

CONSULTATION

on Directive 2010/13/EU on audiovisual media services (AVMSD)

A media framework for the 21st century

Questionnaire

General information on respondents

I'm responding as:

- An individual in my personal capacity
- The representative of an organisation/company/institution

What is your nationality?

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Italy
- Ireland
- Latvia
- Lithuania
- Luxembourg
- Malta

- Netherlands
- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
- Spain
- Sweden
- United Kingdom
- Other

What is your name? Click here to enter text. [Nicola Frank, Head of European Affairs, EBU Brussels Office](#)

Please your email: Click here to enter text. frank@ebu.ch

I'm responding as:

- An individual in my personal capacity.
- The representative of an organisation/company.**

Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

- Yes
- No

Please indicate your organisation's registration number in the Transparency Register.

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Please register in the [Transparency Register](#) before answering this questionnaire. If your organisation/institution responds without being registered, the Commission will consider its input as that of an individual and as such, will publish it separately.

Please tick the box that applies to your organisation and sector.

- National administration
- National regulator
- Regional authority
- Public service broadcasters
- Non-governmental organisation
- Small or medium-sized business

- Micro-business
- Commercial broadcasters & thematic channels
- Pay TV aggregators
- Free and pay VOD operators
- IPTV, ISPs, cable operators including telcos
- European-level representative platform or association
- National representative association
- Research body/academia
- Press or other
- Other

My institution/organisation/business operates in:

- Austria
- Belgium
- Bulgaria
- Czech Republic
- Croatia
- Cyprus
- Denmark
- Estonia
- France
- Finland
- Germany
- Greece
- Hungary
- Italy
- Ireland
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania

- Spain
- Slovenia
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- United Kingdom
- Other

Please enter the name of your institution/organisation/business.

Click here to enter text. [European Broadcasting Union \(EBU\) AISBL](#)

Please enter your address, telephone and email.

Click here to enter text. [Avenue des arts, 56, 1000 Brussels](#)
Tel.: 00 32 2 286 91 15
E-mail: Brussels@ebu.ch

What is your primary place of establishment or the primary place of establishment of the entity you represent?

[The EBU is a Europe-wide alliance of public service media with 73 member organisations in the European Union and beyond. The headquarters of the association are based in Geneva, Switzerland.](#)

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Background and objectives

The Audiovisual Media Services Directive (AVMSD¹) has paved the way towards a single European market for audiovisual media services. It has harmonised the audiovisual rules of the Member States and facilitated the provision of audiovisual media services across the EU on the basis of the country of origin principle.

Since its adoption in 2007, the audiovisual media landscape has changed significantly due to media convergence². The review of the AVMSD is featured in the Commission Work Programme for 2015, as part of the Regulatory Fitness and Performance Programme (REFIT). In its Communication on a Digital Single Market Strategy for Europe³, the Commission announced that the AVMSD would be revised in 2016. Another REFIT exercise is being carried out, in parallel, in the field of telecoms with a view to come forward with proposals in 2016. Some of the issues treated in the current public consultation may have an impact on this parallel exercise and *vice versa*.

In 2013, the Commission adopted a Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values"⁴ inviting stakeholders to share their views on the changing media landscape and its implications for the AVMSD.

On the basis of the outcome of this public consultation, the Commission has identified the following issues to be considered in the evaluation and review of the AVMSD:

1. Ensuring a level playing field for audiovisual media services;
2. Providing for an optimal level of consumer protection;
3. User protection and prohibition of hate speech and discrimination;
4. Promoting European audiovisual content;
5. Strengthening the single market;
6. Strengthening media freedom and pluralism, access to information and accessibility to content for people with disabilities.

You are asked to answer a number of questions revolving around these issues. Please reason your answers and possibly illustrate them with concrete examples and substantiate them with data. The policy options identified are not necessarily mutually exclusive, but may sometimes be combined. Please indicate your preferred policy options, if any, and feel free to provide any other comment that you deem useful.

¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. Hereinafter, "the AVMSD" or "the Directive".

² <https://ec.europa.eu/digital-agenda/en/media-convergence>

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, a Digital Single Market Strategy for Europe, COM (2015) 192 final, 6 May 2015.

⁴ Hereinafter, "The Green Paper" (<https://ec.europa.eu/digital-agenda/node/51287#green-paper---preparing-for-a-fully-converged-audi>)

QUESTIONS

1. *Ensuring a level playing field*

Services to which the AVMSD applies

The AVMSD regulates television broadcasts and on-demand services. It applies to programmes that are TV-like⁵ and for which providers have editorial responsibility⁶. The AVMSD does not apply to content hosted by online video-sharing platforms and intermediaries.

These platforms and intermediaries are regulated primarily by the e-Commerce Directive⁷, which exempts them from liability for the content they transmit, store or host, under certain conditions.

As a separate exercise, given the increasingly central role that online platforms and intermediaries (e.g. search engines, social media, e-commerce platforms, app stores, price comparison websites) play in the economy and society, the Commission Communication "A Digital Single Market Strategy for Europe" announces a comprehensive assessment of the role of platforms and of online intermediaries to be launched at the end of 2015.

SET OF QUESTIONS 1.1

Are the provisions on the services to which the Directive applies (television broadcasting and on-demand services) still relevant⁸, effective⁹ and fair¹⁰?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

⁵ Recital 24 of the AVMSD: "It is characteristic of on-demand audiovisual media services that they are **'television-like'**, i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of 'programme' should be interpreted in a dynamic way taking into account developments in television broadcasting."

⁶ Article 1(1)(a) of the AVMSD. The Audiovisual Media Services Directive applies only to services that qualify as audiovisual media services as defined in Article 1(1)(a). An audiovisual media service is "a service [...] which is under the **editorial responsibility** of a media service provider and the **principal purpose** of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC". This definition covers primarily television broadcasts and on-demand audiovisual media services.

⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

⁸ Relevance looks at the relationship between the needs and problems in society and the objectives of the intervention.

⁹ Effectiveness analysis considers how successful EU action has been in achieving or progressing towards its objectives.

¹⁰ How fairly are the different effects distributed across the different stakeholders?

COMMENTS:

The EBU believes that the provisions of the Directive have played an important role in creating a vibrant and diverse audiovisual market in the EU and its Member States that is based on European values and the ‘dual’ European broadcasting system. The Directive has also been an important instrument contributing to the free flow of information across the EU.

However, for the European audiovisual model to be sustainable and successful in a globalised and converged market place, the different layers of audiovisual regulation, both at the European and national levels, need to be adapted to new technological and market developments.

Public service media (PSM) have played, and continue to play, a vital role in providing pluralistic, high quality content catering to the specific needs of European viewers in a rapidly evolving market for audiovisual media services. In 2014, domestic and EU content made up 84.3% of EBU PSM Members' total TV programming hours, and news and current affairs represented 25.6% of their total TV programming hours (Source: [EBU-MIS](#), based on Members' data).

Programmes provided by PSM organisations are trusted and valued by audiences and attract high levels of viewership. In 2014, EBU PSM Members were reaching 341 million EU viewers every week, over two-thirds of the total EU population. Despite the abundance of offer in the EU audiovisual market, with around 9000 TV channels (Source: [EAO/MAVISE](#)), in 2014 PSM organisations still gathered an average 26% market share (Source: [EBU-MIS](#), based on Members' data).

Importantly, PSM embrace new technologies and are a main driver of innovation. They are present on a variety of platforms, and their programmes can be accessed live and on-demand. Today, 94% of EBU Members livestream their TV channels on the Internet.

For PSM organisations to continue providing their vital contribution within the European audiovisual sector, they need an up-to-date public service remit, an independent and transparent governance framework and sustainable funding. The responsibility of providing such conditions falls mainly upon the Member States. Although PSM organisations are subject to national rules which are stricter and more detailed than the rules of the AVMS Directive, they recognise the high relevance and value of the Directive in shaping the overall structure and ecology of the audiovisual sector in Europe.

While the provisions on the Directive's scope have by and large remained effective to date, this may no longer be the case in the future, with continuing media convergence and increasing consumption of audiovisual services via managed IP networks and through audiovisual platforms.

In the converging digital media environment, the audiovisual value chain is changing. Powerful VOD and OTT providers and new digital intermediaries are emerging, and are often active on a global scale.

Their impact on, and relevance for, European audiences seem to grow steadily.

Audiovisual content including catch-up TV is increasingly accessed and consumed via platforms controlled by gate-keepers. For example, when the BBC iPlayer was officially launched in 2007, the service was accessed entirely over the open Internet; in May 2015, however, 63% of iPlayer usage was ‘gate-kept’, i.e. the service was not accessed directly via a web browser, but through a third-party platform. For an on-demand programme service to be present on such platforms, agreement with the platform operator is normally required and the platform has the capability to act as an intermediary between the media service provider and the audience.

In view of this new development, placing obligations and responsibilities exclusively on audiovisual media service providers, as currently defined in the Directive, and in particular on TV broadcasters, would neither be effective nor fair at the time a revised Directive will come into force.

In particular, we are referring to protection of minors, to access to platforms and due prominence of public value content and to a fairly shared regulatory burden. Such issues may require a mix of regulatory and self-regulatory solutions, which have regard to audience expectations of regulation, and are targeted at concrete public policy problems, as explained further below.

There are doubts with regard to the current Directive's applicability to new online services (see, for example, the Advocate General's Opinion in Case C-347/14 *New Media Online*). And one could certainly consider that the provisions are no longer effective if the Directive's current definitions are interpreted in such a narrow manner that they essentially limit the Directive's scope to television and related catch-up services. In this respect, Recital 24's provision that the concept of ‘programme’ should be interpreted in a dynamic way is an important principle to provide for a flexible future Directive.

Accordingly, there is an increasing need to ensure the continued effectiveness of the Directive's provisions and the underlying values they embody, and fair treatment of all market participants, by having equivalent or complementary rules for all *significant* audiovisual media services *and* platforms (see below), especially if the aim is to design a framework that is robust and future-proof (at least for a period of 5-10 years).

Are you aware of issues (e.g. related to consumer protection or competitive disadvantage) due to the fact that certain audiovisual services are not regulated by the AVMSD?

YES – NO (If yes, please explain below)

COMMENTS:

Traditional live TV still represents the vast majority of total viewing time among all EU countries and

the TV set remains the most commonly used device for watching audiovisual media services. The UK has a leading VOD market in the EU yet every week, 97% of British adults use a TV set to view content and 93% of the 2014 total viewing time by UK adults still occurred on a TV set (Source: [Ofcom](#)). However, TV sets have become increasingly connected and by the end of 2014, 28% of EU viewers declared using a connected TV (Source: [Google Consumer Barometer](#)). In total, each Western European household had on average 4.8 connected devices in 2014, and the number is expected to continue to grow in forthcoming years (Source: [IHS](#)). As a result, live and time-shifted TV programmes are increasingly consumed online, together with other forms of video content, via the open Internet and new audiovisual media service platforms.

