

39th EPRA meeting
Budva, 4-6 June



Plenary Session 1
Green Paper on Convergence – Analysis of NRA's and Stakeholders responses

Background paper by Bernardo Herman¹, CSA (BE)
(Final public version of 26 June 2014)

EC consultation:

From 24 April to 30 September 2013, the European Commission (EC) held a consultation on its adopted [Green Paper](#) “on preparing for a fully converged audiovisual world: growth, creation and values”. The Green Paper addressed far-reaching issues including the economic conditions for fostering EU businesses to deal with international competition, the impact of convergence on the regulatory framework, contribution systems to finance audiovisual works and the way to protect European values (e.g. media freedom, pluralism, protection of minors). The Commission received around 236 non-confidential contributions which are available [here](#).

On 25 April 2014², the EC presented its preliminary remarks on the results of the consultation, stressing that no clear trend emerged from the variety of answers. The diversity of responses can be measured on following issues in particular:

- *Regarding the regulatory differentiation between linear and non-linear services:* some respondents ask for harmonizing both regimes through withdrawing the distinction of services, while others suggest aligning obligations related to linear services on the less stringent regimes of non-linear services. Moreover, a third category of contributors are willing to keep the regulatory distinction as it is.
- *Regarding the regulatory framework and themes covered by the AVMS Directive (adaptation of the AVMS provider definition and /or the scope of the Directive):* some contributors are willing to extend the scope of the regulation so that all platforms distributing videos could be included, while others deem that it is too early to revise the Directive.
- *Regarding the geographical scope:* some respondents request regulatory solutions which would ensure that regulation could be applied to non-European players while others do not want to change the current situation.
- *Regarding the country of origin principle (COO):* some contributors are willing to promote the country of destination principle while others want to keep the country of origin principle which is presented as essential for the functioning of the internal market.

¹ **Disclaimer:** This document has been produced by EPRA, an informal network of 52 regulatory authorities in the field of broadcasting. It is not a fully comprehensive overview of the issues, nor does it purport to represent the views or the official position of EPRA or of any member within the EPRA network.

² Council working group on Audiovisual matters held on 25 April 2014.

Some divides are mirrored in the responses of selected European associations while on specific issues such as the COO principle their positions may come together.

EBU – European Broadcasting Union (public service):

- Underlines the need for regulatory safeguards to ensure access and plurality on content platforms (including portals, user interfaces) and gateways, emphasizing that *findability* of services on user interfaces is also crucial for a democratic society.
- Does not require immediate revision of the EU regulatory framework as regards the regulatory differentiation between linear and non-linear services; the association however warns against potential distortion between operators falling within the geographical scope of the AVMS Directive and those remaining outside this scope. Conversely, there is also a potential distortion “between operators that fall under the material scope of the Directive (which are “media service providers” according to the AVMSD definition and those that remain outside)”. Accordingly, EBU invites to reflect in the medium term on the possibility to create a separate category for content platform or gateway operators.
- Recalls its preferred approach to maintain the COO principle provided its application is limited to countries from within the EU/EEA.

ACT – the Association of Commercial Television in Europe:

- Highlights that the regulatory differentiation between linear and non-linear services may produce market distortions in a future when convergence will allow enjoying both type of services on the same screen and simultaneously receiving video content from the open internet which is unregulated.
- Trusts that the EU institution will keep promoting the COO principle which is encouraging cross-border distribution.

ETNO – the European Network Operators’ association:

- Underlines that the two different categories of services, linear and non-linear, are still not substitutable today. According to this association, it is rather in the medium term that the blurring of boundaries resulting from the convergence of technologies might lead to possible market distortions. To avoid these, it is suggested to use the criterion of general interest content which is under consideration in the Green Paper and the EP Resolution on Connected TV. Using this criterion would help limiting the more stringent regulation of linear content to services which are of particular importance due to their impact on the values enshrined in the AVMSD.
- Calls for a comprehensive evaluation of the current regulatory regime assessing the impact of audiovisual services on society and on the objectives of the AVMSD.
- Stresses that the COO principle should remain the “fundamental basis for ruling the internal market” while the country-of-destination principle should be applied only to those services targeting users in an EU Members State from outside the EU.

Digital Europe:

- Warns against any measure aiming at changing the current regulatory distinction between linear and non-linear services as such intervention would represent ex-ante regulatory measures which are not justified on a nascent market. In the longer term, a regulatory intervention might be considered in case of structural market distortion.
- Points out that the convergence does not require an adaptation of the definition of AVMS providers and / or the scope of the AVMSD.

The associations’ responses might however not fully represent the position of some individual member companies; for instance, Orange, while being an ETNO member, favours the country-of-

destination principle “which it sees as the only regime granting a truly level playing field at national level”.

