GOVERNMENT INTERVENTION IN MARRIAGES OF CONVENIENCE BETWEEN TV BROADCASTERS AND DISTRIBUTORS

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Abstract

Albeit largely neglected in communication sciences research, industrial convergence has put the relation between legacy content media like TV broadcasters and distributors (cable, satellite) firmly on the policy agenda. There seems to be an increasing awareness of the gatekeeping characteristics of mainstream as well as online video distribution, and the power distributors can exert *vis-à-vis* television broadcasters in terms of the bundling of services and pricing. The relation between TV broadcasters and distributors is increasingly characterised by conflicts. Because of public disputes between broadcasters and distributors, and threats of blackout, several governments across Europe are indeed discussing the necessity of regulatory intervention in order to decrease tension and promote cooperation in their media sectors. The article therefore questions how broadcasters have problematised their relation with distributors and put it on the policy agenda, whether it is up to governments to intervene in the relationship between broadcasters and distributors, and whether the proposed policy actions are likely to remedy the tensions in the marketplace.

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Introduction

Distribution has always been a key factor in content industries. Essentially, distribution is the part of the media supply chain determining access to the audience. Since distributors (cable, satellite, etc.) have control of the television channels that reach both the aggregate audience and individual viewers, they act as gatekeepers and therefore have considerable market power. This means that their relevance is not only of an economic nature, but extends to the social and cultural, affecting content diversity and cultural citizenship. As the value of content depends crucially on its distribution and the value of distribution depends on the programming it carries, content and infrastructure are highly interconnected (see Croteau and Hoynes 2006; Doyle 2013b). Nevertheless, infrastructure and in particular the distribution of television content has been largely neglected in communication sciences research (Michalis 2014). In particular communications policy research has had a rather "narrow focus on mass media with a concurrent neglect of telecommunications" (Just and Puppis 2012, 14). Given the technicality of distribution, it has more often been the playground of research in fields like informatics.

Although one might argue that the Internet has opened up a massive array of new means of distribution and, hence, that traditional modes of distribution like cable and satellite have lost power and/or will lose out in the future (for more information on the declining control over content distribution, see Braet 2013; Davenport and Beck 2001), power asymmetries between broadcasters and distributors are likely to persist in Europe as most viewers still use the main(stream) distribution networks to watch television programming (Hesmondalgh 2007). Among Europe's 249 million television households, satellite is the most popular platform, accounting for 85 million homes at the end of 2012. Digital terrestrial television (DTT) is the second most popular way of receiving signals, accounting for 78 million homes. Thanks to the analogue switch-off, cable is on the rise with 68 million homes whereas IPTV, Europe's fastest growing television distribution market, rose to 18 million homes. Power asymmetries between broadcasters and distributors may give rise to conflicts, especially if revenues are disproportionally divided between those firms that invest in content production and those firms that make money by reselling that content. Moreover, also between broadcasters and over-the-top (OTT) platforms (i.e. television content providers operating over the Internet without a traditional distributor being involved) such as Netflix and YouTube relations seem to become increasingly tense. UK broadcasters ITV and Channel 4 have protested against services like TV-Catchup, streaming over 50 UK television channels online without prior consent of the broadcasters and without any remuneration.[1] ITV said it would pursue these and other sites it believed "to be infringing our copyright or using our content in an unlicensed, illegal capacity" (Halliday 2013, sp).

In a converged media environment, in which boundaries between actors and industries are blurring, the relation between legacy content media like television broadcasters and distribution companies has become a "hot topic" in public and policy debates. There seems to be an increasing awareness of the gatekeeping characteristics of mainstream as well as OTT distribution, and the power distribution companies can exert *vis-à-vis* television broadcasters in terms of the bundling

of services and pricing. Free-to-air broadcasters in the United States, the United Kingdom, Germany, Belgium, the Netherlands, etc. have argued that distribution companies benefit enormously from broadcasters' programming without adequate compensation (Donders and Evens 2011). Observing significant concentration in the market for television distribution (compared to the multitude of broadcasters – even though concentration is also a feature of some broadcasting markets[2]) and given the intrinsic dependency of free-to-air television stations from distributors to reach the audience (Oliver and Ohlbaum 2011, 8-9), they claim to be in a weaker bargaining position. Moreover, public broadcasters like BBC (UK), ARD, ZDF (Germany) and VRT (Flanders, i.e. the northern part of Belgium) have protested against (commercial communication) overlays on their programming, which – so they argue – go against their editorial autonomy and responsibility (see, for example, Vlaams Parlement 2013a). Whereas the Court of Justice of the EU (2013) has explicitly confirmed that services like TV-Catchup operate illegally, failing to respect basic principles of copyright law, other issues related to, what we would dub, "economic fairness" and "content integrity" are less easily captured by existing policies and laws applying to media and electronic communications.