In the online environment, and on connected devices, regulated and unregulated audiovisual services are increasingly available alongside one another in an undistinguishable manner, and this is also the case on the user interfaces or programme guides offered by platform operators (which often have one category called ‘video’ or ‘TV’). For ordinary users it is almost impossible to make a choice between regulated and unregulated audiovisual content, and thus to fully benefit from the higher protection afforded by regulated content. This result is even more striking for vulnerable groups of society like children. For example, a programme like *Spuiten en Slikken* is not available between 06.00 and 22.00 on NPO (the Dutch PSM); however, the same programme can be viewed any time of day on YouTube (where it is made available by third parties). There is also a considerable amount of viewing of adult websites by children.

Such developments call into question the concept of consumer protection and protection of minors which underlies the AVMS Directive. Moreover, it puts pressure on the effectiveness of the Directive’s provisions which strive to protect and promote media pluralism and cultural diversity by supporting a viable audiovisual production sector in the EU and its Member States. These important objectives are challenged by a huge presence of content originally produced for foreign markets which are repackaged for European audiences (see Q. 1.2) as well as by content which is currently considered not sufficiently TV-like but might, in the future become more akin to audiovisual media services. It would not be in the interest of a future-proof Directive to set forth a blanket exemption for such services which may transform over time and become sufficiently similar to the services a revised Directive will cover. However, where content is not provided for commercial purposes but distributed on a non-economic basis, the Directive should not apply.

Preferred policy option:

- a) *Maintaining the status quo*

- b) Issuing European Commission's guidance clarifying the scope of the AVMSD. No other changes to Union law would be foreseen.
- c) Amending law(s) other than the AVMSD, notably the e-Commerce Directive. This option could be complemented by self and co-regulatory initiatives.
- d) Amending the AVMSD, namely by extending all or some of its provisions for instance to providers offering audiovisual content which does not qualify as "TV-like" or to providers hosting user-generated content.
- e) Other option (please describe)

Separate set of rules for operators of significant audiovisual platforms (which are aggregating or selecting audiovisual content or providing a user interface).

PLEASE EXPLAIN YOUR CHOICE:

The majority of EBU Members support Option d). However, it should be noted that there are a minority of EBU Members who believe the current scope of the Directive is broadly effective.

As explained above, uncertainties about the current scope of the Directive, continuing media convergence and changing consumption patterns for audiovisual services call for a new and targeted legislative solution.

There is a need for a more balanced set of rules for TV, VOD and OTT providers, including basic requirements for operators of significant audiovisual platforms when aggregating or selecting audiovisual content or providing a user interface.

The AVMSD adopted in 2007 took the rules applicable to television broadcasts as a starting point and complemented them with lighter rules for non-linear audiovisual media services, while leaving it up to Member States to adopt stricter rules for media service providers under their jurisdiction, in particular PSM. The question is now whether it is time to define a new regulatory 'baseline' for *all significant* audiovisual media services *and* platforms. This can be done in line with the graduated approach enshrined in the AVMS Directive.

In the EBU's view, the debate on the future European regulatory framework for audiovisual services should not only include a review of the material scope and thus of the definition of 'audiovisual media services', but also – as a necessary complement – the introduction of appropriate rules for significant audiovisual platforms.

In contrast to the extremely broad notion of *online* platforms, *audiovisual* platforms are much more specific due to the nature of the content that is aggregated and disseminated, their impact on European audiences and their essential role for democratic opinion forming. Audiovisual platforms perform a specific function which can be differentiated from that of search engines, price comparison websites, e-commerce platforms and other platforms of the so-called ‘sharing economy’. The unique characteristics of managed audiovisual platforms speak in favour of sector-specific regulation under the umbrella of the AVMSD.

- Regulation of audiovisual media service providers

The material scope of the Directive is currently determined by the notions of ‘audiovisual media services’ and ‘media service providers’. The criteria used for these definitions certainly need to be examined during the review process (policy option (d)).

While we believe that the main elements of the definitions in Art. 1 AVMSD have proven their value and should be maintained, a majority of EBU Members sees the need for a (limited) update in view of developments in the online market so as to ensure that the Directive covers all audiovisual media services which fulfil similar functions and have a significant democratic, cultural or social impact on society.

Accordingly, changes will definitely be necessary with regard to criteria such as “principal purpose” (in view of multimedia offers and media convergence) and “TV-like” (as there is convergence between TV programmes, TV-like services and unregulated online content in both directions, with for example the only difference being the provider).

For example, in 2014, when asked about the length of the videos watched during their most recent online video session, 49% of European Internet users declared having watched videos shorter than five minutes (Source: [Google Consumer Barometer](#)). Audiovisual services and platforms, including PSM, increasingly offer linear *and* non-linear services alongside each other, as well as long *and* short-form audiovisual content. There is no reason to exclude short-form audiovisual content *per se* from the scope of the Directive; on the contrary, doing so would question the effective protection of minors and defence of European values (in particular against hate speech and content violating human dignity). However, we would not go as far as to include genuine user-generated content within the Directive’s material scope, which is posted, for example, by bloggers without pursuing a commercial objective.

There are also some doubts about the criterion of ‘editorial responsibility’ because more and more ‘grey areas’ are appearing in today’s platform environment. Operators of distribution platforms often exercise a strong influence on the composition of the overall audiovisual offer available on the platform and its presentation to viewers on the platform’s user interfaces; in some cases they also

impose more or less rudimentary editorial guidelines on content providers. Thus they exercise influence on editorial/content matters without taking full editorial responsibility within the meaning of the Directive.

Nevertheless, in our view it still makes sense to maintain distinct rules and responsibilities in the AVMS Directive for ‘media service providers’, i.e. for those operators that exercise full editorial control over their programmes and services. But a distinct set of complementary basic rules are necessary for a new category of audiovisual players that are aggregating or distributing audiovisual content, operating a relevant platform for consumers and controlling the user interface (see below).

- Regulation of ‘audiovisual platform operators’

For the Directive to remain effective in the new environment, it is not simply a question of updating current definitions to extend the scope (policy option (d) above), but of introducing in the Directive, in line with its public policy goals, *a new kind of audiovisual platform regulation with basic rules for aggregators and distributors of audiovisual content and providers of user interfaces* (policy option (e)).

We are not referring here to *horizontal* rules for *online* platforms and intermediaries (the appropriate framework of such platforms being the subject of a separate consultation). However, we believe that - whatever the horizontal framework - there are important *sectoral* issues, which are closely related to the cultural and media policy objectives underlying the AVMS Directive, that need to be specifically addressed at the level of managed *audiovisual* platforms, i.e. platforms that play a significant role in citizens’ access to audiovisual media services.

The purpose of such platform regulation would be twofold. Firstly, it would secure the effectiveness of the current provisions of the Directive, by making sure that they cannot be undermined at the platform level but are adequately supported by platform operators. This concerns, in particular, the *protection of minors* and the *defence of European values* (fight against incitement to hatred etc.). In this respect, audiovisual platform operators should have basic responsibilities regarding the ordering of the user interface (for example, as regards the visibility of, and access to, adult content); moreover, they should have a *subsidiary* responsibility for audiovisual content that they select or aggregate on their platform, but *only insofar* as they are not provided by an audiovisual media service provider within the scope of the Directive, which can take editorial responsibility and ensure the protection of minors in line with the provisions of the Directive – see answer to Q. 3.2 below. Requirements supported at platform level could also cover, for example, the qualitative rules on audiovisual commercial communications – see answer to Q. 2.1 as well as measures to support European audiovisual content – see answer to Q. 4.

Secondly, such platform regulation would provide the opportunity to address new issues that arise at

platform level and for which regulatory tools are needed in the interest of media pluralism and access to information, in particular for the *protection of content integrity* – see answer to Q. 2.1 – and the *findability of public value content* – see answer to Q. 6.2 below. There is also a link between the findability on user interfaces of public value content and the findability of European audiovisual content – see Q. 4 below.

In this context, the notion of ‘audiovisual platform operator’ should be distinguished from online platforms and intermediaries in general. It should cover specifically operators *who select or aggregate audiovisual content on a platform for consumers (without taking full editorial responsibility for it, in contrast to media service providers) and/or who provide a user interface to guide viewers.*

While both functions normally go together, to be effective, platform regulation should also cover cases where content aggregation and user guidance have been separated. An example here could be providers of connected TV-sets that offer a user interface but no content portal of their own; the term ‘user interface’ may cover, for example, on-screen menus, pre-installed apps and remote control buttons. Operators of audiovisual platforms need to be distinguished from mere providers of infrastructure or transmission services, because many cable network operators nowadays go beyond their role as infrastructure providers and develop their audiovisual offer by aggregating linear and non-linear content and providing an interface for users (in which capacities they should naturally be covered by platform regulation).

To avoid any misunderstandings, the EBU does not propose to extend the scope of the Directive to cover general Internet search engines. Nor does the EBU propose to extend the scope of the Directive to all new providers of audiovisual OTT platforms or services on the Internet; such a move would pose a disproportionate burden on smaller companies and start-ups and imply heavy duties for regulatory authorities.

The idea is rather to work with thresholds and thus limit regulation to ‘significant’ audiovisual platforms and services. ‘Significance’ in this context should not be understood only in the sense of overall market share. It should also take into account the different consumption patterns of specific user groups, e.g. young audiences, and in particular that of vulnerable groups of society. It should also take into account the extent to which users are ‘locked in’ or for other reasons usually subscribe to one platform or service only. And last but not least it should take into account the relevant impact on society, in the light of the underlying values of the Directive, and in particular its potential impact on public opinion forming. Concentrating on a smaller number of significant operators should also facilitate self- and co-regulatory solutions.

Ex ante regulation can also be seen as an important preventive measure and safeguard for media

pluralism in view of the strong market concentration trends in the distribution of audiovisual services. This may be illustrated by the position of YouTube in aggregating audiovisual content, and of Samsung in connected devices.

It is estimated that during the second half of 2014, YouTube alone accounted for 22% of all peak downstream traffic in Europe (Source: [Sandvine](#)). In the UK in 2014, 32% of Internet users cited YouTube as a very or fairly important source of information, the number grew to 46% for 16 to 24 years old (Source: [Ofcom](#)). In France, in the month of June 2014 alone, there were a total of 1.1 billion YouTube online video views, which represents an average of 47 YouTube videos per viewer (Source: [CSA](#)).

