

## CONSULTATION

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

*A media framework for the 21<sup>st</sup> 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? Janneke Sloetjes \_\_\_\_\_

Please your email: jsloetjes@netflix.com \_\_\_\_\_

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.  
487726915971-30 \_\_\_\_\_

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
- Slovakia
- Sweden
- United Kingdom
- Other

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

Netflix International B.V. \_\_\_\_\_

Please enter your address, telephone and email.

Keizersgracht 440, 1016 GD Amsterdam \_\_\_\_\_

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

Keizersgracht 440, 1016 GD Amsterdam

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## ***Background and objectives***

The Audiovisual Media Services Directive (AVMSD<sup>1</sup>) 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 convergence<sup>2</sup>. 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 Europe<sup>3</sup>, 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"<sup>4</sup> 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.***

<sup>1</sup> 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".

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

<sup>3</sup> 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.

<sup>4</sup> 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-like<sup>5</sup> and for which providers have editorial responsibility<sup>6</sup>. 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 Directive<sup>7</sup>, 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 relevant<sup>8</sup>, effective<sup>9</sup> and fair<sup>10</sup>?**

Relevant?  YES –  NO –  NO OPINION

Effective?  YES –  NO –  NO OPINION

Fair?  YES –  NO –  NO OPINION

<sup>5</sup> 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."

<sup>6</sup> 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.

<sup>7</sup> 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')

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

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

<sup>10</sup> How fairly are the different effects distributed across the different stakeholders?

COMMENTS:

Netflix supports the view that the Audio-visual Media Services Directive (AVMSD) has been and continues to be a solid basis for existing and new companies to provide audio-visual content both across the EU and globally. The current AVMSD has underpinned the growth of the European film and television sectors: over the past 10 years, TV subscription revenues have grown by nearly €17 billion since 2003, almost doubling their size. Pay revenue per usage hour have increased by 25% for film and television between 2003 and 2013 and pay revenues in the TV sector have grown at 4% annually over the same period.<sup>11</sup>

Fueled by the Internet, connected devices and digital services, consumer media usage in Europe continues to grow at a 4% annual rate. Convenient access to a wide choice of diverse content has never been so strong - for instance, Netflix subscribers worldwide can enjoy over 100 million hours of films and TV shows per day.

The current success of the Single Market can be measured by number of new market entrants and the possibility for audio-visual services to move freely across the EU. This achievement should be supported and provides a good example of how to increase the access to different types of content across the EU, which is one of the key objectives of the Digital Single Market.

**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:

Subscription Video on Demand services, catch-up services as well as traditional broadcasting providers all compete for eyeballs with online services that present audiovisual content but do not exercise editorial control (so-called User generated content or UGC), such as for instance YouTube or Dailymotion, and hence rightfully do not fall under the AVMSD. Indeed, the large volume of content on such services would make it virtually impossible to exercise editorial control over the content hosted on the platform, which would lead to AVMSD compliance issues, hinder the development of such services or make them less available in the EU.

Netflix believes that the fact that certain services providing access to audiovisual content are not regulated has to date not resulted in issues which require an expansion of the scope of the AVMSD.

<sup>11</sup> [The digital future of creative Europe](#)

It is however critical that the burden of regulation does not increase for those companies that currently do fall under the AVMSD. In this context, one of the major benefits of the AVMSD has been the clarity of its application for service providers, and this clarity should be maintained, to ensure that the balance currently struck by the AVMSD remains in place.

***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)*

**PLEASE EXPLAIN YOUR CHOICE:**

The increased choice that is offered by audiovisual services, both those regulated and those not regulated under AVMSD, increases competition and means that consumers have many video options at their disposal. Netflix constantly competes with a wide array of services and must constantly deliver compelling content and improve its user interface to successfully attract and retain subscribers. To foster this competition between different types of audiovisual services, it is important not to increase the burden for those services that are currently subject to regulation under the AVMSD. This would create an un-level playing field with the aforementioned UGC services, as well as other platforms that provide audiovisual content without exercising editorial control. AVMSD service providers should remain in a position where they can freely innovate and develop their services without being constrained by unnecessary burdens.