Broadcasting-distribution relations are influenced by five factors: i.e. the structure of the industry, the structure of the involved companies, the type of services concerned in the relation, personalities, and policy (see Table 1 below). For research on the first three aspects we refer to previous work (Evens and Donders 2013). While expert interviews with industry representatives (see Donders and Evens 2011) show that rather "personal" and even emotional issues play a considerable role in broadcasting-distribution relations, this aspect is difficult to study in an empirically valid way. The policy factor deserves more attention, however. Because of public disputes between broadcasters and distributors, and threats of blackout,

Table 1: Factors Influencing Broadcast-Distribution Relations

MACRO - INSTITUTIONS	– Media-specific regulation – Telecommunications policy – Antitrust regulation – Copyright law
MESO - MARKET	– Industry consolidation – Amount of buyers/sellers – Entry barriers – Technological change
MICRO - COMPANY	– Relative size – Conglomerateness – Vertical integration – Financial resilience
MICRO - PRODUCT	– Product differentiation – Exclusivity – Bundling/subsidisation – Switching costs
INDIVIDU - PERSONAL	– Negotiation strategy – Relative familiarity – Reputation for fairness – History of conflicts

several governments across Europe are indeed discussing the necessity of regulatory intervention in order to decrease tension and promote cooperation in their media sectors. An analysis of these policy initiatives is in place at this stage as government action at the European and/or national level might have significant effects on the media value chain and, consequently, be of importance to citizens across Europe. Indeed, whereas media business literature sometimes underestimates the policy factor, reducing it to some sort of exogenous factor, it is in fact a shaping force in emerging and/or changing media markets (Croteau and Hoynes 2006, 65; for an illustration of the impact of media policy on specific media systems see, for example, Doyle 2013a; Kuhn 2013; Donders and Van den Bulck 2013).

The article therefore questions how broadcasters have problematised their relation with distribution companies and put in on the policy agenda, whether it is up to governments to intervene in the relationship between broadcasters and distributors, and whether the proposed policy actions are likely to remedy the tensions in the marketplace.

Structure and Methodology

The article consists of four parts. Firstly, we elaborate on the role of distribution in media industries. A brief theoretical background for the discussion on broadcaster-distributor relationships is provided, drawing mainly from insights from political economy of communication scholars.

We, secondly, on the basis of a qualitative analysis of press releases, popular press articles, statements in Parliament, etc. carry out an argument mapping exercise (see Dunn 2012), which focuses on how broadcasters problematise their relation with distributors. Such an analysis is necessary as problems are by no means "natural phenomenons," waiting "out there" to be found, but rather constructs that are interdependent, instable and dynamic in nature. Problems are constructed through human interaction and pushed onto or, as emphasised by Freedman (2008), of the policy agenda.

> *Inexperienced analysts suppose that problems are purely objective conditions that are determined by the 'facts'. This methodologically innocent view fails to recognize that the same facts – for example, statistics that show that global warming is on the upswing – are interpreted in varied ways by policy stakeholders. For this reason, the same policy-relevant information frequently results in conflicting definitions of a 'problem'. These definitions are shaped by personal and institutional interests, assumptions about human nature, ideas about the proper role of government, and beliefs about the nature of knowledge itself* (Dunn 2012, 66).

We also take into account whether and how distributors, governments and scholars provisionally take stance on this topic. Who defines the problems? How are commercial problems turned into wider public interest concerns? Whose interests are served best by the problems defined? Answering these questions, we draw from literature review and desk research, covering experiences in the UK, the Netherlands, Belgium, Germany, etc.

Specifically, an argument mapping exercise centers on the following elements: *claim* (what do stakeholders want policy makers to do?), *information* (what data do they provide to sustain their claim?), *motivation* (why should policy makers

follow-up on the claim made?), *qualifier* (is this likely to help?), and *backing* (why is the motivation valid?). *Objections* (i.e. counter-arguments from other stakeholders) are most often also mapped as to allow for a more complete and even-handed analysis. The aim of an argument mapping is to arrange all elements of a certain discourse in a coherent way and to find for inconsistencies or missing information.

Thirdly, we look at the emerging policy answers at the European level and in two countries (the Netherlands and Belgium – more specifically the Flemish Community or "Flanders" that is the autonomous level of government in the area of media policy making), which have taken legislative action in this respect and were selected for our analysis for that reason. This part is largely based on a qualitative document analysis in context of policy and legal documents, complemented with insights from company reports and popular press coverage. Documents are treated both as sources of factual information on the policy outcome (i.e. which rules have been adopted?) as well as reflections of the policy process (i.e. why were these rules adopted?)(Karppinen and Moe 2012). The Netherlands and Flanders were selected as two particularly interesting case studies as they are the only two countries that have adopted laws to deal with the issue of content integrity. Focus of the case studies (for methodological elaboration, see Vennesson 2008) is on the newly adopted laws on content/signal integrity in these two countries. Other rules, e.g., must carry obligations distribution companies have to abide by are not part of the research.

Fourthly, we evaluate whether the emerging policy initiatives are likely to affect broadcasting-distribution relations, in what way, and whether such change is desirable at all. Will, for example and too often neglected, citizens benefit from the adopted legislation? Such an analysis is important as policy makers are often guided by partial information provided by broadcasters and distribution companies. Of course, their information can be instructive, but remains largely anecdotal. Finally, some conclusions and recommendations for further research and policy are outlined.