In 2014, 36.4% of all smart TVs installed in EU countries were Samsung TVs (Source: [EBU-MIS](#), based on IHS data) and the weight of the Korean manufacturer has regularly increased over the last years.

Geographical scope of AVMSD

The AVMSD applies to operators established in the EU. Operators established outside the EU but targeting EU audiences with their audiovisual media services (via, for instance, terrestrial broadcasting satellite broadcasting the Internet or other means) do not fall under the scope of the Directive¹¹.

SET OF QUESTIONS 1.2

Are the provisions on the geographical scope of the Directive still relevant, effective and fair?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

The current rules have been designed for satellite and cable television, and are not adapted to the broadband/online environment.

Thanks to the jurisdiction criteria in Article 2(4), which refer to a satellite up-link situated in a Member State, or subsidiarily to a satellite capacity appertaining to a Member State, it has been possible to de facto extend EU jurisdiction to (foreign) satellite television services distributed to EU audiences via the major European satellite systems (Astra, Eutelsat and satellites operated by national telecom companies). European television viewers have therefore continued to be relatively well

¹¹ Article 2(1) AVMSD – "Each Member State shall ensure that all audiovisual media services transmitted by media service providers **under its jurisdiction** comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State." (emphasis added)

protected - in general, the television services they watch comply with the rules of the Audiovisual Media Services Directive.

However, the same cannot be said about *non-linear* audiovisual media services distributed to European audiences over the Internet; already today, a great number of them originate from outside the EU and therefore fall outside the geographical scope of the Directive. In this respect, the Directive's rules are no longer effective. The same applies to (linear) streaming services over the Internet. In the future, television services as well can and will increasingly be distributed online, and more television services from outside the EU may thus fall outside the current geographical scope.

In 2014 more than 200 video-on-demand services available in the EU came from providers established outside the EU (Source: [EAO/MAVISE](#)). However, it is not the mere number of services that is important, but their impact and significance for society and their role in audiovisual markets. While some of the major non-EU providers (e.g. Netflix) have chosen an establishment in a Member State for their European operations, others (e.g. Google Play Movies, Xbox Live and Playboy group – Source: [EAO](#)) seem to continue to operate their European activities from North America (notably enabling them to avoid EU rules).

Are you aware of issues (e.g. related to consumer protection problems or competitive disadvantage) caused by the current geographical scope of application of the AVMSD?

YES – NO (If yes, please explain below)

COMMENTS:

In the online environment, audiovisual programme distribution platforms and cloud services can easily be set up outside the EU. Audiovisual media services distributed via such platforms can easily escape the EU and Member States' rules for the protection of consumers and support for European production.

The European audiovisual market is attractive for online players established outside the EU, as this is an opportunity for them to gain additional revenue for their audiovisual content (which may already have been amortised on other markets) without having to comply with European rules or to make any significant investment in European content. What's more, they make hardly any contribution to audiovisual production or quality journalism in Europe but divert media consumption and revenues to their services.

There are an increasing number of players that operate from their headquarters outside of Europe, while at the same time differentiating their offer in order to target different national audiences in Europe. This may imply a repackaging of programmes produced for the world market, adapting them

to different European languages and tastes. Local investment in EU original content by these players remains very modest. Translations and some local flavour may be provided with the help of a small presence on the ground (which would also cover sales and marketing) while the huge majority of content remains of a homogenised global nature and the overall editorial control is retained by a head office or parent company located outside the EU.¹²

The fact that such services fall outside the geographical scope of European rules has consequences for the respect of European values and cultural diversity in Europe, undermines protection of European consumers and puts European media service providers at a competitive disadvantage.

Preferred policy option:

a) *Maintaining the status quo*

b) *Extending the scope of application of the Directive to providers of audiovisual media services established outside the EU that are targeting EU audiences.*

This could be done, for example, by requiring these providers to register or designate a representative in one Member State (for instance, the main target country). The rules of the Member State of registration or representation would apply.

c) *Extending the scope of application of the Directive to audiovisual media services established outside the EU that are targeting EU audiences and whose presence in the EU is significant in terms of market share/turnover.*

As for option b), this could be done, for example, by requiring these providers to register or designate a representative in one Member State (for instance, the main target country). The rules of the Member State of registration or representation would apply.

d) *Other option (please describe)*

¹² One such example is ‘Vice’, which provides online video channels for younger people, including some provocative, controversial content, and for which, according to the UK OFCOM, the US parent company Vice Media Inc. holds editorial responsibility, resulting in the UK service falling outside UK jurisdiction (decision of 21 July 2015, Vice UK Ltd vs ATVOD). A number of different national/regional editions of Vice exist throughout Europe.

PLEASE EXPLAIN YOUR CHOICE:

With regard to services originating outside the EU/EEA, the Directive's rules on territorial jurisdiction should be adapted to the online environment. As a principle, services delivered to or targeting European consumers should respect European rules.

Introducing – as in Option c) – the criterion of ‘significance’ is interesting. The EBU has suggested the criterion of ‘significance’ in a similar context, as regards audiovisual platform regulation (see Q. 1.1). In both cases, the idea is obviously to focus regulation on the cases that matter in practice, without overstressing the regulatory and supervisory capacities. However, we believe that ‘significance’ should not only be viewed in purely economic terms. Any measure (including market share or turnover) should also reflect the relevance and impact of the service or platform concerned for society, with particular regard for vulnerable groups, and the safeguard of cultural diversity and media pluralism.

If Option c) is pursued further, a well-defined criterion of ‘significance’ should make the criterion of ‘targeting EU audiences’ superfluous: indeed, if a service is (actively) *delivered* to EU audiences and is *significant* in economic or societal terms, this should be a sufficient justification to bring it under the scope of European rules.

Under both options, care has to be taken not to encourage ‘jurisdiction shopping’ (see also Q. 5); non-EU companies should not be given the possibility of choosing the law simply by registering or designating a representative in a particular Member State. Moreover, such a representative would not necessarily establish a close connection with the Member State in question and this criterion could lead to a high degree of volatility. Practical enforcement must also be taken into account.

2. *Providing for an optimal level of consumer protection*

The AVMSD is based on a so-called "graduated regulatory approach". The AVMSD acknowledges that a core set of societal values should apply to all audiovisual media services, but sets out lighter regulatory requirements for on-demand services as compared to linear services. The reason is that for on-demand services the users have a more active, "lean-forward" approach and can decide on the content and the time of viewing.

In the area of commercial communications,¹³ the AVMSD sets out certain rules, which apply to all audiovisual media services and regulate, for example, the use of sponsorship and product placement. They also set limits to commercial communications for alcohol and tobacco.

It also lays down other rules that apply only to television broadcasting services and regulate advertising from a quantitative point of view. For example, they set a maximum of 12 minutes of advertising per hour on television, define how often TV films, cinematographic works and news programmes can be interrupted by advertisements and set the minimum duration of teleshopping windows.

SET OF QUESTIONS 2.1

Are the current rules on commercial communications still relevant, effective and fair?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

Revenue from commercial communications plays an important role in funding original European content, including content produced or commissioned by PSM. The majority of PSM organisations depend on commercial revenue to supplement the public funding provided for the fulfilment of their remit. In 2014, advertising alone accounted for 11% of PSM revenues (provisional data). At the same time, in 21 out of 28 EU countries, PSM encounter stricter advertising limits than their commercial competitors. The weight of advertising within total PSM income has regularly decreased over the past decade - down from 16.4% in 2005 (Source: [EBU-MIS](#), based on Members' data).

Convergence creates commercial opportunities for the audiovisual sector. Media service providers benefit from new ways of marketing programmes and are able to reach the full audience potential for their programmes thanks to catch-up services. They may also benefit from new forms of advertising which better target consumers' interests. To be able to sustain their overall level of advertising revenues with the increased competition from online services, they also need to develop online advertising.

¹³ "Audiovisual commercial communication" is a broader concept than advertising and it refers to images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement. See Article 1(1)(h) AVMSD.

Taking the advertising market as a whole, online advertising revenues are expected to surpass for the first time TV advertising revenues in Europe in 2015. This has to be seen together with the fact that US-based intermediaries have built very strong market positions in the field of online advertising (for example, in Switzerland it has been estimated that Google and Facebook together have commanded a market share in the digital advertising sector of roughly 50% in 2014).

Appropriate and well-functioning EU rules on commercial communications play an important role in safeguarding viewers' interests as well as public policy goals and fair competition in a single market. A majority of EBU Members are of the opinion that the current AVMSD provisions on commercial communications remain by and large relevant and effective to date.

At the same time, there is a fundamental gap in the current regulatory framework as it fails to protect signal and content integrity, leaving the door open to *uncontrolled overlays of commercial communications* by third parties on audiovisual media services, or similar parasitic practices across platforms. This potentially undermines commercial revenues of media service providers, diverting revenue to intermediaries that do not invest in audiovisual production, thus negatively affecting the whole European audiovisual production value chain.

Moreover, in order to ensure that rules are fair and sustainable in the longer term, we believe that a robust set of *qualitative* rules and principles should apply to *all* electronic audiovisual commercial communications, regardless of whether these are part of an 'audiovisual media service' within the current definition of the AVMS Directive.

We also believe that there is still a case for maintaining *quantitative* rules with regard to linear audiovisual media services.

However, certain specific notions and rules in the existing AVMSD have proven difficult to implement in practice. While any future EU commercial communications framework continues to need flexibility in its application, certain provisions could benefit from *simplification* or *clarification*, for example as regards sponsorship, product placement and self-promotion (for further details, see below).

Are you aware of issues (e.g. related to consumer protection or competitive disadvantage) caused by the AVMSD's rules governing commercial communications?

YES – NO (If yes, please explain below)

COMMENTS

The main new risks of which we are aware, for consumer protection and fair competition between different players in the audiovisual value chain, do not stem from the current provisions of the Directive but rather from the lack of provisions protecting the integrity of audiovisual media services against different forms of interference at platform level.

