

The media regulation in age of convergence

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I. Introduction

Media policy has been central to the development of the media in all its forms. Government policy institutions regulate the ownership, production and distribution of the media, and seek to manage and shape some cultural practices in order to direct the media institutions towards particular policy goals. The freedom of communication has been constrained by general civil and criminal law, as well as by the laws and regulations specific to the media. The legal elements that are not specific to the media, but which have an impact upon its operations, include the law of defamation, copyright, contempt etc.

Media organizations are also subject to a series of technical, marketplace and conduct regulations on the elements of ownership or content and performance, both as general forms of industry regulations, and regulations that are specific to the media, by virtue of their unique role as an instrument of public communication.

Specifically, broadcast media have been subject to an extensive mix of government regulations.

The rationales for media regulation have included (Flew 2007:172):

- the ability to use media for citizen-formation and for the development of the national cultural identity;
- the implied rights of public participation and involvement associated with the media as forms of public communication;
- concerns about media impact on children;
- the “public good” elements of media commodity, including non-rival and non-excludable elements of access and consumption;
- the “market failure” possibilities in a purely commercial media system.

Regulation in the media field in the original sense refers to an arbitrary process under the rule of the state, usually concentrated in a (more or less) independent regulatory body. This body makes decisions in situations where there are conflicting interests.

The term “regulation” is already mentioned in the US Constitution, going back to the late

eighteenth century. The concept of “governance” is more recent and reflects the fact that over the past decades civil society organizations were increasingly voicing their concerns about many issues (including environment, gender, unemployment etc.). This certainly affects new forms of communication and the internet.

Governance was first developed in the 1980s as a concept to introduce good practices in corporations, with the intention to improve relations with the public and make decisions more transparent. The term was then introduced in the analysis of international relations, reflecting the fact that in the absence of a global government, successful decision-making becomes a highly complex procedure between national governments, international organizations like the UN, economic actors and NGOs.

Modern governance has different meanings. A rather general definition describes it as government that interacts with society, applying interactions “with a ‘co’-public-private character, offset against a ‘do-it-alone’ government perspective” (Koosman, 2003: 3). According to Koosman (2003), governance describes a mix of all kinds of social responses to changing government demands, based on the idea that governance is made up of both public and private ‘governors’. In contrast to the concepts of self-regulation, which were primarily developed in law and reflect legal thinking, governance is a “socio-political” term and is based predominantly on social and political science analysis. A crucial aspect is the idea that political decision-making should go beyond the strict boundaries of state apparatus and should seek to involve interested and competent partners in the economy and civil society. It is especially the inclusion of the civil society and its representatives, old associations and new non-governmental groups, allowing new forms of public interest advocacy that is typical for concepts of governance.

Governance makes the decisions instead of the state and expects the state to respect these. Of course, governance is a concept that is in an experimental phase and still has to prove its usefulness in a global context (Flew, 2007).

II. Regulations in the media field – a new approach

Legal solutions, which include applicable law, are clearly aimed at the analogue reality, in which frequencies are scarce, work is still in great institutions of broadcasting (public and private), the regulatory body is occupied largely in controlling the content, and the decisions concerning the schedules use similar criteria to those of beauty contests. The situation in which they came to work today, the broadcast media in no way eliminate the problems and dilemmas of regulation. On the contrary, today’s visual landscape, subject to a fundamental change requires thoughtful and far more complex regulation than at present. Technology remains the driver of the change, and strictly speaking the phenomenon of technological convergence media, telecommunications and informatics.

The right of the media, the telecommunications and the law to compete and, consequently, the competition law no longer fit the environment of convergence, which broke through the traditional boundaries and barriers to cross. What's more, each of these areas of law and related regulatory bodies dealing with different aspects of communication, carry out, in essence, a different social policy objectives. The situation in the three categories - content, distribution and competition is actually governed by different departments and other bodies of law which causes chaos in the market from the investor/user perspective. There is a lack of legal security and confidence being conditions-necessary for the development of new markets as a result of complex convergence. And this situation calls into question the current model of regulation of the media, as well as the shape and rules of the regulatory authorities. Indeed, we face a dilemma: do we have to regulate convergence or a convergence of regulation and otherwise alter the role of regulatory authorities.