## 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 Directive<sup>12</sup>.

### **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:

#### **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:

Netflix supports the current country of origin approach under which the geographical scope of the AVMSD is limited to AVMS that are located within the EU. We believe that giving extra-territorial effect to the rules laid down in the AVMSD will make these very difficult to enforce, which would undermine the overall effectiveness of the Directive.

Moreover, extending the geographical scope of AVMSD might negatively impact the availability of innovative new services as well as content in the EU. Such an extension would result in a conflicts of laws, as a service would be governed by two (or more) sets of rules in different jurisdictions. This may lead innovative services to become more hesitant to roll-out in the EU. As a result, socially valuable content such as news, provided from different countries and cultures, might become less available to European citizens.

#### ***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.*

<sup>12</sup> 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)

*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)*

PLEASE EXPLAIN YOUR CHOICE:

Netflix refers to its answer to question 1.2.

## **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<sup>13</sup>, 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**

<sup>13</sup> "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.

**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:

**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

***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)*

PLEASE EXPLAIN YOUR CHOICE:

Netflix, as an advertising-free service, is not in a position to provide meaningful input to this specific question.

**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:

The current set of rules provided for in the AVMSD is a solid framework offering the appropriate protection of users, in particular minors and people with disabilities. For our position regarding the protection of minors, please see our response under question 3.2.

**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:

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:

The line between linear and non-linear audiovisual services may have become less clear cut, but

there is still a considerable difference in user control, which justifies the continuation of the current graduated approach under the AVMSD. The current rules for non-linear service providers have allowed on-demand services, like Netflix, to implement measures that fit well within the service and that enhance their subscribers' control over what to watch when. The measures implemented by Netflix include PIN protection, age rating and age gating options. This is in line with recital 60 AVMSD, read in conjunction with the Recommendation of 2006 of the European Parliament and the Council, which states that "personal identification numbers (PIN codes), filtering systems or labeling" could be employed to ensure adequate protection of minors.<sup>14</sup>

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

YES –  NO –  NO OPINION

COMMENTS:

Yes, the current rules offer a solid and robust framework that appropriately addresses the protection of minors in the media world. As indicated, Netflix and other VOD providers have built a variety of tools to ensure that parents can protect their children from inappropriate content. From age rating information to specific children's sections and PIN protection measures, Netflix aims to create an environment that is safe for minors and that give parents suitable options to give access to appropriate content for younger children.

In order for audiovisual media services to scale up, grow and attract subscribers across Member States, flexible tools to protect under age viewers are important. As per Netflix's experience, self-rating is a flexible method tool to age-rate content as it allows us to rate new content quickly and consistently across European markets.

Moreover, in order for any rating system to be successful, a media service provider needs the legal certainty that the rating system of their country of origin is accepted and lawful in all European markets where it chooses to provide its service. Netflix would therefore welcome a clarification of the applicability of the country of origin principle to rules regarding minor protection, a coordinated

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<sup>14</sup> Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, OJ of 27 December 2006, L 378, p. 72, paras. II 1, 2.

field under the AVMSD.

**What are the costs related to implementing such requirements?**

Costs: variable, depending on the type of implementation

COMMENTS:

When comparing the costs of implementing a self-rating regime with the costs of submitting content to a rating board and implementing ratings on the service, it becomes clear that self-rating regimes like the Dutch NICAM system are a reliable, efficient and affordable way to rate content. This is due to the fact that there is no direct cost incurred when rating a specific title: a Dutch AVMSD service provider that uses NICAM pays training costs and a nominal yearly fee to be able to self-rate as many titles as necessary. On the other hand, relying on rating boards to rate content and submitting titles for rating means a service provider incurs a per-title or per-minute fee. While both methods involve costs for staff and overhead, Netflix estimates that the costs for self-rating a (hypothetical) catalogue of 5.000 titles would likely be about a factor seven lower than rating these titles by submitting them to rating boards.

**What are the benefits related to implementing such requirements?**

Benefits:

COMMENTS:

Offering a subscription video on demand service with ample opportunities to control viewing options for minors creates trust among subscribers and a better viewing experience.