Preferred policy option:

a) *Maintaining the status quo*

b) *Rendering the rules on commercial communications more flexible, notably those setting quantitative limits on advertising and on the number of interruptions.*

c) *Tightening certain rules on advertising that aim to protect vulnerable viewers, notably the rules on alcohol advertising or advertising of products high in fat, salt and sugars.*

d) *Other options (please describe)*

1. *Applying a robust set of qualitative rules for all audiovisual commercial communications (beyond the current scope of the Directive) whilst maintaining quantitative rules for linear audiovisual media services*
2. *Achieving simplifications or clarifications in specific areas.*
3. *Enshrining the principle of protection of signal and content integrity to prevent overlays of commercial communications on audiovisual media services, or similar parasitic practices by third parties. (This is a new issue, which is mainly, but not exclusively, linked to audiovisual commercial communications).*

PLEASE EXPLAIN YOUR CHOICE:

- **Qualitative rules for all audiovisual commercial communications**

The current qualitative rules of the Directive provide high levels of protection to viewers, including vulnerable categories such as minors, with regard to audiovisual media services. However, this same high level of protection should apply to all audiovisual commercial communications, regardless of the way they are accessed by viewers and embedded in or linked to audiovisual programmes.

This is necessary to protect viewers and also to maintain the quality of the viewing experience of audiovisual media services as well as their editorial integrity. This should include strong rules on the identification of commercial communications and the separation of advertising from editorial content, whether linear or non-linear, alongside the bans on surreptitious advertising and on the use of subliminal techniques.

- Simplifications or clarifications in specific areas (sponsorship, product placement and self-promotion)

Some of the current AVMSD provisions on commercial communications pose difficulties in implementation, sometimes varying from Member State to Member State. This calls for a simplification or clarification of these provisions, which would also make it easier to deal with these matters vis-à-vis third parties (e.g. in the contractual relationships between media service providers and independent producers). Below is a non-exhaustive list of possible improvements to existing provisions:

- with regard to sponsorship, clarifying that modern and flexible ways of identifying a sponsor, including moving images are indeed allowed under the current AVMS Directive;

- with regard to product placement, clarifying under which conditions product placement is allowed and ensuring that it is not subject to unclear restrictions and definitions.

- with regard to self-promotion, clarifying that the mere provision of information about a media service provider's own programmes and services does not qualify as self-promotion or advertising.

- Protection of content integrity

To safeguard the editorial responsibility of media service providers and the functioning of the audiovisual value chain, it is necessary to protect audiovisual media services against commercial overlays and other parasitic business practices across platforms. Accordingly, platform operators should be required to respect signal and content integrity.

The introduction of complementary rules for audiovisual platform operators (see reply to Q. 1.1 above) will be an opportunity to address this pressing issue, since it is at the platform level that the main risks arise and that easy remedies are available.

3. *User protection and prohibition of hate speech and discrimination*

General viewers' protection under the AVMSD

The AVMSD lays down a number of rules aimed at protecting viewers/users, minors, people with disabilities, prohibiting hate speech and discrimination.

SET OF QUESTIONS 3.1

Is the overall level of protection afforded by the AVMSD still relevant, effective and fair?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

User protection is no longer fully effective since connected devices and audiovisual platforms - which users increasingly rely on to access audiovisual media services – often provide access to content that falls outside the scope of the AVMS Directive alongside content within its scope.

In most of the areas mentioned under this heading (hate speech, discrimination, protection of minors) the increasing presence and accessibility of unregulated content alongside regulated content on audiovisual media platforms raises the pressing issue of more effective protection of users and of European values and public interests. Compared to other areas, this is less of a question of competitive disadvantage for European media service providers, however, the issue of a fair sharing of the burdens of regulatory measures among all stakeholders, including audiovisual platform operators, certainly comes into play.

Are you aware of issues (e.g. related to consumer protection or competitive disadvantage) stemming from the AVMSD's rules?

YES – NO (If yes, please explain below)

COMMENTS:

See under Q.1.1 and below regarding protection of minors.

Protection of minors

The system of graduated regulation applies also to the protection of minors: the less control a viewer has and the more harmful specific content is, the more restrictions apply. For television broadcasting services, programmes that “might seriously impair” the development of minors are prohibited (i.e., pornography or gratuitous violence), while those programmes which might simply be "harmful" to

minors can only be transmitted when it is ensured that minors will not normally hear or see them. For on-demand services, programmes that "might seriously impair" the development of minors are allowed in on-demand services, but they may only be made available in such a way that minors will not normally hear or see them. There are no restrictions for programmes which might simply be "harmful".

SET OF QUESTIONS 3.2

In relation to the protection of minors, is the distinction between broadcasting and on-demand content provision still relevant, effective and fair?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

PSM have a special responsibility for the protection of minors under their public service remit, which normally goes beyond the minimum requirements of the Directive; PSM strive to ensure a high level of protection of minors across all platforms and devices. The value of the protection of minors is deeply rooted in their "DNA", in particular because of their specific role as providers of trusted content.

Production of appropriate content for children and young people is a key positive action. PSM have an outstanding track record in providing suitable content for children and for doing everything within their sphere of control to provide a safe viewing environment. In 2014, PSM organisations in the EU offered more than 100,000 hours of children programming, either on their flagship channels or on their numerous dedicated children TV channels - 16 of them in 12 markets. PSM organisations were also providing 27 dedicated safe online offers for children - in 19 markets. (Source: [EBU-MIS, based on Members' data](#)).

As part of their remit, PSM have a fundamental role in helping people, in particular the younger generation, not only to understand how new digital technologies work and how to access varied and trusted quality content; PSM explain the benefits and risks of the Internet but also help youth acquire the necessary skills to become informed and active citizens in a multi-platform environment.

PSM also work closely with educational partners - institutions, teachers, schools, universities and parents - to encourage creativity and reflective skills in children within a trusted online space. EBU Members have achieved success through a variety of programmes that combine the potential for personal development with simple fun.

While linear viewing remains dominant overall, media consumption is increasingly shifting to non-linear services. For younger audiences, non-linear viewing of audiovisual content is becoming more widespread and younger generations increasingly watch audiovisual content on connected devices and via OTT platforms (see above under Q.1.1). For example, in Denmark the TV set only accounted for 41% of 7 to 12 year old children's daily screen time in 2014, 38% of these children declared using YouTube every day or almost every day (Source: [Norstat for DR Media Research](#)).

This development is at odds with the fact that the current Directive offers considerably less legal protection for minors with regard to on-demand services as compared to television, because there is no mandatory equivalent to the 'watershed' for unsuitable content online, although some providers do offer this through self-regulation.

Even where parental control systems exist, there is sometimes a lack of cross-platform interoperability in the new multiplatform environment.

The restrictions regarding the times of broadcast ('watershed rules') are well understood by audiences and generally highly supported. On the other hand, they lose part of their effectiveness if they are not also applied to non-linear services. In the UK, for instance, PSM have sought to ensure that their online services sufficiently protect minors from accessing unsuitable content by providing detailed programme content information and clearly signposting content that is inappropriate for under-eighteens. This includes operating a "G" for guidance system and offering parents the option to set a PIN code so a device does not play either 16 or 18 rated content unless you type in the PIN code.

Has the AVMSD been effective in protecting children from seeing/hearing content that may harm them?

YES – NO – NO OPINION

COMMENTS:

See comments above. As the Directive's rules on protection of minors are less stringent for non-linear services, and do not include any responsibility for audiovisual platform operators, the overall protection provided by the Directive is suffering and gradually losing its effectiveness. Certain limitations of the scope of the Directive (e.g. that programmes must be 'TV-like') also risk excluding certain audiovisual services which are of particular attraction to younger audiences, as they consist mainly of short-form audiovisual content.

Content may be distributed out of context or may be transformed into inappropriate content. A particularly illustrative example is professional audiovisual content (i.e. cartoons) which in its original

version is perfectly suitable for children but which may be modified or parodied by users or other third parties in a way that could harm minors (e.g. dubbed with violent or pornographic language) and then distributed on audiovisual platforms online without any safeguards.

Some of the issues may be addressed in the context of the AVMS Directive review process, see our proposals below.

What are the costs related to implementing such requirements?

Costs:

COMMENTS:

In general, it is difficult to carry out a cost/benefit analysis of a legislative instrument and in particular to quantify costs. The EBU would like to underline that an assessment of the effectiveness and relevance of the AVMSD cannot be made on purely economic terms but will have to take into account, above all, cultural implications for society.

Rating and labelling audiovisual programmes according to their suitability for minors and introducing corresponding measures to limit minors' access to unsuitable audiovisual content naturally implies certain costs for content producers and media service providers. However, we believe that this is money well spent in the interest of society. It is fair for such investment to be spread across the different actors.

What are the benefits related to implementing such requirements?

Benefits:

COMMENTS:

Apart from the more general societal benefits, which clearly outweigh the costs, media service providers (including PSM) also benefit from the opportunity to bring their quality programmes to consumers within a safe viewing environment for children/families.

Are you aware of problems regarding the AVMSD's rules related to protection of minors?

YES – NO (If yes, please explain below)

COMMENTS:

See comments above. Media consumption by young audiences is shifting towards non-linear services, short-form audiovisual content and new platforms, where there is less protection (compared to linear services) or no protection at all under the Directive (with regard to content falling outside the material or geographical scope of the Directive).

Preferred policy option:

a) *Maintaining the status quo*

b) *Complementing the current AVMSD provisions via self- and co-regulation*

The status quo would be complemented with self-/co-regulatory measures and other actions (media literacy, awareness-raising).

c) *Introducing further harmonisation*

This could include, for example, more harmonisation of technical requirements, coordination and certification of technical protection measures. Other possibilities could be the coordination of labelling and classification systems or common definitions of key concepts such as minors, pornography, gratuitous violence, impairing and seriously impairing media content.

d) *Deleting the current distinction between the rules covering television broadcasting services and the rules covering on-demand audiovisual media services.*

This means either imposing on on-demand services the same level of protection as on television broadcasting services (levelling-up), or imposing on television broadcasting services the same level of protection as on on-demand services (levelling down).

e) *Extending the scope of the AVMSD to other online content (for instance audiovisual user-generated content or audiovisual content in social media), including non-audiovisual content (for instance still images)*

One option could be that these services would be subject to the same rules on protection of minors as on-demand audiovisual media services.

f) *Other option (please describe)*

1. Further alignment of the rules for linear and non-linear services

2. Extending the material and geographical scope of the Directive (see under Q.1.1 and 1.2)

3. Introducing a complementary set of rules for operators of significant audiovisual platforms (which are aggregating or selecting audiovisual content or providing a user interface)

PLEASE EXPLAIN YOUR CHOICE:

Protection of minors and human dignity are fundamental values which are of special concern and represent a key challenge in today's converging media environment. They must be given due attention during the review process. Changes are necessary to ensure a high level of protection for all audiovisual services across all platforms and devices.

The fact that unsuitable content is readily available on Internet video platforms around the clock shows that the existing tools are insufficient. As minors increasingly turn to new ways of consuming audiovisual content, regulation needs to follow suit.