The European Community applies AVMSD (The Audiovisual Media Services Directive) by substituting the previous Directive "Television without Frontiers". The purpose of the new Directive was to include ordering rules on the advertising market, including time constraints, the provisions relating to the product placement etc. All of this is to ensure legal certainty and to create the best conditions for the development of competition in the audiovisual media services in the EU. The new Directive has significantly broadened the scope of Community legislation to include new services such as audiovisual media services on the internet or mobile phones as well as the so-called non-linear services. It makes amendments to the legislation previously in force, including the principles of the use of advertising, sponsorship, such as consumer protection criteria for the protection of human dignity, minors, promotion of cultural diversity, the right to information, media pluralism, and media literacy. The Directive aims to contribute to better compliance with fundamental rights recognized in the Fundamental Rights Charter.

A new approach to regulating media activities should be treated as a kind of specific services for the Information Society, even the media treating the public and private, and respecting the needs of different categories of customers, including minorities, children and adolescents.

The regulations in the field of media must be due to several fundamental principles of audiovisual policy, including the assumption that the scope of intervention, in accordance with the principle of "light touch", may not exceed what is necessary; separate from what is on the content of this which includes the distribution of media; technology neutral regulatory duties to differentiate linear and non-linear services; to protect freedom of speech, pluralism, programming diversity, respect the right of reply, to protect minors; and finally recognize the role of public media, as it formulates the Protocol to the Amsterdam Treaty - as "the foundation of a democratic society and its culture."

Regardless of whether states will decide on the creation of an integrated regulatory authority or the regulatory powers in the field of media, telecommunications and the protection

of competition will be divided into several regulatory bodies should be the basis for making a deep analysis of the market and define the so-called ex-ante relevant markets, a process which until now has been undertaken only with the mergers of large media companies and telecommunications and is an ex-post, indeed in different ways and varying degrees of success. One may define the markets and, at the same time, act in accordance with the principles of competition law, but the basis of analysis should always be the audiovisual policy of the country which respects the freedom to provide services, develop and promote competition and perceives the economic functions of the media. The initiatives should have a firm legal basis and the regulatory action taken in cases that identified - during the observation of the market - deficiencies. The scope and strength of the interference must be proportional to the identified exceptions and violations.

Many EU member states have different ideas about the location and capacity of regulatory authorities in the media and telecommunications, while some practical solutions (e.g., a British convergent body OFCOM) were put into effect.

According to the Framework Directive of the European Commission, each regulatory body should be totally impartial and independent. Its activities should be planned, and the decision-making process - transparent, for both the industry and the public. It should be a body active in taking initiatives and regulatory acts within the law freely and flexibly, without singling out any technology. It must be a body with a clear internal structure, providing easy access to the tasks published on regular basis, and with extensive consultation for their decisions. Attempt - time will tell if successful - is the creation of OFCOM, a UK regulatory authority, which replaced the five existing ones in the UK and regulating various aspects of media activity. Before the idea of establishment of OFCOM, this discussion went on for several years, followed by a four years' process of forming an integrated body, and finally an organizational audit was carried out emerging the new regulator based on the criteria which the new regulatory authority had to meet. The pros and cons of five generic models have been reviewed, based on which one could create a new institution.

OFCOM is the regulator for the "light touch", whose activity consists in the elaboration of standards of good practice, which serve as standards for self-regulation by media institutions. It is the regulatory body, which not only controls (including public media), but also cares about the state of the media sector, telecommunications and wireless communications services in the UK. This concern relates to the public media (standards of decency, diversity of programming, the prevention of monopolistic practices) and broadcasters (the policy of fair competition). Besides the traditional functions of OFCOM: it licenses, allocates frequencies to broadcasters, investigates complaints, and monitors the content of media messages.

The structure of OFCOM's view is quite complex and is a combination of a commercial business model and the structures of public administration. The main bodies are the Su-

pervisory Board, the Board and Advisory Committees and the subcommittees. The structure is made by quite an original panel of consumers which, as a body independent of OFCOM to speak in the interests of consumers, including elderly, disabled and low-income, living in rural areas, commissions research, advises the Management Board, the Supervisory Board and the Advisory Councils.