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

YES –  NO (If yes, please explain below)

COMMENTS:

Netflix has encountered situations where stakeholders have disputed the applicability of the country of origin principle to the rules on minor protection. It is in the interest of all service providers that want to scale up their service across EU territories to clarify the applicability of the country of origin principle to the rules on minor protection and to restrictively interpret any derogations to this principle.

***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)*

PLEASE EXPLAIN YOUR CHOICE:

As explained in section 3.2, Netflix finds the current provisions laid down in the AVMSD sufficient, but welcomes any clarifications and possible further support of self-regulatory models like the Dutch NICAM self-rating system which is developed and broadly adopted by media service providers in the Netherlands. More importantly, Netflix would welcome a clarification that unequivocally confirms the applicability of the country of origin principle to the rules regarding minor protection.

#### 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 works<sup>15</sup> and independent productions<sup>16</sup>. 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:

Online audiovisual services, like Netflix, are uniquely positioned to broaden the promotion and distribution of European creations, not only in the EU but even the entire world. For example, European shows and feature films on Netflix can be exported and viewed by a global audience allowing for more viewers than when a show would be restricted to a national broadcaster, or VOD service.

Netflix supports the aim to promote the visibility and discoverability of European works and the stimulation of the European audio-visual sectors. At the same time, it views the initiatives currently presented within the AVMSD to better promote the access to and promotion of European works using quotas and prominence as potentially detrimental to the sustainability of existing and new business models and personalisation of services that allow European consumers to access a wide variety of European and international content.

Rigid numerical quotas risk suffocating the market for on-demand audio-visual media services. An

<sup>15</sup> For European works: a majority proportion of broadcasters' transmission time.

<sup>16</sup> For European works created by producers who are independent of broadcasters: 10% of broadcasters' transmission time.



obligation to carry content to meet a numerical quota may cause new players to struggle to achieve a sustainable business model, causing distortions as such players may have to spend resources on content in excess of its economic return. For example, hours-based or titles-based numerical quotas risk creating a perverse incentive for VOD service providers to license more of the least expensive European titles and fewer premier European titles. This undermines what should be the goal of promoting European works: 1) ensuring that European content producers that succeed in Europe and internationally are rewarded for their success and 2) the growth of high-quality and internationally competitive European content production.

As for rules on prominence, these are not compatible with the way subscribers watch content via subscription on demand services. When watching content via a VOD service, they already control their own viewing experience and the titles surfaced to them are highly personalised. Regulatory measures that would interfere with a VOD company's "personalised" approach to providing their services would undermine the ability of a service to approach its subscribers with content tailored to their needs and interest.

At the same time, the consumer personalisation approach allows for more European works to be available to subscribers that are interested in such types of content and helps them find those European works -in effect, promoting them and creating a virtuous demand-supply cycle.

Per Netflix' view, the focus of European audiovisual media policy should be on incentivizing the production of European content and not imposing quotas on broadcasters or other AVMS providers who may then struggle to meet the supply or would experience interference with a personalized approach that is specifically designed to attract, delight and thus retain their subscribers.

**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:

Netflix would like to point out that, as a result of the variation of audiovisual services in the EU, the

percentage of European works per service differs greatly. Instead of seeking to commit all on-demand services, both public and commercial, to similar rules for the promotion of European content, Netflix favors an approach where specific types of on-demand providers, such as pure entertainment services, gain more freedom to decide how they contribute to the development of high-quality European content without being stifled by quota or prominence rules, as indicated in our answer to the first question of section 4 of this consultation.

It is relevant to remember the European Commission 2014 Study on Fragmentation of the Single Market for on-line video-on-demand services,<sup>17</sup> where content providers reported the following: “the idea that the launch of large brands (originating in the US) influences the mass-market take-up of VOD was voiced in other interviews as well. Even if these players are potential competitors, some of the interviewees saw their entrance as potentially beneficial for the market as a whole.”