This being said, a future Directive should leave room to account for different cultural sensitivities among Member States. Similarly, the choice and combination of available protection measures (e.g. scheduling, technical requirements or warning signals) may be decided through self- or co-regulation and at the Member State level.

- Further alignment of rules for linear and non-linear services

While the EBU and its Members do not see particular problems in protecting minors on the basis of the existing rules of the Directive, the case for a stronger alignment of the level of protection between linear and non-linear audiovisual media services is emerging. This should be done more in the sense of a levelling-up of the rules for non-linear services than a levelling-down of the rules for linear services.

Currently, the protection measures in Art. 27(2) and (3) AVMSD against harmful (“likely to impair”) content on television have no equivalent in the field of non-linear services (Art. 12 applies only to content which may *seriously* impair minors, as an equivalent to Art. 27(1)). Accordingly, children are not protected under the Directive with regard to age-inappropriate on-demand content, and this asymmetry needs to be addressed. Ideally, a clear rating and labelling system for harmful content should be used for both linear and non-linear audiovisual media services at the national level. This may be complemented by effective user-friendly parental control or filtering systems. Parents should have the means to filter content; they should be able to determine what the minors are allowed to see. It would be sufficient for a revised Directive to establish the principles, leaving the choice of concrete measures to the national regulatory authorities or to self- or co-regulation.

- Extending the material and geographical scope of the Directive

It is important to remove outdated limitations from the notion of ‘audiovisual media services’ which risk excluding exactly those forms of audiovisual programmes and services which are particularly attractive to young audiences. In particular, an effective protection of minors makes it necessary to

regulate short-form audiovisual content in a similar way as for traditional television programmes (see under Q. 1.1.).

Moreover, the principle that all audiovisual media services targeting viewers in Europe should come under European rules (see Q. 1.2) is of particular importance for the protection of minors.

- Introducing a complementary set of rules for operators of significant audiovisual platforms (which are aggregating or selecting audiovisual content or providing a user interface)

To remain effective, protection also needs to be available at the platform level.

Where platform operators select or aggregate audiovisual content which is not under the editorial responsibility of an audiovisual media service provider that ensures the protection of minors in line with the provisions of the Directive, the platform operator should have a *subsidiary* responsibility for this content. This is particularly relevant where platform operators make non-European audiovisual content available to European consumers. This should not generate a second layer of control for audiovisual media services which are already under the editorial responsibility of a European media service provider. In other words, the responsibility of platform operators in terms of protection of minors should extend *only* to audiovisual content which is made available on their platform and is not already under the editorial responsibility of a media service provider that (materially and geographically) falls under the AVMS Directive. This important limitation of the responsibility and of the role of the platform operator should be clearly established as a legal principle in a revised Directive.

Moreover, platform operators should ensure the effective protection of minors in designing their platform, and in particular its user interface. For example, adult content should be clearly separated and not made easily visible by or accessible to minors. Where platform operators include adult content on their platform, they should provide for effective technical protection measures (access controls and age verification) for such content.

The requirements for findability of public interest content (see Q. 6.2 below) should also ensure that public value content for children is prominently displayed on user interfaces, thus promoting a safe online space for children.

4. Promoting European audiovisual content

The AVMSD aims to promote European works and as such cultural diversity in the EU. For television broadcasting services, the EU Member States shall ensure, where applicable and by appropriate

means, a share of EU works¹⁴ and independent productions¹⁵. For on-demand services, the EU Member States can choose among various options to achieve the objective of promoting cultural diversity. These options include financial contributions to production and rights acquisition of European works or rules guaranteeing a share and/or prominence of European works. The EU Member States must also comply with reporting obligations on the actions pursued to promote European works, in the form of a detailed report to be provided every two years.

SET OF QUESTIONS 4

Are the AVMSD provisions still relevant, effective and fair for promoting cultural diversity and particularly European works?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

With the globalisation of media markets and the increasing distribution of audiovisual content over the Internet, it is all the more relevant and important to have a viable and flourishing European audiovisual media and production industry, in particular strong public service media. The need to take measures to support cultural diversity and media pluralism has also been recognised, by almost all countries in the world, in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

The EBU believes that continued investment in quality content also remains a key driver for technological innovation and the development of new services. Audiences will only access and engage with the various platforms/devices if the stream of creative audiovisual works is sustained. Thus, sustaining the investment streams for original European content should be a key part of any future public policy approach accompanying convergence.

With regard to linear services, the Directive's provisions can still be considered effective, and the promotion of European works has been an important tool for protecting cultural identities and diversity in Europe. This is obvious if one compares the proportion of European works on TV channels which is regularly over 50% with the market share of European films in cinemas across the EU (33.6% in 2014 up from 26.2% in 2013, Source: [EAO](#)).

¹⁴ For European works: a majority proportion of broadcasters' transmission time.

¹⁵ For European works created by producers who are independent of broadcasters: 10% of broadcasters' transmission time.

Effectiveness of the provisions with regard to non-linear services is more difficult to assess, also because major providers of non-linear services seem to fall outside the current Directive's material or geographical scope. However, promotion of European works by PSM already applies to their catch-up and video-on-demand services in the same way as to their linear channels.

The current AVMS requirements for the promotion of European works are not just symbolic of the EU's commitment to protect cultural diversity in line with the EU Treaty and the UNESCO Convention, but are part of a comprehensive set of public policy interventions both at the national and EU levels to support audiovisual production, which include regulatory measures, support schemes and – last but not least – PSM.

With regard to PSM, the Directive's requirements on European works go hand in hand with, and are normally reinforced by, the public service remit as defined by the Member States. The fulfilment of the public service remit is regularly reported on by PSM organisations and assessed by their supervisory bodies. As a result, PSM regularly over-fulfil the requirements of the Directive.

PSM are major investors in audiovisual production in Europe. In 2014 PSM organisations in the 28 EU Member States invested over EUR 16.6 billion in content (Source: [EBU-MIS](#), based on Members' data). On average, PSM programming consists of around 65% of own and commissioned audiovisual productions, and some of them give as much as 90% of their airtime to local formats (Source: [EBU-MIS](#), based on Members' data). European fiction represented 39% of total fiction programmes broadcast by all European TV channels in 2013 but the share of European fiction rose to 64% when considering only PSM (Source: [EBU-MIS based on EAO/Rovi data](#)).

The best way to ensure the creation and market appeal of European audiovisual programmes is to support a well-functioning audiovisual media chain both at the national and European levels and to ensure that European media companies have the economic means to produce or commission content. Considering the major contribution PSM organisations make to European audiovisual productions, sustainable funding for PSM is of key importance. In the light of the growing number of global players active in the value chain, it also makes sense to ensure that each relevant player in the value chain contributes to producing European audiovisual content; this is not only a matter of critical mass but also a matter of fairness.

The EBU would also strongly encourage the European Commission and Member States to ensure that audiences can access public service content on the platform of their choice. In this respect, ensuring the effective enforcement of EU open Internet rules alongside the adoption of a future-proof

framework for the findability of content of public value (see Q. 6.2) are fundamental instruments to preserve and promote the availability and distribution of culturally diverse European offers.

In terms of European works, including non-national ones (i.e. those produced in another EU country), the catalogues offered by audiovisual media service providers contain:

a) the right amount;

b) too much;

c) too little

d) no opinion

COMMENTS:

The production of culturally diverse content is a valuable European asset, appreciated by European audiences, as shown by the popularity of original locally produced content. Today, the vast majority of original European productions continue to be made or commissioned by PSM organisations or their commercial counterparts. As already explained, European works - both domestic and non-domestic - are significantly more prominent in the TV schedules and on-demand catalogues of PSM organisations than those of other providers.

Would you be interested in watching more films produced in another EU country?

YES – NO – NO OPINION

COMMENTS:

In recent years, a number of European TV series (like *Borgen*, *Real Humans* and *Sherlock*, produced by PSM and local producers) have been successful internationally and have shown that Europe is capable of producing global success stories. High quality European TV series have huge economic and cultural potential and can also have a lasting influence in raising audience interest in non-national European audiovisual works, in a market which has long been characterised by a strong presence of non-European productions.

Moreover, international co-productions continue to be an important means not only to secure the financing for ambitious and expensive projects, but also to create European works which are capable of meeting the interests of the public in more than one European country, combined with distribution and marketing plans across the EU. PSM often take part in such co-productions.

European film festivals and awards (such as the Lux Prize awarded by the European Parliament) also make a welcome contribution to increase public interest and thus to help the circulation of European films across national borders.

Support schemes for professional subtitling of audiovisual works, or for any new techniques to cross language barriers, can also help to make more films produced in one EU country accessible to a wider public in other countries.

However, the EBU believes that introducing a separate quota for non-national European works would not be an appropriate step forward and would recommend EU policymakers to focus on solving problems related to rights clearance with regard to non-linear services in order to promote the development of cross-border services.

Have you come across or are you aware of issues caused by the AVMSD's rules related to the promotion of EU works?

YES – NO (If yes, please explain below)

COMMENTS

A first issue relates to the lack of contribution to the production and distribution of European works by certain online players which either fall outside the current (material or geographical) scope of the AVMS Directive (see under Q.1.1 and 1.2) or which try to avoid stricter national rules through jurisdiction shopping within the EU (see Q. 5). This may undermine the effectiveness of European and national rules and distort competition among operators.

A second issue relates to structural changes in the European audiovisual production sector. A number of European markets (e.g. UK, Netherlands) are experiencing increasing consolidation in the 'independent' production sector, characterised by the acquisition of European independent producers by global communications groups, which are often vertically integrated (e.g. covering production, broadcasting and distribution). If the independent production quota is applied to the benefit of these media groups, it may fail to achieve its original objective, i.e. to strengthen the European audiovisual industry and to 'stimulate new sources of television production, especially the creation of small and medium-sized enterprises' (Recital 68). This development needs to be taken into account in the definition by Member States of 'independent producers' (see Recital 71). Importantly, Member States need to retain the necessary flexibility in defining this notion, so as to ensure that the independent production quota continues to achieve its cultural and media policy objectives.

To avoid any misunderstandings, the EBU continues to support the independent production quota, which remains valuable for the EU creative sector. In this respect, PSM play an indispensable role by commissioning, and including in their schedules and catalogues, a high amount of locally developed independent productions.

What are the benefits of the AVMSD's requirements on the promotion of European works? You may wish to refer to qualitative and/or quantitative benefits (e.g. more visibility or monetary gains).