These issues raise a lively debate among **audiovisual regulators as well**. To date, no common view emerged on the need to harmonize linear and non-linear services for instance, the same applies to the question related to the possible revision of the COO principle. Considering the number of contributions and their diversity, further discussion is certainly necessary to shape future models of media regulation. Against this background, representatives from the industry have been invited to exchange their views together with EPRA members on these subjects. To ease the debate, extracts from the panelists’ positions have been copied or synthesized in the tables below (see pages 4 to 9 of this document).

At European Parliament level:

On July 4th, 2013, the European Parliament issued a *Resolution on Connected TV*³ whereby the Commission was invited to:

- ✓ *Eventually revise the AVMS Directive “with respect to the rules on findability and non-discriminatory access to platforms, for content providers and content developers as well as for users, **expanding the concept of platforms** [...]” - § 1 of the before mentioned Resolution.*
- ✓ *“Provide a breakdown of which regulatory mechanisms [...] should perhaps be established in order to create a **level playing field for all content and service providers**”*
- ✓ *provide a “ **connected TV platform regulation** which guarantees access to, and integrity of, broadcasters’ content, transparency for consumers and application of basic code of ethics (e.g. protection of minors and of private life)” - §26 of the Resolution*
- ✓ *“...To ensure that the level of protection in respect of audiovisual media services established by means of the special regulatory requirements of the Audiovisual Media Services Directive is not undermined by unauthorised provision of access on other platforms”- §36 of the above-mentioned Resolution*
- ✓ *“To pay due attention to important audience protection issues such as the protection of minors, and believes that Electronic Programme Guides may be a possible platform on which to address these issues” - §44 of the Resolution.*

On 28 January 2014, the Committee on Culture and Education adopted a report on “*Preparing for a Fully Converged Audiovisual World*”⁴. This report echoes some concerns which are outlined in the aforementioned Resolution. On convergent markets, the European Parliament:

- *Stresses that regulation is required where content gateways control access to media and impact directly or indirectly on the shaping of opinion [...];*
- *Stresses the need to align the rights and obligations of broadcasters with those of other market players by means of a horizontal, cross-media legal framework.*

This report served as basis for a new [Resolution](#)⁵ on the same subject that the European Parliament adopted on 12 March 2014.

³ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-329>

⁴ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0057+0+DOC+XML+V0//EN>

⁵ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0232+0+DOC+XML+V0//EN>

Q2 - Factors affecting the availability of premium content, need for regulatory intervention?

<i>ProSiebenSat.1</i>	<i>Sky</i>	<i>Telefonica Digital</i>	<i>Be - CSA</i>	<i>De - DLM</i>	<i>Fr - CSA</i>
EC to examine possible abuses of license fees by public broadcasters to either drive up costs for premium sports rights, or to fill up their prime time slots almost exclusively with major Hollywood productions.	Exclusivities become a key competitive driver, in particular the possibility of broadcasting major events in live exclusive.	Setting a fully unified single European market for content rights will benefit EU citizens: wider variety of content right and reduced content prices. Ask for license conditions allowing competition between different platforms.	While being an important factor of differentiation, exclusivities create market entry barriers that small players cannot overcome. Global players could have unrivaled financing capacities which could put fundamental values of the AVMSD such as pluralism at risk.	US companies should allow for an adequate balance in the competition between EU and US content providers. Rights of short reporting – related to sports events – should be maintained.	Market conditions, commercial practices and applicable law, e.g. media chronology, influence the availability of premium content. The competition authority played a strong role to ensure the availability of premium content despite mergers of different stakeholders on the market.

Q3 – Growth and innovation: are there obstacles which require regulatory action on access to platforms?

<i>ProSiebenSat.1</i>	<i>Sky</i>	<i>Telefonica Digital</i>	<i>Be – CSA</i>	<i>De – DLM</i>	<i>Fr - CSA</i>
No obstacles for the moment, as long as platform operators do not abuse their bottleneck position by prioritizing own content, penalizing other content, or show a search bias towards own content or prioritize illegal providers over legal sources.	Chances of entering the market have proliferated. No obstacles in terms of access requiring regulatory intervention.	Increased diversity of channel and devices; several layers provide for control of the content delivered to the user. Necessary to consider imposing obligation of access to these essential facilities that may act as gate-keepers. + Closely monitor their commercial practices to be sure that hardware, software and operating systems follow non-discrimination rules.	New players should be assimilated to AVMS distributors; they tend to have a gatekeeper position which could need to be evaluated and remedied. Art. 5.1 b) of the Access Directive enables NRAs to impose access to application interfaces and EPG on reasonable and non-discriminatory terms. The list of infrastructures could be extended.	Users should be able to choose the transmission platform for consuming premium content to warrant access even where providers link access to premium content. Equal access and non-discriminatory treatment should be ensured for smaller providers as well so that their offers can be found.	The use of competition law tools has proved to be insufficient to ensure a dynamic and competitive market. Ex ante regulation could be imposed on SMP operators; this approach should be encouraged at EU level.