It is correct that the arrival of Netflix in the EU has not caused audiovisual production to soar: on the contrary, the European Audiovisual Observatory noted that in 2014, the market share for European films in cinemas reached a record high of 33.6% (highest recorded since 1996), whilst EU production levels have been steadily increasing over the past decades. This trend continued in 2014, as the estimated number of European feature film productions increased from 1587 to 1603 films. This represents yet another record high and breaks down into an estimated 1118 feature fiction films and 485 feature documentaries. About 32% of European feature films were produced as co-productions while 68% were national productions.<sup>18</sup>

Netflix firmly believes that any service operating in the EU will always need local content to be successful. Our VOD catalogue is built to provide our subscribers with the content they want to watch. For that reason, Netflix currently provides its subscribers in all European markets with a mix of licensed and original European content, thereby contributing to the promotion of European works not only within EU countries, but also across the EU as well as outside. Netflix currently licenses thousands of TV shows and feature films from different EU countries, from *Peaky Blinders* and *Call*

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<sup>17</sup> (p.33). 2014 Study on Fragmentation of the Single Market  
[http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=6355](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=6355)

<sup>18</sup> See <http://www.obs.coe.int/en/-/pr-cannes-2015-film-market-trends-2014>

the Midwife (UK), to Rita, Hjørdis and the Killing (Denmark), Arthur & the Invisibles and The Returned (France), the Bridge and Arne Dahl (Sweden) and Pan's Labyrinth (Spain).

Besides licensing content, Netflix has produced in association with the Norwegian Broadcasting Corporation (NRK1) the series "Lilyhammer", and has recently commissioned a French series called Marseille, which will be entirely produced in France. This clearly demonstrates that Netflix is committed to continue to invest in and license compelling content regardless of its origin. It also demonstrates that the demand by users is sufficient to generate such content based on market logic, rather than regulation.

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

YES –  NO –  NO OPINION

COMMENTS:

**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

**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: n/a

**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:**

Netflix became available in the EU after the introduction of the aforementioned requirements and cannot give an estimate of the changes in costs. The reporting obligation has been fulfilled in 2015 and the costs incurred qualify as moderate.

***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 Productions<sup>19</sup> (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)*

***PLEASE EXPLAIN YOUR CHOICE:***

As follows from our answers to the questions in this section 4, Netflix believes that the focus of European audiovisual media policy should be on incentivizing production of European content and not imposing quotas on broadcasters or other AVMS providers. We also believe that increase in content production demonstrates that there is no to introduce additional promotion measures at the European level.

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<sup>19</sup> Works transmitted within 5 years of their production.

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:

'Bringing down barriers to unlock online opportunities' and creating a true Digital Single Market is one of the Commissions top priorities. The AVMSD in its current form already contributes to this important goal through the country of origin principle, which allows audiovisual media service providers to operate under one regulatory scheme.

The country of origin principle has been a cornerstone for the development of innovative cross-border services, and it must remain at the core of the AVMSD. This was recognized by the European Commission in its 2013 Green Paper on convergence<sup>20</sup>, where the Commission stated that 'the main rationale for the regulation of audiovisual media services at EU level has been the Internal Market, with the country of origin principle at its core. This 'single European TV market' has entailed a

<sup>20</sup> 2013 Green Paper 'Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values', [COM(2013) 231 final]

minimum set of common rules covering aspects like advertising, protection of minors and promotion of European audiovisual works.’

Prior to the publication of the Green Paper, in 2007, the paper

‘Country of Origin Principle in the EU Market for Audiovisual Media Services: Consumer’s Friend or Foe?’<sup>21</sup> stated in its conclusions that ‘the country of origin principle coupled with minimum harmonization, is advantageous for consumers and compatible with their interest: It gives them a wider choice of audiovisual media services, which know no borders anymore, but also the security that all services they receive will comply with a fundamental set of principles established at the EU level. It fosters not only free flow of information but also freedom of expression of Europeans (...) not only European industry, but also European viewers are much better off.’

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

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

COMMENTS

As indicated in our answer to question 3.2, Netflix has experienced situations where a stakeholder disputed the applicability of the country of origin principle to the rules on minor protection.

Netflix believes that the country of origin principle should be retained in full as the cornerstone of AVMSD, and that the principle should not be “chipped away” by carving out certain issues or exceptions (such as levies, local rules on financing or prominence) to make room for different approaches which will be directly in conflict with developing a Digital Single Market.

