content for children and families’, *LSE Blogs*, November 16, 2016, <<http://blogs.lse.ac.uk/parenting4digitalfuture/2016/11/16/how-brex-it-could-affect-media-content-for-children-and-families/>> accessed 19/04/2018.

¹²⁷ AVMSD, Art 2.3(c).

¹²⁸ Herold (2008), 6.

¹²⁹ The Economist, ‘The right way to do Brexit’, *The Economist*, February 22, 2018.

¹³⁰ European Economic Area Agreement 1994 (EEA Agreement), Article 36; EEA Agreement, Annex XI.

¹³¹ EEA Agreement, Art 36.1: “Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.”

non-EU European Free Trade Association Members from the right to vote in certain regulatory representative bodies such as the European Regulators Group for Audiovisual Services.¹³² If the UK were to achieve a deal to remain under AVMSD coverage, media service providers under its jurisdiction could continue to operate under the country of origin rule, which would be an important outcome from the perspective of regulatory certainty. The prospect of continued EU regulation, without a corresponding right to vote might be hard to stomach for UK negotiators at the Brexit table, but would nevertheless easily be the best solution for the UK to retain the most media service providers under its jurisdiction as possible. Potential future changes to the country of origin principle, that the UK would have no voice in, may however lead some media service providers to consider establishing themselves elsewhere.¹³³

The political sentiment in the UK itself will largely dictate which of the three options the UK government will pursue. Certainly, each of the outcomes will cause political backlash from some segments of the UK public in light of current divisions in public opinion.¹³⁴ A White Paper issued in July 2018 by the UK Government couches the replacement of the country of origin principle in the following vague language: “[t]he UK is seeking the best possible arrangements for this sector”.¹³⁵ This is not sufficiently clear to determine which of the scenarios applies. However, as the White Paper seeks to “propose new arrangements for services”,¹³⁶ rather than keeping the UK in the single market as it seeks to do for goods, it seems like the UK’s aim here is towards a harder Brexit on the audiovisual side. The EU, on its part, has criticised the UK White Paper as largely unworkable, which raises questions as to how much, if anything, will be agreed in time for the Article 50 deadline of March 2019.¹³⁷

Early suggestions that the negotiations would be easy now appear to be nothing but fantasy.¹³⁸ The two former scenarios, ‘no deal’ and ‘hard’ Brexit, should appear as especially worrisome to media service providers currently based in the UK, whereas the ‘soft’ Brexit scenario is vastly

¹³² EEA Agreement, Annex XI, 20-21.

¹³³ Harcourt (May 2016).

¹³⁴ John Curtice, ‘What kind of Brexit do voters want?’ *BBC*, July 4, 2018.

¹³⁵ UK Government White Paper, *Relationship between the United Kingdom and the European Union*, July 12, 2018, [102].

¹³⁶ *Ibid.*, 2.

¹³⁷ David M Merszenhorn, Maïa de la Baume, ‘Barnier dismantles UK’s Brexit white paper’ *Politico*, July 20, 2018.

¹³⁸ The Economist, ‘Brexit delusions flourish in Britain’s fevered political climate’, *The Economist*, October 19, 2017.

preferable from a business perspective. It is unlikely that the UK will obtain the exact same deal as Norway, and it remains as of yet to be seen how the UK government plans to escape EU burdens, while retaining its many benefits.¹³⁹

5. Conclusion

The country of origin principle has for decades defined EU media regulation, thus shaping the market of audiovisual media.¹⁴⁰ Its central role in the AVMSD remains largely unchanged in the most recent reform process launched by the EC, despite its functioning being called into question by emerging technologies and the resulting changes to business models.¹⁴¹ The prevalence and implications of ‘forum shopping’ severely strain the country of origin’s functioning in its current iteration. The effectiveness of propaganda campaigns also appears to be facilitated by the current procedures for derogation from the principle, as actors waging such campaigns can benefit from the lax rules in some EU Member States to infiltrate the EU mediasphere as a whole. The case of Brexit challenges the country of origin principle in a different way, as its creators likely did not foresee a Member of the Union leaving, and therefore did not account for this possibility and its effects on broadcasting jurisdiction. Moreover, the UK position on audiovisual broadcasting remains vague in the most recent documents produced by the government, which is troubling in the face of rapidly-approaching deadlines.

Reforms of the country of origin principle should take into account the changing times we live in, focusing in particular on speeding up the response time to destructive forms of audiovisual media, which can now spread faster than ever before. To do so, simplified and fast-track rules on derogation from the country of origin principle may be required. Additionally, increasing regulatory convergence between different types of audiovisual media may be a necessity to ensure that linear and on-demand media players encounter a level playing field.¹⁴²

¹³⁹ The Economist, February 22, 2018.

¹⁴⁰ Herold, 6.

¹⁴¹ AVMSD Proposal, 5; Wagner (2014), 291-294.

¹⁴² OECD (2013), 5.

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