The Role of Distribution in Media Industries

Much of the literature regarding the role of distribution in media industries is rooted in the political economy of communication. This rather critical approach aims at unravelling power relationships in media markets and analysing structural processes of control over the production, distribution and consumption of media (Mosco 2009). Already in 1987 Nicholas Garnham claimed that "*it is cultural distribution, not cultural production, that is the locus of power and profit*" (31). Garnham contends that, because the business of cultural goods is much about "creating audiences" as it is about "producing cultural artefacts," distribution is characterised by the highest level of capital intensity, ownership concentration and multi-nationalisation. In a similar vein, Hesmondhalgh (2007) points to the hourglass structure of the media industries (many producers, few distributors) and argues that power resides with those firms that control distribution of cultural production. Miège (2011) observes a particular rise in the position of hardware manufacturers, web players and telecom firms, exerting control of all information that is distributed over their networks. Cunningham and Silver (2013) pose that the power and profitability in screen industries have always resided in distribution, and born digital,

globally focused players like YouTube, Apple and Netflix will become the King Kongs of the media industries.

Undeniably, the rise of multichannel TV (cable and satellite), the transition to digital and the popularity of the Internet (streaming and downloading) as a new distribution platform affect the power structures and relationships in the audiovisual media landscape. Following a more technology-optimistic perspective, Todreas (1999) and Benkler (2006) claim that new technology is likely to erode the monopolistic control over distribution and contends that the economic power conferred by control over distribution networks is being reconfigured around alternative sources of economic rents, such as copyright regimes. In addition, Christophers (2008) insists that power in the media landscape has shifted in favour of content producers and television broadcasters. Profits will move upstream as content has the opportunity to create branded, high-quality products.

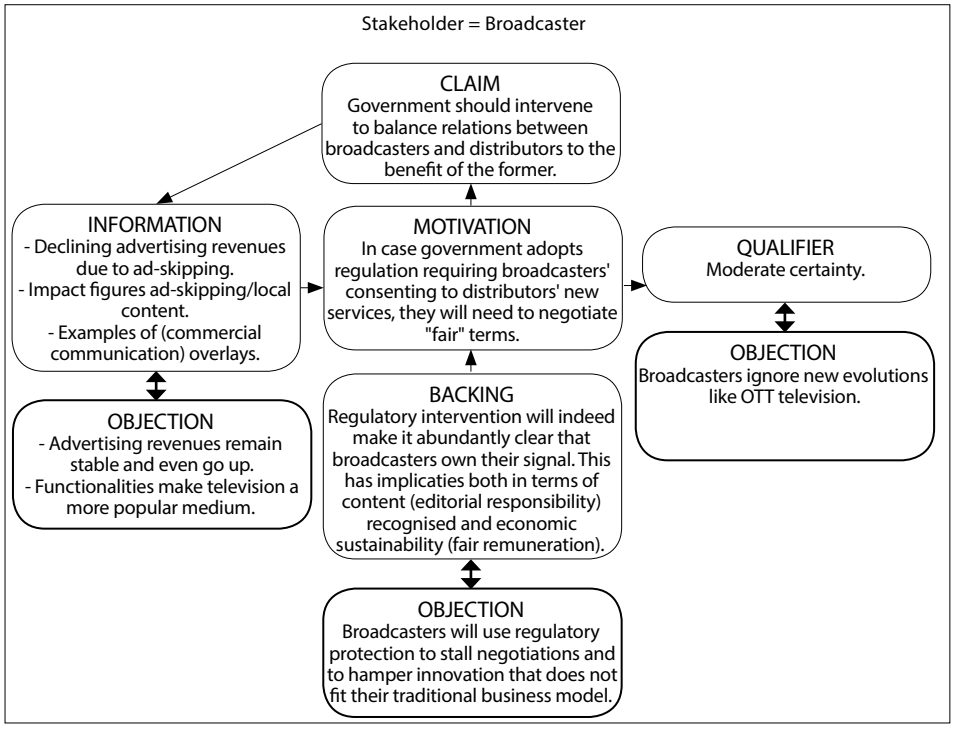
A third perspective (e.g. Doyle 2013b, Evens 2013a) stresses the mutual power between television producers and distributors, and points to the interdependency between audiovisual production and distribution. Broadcasters need distribution to generate advertising revenues whereas distributors need programming. Furthermore, they emphasise the importance of the political and economic context of production and distribution to assess power relationships. Whereas in some markets distributors are the leading party, broadcasters may be powerful in other markets.

Focus of the next section is on uncovering which of the abovementioned theoretical approaches is reflected most in broadcasters' "structuring" of their problematic relation with television distribution companies and whether that approach is also visible in emerging policy initiatives.