**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*

<sup>21</sup> A. Herold, ‘Country of Origin Principle in the EU Market for Audiovisual Media Services: Consumer’s Friend or Foe?’, conclusions on p.23, via <http://link.springer.com/article/10.1007%2Fs10603-007-9054-1#page-1>.

- 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)*

**PLEASE EXPLAIN YOUR CHOICE:**

As indicated in our answers to the questions in this section 5, Netflix strongly believes the Country of Origin principle should be retained in full.

Undermining the country of origin principle could lead to multiple negative consequences, namely:

1. The Country of Origin principle creates the necessary legal certainty to generate investment in content and innovative services. See notably the European Parliament Report on the Implementation of the Audiovisual Media Services Directive,<sup>22</sup> which states that the EP:

'6. Notes in particular that the **'country of origin'** principle, when properly applied, gives broadcasters important clarity and certainty about their operational arrangements;'

2. The AVMSD is an internal market instrument based on art 53 (1) and 62 TFEU. Removing the Country of Origin principles would probably render this legal basis invalid.

3. Weakening the Country of Origin principles would lead to a re-fragmentation of the European audiovisual market: broadcasters and other media service providers would limit distribution within national borders, to the detriment of European citizens' current access to content.

Challenging the Country of Origin principle could have a domino effect in other EU instruments, such as SatCab and the Ecommerce Directive.

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

Independence of regulators

<sup>22</sup> European Parliament Report on the Implementation of the Audiovisual Media Services Directive (2012/2132(INI), adopted 28 February 2013).

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:

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

YES –  NO (If yes, please explain below)

COMMENTS: n/a

**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).*



PLEASE EXPLAIN YOUR CHOICE:

n/a

Must Carry/Findability

In the context of the regulatory framework applicable to the telecoms operators, under the Universal Service Directive<sup>23</sup>, 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 Directive<sup>24</sup>, Member States can also set rules on the inclusion of radio and TV services in electronic programme guides (EPGs)<sup>25</sup> 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

COMMENTS:

In terms of consumer experience and consumer viewing patterns, linear broadcasting continues to elicit strong consumer interest.

One key aspect of online offerings is that there is fundamentally more user control in online platforms, thus requiring fewer obligations than traditional TV broadcasting. As noted in section 3.1 of the Green Paper preparing for a fully converged audio-visual world (2013) *"the AVMSD makes a distinction between linear (television broadcasts) and non-linear (on-demand) services, based on the*

<sup>23</sup> Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC

<sup>24</sup> 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

<sup>25</sup> 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.

*much higher degree of consumer control in on-demand services, justifying less stringent regulation in certain areas.” This observation is still valid as it was in recent years and in the most recent iteration of AVMSD, perhaps even more so now that audiences are well used to dealing with (and personalising, filtering, and controlling their viewing) online services and content.*

Obligations for “must carry” or prominence would not make sense for online offerings, and could undermine the benefits of such services for consumers, who turn to these services to look for specific content. Interfering in this process with imposed “public interest” content may further render the latter less appreciated. “Must carry” obligations may also undermine the ability of new services to offer content in the way they think would be interesting for consumers, particularly if paired with quotas for European content.

**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: n/a

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

YES –  NO (If yes, please explain below)

COMMENTS: n/a

***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:

#### 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:

**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 n/a

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

YES –  NO

Cost:

COMMENTS: n/a

**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

#### 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:

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

YES –  NO (If yes, please explain below)

COMMENTS n/a

***Preferred policy option:***

a)  *Maintaining the status quo*

b)  *Other options (please describe).*

PLEASE EXPLAIN YOUR CHOICE

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:

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

YES –  NO (If yes, please explain below)

COMMENTS n/a

***Preferred policy option:***

a)  *Maintaining the status quo*

b)  *Other options (please describe).*

PLEASE EXPLAIN YOUR CHOICE

## 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 n/a

#### ***Preferred policy option:***

a)  *Maintaining the status quo*

b)  *Other options (please describe).*

PLEASE EXPLAIN YOUR CHOICE

### ***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.