Q10 – Linear and non-linear services; is there evidence of market distortion caused by the regulatory differentiation? Solutions?

<i>Bouygues</i>	<i>ProSiebenSat.1</i>	<i>Sky</i>	<i>Telefonica Digital</i>	<i>Be – CSA</i>	<i>De – DLM</i>	<i>Fr – CSA</i>
<p>Frontier between linear and non-linear services is blurring. Both services are available on the same device. Pointless and confusing to have two different regulatory environments on two sides of the same screen. It is possible to watch time-shifted linear programs and fast forward the video with a DVR. The linear programmes are thus becoming non-linear.</p>	<p>Most obvious and visible market distortion: quantitative advertising restrictions for linear services like TV broadcasts; request for a more flexible framework. Differentiation fails to address growing relevance of at least some non-linear media services; one should move from regulation based on types of distribution towards regulation focused on content. Similar service must be regulated in a similar way.</p>	<p>Hybridization of business models and unifying perception of the product by end-users → Any future regulatory framework should be adapted to the changed market situation, going beyond any distinction between linear and non-linear modes, given their perceived interchangeability among users.</p>	<p>Despite the convergence trend and the uncertainty about future business models, linear vs. non-linear service differences will remain in the future.</p> <p>Applying the same obligations for linear and for non-linear services would imply tougher obligations for non-linear business models and hamper innovation on this business model.</p>	<p>Terminals increasingly offer an equivalent viewing experience for the two types of services. According to a Belgian study, catch-up and VoD are consumption modes which are constantly growing; catch-up is predominant in some parts of the country. Both regimes should be harmonized to avoid discrimination of services which are available on the same screen.</p>	<p>Today, no indication pointing to market distortion (only a third of connected TVs are used on line). Quantitative advertising restrictions related to linear TV result in differentiations which impact the market however. They should be lifted. With the ongoing technical convergence, criteria of linear versus non-linear delivery appear increasingly inadequate. More attention requested on the relevance of an offer on public opinion shaping and its effect on the society.</p>	<p>Distinctions between both regimes are still justified and do not lead as such to market distortions. Both services are not necessary competing against each other. Regarding VoD (without subscription), each service pertains to a distinct market. Most important distortions lie rather between editors located in France and others established in other EU Member States offering reduced VAT rates.</p>

Q11 – Need to adapt the definition of AVMS providers and / or the scope of the AVMSD? In which areas could emphasis be given to self/co regulation?

<i>Bouygues</i>	<i>ProSiebenSat.1</i>	<i>Sky</i>	<i>Telefonica Digital</i>	<i>Be - CSA</i>	<i>De - DLM</i>	<i>Fr - CSA</i>
<p>The scope of the AVMSD should embrace all players on the market without distinction. AVMS definition to be updated to best mirror the current audiovisual consumption. Current definition does not apply to players such as YouTube whereas its significance in the global audiovisual market is overwhelming.</p>	<p>EC to explore future possibilities and facilitate initiatives to find common self- or co-regulatory schemes with non-EU market players to minimize distortions originating from different levels of statutory regulations.</p> <p>The audiovisual industry should not be excluded from the planned Free Trade Agreement with the US.</p>	<p>The solution would be a new regulatory approach, free from any cultural conditioning, able to catch the complex nature of convergence.</p> <ul style="list-style-type: none"> ▪ Objective-based regulation ▪ regulatory intervention to be both technologically neutral and proportionate <p>Under the existing framework, all possible measures should be adopted to ensure that all players comply with fundamental principles.</p>	<p>Non-EU audiovisual service providers should be subject to the same rules than those governing EU providers → level playing field for all business to compete on equal footing.</p> <p>Self- and Co-regulation can generally be an option, especially as regards Child and Youth Protection.</p>	<p>A new category of AVMS distributor should be created in the AVMS Directive. The new category should include all players distributing AVMS through a platform, i.e. from a network but also through a portal, the internet, an application store, ...provided that their economic activity has some significance.</p> <p>The concept of virtual establishment should be developed for players located outside Europe but targeting the European market.</p>	<p>Platform providers should be included in the scope of the AVMSD in a separate provision; they should be required to ensure the non-discriminatory distribution of audiovisual content.</p>	<p>Competition law cannot sufficiently value the competitive pressure exerted by platforms for video sharing on traditional players as video sharing is not an economic activity as such. Because of their important role on fundamental values of the AVMSD and the increased cross-border nature of distribution, a new category of AVMS distributors should be created; this category would include all connected terminals as well as apps stores' platforms.</p> <p>Legal status and economical relationship between search engines and content rights owners should be analysed.</p>

Q12 – What would be the impact of a change of the audiovisual regulatory approach on the country of origin and therefore on the single market?