Benefits:

COMMENTS:

Above all it is the European societies which benefit from a rich and diverse range of European works reflecting the identities and diversity of European societies and the social, political and cultural realities experienced by European citizens. This pluralistic offer allows European societies and citizens to share their experiences, at local, national and European levels. It also preserves cultural and linguistic diversity across the EU and supports mutual understanding and social cohesion and other European values.

Apart from these societal benefits, there are also strong economic benefits, both direct and indirect. The Directive's requirements support a variety of European actors, ranging from small independent producers to large groups, in their production of high quality media content. The EU audiovisual market represents 20% of the world audiovisual market and was valued at EUR 132.7 billion in 2013 (Source: [EAO](#)). A viable and thriving EU audiovisual industry is thus an important factor for economic and industrial growth in Europe.

As an audiovisual media service provider, what costs have you incurred due to the AVMSD's requirements on the promotion of European works, including those costs stemming from reporting obligations? Can you estimate the changes in the costs you incurred before and after the entry into force of the AVMSD requirements on the promotion of European works?

Costs:

COMMENTS:

Preferred policy option:

- a) *Maintaining the status quo*
- b) *Repealing AVMSD obligations for broadcast and/or for on-demand services regarding the promotion of European works. This would entail the removal of EU-level harmonisation on the promotion of European works, which would then be subject to national rules only.*
- c) *Introducing more flexibility for the providers' in their choice or implementation of the measures on the promotion of European works.*

This could imply, for example, leaving more choice both to TV broadcasters and video-on-demand providers as to the method of promoting European works.

d) *Reinforcing the existing rules.*

For television broadcasting services this could be done, for example, by introducing additional quotas for non-national European works and/or for European quality programming (e.g. for fiction films, documentaries and TV series) or for co-productions; or by setting a clear percentage to be reserved to Recent Independent Productions¹⁶ (instead of "an adequate proportion"). For on-demand services, further harmonisation could be envisaged: by introducing one compulsory method (among e.g. the use of prominence tools, an obligatory share of European works in the catalogue or a financial contribution – as an investment obligation or as a levy) or a combination of these methods.

e) *Other options (please describe)*

1. *Extending the material and geographical scope of the Directive (see under Q.1.1 and 1.2)*
2. *Maintaining the status quo, subject to the simplification of the definition of European works and possibly adapting the rules for non-linear with the aim of increasing their effectiveness*
3. *Adopting rules on the findability and prominence of European content of particular value for society on all significant platforms (see under Q. 6.2)*

PLEASE EXPLAIN YOUR CHOICE:

Cultural diversity and media pluralism are important European values, and the European audiovisual media sector plays a crucial role in their implementation and promotion. This is particularly true for PSM. Sustained levels of financing for PSM are key to safeguarding high levels of European works.

In addition to sustainable PSM, a well-functioning audiovisual media value chain which ensures that European media companies have the financial means to produce or commission content, combined with requirements to promote the distribution and production of European works as in the current AVMS Directive, while safeguarding editorial freedom, should be seen as key elements of the European audiovisual model.

¹⁶ Works transmitted within 5 years of their production.

The forthcoming revision should be used to simplify and update the definition of ‘European works’. The current definition in Art. 1(1)(n), (2)-(4) AVMSD is overly complex and uses too many criteria, some of which are difficult to assess by media service providers if they are not producers themselves. In practice, it is simply unrealistic to expect media service providers to apply all these criteria to the huge number of relevant programmes in their schedule or catalogue. In parallel, it would seem appropriate to update the notion of European works so as to include co-productions with partners from countries covered by the European Neighbourhood Policy.

Finally, the assessment of the effectiveness of the provisions with regard to non-linear services needs to be improved. Some EBU Members are generally critical of fixed quotas while others are in favour of adapting the rules for non-linear services in order to increase their effectiveness to a level comparable to linear services and envisaging measures to support European audiovisual content at platform level.

5. *Strengthening the single market*

Under the AVMSD, audiovisual media companies can provide their services in the EU by complying only with the rules within the Member States under whose jurisdiction they fall. The AVMSD lays down criteria to identify which Member State has jurisdiction over a provider. These criteria include where the central administration is located and where management decisions are taken on programming or selection of content. Further criteria include the location of the workforce and any satellite uplink, and the use of a country’s satellite capacity. The AVMSD foresees the possibility to derogate from this approach in cases of incitement to hatred, protection of minors or where broadcasters try to circumvent stricter rules in specific Member States. In these cases the Member States have to follow specific cooperation procedures.

SET OF QUESTIONS 5

Is the current approach still relevant, effective and fair?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

The country-of-origin principle effectively facilitates cross-border services and provides for legal certainty, which is an indispensable asset for creating a digital single market.

It has been particularly effective with regard to linear services (in conjunction with the Satellite and Cable copyright Directive). For example, by the end of 2013, 75% of PSM organisations in the EU were distributing their ‘flagship’ national TV channels – on top of any existing international stations they had - in some other EU markets (Source: [EBU-MIS](#), based on Members’ data). For non-linear services (which are currently not covered by the Sat/Cab Directive) problems related to rights clearance have to some extent limited or delayed the development of cross-border services.

On the other hand, without effective safeguards there is a risk that the application of the country-of-origin principle leads to a situation where important national measures to support cultural diversity or media pluralism or to protect minors and European values are undermined or where certain operators gain unfair competitive advantages through jurisdiction shopping or other practices.

The current mechanism foreseen to prevent abuses (in Art. 4(2)-(5) AVMSD) is not effective in practice; in some countries, this leads to regulatory distortions between competing media service providers and thus to a lack of fairness.

Are you aware of problems regarding the application of the current approach?

YES – NO (If yes describe and explain their magnitude)

COMMENTS

While we would like to stress that in our view the country-of-origin principle is still effective in achieving its main objectives and should remain the foundation in the future, we are aware that sometimes problems have arisen with regard to audiovisual media services targeting audiences in other Member States, and which under specific circumstances may materially undermine the effectiveness of national rules in important areas (e.g. support for domestic/European production, protection of minors, and safeguards against distortion of information or propaganda).

The current Directive does not provide any effective remedies for such situations. In particular, the mechanism foreseen in Art. 4(2)-(5) AVMSD for cases of ‘circumvention’ is too narrow and does not lead to practical solutions.

In 2014, 20% of the on-demand audiovisual media services whose providers were established within the EU were primarily targeting audiences in a country other than the country-of-origin (Source: [EAO](#)).

If you are a broadcaster or an on-demand service provider, can you give an estimate of the costs or benefits related to the implementation of the corresponding rules?

YES – NO

Estimate of costs:

Estimate of benefits:

COMMENTS:

Preferred policy option:

a) *Maintaining the status quo*

b) *Strengthening existing cooperation practices*

c) *Revising the rules on cooperation and derogation mechanisms, for example by means of provisions aimed at enhancing their effective functioning*

d) *Simplifying the criteria to determine the jurisdiction to which a provider is subject, for example by focusing on where the editorial decisions on an audiovisual media service are taken.*

e) *Moving to a different approach whereby providers would have to comply with some of the rules (for example on promotion of European works) of the countries where they deliver their services.*

f) *Other options (please describe)*

Additional safeguards in cases where media service providers (or audiovisual platform operators) are targeting audiences in other Member States and risk materially undermining the effectiveness of national rules, but without weakening the overall operation of the country-of-origin principle.

PLEASE EXPLAIN YOUR CHOICE:

The country-of-origin principle for services originating within the EU/EEA is a cornerstone of the AVMS Directive, and this should remain the case.

At the same time it must be recognised that the country-of-origin principle in its current form was developed mainly with satellite television in mind, and some changes may be necessary to adapt it to the online environment.

In particular, there is a need for further safeguards - without weakening the overall operation of the

country of origin principle - namely when media service providers or audiovisual platform operators are targeting audiences in other Member States and risk materially undermining the effectiveness of national rules.

Revising the rules on cooperation and derogation mechanisms to make them more effective would also be an opportunity to align the rules for linear and non-linear services and thus streamline the applicable procedures.

In certain instances, clarifying the limits of the coordinated fields of the AVMS Directive may also help, for example as regards parafiscal charges (e.g. contributions to a national film production fund). Clarifying that parafiscal charges are not part of the coordinated fields would create legal certainty and would allow Member States more flexibility and means of action to support cultural diversity.

6. Strengthening media freedom and pluralism, access to information and accessibility to content for people with disabilities

Independence of regulators

Free and pluralistic media are among the EU's most essential democratic values. It is important to consider the role that independent audiovisual regulatory bodies can play in safeguarding those values within the scope of the AVMSD. Article 30 AVMSD states that independent audiovisual regulatory authorities should cooperate with each other and the Commission. The AVMSD does not directly lay down an obligation to ensure the independence of regulatory bodies, nor to create an independent regulatory body, if such a body does not already exist.

SET OF QUESTIONS 6.1

Are the provisions of the AVMSD on the independence of audiovisual regulators relevant, effective and fair?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

It is of great relevance and importance to ensure the independence of audiovisual regulators, in line with the Council of Europe Recommendation (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector. Such independence helps to underpin media freedom and pluralism, as enshrined in Art. 10 of the European Convention on Human Rights and in Art. 11 of

the EU Charter of Fundamental Rights.

Art. 30 of the Directive mentions ‘independent regulatory bodies’ in the Member States, but it merely promotes cooperation among these bodies where they exist, and with the degree of independence they have been granted (or not) by Member States. However it does not contain a requirement for Member States to set up independent regulatory bodies and ensure their independence, and the Directive therefore cannot effectively protect independence.

Are you aware of problems regarding the independence of audiovisual regulators?

YES – NO (If yes, please explain below)

COMMENTS:

In general, Member States' regulatory bodies function well and carry out their work of implementing the Directive in an independent manner. However, in certain countries the legal safeguards to ensure the independence of regulators are weak, and there are also sometimes incidents of political interference.

Preferred policy option:

a) *Maintaining the status quo*

b) *Laying down in the AVMSD a mandate for the independence of regulatory authorities, for example by introducing an explicit requirement for the Member States to guarantee the independence of national regulatory bodies and ensure that they exercise their powers impartially and transparently.*

c) *Laying down minimum mandatory requirements for regulatory authorities, for example detailed features that national regulatory bodies would need to have in order to ensure their independence.*

Such features could relate to transparent decision-making processes; accountability to relevant stakeholders; open and transparent procedures for the nomination, appointment and removal of Board Members; knowledge and expertise of human resources; financial, operational and decision making autonomy; effective enforcement powers, etc.

d) *Other options (please describe).*

Enshrining the principle of independence of regulatory authorities for the audiovisual sector from political and economic powers in the AVMSD, but leaving it to individual Member States to choose the appropriate measures to achieve this objective.