III. Alternative regulation mechanisms: co- and self-regulation

Accelerated liberalization of the world economy and the rapid development of new technologies result in increasing complexity of social reality and business. The consequence of these changes in the political process is defined in political science as the creation of the so-called “weak state”. In accordance with the concept of a modern state, institutions communicate more and more of their competence to social actors (e.g. social organizations) and private ones (e.g. professional organizations). Indeed, the formation of a modern, knowledge-based society makes the political institutions need more than ever highly specialized knowledge. This imperative leads them to cooperate and use resources and learn from the experience of some social and economic organizations. These changes in the structure of the modern state democracy are also reflected in the way of governance. A member state ceasing to play a central role also departs from the traditional way governance based on the so called command and control regulation. Instead of strict and detailed regulations, state institutions tend to institute general regulations, moving a large part of the liability for certain areas of social and economic life on private entities. In the context of the recent activity, publications are dominated by two terms: self-regulation and co-regulation.

You can talk about self-regulation where the different actors in the economic area on their own initiative choose to define the rules that organize the functioning of the industry. In its “pure version”, self-regulation does not imply intervention by the state institutions because the initiative comes from bottom up. The burden of developing, monitoring, enforcing, or possibly revising common rules and standards rests with the business, which in a way entirely voluntarily undertake this task. It being voluntary and its grass-roots nature seem to be the most important features of self-regulatory mechanisms. In addition, this term is also used often in relation to internal rules adopted by individual market participants. In this type of cases, the tool is to regulate the inner self (Rules of Procedure, Code of Good Practice), for example, determining the ethical standards applicable to staff. This kind of self-regulation is often overlooked in the literature, but it is quite a common phenomenon in this area of the media.

The content of this design is as already mentioned, the common rules of conduct or standards (e.g., technical or ethical) to which the parties undertake to comply. They constitute

the codes of conduct or codes of good practices, which are instruments of self-regulation. In addition to the written rules, these instruments should include: principles of monitoring, rules for the implementation of common rules, penalties for violation of the rules, rules for consultation on the evolution of the code or even for changing the code alone. For the implementation of the code's provisions, monitoring and possible imposition of sanctions in case of non-observance of the rules of responsibility are usually set up by the entities making up the system. Such organization is a mechanism to coordinate the functioning and often becomes a powerful and important element of the market. In addition, operators making up the self-regulatory mechanism should provide adequate resources so that it can freely carry out their tasks and the functioning of the entire system should be subject to cyclical review carried out by independent entities (e.g., auditing firms). The reasons for this type of bottom-up initiatives are high cost and inadequacy of the traditional regulations for the area. The decision to take action by oneself is a kind of "escape" from the intervention of the state and the associated risks and costs. On the other hand, the cooperation between the competing actors to define common standards is dictated by the desire to build confidence in the product or service offered by raising its quality. The standards and operating principles codified in the self-regulatory system by the industry tend to be more detailed and stringent than the current rules.

The possibility of building a self-regulatory mechanism is also dependent on the structure of a given economic sector. In the case of strong competition, limited opportunities for cooperation, too many players may choose to remain outside the system. Its effectiveness directly depends primarily on voluntary cooperation of the many actors.

The advantages of self-regulation include the players' sense of responsibility for the proper functioning of the entire industry as well as reducing the cost of the possible intervention of the state. Another value to consider is the fact that such systems may be used in the areas to which state regulation does not seem appropriate. On the other hand, underlying the voluntary initiatives of this kind, which is in some respects an advantage of such systems, may limit the possibilities to enforce common provisions in the event of violations. In addition, an improperly constructed system can create a self-regulatory red tape, unable to act structures. It also indicates the lack of democratic legitimacy for such forms of regulation, in particular the likely gap between the interests of market players and the public interest.

The second mechanism for co-regulation raises some controversy. Some publications treat the work of social organizations and professionals from public institutions as a form of self-regulation regulated. In spite of some problems with actual highlighting the scope of this term in practice, this type of cooperation is defined as co-regulation and is treated as a distinct theoretical model. These different views largely stem from the fact that co can be broadly defined as a model that combines elements of traditional self-regulation and regulation.

According to the Mandelkern Report (2003), there are two basic types of co-regulation. For the first of them (the initial approach), public institutions initiate the establishment of a mechanism through the legal definition of its main objectives, implementation mechanism and monitoring system. Industry operators have as the task to determine the precise rules on the basis of defined targets. The second type of co-regulation (i.e. the bottom to top approach) is to transform the public sector institutions of self-regulatory mechanism into the existing rules. The foundation of this system are the legal framework defining the objectives, the basic rights, the implementation mechanisms, the review bodies, the manner of financing and the rules monitoring the system. Despite the functioning of the body being formed by *inter alia* the representatives of the industry, the system remains a central entity public body, which controls the right of its functioning.

