

PCMLP, University of Oxford, Spring 2005 Seminar Series
“What’s Wrong With Competition Policy in the Media Sector”?
Oxford, February 14, 2005

Sector-Specific Regulation of Converging Media

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Outline

- **Current Concepts of Sector-Specific Media Regulation**
- **Re-Shaping the Existing System**
- **Discussion**

Sources of Law

- EU Television Without Frontiers Directive
- EU Transparency Directive
- EU E-Commerce Directive
- CoE Convention on Transfrontier Television
- Member State Laws

Traditional Justification of (TV) Content Regulation

→ ***“Broadcast TV has a special impact on the formation of opinion”*** (German Federal Constitutional Court):

- **Spread effect**

- Free to air television services are addressed at / received by an undefined number of viewers

- **Suggestive power**

- Special effect of moving images on the viewer's perception
- Fixed programming schedule
- Intense and authentic viewing effect

- **Immediacy**

- Live broadcasts suggest direct viewer participation in what is happening on the screen

The Role of „New Services“

Example	Spread Effect	Suggestive Power	Immediacy	Sector-Specific Regulation Justified?
Broadcast TV	Yes	Yes	Yes	Yes
Webcasting	Some	Some	Yes	Some
Video on Demand	Some	Some	No	Some
Website	Yes	Some	Yes	Some
Teletext	Yes	No	Yes	Some

Aims & Instruments of Sector-Specific Regulation

Aim	Instrument
Safeguarding pluralism and diversity of opinion / Promotion of cultural and linguistic diversity	<ul style="list-style-type: none">• Licensing / programming standards• Right to short reporting• Listed Events• Access rights for third parties• Quotas on the origin of content• Restrictions on media ownership
Protection of youth	<ul style="list-style-type: none">• Prohibited content• Scheduling restrictions
Protection of human dignity	<ul style="list-style-type: none">• Right to reply• Right to complain
Consumer protection	<ul style="list-style-type: none">• Restrictions on advertising and sponsoring• Data protection

EU / CoE Approach

(+) **Programme Services**

- TWF Directive, TT Convention
 - „TV programmes transmitted to the general public in encoded or unencoded form, unless operating on individual demand“
- ⇒ only real time television services (free and pay TV)

(?) **„Grey areas“**

- ⇒ VoD, Pay Per View, Webcasting, Interactive TV, etc.

(-) **Information Society Services**

- Transparency Directive, E-Commerce Directive
 - „any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services“
- ⇒ all other electronic communications services

German Approach (1)

Programme Services	Information Society Services	
	Media Services	Tele Services
Interstate Treaty on Broadcasting	Interstate Treaty on Media Services	Tele Services Act
Point to multipoint	Point to multipoint or point to point	Point to point
Fixed programming schedule	Relevant editorial content	No relevant editorial content
TV (and radio) programmes Free TV and pay TV services	On demand TV services; Teletext Online magazines and websites, e.g. cnn.com	E-Commerce transaction services, (i.e. online banking); Online databases

German Approach (2)

Broadcast Services

- Licensing requirement
- Ownership restriction
- Journalistic standards
- Programming quotas
- Access rights
- Listed events
- Advertising restrictions
- Sponsoring restrictions
- Protection of youth
- Right to reply
- Privacy (Encrypted TV)

High level
content regulation

Media Services

- No notification / licensing
- Transparency obligation
- Journalistic standards
- (Minor) restrictions on advertising & sponsoring
- Protection of youth
- Right to reply
- Liability for content
- Privacy

Low level
content regulation

Tele Services

- No Notification requirement
- Liability for „content“

No significant
content regulation

Open Issues in Light of Converging Media

- **How much sector-specific regulation is needed anyway?**
 - What is high level / low level regulation?
- **Apply horizontal or vertical approach?**
 - Generally applicable requirements for all kind of services, or
 - Special requirements for each service category?
- **What are the relevant definitions and criteria?**
 - EU: Programme services / information society services
 - Germany: Broadcast / media / tele services
- **How to deal with the “grey areas”?**
 - Expand the definition of „programme service“?
 - Form a separate sub-category for „new services“?
 - Adopt specific „multimedia laws“?