Perceived Problems and Diverging Interpretations: In Search of Empirical Data

This article zooms in on the definition of a policy problem (i.e. the problematic relation between broadcasters and distributors), emerging policy solutions dealing with this problem, and the aptness of these emerging policies. Looking first at the "problem structuring" issue, this section analyses the numerous issues that are raised by broadcasters in relation to broadcasting-distribution relations and subsequently "problematised" by broadcasters. The latter's claims and arguments are discussed and summarised through an argument mapping exercise (see methodological section, cf. supra), including, but not focussing on, counterarguments made by distributors (i.e. *objections*). Aside from other possible conflicts that might be dealt with (e.g., must-carry of linear and non-linear services), the focus of the article is on two problems, constructed by broadcasters (Figure 1). First, alleged unfair economic practices with distributors failing to adequately remunerate broadcasters for their content. Second, distributors' interventions with broadcasters' editorial autonomy and responsibility. The authors are at this point not implying that these problems are "real." Rather, the aim of the analysis is to "de-construct" the construction of a policy problem by several free-to-air broadcasters.

Figure 1: Argument Mapping of Broadcast-Distribution Relations



"Unfair" Economic Practices and Investment in Local Content

Discussions between free-to-air broadcasters and distributors are captured by the tension between maximising own revenues on the one hand while not jeopardising a long-lasting contractual relation. Broadcasters argue that relations with distributors are (no longer) economically "fair." To sustain this argument, they point at two issues. First, there are conflicts about so-called "retransmission payments" and "distribution costs." The former are paid by distributors to broadcasters and can be regarded as a remuneration for the exploitation of broadcasters' signal; the latter flow from broadcasters to distributors in exchange for carriage (Evens 2013a). The variety in contracts between broadcasters and distributors is enormous, and needs to be investigated in the local political and economic context. In the UK, free-to-air broadcasters, including the BBC, have paid substantial amounts for carriage to BSkyB without a retransmission sum being paid to them (Mediatique 2012). However, free-to-air broadcasters in Denmark, the Netherlands and Flanders receive substantial retransmission payments. However, even in these cases most broadcasters hold that the sum they receive is too low in comparison with the contribution made to distributors' offer to consumers. Broadcasters claim that they carry the bulk of investments in quality content whereas distributors take a disproprtional share of the pie, without significantly contributing to the financing and production of that content. According to UK media regulator Ofcom (2012), in 2010, UK public service broadcasters spent 27 percent of their revenues on domestic first-run originations (£1.868 billion) compared to only 2 percent for pay-TV

operators (£215 million). In this regard, a senior UK television executive, quoted by The Guardian journalist Mark Sweney (2011, sp) said "We all pay a fair amount of money to Sky and provide them with free channels, but no money flows to us. Yet, where would their platform be without PSB channels? How many people would subscribe?"

A second problem put forward by broadcasters relates to the new television functionalities offered by distributors to consumers: the digital video recorder (DVR), the electronic program guide (EPG), ad-skipping, "flex view" with various degrees of recording facilities, etc. These services are a thorn in the flesh of many broadcasters. While traditional advertising remains overwhelmingly important in free-to-air broadcasters' revenues (about 30 percent of the television industry's turnover), the revenue model is undeniably under pressure and this, seemingly, to the benefit of more customised services offered by distributors and OTT players that allow ad-avoiding behaviour (Picard 2013; Knapp 2013). In particular in Flanders, television broadcasters oppose distributors' practices in this regard. The argument is that distributors build business models (ab)using broadcasters' content without appropriate financial compensation. The analogy with companies like Google and Facebook, using content from legacy media to the benefit of their business model holds. Television executive Christian Van Thillo (Medialaan) said distributors give away content for free in order to lock in consumers in triple play bundles (television, Internet and telephony). Arguing he did not oppose flex view and other types of services, he did say broadcasters should receive a fair compensation for this additional use of their signal. Otherwise, so Van Thillo claimed, broadcasters will become unable to uphold investments in domestic content. In other words: distributors can "play around" with broadcasters' signal provided they have the latter's prior consent, which will in most cases depend upon a contractually arranged remuneration flowing from distributor to broadcaster.

> *There is disagreement [between broadcasters and distributors] on several issues, but essentially it comes down to the television signal. The question is whether a TV channel, which represents a brand, a program schedule, presenters and channel values, is owner of the signal. Of course, it is the owner of that signal. Otherwise, we might better quit the business. A newspaper company, for example, also owns its product until it is in the shop* (NN 2013, own translation).

Both inadequate retransmission payments and lack of compensation for new services would, according to several broadcasters, result in declining investments in original domestic content which are an important instigator of economic growth in the audioviual production sector but the most expensive programming genre to produce. Delayed viewing and hence ad-skipping in the 18-54 age category has made it difficult to raise advertising income and therefore produce profitable domestic series, so it is argued. Flemish private broadcaster VMMa (now "Medialaan") has, for example, provided figures that illustrate the pervasive nature of delayed viewing (with approximately 80 percent of ad-skipping), in particular when drama series (the most costly content) are concerned. Table 2 shows a substantial and continuous increase in delayed viewing could be observed for its most popular programs. Delayed viewing figures for drama series like *Danni Lowinski* went from

27.3 in 2012 to 36.5 percent in 2013 (with no further broadcasts of the series in 2014 and also no broadcasts of telenovellas anymore) and even "live" entertainment is captured by the phenomenon of delayed viewing.[3] Preliminary figures indeed suggest that investments by broadcasters in domestic, independent productions have fallen since 2007. In recent years, investments in domestic production have dropped with 30 percent, whereas output in terms of hours of domestic content has fallen with 15 percent (Loisen 2011; Vlaams Parlement 2013c).