I'd conclude that co-regulation as opposed to self-regulatory leaves the operational supervision of the system to the authorities. The same rules, standards and sanctions which it contains are gaining greater legitimacy. By that, the freedom of private entities is significantly reduced, which in addition to increased control may carry greater distrust and lower commitment. The creation of the self- and co-regulatory mechanisms is possible in those areas where government intervention is not necessary or when it is a very serious matter. Therefore everything depends on the shape and the structure of the sector. Instead, it seems that the choice between self-regulation and co-regulation in addition to the characteristics of the area is also conditioned by cultural factors. Most self-regulatory solutions for the state to advocate strongly rooted culture are in liberal Great Britain, Ireland and the Netherlands. Other European countries with the political culture imposing state intervention are more in favour co-regulatory mechanisms. In addition, none of these mechanisms are used for areas of political significance such as the safety of citizens. Finally, in practice it is often difficult to make a precise distinction between the above mentioned two models of alternative methods of regulation. The table below illustrates the main theoretical differences between the new alternative and the old mechanisms of the regulation in the media.

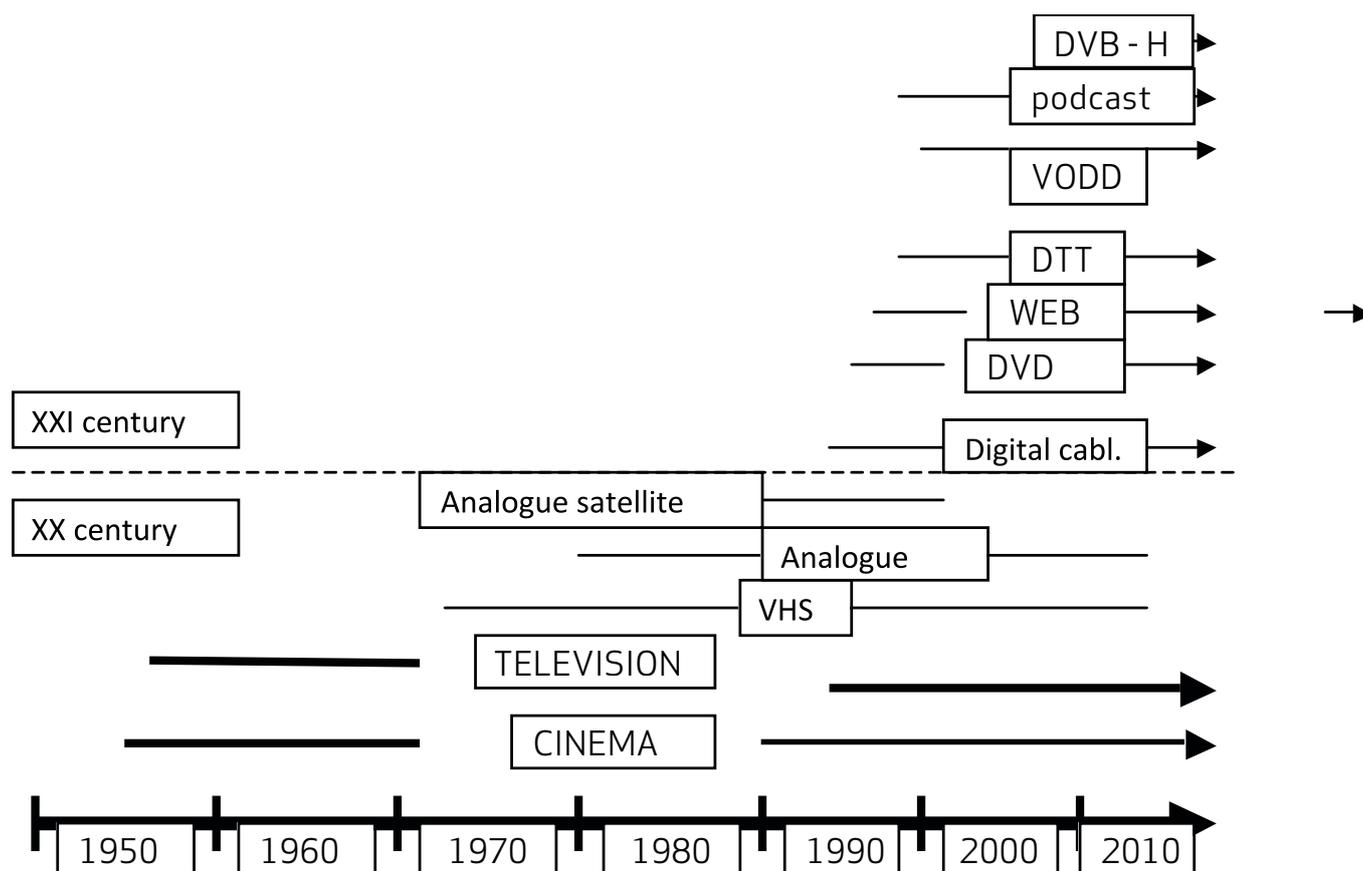
	SELF-REGULATION	CO-REGULATION	TRADITIONAL REGULATION
Role of private entities	Initiating and supervisory actors (entities)	Define the rules and standards based on main objectives developed by public bodies	Use the law
Role of public institutions	Supporting system	The role of supervision and coordination of support	Issuing regulations and controlling their implementation
Tools	Codes of conduct and codes of good practices	<ul style="list-style-type: none"> • general (framework) regulations • codes of conduct and codes of good practices 	Detailed regulations
Supervisory system	Self-regulatory body	Public body	Public body