<i>Bouygues</i>	<i>ProSiebenSat.1</i>	<i>Sky</i>	<i>Telefonica Digital</i>	<i>Be - CSA</i>	<i>De - DLM</i>	<i>Fr - CSA</i>
<p>The country of origin principle causes huge discrepancies between national players subject to heavy regulation and taxes, and global players using this principle to circumvent most constraints. Nonetheless, the COO principle remains useful for EU players acting in several countries. Ex: Eurosport. → Harmonization is preferred.</p>	<p>COO principle = cornerstone of the development of Europe's media industry: most important facilitator of cross-border activities; also plays a very important role in</p> <p>a) ensuring access to different information vital for a democratic society,</p> <p>b) motivating MS to adapt their regulatory ecosystem to offer their own domestic industry a level playing field to compete with industries from other MS.</p>	<p>COO principle is a key element of the AVMSD as it currently is; a point of reference to ensure the certainty of law and as such should not be changed.</p>	<p>Without this principle, the provision of cross border media services would be dramatically hampered and EU citizen's freedom to access to content</p> <p>→ COO principle should be maintained as it is the only way to provide pan-European services.</p> <p>Non-EU media service providers should register in one Member State.</p>	<p>The COO principle should be questioned because of its disturbing and discriminatory effect on the market when the regulatory regime of the originator is not harmonized with the country of consumption. The new rules to be applied as from 01/01/2015 regarding the tax related to electronic services could be an inspiration source - i.e. the tax will be charged where the customer belongs.</p>	<p>COO principle should be maintained.</p>	<p>Differences in national transposition of the AVMSD and asymmetric tax regimes put into question the COO principle. Recalls proposals from Lescure's mission on country of destination and the concept of virtual head office for the service. Better harmonization of applicable rules should be a first step.</p>

Q13 – Relationship between provisions of the AVMSD and the E-Commerce Directive

<i>Bouygues Europe</i>	<i>ProSiebenSat.1</i>	<i>Be – CSA</i>	<i>De - DLM</i>	<i>Fr - CSA</i>
<p>Platforms widening their activities with editorial intervention way beyond operations that their “host” legal statute (mere storage or transmission of information) would legitimate should bear some editorial responsibility. Several tracks to explore: active host statute (Italy), distinction between “technical host” vs. “content host” (France), editorial responsibility for the digital world (Belgium), new category of platform provider (Germany).</p>	<p>First challenge: different level of regulation between linear (+ the few non-linear) services governed by the AVMSD and the multitude of services governed by the E-commerce Directive. On any so called “connected device” the difference between those is already blurred from the viewers’ or users’ perspective. Second: the physical domicile of a media service is no longer a relevant factor as long as the service provider has access to broadband anywhere on globe.</p>	<p>Editorial responsibility of hosting platforms should be acknowledged when content is promoted and generates revenues. It seems obvious that hosting platforms have an economic activity when they actively promote (user generated) content, derive advertising revenues from the views, make recommendations based on their customer preferences or hold the right to modify these contents. Along these lines, recital 21 of the AVMSD does not apply to hosting platforms.</p>	<p>The distinction between editorial audiovisual services bearing relevance for the formation of opinion on the one hand, information services on the other hand, will continue to apply even in a more strongly converged media landscape. It is therefore essential that the AVMSD prevails on the E-commerce Directive as specified in art. 4(8) AVMSD.</p>	<p>Because of convergence, some services could be regulated by both AVMSD and the E-commerce directive. Better coherence between both directives is requested.</p>

Q 20 – Are the current rules of the AVMSD appropriate to address the challenges of protecting minors in a converging media world?

<i>ProSiebenSat.1</i>	<i>Sky</i>	<i>Be - CSA</i>	<i>De -DLM</i>	<i>FR - CSA</i>
Refer to answers given by the self-regulatory body for the protection of minors in multimedia (FSM) in Germany.	The AVMSD rules were built around a specific idea of television. Nowadays these rules struggle to seize the further complex issues arising from convergence. Being a technological tool, the parental control system represents a protection mode subject to changes and improvement. Therefore it does not seem appropriate to amend the Directive: the speed at which consumption habits change requires the adoption of a more flexible approach.	As convergence leads to receiving all content on the same screen, it is not justified to keep a distinct regime for non-linear services. Consumers need a coherent and non-discriminatory system which will not be confusing.	Any amendment of the AVMSD provisions must be carefully considered so as not to impact the existing level of protection of children and adolescents. Questions related to the assessment and classification of content should be dealt with at national level to allow for adequate provisions in line with the cultural and societal specificities prevailing in individual Members States.	The current EU regulatory framework does not take sufficiently into consideration the variety of distribution supports (i.e. platforms) although the technological neutrality principle is enshrined in the legislation. A common regulatory framework should be applicable to all cultural services.