Table 2: Delayed Viewing in 2012 for Flemish Television (by programme; source: CIM)

Programme title	Content genre	Channel	Percentage of delayed viewing
Met man en macht	Fiction	VIER (commercial)	41.9
Code 37	Fiction	VTM (commercial)	40.4
Danni Lowinski	Fiction	VTM (commercial)	36.5
Zone Stad	Fiction	VTM (commercial)	35.3
Salamander	Fiction	Één (public)	26.1
The Voice (van Vlaanderen)	Entertainment	VTM (commercial)	24.0
Het Journaal	Information	Één (public)	4.6
Het Nieuws	Information	VTM (commercial)	5.2
Manneke Paul	Talk show	VTM (commercial)	9.4
Café Corsari	Talk show	Één (public)	4.0

Editorial Autonomy, Independence and Responsibility

Discussions between broadcasters and distributors do not solely revolve around financial issues; they also relate to broadcasters' editorial autonomy and responsibility. The former refers to broadcasters' independence in scheduling and producing programs. It is related to the fundamental right of freedom of expression and as such recognised by all EU Member States' constitutions. The latter refers to the fact that broadcasters are obliged by law to comply with rules on the protection of minors, commercial communication, hate speech, European content quotas, etc. They are "editorially responsible" for the content that is being broadcast, even if distributed by a cable, satellite or OTT provider of television services. Indeed, it is presumed by the Audiovisual Media Services Directive that broadcasters hold "effective control both over the selection of programmes and over their organisation" (Article 1(c) of the AVMSD).

Their editorial autonomy and responsibility is, according to broadcasters, being breached by distributors when these, for example, put overlays on broadcasters' programming. Overlays can refer to social media, might advertise programs of a similar genre consumers are watching, or can concern commercial communication messages that are not administered by broadcasters but by distributors. In Germany, the UK and Flanders there have been heated debates on the legality of overlays. In Germany, public broadcaster ZDF noticed Panasonic was putting overlays on news bulletins. These overlays concerned commercial communication, advertising for

among others MySpace. In the UK streaming service TV Catchup immersed BBC programming with commercial communication. Some users protested in forums, saying such a practice was against UK regulation. TV Catchup counter-argued, saying it was legally entitled to run advertising before BBC programs (ignoring the banners surrounding programs) and even inquiring after users' motivation to protest against its practices. In fact, the company was supported by some viewers, saying BBC itself also behaved in very commercial ways and, hence, not noticing so much of a difference between BBC's and TV Catchup's behaviour.[4] In Flanders telecommunications incumbent Belgacom and also cable provider Telenet put overlays on public service children's programming, in so doing not only ignoring public broadcaster's VRT editorial autonomy, but also going against the provisions of the Flemish media decree that hold that children's programming on public service television should be free from commercial communication. The distributors are not held by these provisions, as are the broadcasters that are editorially responsible.

The abovementioned practices puzzle regulators. They might raise questions on what levels of protection consumers expect in an inter-connected media environment. More importantly, overlays and similar practices challenge basic notions of editorial autonomy and responsibility. Author rights law, including the internationally agreed rules of the Berner Convention, might at first sight seem clear on this: people or companies that want to adapt legally protected works need permission of the author to do so. The question is whether adding something (e.g. an overlay) without actually changing the underlying content is an adaptation indeed.

An overarching problem identified by broadcasters relates to the concentration of market power in distribution markets, producing relative bargaining power *vis-à-vis* broadcasters. In fact, it is argued that the oligopolistic market structure of distribution in several EU Member States explains for the weak bargaining position of broadcasters in supposedly "normal" buyer-supplier negotiations and justifies regulatory intervention. The standard economic case in favour of government intervention in media industries is that market failure occurs and needs to be corrected (Doyle 2013b). Regulatory intervention may thus be required to deal with the problem of externalities and to restrict the exercise of oligopoly power. In a BBC commissioned report Oliver and Ohlbaum (2011, 2) indeed argue that regulatory intervention is necessary "to help set the terms of retransmission" and rebalance power asymmetries between broadcasters and distributors. Such intervention, so the report continues, merely recognises that "negotiations between leading networks and third party platforms are unlikely to lead to an optimal outcome."

In short, broadcasters argue regulatory intervention is needed to correct, what they deem, asymmetric buyer-supplier relations. In so doing, they identify two problems. First, they argue that lack of adequate financial compensation exemplifies unfair economic behaviour from distributors and will eventually result in declining investments in domestic content. Given the topical nature of the discussion, few empirical evidence (leaving aside the anecdotal information provided by broadcasters themselves, see above) backs this claim. Secondly, they – and in particular public broadcasters – point at their editorial responsibility and the protection of consumers, which is foreseen by both European and national media regulation. In spite of some research on broadcast-distribution relations (see, for example, Evens and Donders 2013), there are few, independent and comprehensive studies

of the issue. Policy makers are often guided by partial information provided by broadcasters, which can be instructive, but remains largely anecdotal.