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General Policy Objectives

- Maintain the regulatory separation of programme services and information society services in general
- Form additional service category to address „grey areas“, i.e. to cover „media services“
- Apply low level content regulation to „media services“
- Re-consider existing definition of programme services and adjust regulatory standards to be applied
- Define service categories as clearly as possible to avoid implementation problems
- Use terms that are flexible, dynamic and technologically neutral

Scope of Revised Regulatory Framework

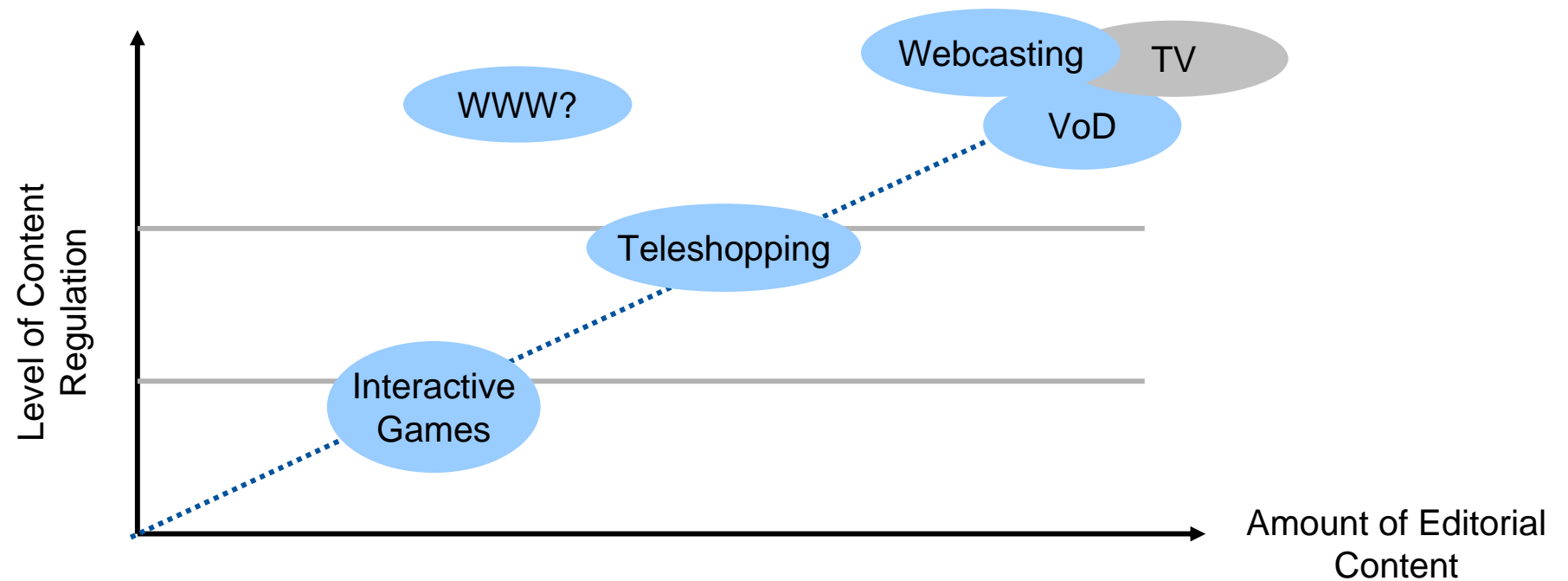
- **Broadcast TV services** (= programme services)
 - Maintain current definition, but without limitation to certain means of transmission
 - DSL / 3G broadcast transmissions would also be covered

- **„Media services“** (= sub-category of programme services)
 - Option 1: Criteria Approach
 - Number of users, type of content, amount of user control, amount of editorial content, criteria combinations?
 - Option 2: Listings
 - Option 3: General Approach
 - All media services (information society services) other than broadcast television

Scope (cont'd)

Approach	Description	Pro	Contra
Option 1 (Criteria)	Service-oriented criteria, referring to editorial content, etc.	Strong reference to content-related specifics of a service	Difficult to implement, „ideal“ criterion will be hard to find
Option 2 (Listings)	Relevant services are explicitly listed	Precise and transparent definitions	Not flexible unless regularly updated; likely to face coordination problems
Option 3 (General)	Broad scope, but only minimum material provisions	Avoids criteria problems, flexible towards future services	Many „regulated services“