PLEASE EXPLAIN YOUR CHOICE:

The EBU is strongly committed to media freedom and pluralism of which the independence of regulatory authorities is an essential component (see Council of Europe Recommendation (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector); however, the EBU is also aware of the need to take into account the national circumstances and specificities.

The independence of media authorities from political powers at all levels is of utmost importance for media freedom and pluralism, and for the functioning of the democratic systems in the EU and in the Member States. However, in view of the variety of constitutional systems and political cultures, and the different organisational set-ups of the democratic institutions in the Member States, the appropriate measures to effectively guarantee independence will inevitably vary from Member State to Member State. Therefore we see no point in harmonising the structures or requirements.

Must Carry/Findability

In the context of the regulatory framework applicable to the telecoms operators, under the Universal Service Directive¹⁷, Member States can in certain circumstances oblige providers of electronic communications networks to transmit specific TV and radio channels ("must-carry" rules). Under the Access Directive¹⁸, Member States can also set rules on the inclusion of radio and TV services in electronic programme guides (EPGs)¹⁹ and on presentational aspects of EPGs such as the channel listing. Most recent market and technological developments (new distribution channels, the proliferation of audiovisual content, etc.) have highlighted the need to reflect on the validity of the must-carry rules and on whether updated rules would be required to facilitate or ensure access to public interest content (to be defined at Member State level), for instance by giving this content a certain prominence (i.e. ensuring findability/discoverability).

SET OF QUESTIONS 6.2

Is the current regulatory framework effective in providing access to certain 'public interest' content?

Effective? YES – NO – NO OPINION

¹⁷ Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC

¹⁸ Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as amended by Directive 2009/140/EC

¹⁹ Electronic programme guides (EPGs) are menu-based systems that provide users of television, radio and other media applications with continuously updated menus displaying broadcast programming or scheduling information for current and upcoming programming.

COMMENTS:

Must-carry rules in the Member States generally ensure the carriage of television channels of particular value for society on cable television and other distribution networks. Art. 31 of the Universal Service Directive recognises this possibility for Member States and provides a common European framework from a telecoms perspective, while leaving aside the specific content aspects.

However, access issues do not only arise with regard to cable television, IPTV and satellite TV networks, i.e. specialised electronic communications networks, but also with regard to terminal equipment (e.g. connected TV sets) and – most importantly for the future - managed platforms distributing audiovisual content over the Internet. In other words, the access issues which arise with regard to audiovisual media services on new platforms are much broader and go beyond the current scope of the Directives of the Telecoms Package.

Moreover, Art. 31 Universal Service Directive is not flexible enough in the sense that it does not cover the possibility for Member States to extend their must-carry rules to *non-linear* audiovisual media services of particular value for society. It is thus lagging behind, even compared to the *current* AVMSD.

Importantly, ensuring access to ‘public interest’ content is primarily a media policy issue; most Member States have incorporated their must-carry rules into their media laws, and have entrusted the regulatory authorities for the audiovisual sector – or converged regulators where they exist – with their implementation.

The review of the AVMSD is therefore an opportunity to provide an up-to-date European framework for access to significant platforms for the distribution of audiovisual content, in line with the policy objectives underlying the Directive.

Moreover, in the converged media environment, scarcity of transmission capacity is often no longer the major bottleneck. A bottleneck of increasing importance is the interface through which users find their favourite programmes, since a user's attention span is limited and there is only limited space on the home screen of any user interface, portal, programme guide, etc. Media convergence and connected devices will lead users to be increasingly dependent on interfaces, portals, guides, recommendation engines, etc. to find the content they wish to access (see the [2012 Study by Communications Chambers on PSB Prominence in a Converged Media World](#)). This puts operators of managed audiovisual platforms in a powerful position as gatekeepers (see Q. 1.1).

The fact that services are increasingly personalised and viewers are shown content which predominantly matches existing tastes and interests, risks giving them more of the same (so-called “filter bubble effect”). By making ‘public interest’ content easy to find in a converged viewer

environment, viewers will remain comprehensively informed and will continue to receive pluralistic/thought-provoking and diverse viewpoints which are indispensable for shaping public opinion. Ensuring the findability of 'public interest' content will also reinforce the protection of minors, not least in view of the PSM's special responsibility in providing age-appropriate content and a safe viewing experience (see Q. 3).

Therefore we believe that it is time to address access *and* findability issues in a revised AVMS Directive. This is in line with the position taken by the European Parliament (Resolution of 12 May 2014 on Preparing for a Fully Converged Audiovisual World, points 6-16, and Resolution of 4 July 2013 on connected TV, point 20).

Evidence on viewer expectations supports the principle of extending prominence rules to video-on-demand (VoD) content. Consumer research conducted in 2012 for the BBC suggests a majority of viewers (64% of respondents) expect a default catch-up or VoD menu to reflect the ordering of the linear EPG. In the same survey, 63% said that in a menu including catch-up VoD, other VoD and other apps (YouTube, iTunes) they would still expect catch-up VoD to be listed first. These findings are consistent with qualitative consumer research Freeview conducted in 2014 and underpin the importance of the inclusion of viewer expectations (Source: [Digital UK](#)).

The default settings are crucial as a large part of users are unlikely to change the settings of user interfaces provided by platform operators. While it is highly recommendable that providers of user interfaces allow users to personalise the settings, the complexity – both technically and in view of the abundance of offers – is so high that this will not be a realistic option for many users. Even in the relatively simple linear multichannel environment, research has shown that many users do not change the default order of channels configured by the cable network operator or the TV manufacturer. For example, in Denmark in 2014, 38% of all homes lived with the channel order supplied by their TV providers (Source: [Megafon for DR Media Research](#)).

If you are a consumer, have you faced any problems in accessing, finding and enjoying TV and radio channels?

YES – NO (If yes, please explain below)

COMMENTS:

Have you ever experienced problems regarding access to certain 'public interest' content?

YES – NO (If yes, please explain below)

COMMENTS:

Currently, 'public interest' content, and particularly programmes provided by European PSM, are key

for operators of new or emerging audiovisual platforms to attract audiences; this is also true for global players which need local content for their launch in different European countries. This may explain why PSM so far have not had major difficulties in being present on these platforms.

However, this situation cannot be expected to continue once these platforms have matured, and in particular once some of them may have gained strong positions in European audiovisual markets. At that stage it seems almost inevitable that 'public interest' content, which is generally provided to consumers for free or without any extra payment, will come into conflict with the commercial business interests of platform operators, which will have an incentive to give preference to their own competing programme offers, or to those of their affiliated companies, and more generally to content which generates extra revenue for them (e.g. through the sharing of subscription or pay-per-view revenues or revenues from online advertising).

There is also a risk that audiovisual platform operators start to monetise prominence on user interfaces or reach global prominence deals having no regard to local markets and audiences.

It is thus time to take precautionary measures to pre-empt these major risks. If one were to wait until such risks have materialised, it could be too late, as irremediable harm could have been done to the European audiovisual system, especially taking into account the time it takes to adopt and implement new legislation.

Preferred policy option:

- a) *Maintaining the status quo, i.e. keeping in place the current EU rules on must carry/ EPG related provisions (i.e. no extension of the right of EU Member States to cover services other than broadcast).*
- b) *Removing 'must carry' /EPG related obligations at national level/at EU level.*
- c) *Extending existing "must-carry" rules to on-demand services/and or further services currently not covered by the AVMSD.*
- d) *Amending the AVMSD to include rules related to the "discoverability" of public interest content (for instance rules relating to the prominence of "public interest" content on distribution platforms for on-demand audiovisual media services).*

e) *Addressing potential issues only in the context of the comprehensive assessment related to the role of online platforms and intermediaries to be launched at the end of 2015 as announced in the Digital Single Market Strategy for Europe.*

f) *Other options (please describe).*

PLEASE EXPLAIN YOUR CHOICE:

The audiovisual value chain is changing, with new digital players aggregating content and providing intermediary platforms between the media content providers and viewers, with their own user interfaces. This leads to new bottlenecks as mentioned above, where the issue is not limited bandwidth but limited space on user interfaces which limits users' access to content.

Audiovisual platform operators, in selecting and guiding users towards programmes and services, and by the composition of the overall offer and design of their user interface, affect viewers' ability to find and access programmes and services, including PSM catch-up players. Platform operators' commercial incentives will differ from the public policy objectives underpinning PSM and they may favour their own content and services if they are vertically integrated, or reach valuable - and increasingly global - deals with commercial providers with which PSM cannot compete.

The universal availability of public service content is one of the basic principles of the European audiovisual model. To the extent that they exist, current 'must-carry' and 'prominence' rules ensure that public service and other 'public interest' channels are available and easily found on traditional cable TV platforms; one of the key challenges with convergence is to adapt these existing rules to the new audiovisual media landscape and make them future-proof, so that they also cover non-linear services and new managed platforms providing access to audiovisual content, and in particular user interfaces.

Ensuring the *appropriate prominence and easy access to content of particular value for society* should be a key component of audiovisual platform regulation (regarding this notion, see Q.1.1 above). In the digital and converged environment, rules ensuring the findability or 'discoverability' of public interest content can be seen as the logical accompaniment for must-carry rules.

Viewers should not only have easy access to their favourite and trusted content, they should also be able to easily recognise the media service provider of their choice and whom they trust, in view of its editorial control over the content. The media offer of PSM (and other providers of high quality

content) should not disappear in an unrecognisable disaggregated mix, for example in the offer of the cable networks or on the user interface of connected TV sets.

There is an opportunity for achieving a consistent European approach. In the interest of European citizens and societies, all Member States must ensure that programmes and services which as being of particular value for society, for democratic, cultural or social reasons, can be easily found and accessed on relevant platforms, whether they are linear or on-demand. While this principle should be made mandatory in the future AVMS Directive, the concrete design of the scheme, above all, the determination of the relevant services as well as technical means whereby findability and due prominence are guaranteed, should be determined during the implementation at the national level. This will allow for the flexibility necessary to keep up with technological and market developments and to meet evolving audience needs and expectations. Member States could be encouraged to take measures to improve visibility of public interest content from other Member States.

Accessibility for people with disabilities

The AVMSD sets out that the Member States need to show that they encourage audiovisual media service providers under their jurisdiction to gradually provide for accessibility services for hearing and visually-impaired viewers.

SET OF QUESTIONS 6.3

Is the AVMSD effective in providing fair access of audiovisual content to people with a visual or hearing disability?