As the following shorter section illustrates the objections made to the claims made by broadcasters are equally vague and are not sustained by empirical evidence either.

Objections

From their side, distributors (see Vlaams Parlement 2013b) have consistenly argued that the above type of reasoning is the reason for broadcasters' threatened position. It is claimed that broadcasters are too conservative, fear innovation and under-estimate the capacity of the viewer to tape programs and skip ads even when distributors do not enable this (given the availability of low-cost recording alternatives like TiVo or AutoHop). Furthermore, broadcasters would over-estimate the uptake of DVR functionalities and the popularity of ad-skipping (Deloitte 2011). In addition, it is said that broadcasters deny distributors' contribution to their business model by providing access to audiences and ignore the investments cable, satellite and other distribution companies make in order to ensure performant infrastructure networks. Belgian network incumbent and IPTV provider Belgacom claims it invested over €500 million in the deployment of VDSL2 infrastructure to ensure high-bandwidth services such as HDTV. With its "Digital Wave 2015" program, cable TV operator Telenet announced an extra €30 million per year to upgrade its network to DOCSIS 3.0. Hence, they claim it is not irreasonable to charge broadcasters that seek access to the distribution network. As said by a Sky spokesperson: "We ask for a financial contribution that reflects the performance of channels on the Sky platform, with those who benefit the most paying accordingly" (Sweney 2011). Finally, distributors often contend that they pay free-to-air broadcasters much higher retransmission fees compared to other markets, most notably the US. Since they do not provide actual data, these claims are hard to verify though.

Possible Solutions: The Protection of the Integrity of Broadcasters' Content

In the UK the Minister of Culture Ed Vaizey said: *"We're not going to rush into a regulatory solution because I believe there's no reason the market shouldn't be able to work out a fair and equitable solution as things stand"* (yet, hinting at regulation when industry fails to come to a consensus)(Sweney 2013, sp). However, in Flanders and the Netherlands, governments have decided to take action, adopting amended media laws; and also at the European level there is a definite interest in following up on this issue.

European Union: Towards Establishing Content Integrity

In January 2013, the Committee on Culture and Education of the European Parliament published a draft report on Connected TV. Referring to cultural diversity, fundamental rights like freedom of expression, and the importance of public service broadcasting, the Committee called for a resolution of the European Parliament on issues related to hybrid and connected TV. In its draft report, the Committee urges the European Commission to revise the Audiovisual Media Services Directive. It should lay down provisions that will control *"the availability of, and access to,*

audiovisual media services and other communications services or their representation on hybrid receiving devices, so as to prevent producers of such receiving devices or suppliers of the services in question from exploiting their gatekeeper position which discriminates against content providers" (Committee on Culture and Education 2013, 5). Whereas the Committee explicitly refers to the importance of "findability" of public service content on new platforms, it also calls for a flexibele approach towards advertising rules in the Audiovisual Media Services Directive as to allow the exploitation of new opportunities (*Idem,* 6).

Besides these more generic principles, which emphasise the importance of a level-playing field for both platform owners and content providers, the Committee also introduces the principle of "integrity of services," providing:

> *Calls on the Commission to safeguard by law the integrity of linear and non-linear services on hybrid platforms and in particular to prohibit the overlay or scaling of these services with third-party content, unless the latter have been authorised by the content provider and explicitly initiated by the user; points out that unauthorised use or dissemination by third parties of the content or broadcast signals of a provider must likewise be prevented* (Committee on Culture and Education 2013, 6-7).

Interestingly, the report does not make any reference to copyright in this regard. It positions "integrity" of services or content as a new concept. It does not define the concept, however. Indeed, the Committee gives the example of overlays and asks for a prohibition of these "unless the latter have been authorised by the content provider and explicitly initiated by the user" (see above). Integrity is, hence, linked to some sort of ownership by the content provider as the latter should authorise a modification (like, for example, an overlay). Integrity is, moreover, related to the rights of consumers.

It remains to be seen whether and how the concept will appear in an eventual resolution of the European Parliament. Similarly, the European Commission still needs to pick it up in its revision of the Audiovisual Media Services Directive – a revision that has not started off yet and is not likely to be completed soon. However, it is very likely that Member States might pro-actively engage with the issue, triggering prejudicial interpretations of the Court of Justice of the European Union.

The Netherlands: Editorial Autonomy and Content Integrity

In the Netherlands an amendment of the media law has been proposed by members of Parliament in spring 2013 and subsequently adopted in summer. Specifically, the new rule allows for "ministerial regulations," which provide that the signal of some designated services (e.g., subtitling, "red button" services) should be considered an integral part of program channels and that more specific rules can be specified for the transmission of these services (Tweede Kamer der Staten Generaal 2013).[5] In other words: the Dutch government can apply "must carry" status not only to the linear broadcast channel, but also to certain add-on services, and this in a flexible way. Indeed, a "ministerial regulation" can be adopted quite easily and does not require lengthy, burdensome (yet, democratic!) parliamentary processes.