Source: P. Stepka, W. Kolodziejczyk, 2006

Table 1 - Comparison of the alternative forms of regulation and traditional regulation

IV. Convergence as a driver of new regulations

The phrase *technological convergence* was defined in the 1990s. It was used to describe the mutual infiltration of technologies and services characteristic to the electronic media sector, the telecommunications sector and the new technologies sectors.



The accelerating pace of the new technologies as ways to distribute electronic media content

These processes were first noticed in the late 1970s with the development of video-text and later in computer-based-client-server networks such as those of CompuServe and AOL. The literature of that period uses such phrases as *communications* and *telematique*, which meant the combination of computer and telecommunication technologies. N. Negroponte predicted, at that time, the greatest advancements in the mutual permeation of computer technologies, the printed and electronic media (Mueller, 1999). Later, it was the development of digital technologies that delineated the concept of technological convergence as we know it today. (Carter, 2005). The literature of the 1990s includes many examples of definitions describing the multi aspect and dynamic character of the process. What was focused on was the gradual integration of the previously separate technologies and markets, the electronic, the telecommunications, the internet and the printed media markets. The integration took place in terms of infrastructure, equipment and media content. Simultaneously, the strict demarcation between different media becomes blurred. Negroponte describes this state as “mediumlessness” (Negroponte, 1995).

The phenomenon of technological convergence was analysed by the European Commission in a document, the *“Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation. Towards an Information Society Approach”*, which was published in 1997. (EC, 1997). Although it was an EU document, its analyses and conclusions can be considered universal. It points out two basic meanings of technological convergence:

1. A group of characteristics of various network platforms which enables the carrying out of various types of services;
2. Consumer’s equipment compatibility such as the telephone, the TV set and the PC (EC 1997).

There is, on the one hand, the creation of infrastructure which enables the distribution of various services, and, on the other, changes in consumer equipment which allow the reception of many new services. This way converging are platforms, services and equipment.

Aside from the multi-level homogenisation process, technological convergence leads to the creation of entirely new services, unknown before, such as IPTV or mobile TV.

According to S. Lax, technological convergence “centres around the embedded computer as processor and store for all manner of media and communications content, with inputs from a whole range of sources and outputs to a similar variety of devices and outlets.”(Lax, 2009). The consequences of this process go beyond the technological sphere and are visible in culture, social relations and, most of all, in economy. Various sectors of the economy are integrating which means that new expansion possibilities are opening up, and multimedia groups are being created, active in various sectors. The power of technological change is responsible for strong economic growth and innovation, as noticed by the European Commission (EC, 2005). Despite a slump on the dotcom market in early XXI century, the process of technological convergence is still considered a major factor determining change in the sector.

V. New regulatory perspectives in convergence era

Convergence is already a reality in the market. The rise in the number of bundled offers (most frequently combined broadband, telephony and IPTV) serves to illustrate the convergence of the telecoms and media markets. In April 2007, of the sample of 1226 broadband offering available in different EU countries, only 13% combined broadband access with telephony and/or television. Two years later, this figure has increased to 27% (Reding, 2009).