Effective? YES – NO – NO OPINION

COMMENTS:

Public service media have been at the forefront of initiatives enabling vulnerable user groups to consume audiovisual media services. Universality is one of the core values of PSM, and accordingly PSM organisations have continuously contributed to enhancing the access to content of people with a visual or hearing disability and strive to maintain a large offer of services adapted to their needs. From a social point of view, measures for further inclusion of all members of society are essential to ensure a high level of participation in public opinion formation and integration in current affairs and events.

This is why, for example, in Germany ZDF provides subtitles for over 40% of the programmes on its main channel, reaching 100% during main viewing time (16:00 to 22:15). In the Netherlands, NPO subtitled 98.1% of the original national programming on its three main TV channels in 2014. And in Finland, by 2016, Yle will be offering subtitles for all of its programmes in Finnish and Swedish. In addition to written and audio subtitles, Yle also provides a wide range of programmes in sign language

– from daily news bulletin and weekly current affairs magazines, to sport and children’s programmes. Since 2011 Channel 4 has voluntarily been making 100% of its programmes on all its channels available with subtitles (above the quota of 90%) and audio-describing at least 20% of programmes (above the quota of 10%), reaching 28% in 2014.

Yet the amount of accessibility services provided by individual PSM organisations differs naturally, depending on the national context and financial resources available. A 2013 EBU survey showed that the proportion of subtitled programmes offered by PSM organisations on their main channels varied from around 20% to more than 80% and that exactly half of the EU PSM organisations offered signed programmes (EBU, based on Members’ data). Furthermore, new means of audiovisual media consumption imply additional investments for broadcasters in order to provide access services for extra online content and mobile devices. In other words, interoperability issues as well as financial costs may create barriers to the development of such services, especially for weaker broadcasters. Still, it is worth noting that, in 2013, already one third of EU PSM organisations were making their subtitles available for mobile devices (EBU, based on Members’ data), illustrating the durable engagement of PSM organisations towards accessibility.

The EBU is actively addressing technical interoperability issues in this domain. For example via the creation of the open, W3C TTML based, EBU-TT subtitling format. EBU-TT-D is referenced by HbbTV and Freeview Play, amongst others. As progress is strongly technology-led, this underlines the importance of specifically including audiovisual R&D in the scope of EU R&D funding programmes.

Have you ever experienced problems regarding the accessibility of audiovisual media services for people with a visual or hearing disability?

YES – NO (If yes, please explain below)

COMMENTS

If you are a broadcaster, can you provide an estimate of the costs linked to these provisions?

YES – NO

Cost:

COMMENTS:

Preferred policy option:

a) *Maintaining the status quo*

b) *Strengthening EU-level harmonisation of these rules.*

Instead of encouraging it, the EU Member States would be obliged to ensure gradual accessibility of audiovisual works for people with visual and hearing impairments. This obligation could be implemented by the EU Member States through legislation or co-regulation.

c) *Introducing self and co-regulatory measures*

This could include measures related to subtitling or sign language and audio-description.

d) *Other option (please describe).*

PLEASE EXPLAIN YOUR CHOICE

The AVMS Directive provides an adequate legal framework to further the access of people with a visual or hearing disability. In line with their mission to provide universal services, PSM have notably contributed to this important social objective and show an excellent track record with regards to the implementation of accessibility tools.

The provision contained in the Directive allows for the establishment of targets defined at the national level while at the same time giving Member States leeway to set forth different obligations for different types of providers and services in accordance with the state of development of national markets, differences in viewing habits and available financial resources. This approach should be complemented by co- or self-regulatory schemes which would give the audiovisual industry an important stake in the promotion of accessibility programmes.

Events of major importance for society

The AVMSD authorises the Member States to prohibit the exclusive broadcasting of events which they deem to be of major importance for society, where such broadcasts would deprive a substantial proportion of the public of the possibility of following those events on free-to-air television. The AVMSD mentions the football World Cup and the European football championship as examples of such events. When a Member State notifies a list of events of major importance, the Commission needs to assess the list's compatibility with EU law. If considered compatible, a list will benefit from 'mutual recognition'.

SET OF QUESTIONS 6.4

Are the provisions of the AVMSD on events of major importance for society relevant, effective and fair?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

The public's access to information and events of major importance to society is one of the core values and objectives of the Directive and this must be preserved in the interests of the European public.

The "listed events" mechanism was introduced in 1997 via the revision of the Television without Frontiers Directive to ensure that events of major importance for society are properly available to all members of the public for free. The Court of Justice also highlighted its importance for the functioning of a democratic and pluralistic society in cases C-201/11P UEFA v European Commission, C-204/11P FIFA v European Commission and C-205/11P FIFA v European Commission.

Although the legislation may apply to any type of event of significance to society (e.g. national song festivals), the main focus is on sports events because of the key role they play in fostering regional, national and European identity. Such events range from minor or niche sports to major international (premium) events, all of which promote social cohesion and also encourage individual participation in sports.

In an era of spiralling prices paid for exclusive sports rights ("must-have" acquisitions for pay-TV providers, the costs of which are ultimately passed on to consumers), the listed events provisions are more important than ever to ensure universal access to important society events. Experience shows that without effective provisions, such events - or all but a very restricted part of these events - will disappear behind a pay wall, accessible only to a minority subscriber base. In such cases, social cohesion and identity would suffer.

Approximately 20 Member States have lists in place, but only around 10 are notified to the European Commission. The lack of notification means that the national list cannot be enforced vis-à-vis exclusive rights holders outside the relevant territory, potentially undermining the overall effectiveness and purpose of the system. The EBU makes a number of proposals below to address these and other issues.

Have you ever experienced problems regarding events of major importance for society in television broadcasting services?

YES – NO (If yes, please explain below)

COMMENTS

Past experience – to the extent that lists were in force – has been positive because it has enabled the public to have access to events of major importance for no additional cost and resulting in up to 95% of the population being able to share the experience of watching an event of major national importance in certain countries. Absent the protection provided by the listed events legislation, such events - or all but a very limited part of the events - would only be available to the paying few, and nations would no longer unite behind events like the Olympics or the football World Cup.

The EBU makes a number of proposals below to improve the overall effectiveness of the system in practice.

Preferred policy option:

a) *Maintaining the status quo*

b) *Other options (please describe).*

Improving the overall effectiveness of the system

PLEASE EXPLAIN YOUR CHOICE

In line with the interests of the European public as a whole, as explained above, all Member States should be obliged to introduce a list of major events and notify the list to the European Commission (currently only ten, i.e. half of Member States with lists have notified).

In parallel, the notification procedure itself should be simplified and speeded up, which should be feasible given Member States' broad discretion in defining the list (as confirmed by the European Court of Justice).

In order for the system to operate effectively in the interests of the European public, the EBU also makes the following proposals:

- *Universal availability:* The condition in Art. 14(1) and (3) “a substantial proportion of the public must not be deprived” is sometimes interpreted to the effect that even up to one third of the population could be deprived of the event, thereby defeating the purpose of the provision. In order to reflect technological developments and ensure accessibility for all, the Directive

should positively clarify that the listed event should be universally available to virtually all the population.

- *Findability and quality standards:* Similarly, in order to ensure the accessibility of the service in practice, the Directive should provide that the service transmitting the listed event is easily findable by the viewer and in line with the prevailing quality standards (taking into account that standards evolve and listed events should always be available for free and not merely in low quality format).
- *Fair and reasonable access to rights:* The Directive should stipulate that there should be no blocking of qualifying broadcasters' access to the rights for listed events, neither in the bidding process nor via sublicensing, and they should be made available on terms which are fair and reasonable for such broadcasters in a timely way. In order to prevent blocking in practice, the Directive should also oblige Member States to have an effective dispute resolution procedure in place.

Short news reports

The AVMSD requires Member States to ensure that broadcasters established in the Union have access, on a fair, reasonable and non-discriminatory basis, to events of high interest to the public for the purposes of short news reports.

SET OF QUESTIONS 6.5

Are the provisions of the AVMSD on short news reports relevant, effective and fair?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

As already explained under Q. 6.4, the public's access to information is one of the core values and objectives of the Directive. This also covers the Directive's provisions on short news reports, which protect the right of the public to receive information about events of high interest for which certain broadcasters have acquired exclusive TV rights. The news access rules enable other broadcasters not holding the exclusive rights to produce and use short extracts of the events, thus contributing to a plurality of views and to media diversity. This may be achieved by granting access to the exclusive broadcaster's signal and/or access to the venue of the event itself. Also, the news access provisions (including the quotation exceptions to copyright) extend to a wider set of events than those covered by

the national listed event rules, including for example social, political and economic events, as well as culture, entertainment and sport.

Where the AVMS news access rules are implemented effectively, the public does not miss out on (free) information about an event of high interest to the public that is otherwise covered exclusively by another (likely pay-TV) broadcaster. Free access to information about such events clearly promotes the interests of democratic and pluralistic society, and the news access provisions must be preserved.

Have you ever experienced problems regarding short news reports in television broadcasting services?

YES – NO (If yes, please explain below)

COMMENTS

Preferred policy option:

a) *Maintaining the status quo*

b) *Other options (please describe).*

PLEASE EXPLAIN YOUR CHOICE

In Case C-283/11 Sky Österreich, the Court of Justice confirmed the importance of Art. 15 AVMSD in safeguarding the fundamental freedom to receive information and promoting media pluralism as enshrined in Art. 11 (1) EU Charter of Fundamental Rights. To this effect, the right to short news reports complements the provision on listed events. The Court further confirmed that the way the provision had been constructed by the European Union legislature struck a fair balance between the different stakeholders and was thus considered proportionate.

The current provision allows for flexibility and a change at this stage does not seem required.

Right of reply

The AVMSD lays down that any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies.

SET OF QUESTIONS 6.6

Are the provisions of the AVMSD on the right of reply relevant, effective and fair?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

Have you ever experienced problems regarding the right of reply in television broadcasting services?

YES – NO (If yes, please explain below)

COMMENTS

Preferred policy option:

a) *Maintaining the status quo*

b) *Other options (please describe).*

PLEASE EXPLAIN YOUR CHOICE

We see no need for change, but we would also have no principal objection against an extension of the right of reply or equivalent remedies to non-linear services, which has taken place in most Member States (in line with Council of Europe Recommendation (2004) 161 on the right of reply in the new media environment).

Conclusions and next steps

This public consultation will be closed on 30 September 2015

On the basis of the responses, the Commission will complete the Regulatory Fitness and Performance (REFIT) evaluation of the AVMSD and inform the Impact Assessment process on the policy options for the future of AVMSD.