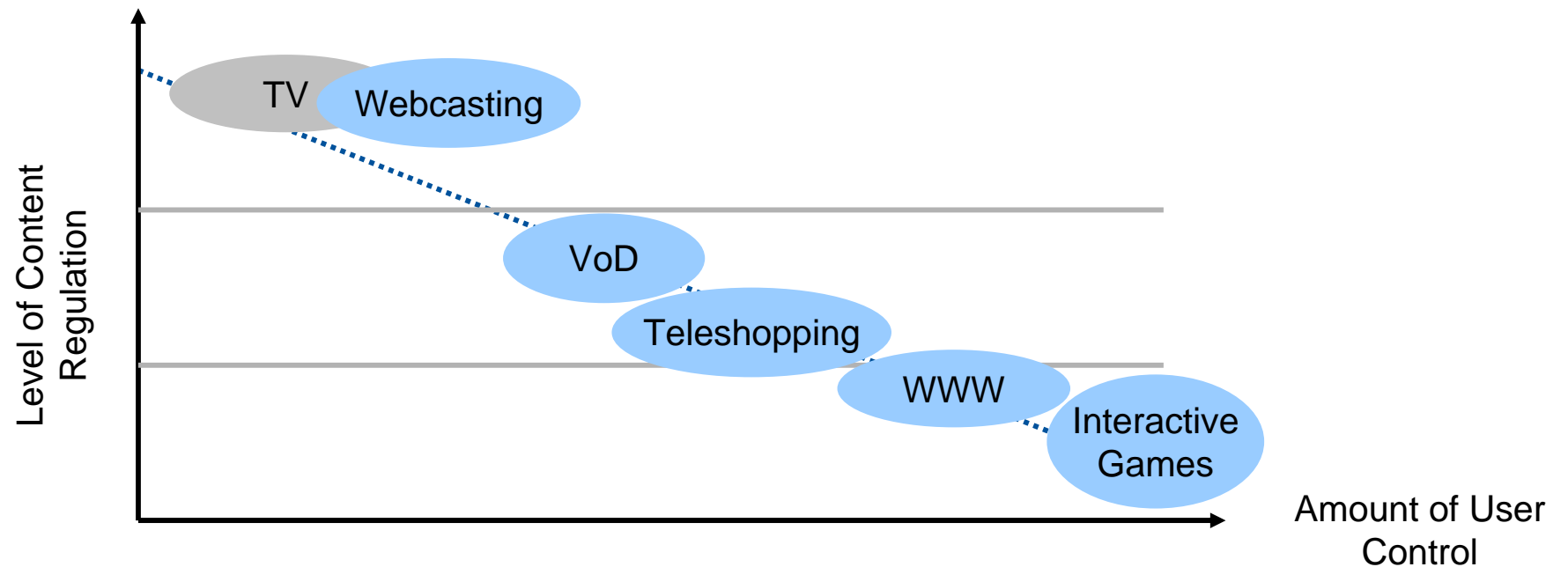
Criterion 1: Editorial Content



Pro's: Considers opinion-forming relevance“of media content

Con's: Determination of „content“

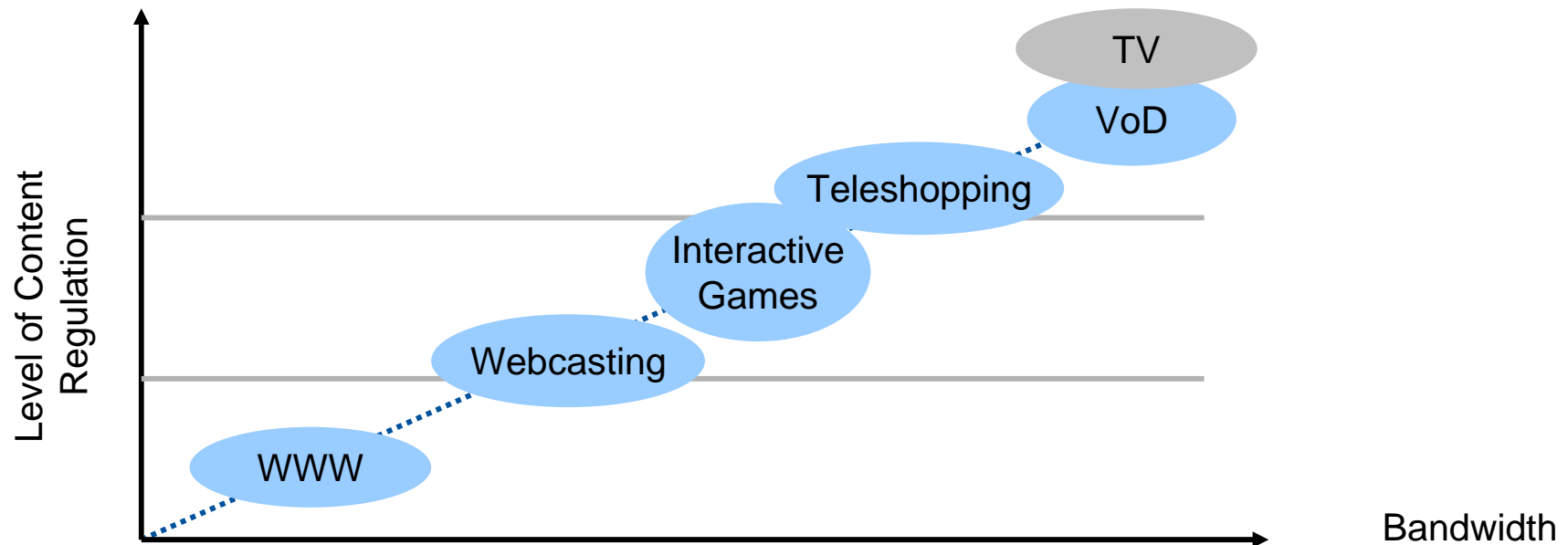
Criterion 2: User Control



Pro's: High amount of user control = lower impact on opinion-forming processes

Con's: Determination of „user control“

Criterion 3: Bandwidth



Pro's: Bandwidth = Data = Information = Content; technology-neutral; easy to handle

Con's: Subject to constant changes of transmission technologies, needs to be combined with other criteria

Material Standards

- **General Interest Objectives**

- Dignity and equal worth of every human being;
- Freedom of expression and information;
- Free flow of information and ideas;
- Common heritage of EU Member States / ECTT parties

- **Specific Areas of Regulation**

- Existing TWF/ECTT provisions as a starting point
- But: Revision process offers unique chance for an overall critical review
 - Shall the particular field be regulated *at all*?
 - If so, what regulation for what category of services (horizontal approach or vertical/service-oriented regulation)?

Material Standards / Regulatory Levels

Material Provisions	Broadcast TV Services	Media Services
Responsibility	(+) (+)	
Transparency	(+) (+)	
Right to Reply	(+) (+)	
Protection of Minors	(+) but low level	
Advertising	(+) but low level	
Origin of Programming	(+)	(-)
Listed Events	(+)	(-)
Ownership Restrictions	(+)	(-)

The Case of Advertising Restrictions

- **Current situation**
 - Obligation to separate advertising from editorial content
 - List of banned advertising content
 - Complex system of scheduling restrictions
- **„Real danger“ of advertising is not that viewers consume too much of it, but that they do not perceive it as such**
- **Proposed low level regulation**
 - Maintain obligation to separate advertising from editorial content
 - Eliminate all restrictions on the quantity of advertising
 - Maintain only basic content-related restrictions (e.g. no advertising for tobacco and pharmaceutical products, no advertising that could be harmful to children, etc.)
 - To be applied to broadcast TV and to “media services”

Conclusions

- Justification of high level sector-specific regulation at least with regard to some (new) media seems questionable
- Existing framework is only partly suitable for converging media
- When re-shaping the existing framework, defining the scope of a future regulation is probably the most critical task
- Finding suitable abstract criteria for defining different service categories is likely to fail / specific lists of services might be a more efficient approach
- Materially, the entire current regulatory framework should be re-considered
- In many regards, the existing material provisions are too complex
- Sector-specific regulation as such will probably nevertheless be requires even with converging media

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