EU's regulatory framework for electronic communications adopted in 2002 was itself designed to take account of the phenomenon of convergence. Consequently, the existing framework covers the full range of electronic communications services – and not just telephony or access to internet services – in order to reflect convergence between different transmission media, including broadcasting.

The power of technological change and its consequences for the economy and social life is something to be taken into consideration by the authorities responsible for the institutional/legal ramifications in this sector. The EC, in its announcement from June 1, 2005, stated, “A pro-active policy is necessary in response to the ongoing fundamental technological changes. Digital convergence needs a political one, it is necessary to adjust regulation where there is need, in order to remain consistent with new digital economy” (EC, 2005).

Convergence drastically changes the foundation upon which the traditional regulatory broadcasting regime is based. According to S. G. Verhulst “the analogue model was characterized by scarcity of frequencies and few intermediaries, a one-to-many flow of information, distinctive industry sectors, linear programming, a mediated consumption environment and national boundaries”(Verhulst, 2002;332).

The rise of digital radio and television and the internet has confounded, if not totally eliminated, these traditional understandings of “radio” and “television” broadcasting regulation. According to S.G. Verhulst as shown in Table, digital content is based on the assumption that there is abundance, as opposed to scarcity in the analogue model, and that there are new and different mediation processes in the digital environment. As part of the latter assumption, disintermediation and individual involvement cause traditional mediators to become obsolete (2002; 333).

ANALOGUE MODEL	DIGITAL MODEL
scarcity and few players (duopoly)	abundant players (branding)
one-to-many	many-to-many
distinctive sectors	convergence of sectors
linear programming	non-linear programming (on demand)
mediated consumption environment	disintermediation and individual consumption environment
National boundaries	transnational and global

Table 2 - Regulatory context

Moreover it should be noted that so far the different markets were regulated separately (vertically). This is still the case in countries which have traditional regulatory bodies. However, the advancing process of convergence has led many countries to debate on the issue of regulation reform in this area, in order to enable further development of the market.

In the EU, the first step toward this was the issuing of the Green Paper by the European Commission which encouraged the 15 members to initiate structural changes regarding the regulation of the electronic and telecommunication markets, taking into consideration the process of technological convergence. A large number of different regulatory bodies can be a potential barrier to the development of companies in this field. The European Commission questioned the effectiveness of functioning of separate regulatory bodies in the age of convergence and has proposed three possible scenarios for the future:

Scenario 1: Building regulatory bodies based on already existing structures,

Scenario 2: Establishing a new regulation model for new types of services, which will co-exist with old regulation systems for telecommunications, radio and TV sectors,

Scenario 3: Progressive introduction of a new model effective for all services, traditional and new one.

From the above, the most interesting seems to be scenario No. 3 as it is for the creation of new regulation encompassing old and new services. It is a radical solution but it could also lead to the future creation of institutional ramifications for the sector and an evolution toward regulation taking into account the rule of technological neutrality. It should be noted that the European Commission did not vote on any of the three scenarios leaving it to member states to decide on their own media policy. In the conclusions presented by the European Commission in a special Communication COM (1999), 108 institutions underlined the need for a change of regulation to more horizontal, and one which would differentiate between media content and infrastructure (EC, 1999). The postulate for reforming the regulation model, according to the technological neutrality rule, and stepping away from the vertical regulation model seem to be the key conclusions of the debate.

National regulators are facing different regulatory challenges due to the convergence of telecoms and media: these include margin-squeeze analysis of bundled offers by SMP operators, the revision of must-carry obligations, the use of spectrum and, in particular, of the digital dividend. In this case there are, *inter alia*, several implications for regulatory bodies. For example:

- At what stage you assume the consumer is responsible for their own viewing;
- What future for quantitative regulation in a stage of self-scheduling and PVRs;

- What must always be regulated;
- Which services must be regulated;
- By whom they must be regulated.

Recently as B. Zankova wrote: “Against the backdrop of the dynamic media landscape regulation is changing rapidly searching for new configurations and solutions. Regulators in the media field will also undergo transformations... Under such conditions the regulatory bodies we know today should also pursue adequate structural designs reflecting the multi-dimensional character of the environment. Apparently markets and administrative type of governance will yield to networks and partnerships transcending national borders as the latter can react in a more flexible manner to the shifts in the media system and its enlargement” (Zankova, 2013).

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