Concretely, the change of the Dutch media law could (in case a ministerial regulation follows) make it possible for broadcasters to make sure that particular

services are transmitted together with their programs as these services are considered an integral part of the broadcasting signal. Subtitling is explicitly referred to, but in the elucidation of the legislative proposal reference is also made in a rather broad, all-encompassing manner, to "interactive" services (Tweede Kamer der Staten Generaal 2013, 1-2). There is no mentioning of the prior authorisation or prohibition of particular services like ad-skipping and delayed viewing, however.

Flanders: Signal Integrity

Flanders has probably taken the most pro-active approach in tackling tensions between broadcasters and distributors. Since 2010, when the CEOs of the three main broadcasting companies in Flanders (public broadcaster VRT and commercial broadcasters VMMa and SBS) wrote a joint letter to cable operator Telenet complaining about services like delayed viewing, tensions between broadcasters and distributors have been on the rise in Flanders. The argument on falling investments in Flemish content has found fertile ground in Flemish politics. After all, there has been a long-lasting commitment to ensure the production and broadcasting of local content in Flanders, which is a region that is very much aware of its cultural heritage in a "difficult" country like Belgium with three language communities (i.e. the Dutch, French and German language communities).

In spite of very contentious and conflictuous debates in Flemish Parliament, the Commission Media of the Flemish Parliament reached a consensus on a legislative proposal acknowledging that broadcasters are the owners of the broadcast signal on 11 June 2013. The legislative proposal was unanimously adopted in the Commission Media of the Flemish Parliament on June, 25; and subsequently voted unanimously across opposition and government in Flemish Parliament on July, 10. The decree provides quite revolutionary that service providers (whether cable, xDSL, satellite, OTT …) have to transmit the television broadcast signal without interruptions or alterations. All functionalities that go against this require the prior consent of the concerned television broadcasters (and possible additional payment). In the absence of prior consent a conciliation procedure of three months, facilitated by the Flemish Regulator for the Media, can be initiated. Functionalities that go against the editorial independence, autonomy and responsibility of broadcasters can be refused by broadcasters and no conciliation procedure is required in this regard. In case broadcasters receive additional remuneration for allowing specific functionalities, these revenues have to be invested in the production of Flemish content (Vlaams Parlement 2013a).

Article 180 (§1-2) of the Flemish media decree[6] thus recognises or at least implicitly refers to principles of economic fairness and editorial responsibility. It emphasises the necessity of negotiation, with the important requirement for distribution companies to have the prior consent of broadcasters in case they want to add functionalities to the latter's signal. In the elucidation of the proposal of decree, emphasis is put mainly on the cultural motivations (i.e. protection of Flemish content, the Dutch language, etc.) underlying the new legislation.

Problem Solved? The Multi-faceted Nature of Problems and the Necessary Multi-faceted Nature of Policies

Few observers will deny the tensions in broadcasting-distribution markets. Media markets are in turmoil and power relations are in some instances asymmetric (but not necessarily always in favour of distributors). EU distributors are often more powerful than free-to-air broadcasters due to oligopoly control over distribution facilities, and can exert substantial bargaining power during carriage negotiations. In contrast to the US, domestic broadcasters in the EU are less integrated with powerful production studios and have less leverage vis-à-vis prominent distribution powerhouses including Sky, Liberty Global and Vodafone (Evens 2013b). This asymmetry is not problematic *per se*. The exercise of power in buyer-supplier relations does not always generate negative consequences for the party that is less powerful. Powerful parties like distribution companies, that very often hold gatekeeper positions, might undertake actions that improve coordination and result in benefits for both parties (dubbed "pie-expansion"). In that case, the weaker party has to be able to rely on the dominant party to engage also in "pie-sharing." Indeed, imbalanced relationships can be characterised by mutual trust, but only in case the powerful party treats the weaker party fairly. And this is where the shoe often pinches.

Albeit being questioned by distributors, the emerging policy initiatives in the EU have merit. The draft report of the Committee on Culture and Education of the European Parliament *minimum minimorum* puts an important issue on the policy agenda. Far too often content and infrastructure have been treated separately by policy makers at the national, European and international level. In its discussion of hybrid and connected television, the Parliament adopts a more integrated approach, which is recommendable and might trigger further discussion in the future. One should hope this will be the case as a European solution for this problem seems most desirable. The Dutch approach seems quite prudent. It assigns ownership of the broadcast signal to broadcasters, covering also services added to the program. However, its notion of content integrity is less wide-ranging in comparison with the Flemish media decree. The latter goes much further and is more disruptive, requiring prior authorisation of broadcasters for all new functionalities added to the broadcast signal by distributors.

It remains to be seen which approach, the Dutch or Flemish, will stand the test of time, and which will solve the problems identified by policy makers. Indeed, whereas the Dutch text is more prudent and might, hence, be acceptable from a European internal market point of view, the Flemish text might be more effective (in terms of changing broadcast-distribution relations) while being more vulnerable to European criticism for being disproportionally affecting distributors' delivery of services. Moreover, there are not only the tests of the European Commission (with DG Internal Market investigating whether the Flemish signal integrity decree is in line with the E-commerce and Transparency directives and the Electronic Communication Package) and the Court of Justice of the European Union (should a prejudicial question be raised), but there is also the test of technology. Indeed, how likely is it that consumers can and will circumvent restrictive measures imposed by policy makers?

To some extent, taking the merit of these actions and also the related uncertainties into account, the Dutch and Flemish initiatives concern alterations of media law. Whereas this might be a step in the good direction, the problems identified in the second section of this article are multi-faceted. They touch upon content and infrastructure, different legislative frameworks, companies across the media value chain, changing technologies, business models under pressure, etc. This means these problems, if and when substantiated better by empirical evidence, require a multi-faceted policy as well. Although current initiatives might result in some short-term changes, they "alone" will not do the trick as broadcast-distribution relations are affected by four types of policies: media policy, copyright law, competition law and electronic communications law.

Conclusion

Answering the first question raised in this article, i.e. how broadcasters constructed their relation with distributors as a policy problem, it is clear that free-to-air broadcasters rely very much on a blended cultural and economic argumentation, pointing at the cultural importance of freely accessible domestic programming for audiences on the one hand and the economic interest of governments to protect/shield a sustainable and local development of broadcasting markets. They adhere to a conflictual "distribution-takes-all" approach, which is (to some extent) accepted in emerging policy initiatives in the Netherlands and Flanders. Indeed, we illustrated that governments are in some cases intervening, albeit in different ways. The approach in the Netherlands and Flanders is, for example, similar at first sight, but very different when taking a closer look. This will most likely raise issues within a European internal market. Thirdly, it remains to be seen whether the adopted legislation will solve the problems broadcasters identify. Both the legal and technological "sell-by-date" of the rules is debatable. In addition, the adopted rules set out from the assumption that broadcasters have to be protected from distribution companies, an assumption that is based on another assumption that distributors can exert a linear, top-down influence on broadcasters. Such an assumption is flawed and neglects recent scholarly work, which provides evidence of a more circular power relationship between television broadcasters and distributors.

The media sector, including broadcasting and distribution, will continue to change. Technological change, internationalisation and consolidation of the media sector will make policies increasingly difficult to enforce. National legal initiatives are also likely to be challenged at the European level, even though initiatives like the European Media Futures Forum (2012), emphasising the importance of European content industries, seem to indicate a more balanced approach towards infrastructure and content issues might emerge at the European level, correcting the previous predominant focus on infrastructure. Policies of course also have difficulties keeping pace with fast technological evolutions. That does not mean, however, that policy makers should not explore the possible means to protect local content, quality programming, pluralism and diversity. In so doing, they should however not opt for easy symbolic solutions, but go for a complementary policy approach. This requires, first and foremost, an adequate structuring of problems. With regard to this issue it is not altogether clear what exactly is the basic policy problem: too low retransmission payments, a lack of economic rewards for new,

interactive services, or competitive imbalances in media markets with some companies occupying gatekeeping positions. Moreover, more scientific research on these markets and in particular the interplay between content and infrastructure markets is necessary to have some empirical data policy makers can rely on when developing policies. On a final note, policy makers should avoid the trap of overt protectionism. This does not mean that there is no public value in the economic protection of local companies. However, one should be aware of mere instrumentalisation to serve short term needs of industry on both infrastructure and content sides.

Notes:

1. http://www.tvcatchup.com/

2. The multitude of broadcasters does, however, not guarantee diversity and pluralism in the market.

3. CIM is the Centre for Information on Media in Flanders. It records all figures regarding television viewing in Flanders (http://www.cim.be/).

4. See, for example, http://forums.tvcatchup.com/showthread.php?11456-Having-adverts-on-any-bbc-channel-is-against-regulation

5. Translation from Dutch: *"Bij ministeriële regeling kunnen diensten worden aangewezen waarvan het signaal als integraal onderdeel van de programmakanalen moet worden doorgegeven en kunnen nadere regels worden gesteld voor de doorgifte van deze diensten."*

6. Article 180: *"§1. Dienstenverdelers geven de lineaire televisieomroepprogramma's die deel uitmaken van hun aanbod van televisiediensten in de Vlaamse Gemeenschap, onverkort, ongewijzigd en in hun geheel, door op het ogenblik dat ze worden uitgezonden. Dat geldt ook voor de bijbehorende diensten, vermeld in artikel 185, §1, tweede lid, laatste zin. §2. Elke functionaliteit die een dienstenverdeler aan de eindgebruikers aanbiedt en die het mogelijk maakt om de in het eerste lid bedoelde lineaire televisieomroepprogramma's op een uitgestelde, verkorte of gewijzigde wijze te bekijken, is onderworpen aan de voorafgaande toestemming van de betrokken televisieomroeporganisatie. De voorafgaande toestemming is vereist van iedere televisieomroeporganisatie die onder het toepassingsgebied van artikel 154, eerste en tweede lid, valt. De betrokken televisieomroeporganisatie en dienstenverdeler onderhandelen te goeder trouw en dienen hun toestemmingswijze op een redelijke en proportionele wijze uit te oefenen. Wanneer een akkoord hierover leidt tot financiële vergoedingen van de dienstenverdelers aan de televisieomroeporganisaties, dan dienen die te worden aangewend voor Nederlandstalige Europese producties, overeenkomstig artikel 154."*

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