

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

UK and France respectively

What is your name?

1. Catherine Starkie 2. Sophie Scrive

Please your email: catherine.starkie@magazinemedia.eu;
sophie.scrive@enpa.be

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.

EMMA: 37937886834-69, ENPA: 37937886834-
69_____

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.

- EMMA, European Magazine Media Association and ENPA, European Newspaper Publishers Association

Please enter your address, telephone and email.

- EMMA, European Magazine Media Association
Square Du Bastion 1a, 1050 Brussels
Tel: 00 32 2 536 06 02
E-mail: Catherine.Starkie@magazinemedia.eu
- ENPA, European Newspaper Publishers Association
Square Du Bastion 1a, 1050 Brussels
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Email: sophie.scrive@enpa.be

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

Brussels

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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.

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>)

Please indicate your preferred policy options, if any, and feel free to provide any other comment that you deem useful.

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

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?

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

COMMENTS:

The AVMSD as it is currently implemented in the different Member States is an important acquis for the audiovisual media landscape in the EU. It has provided over the years and still provides a balanced framework and legal certainty to stakeholders, allowing the development of the media market in Europe, whilst ensuring the application of graduated rules, depending on the type of audiovisual media which are provided (linear or non-linear).

The AVMSD has therefore allowed the audiovisual sector to grow and expand in the digital environment without obstacles and under clear rules. The consultation launched by the Commission opens a debate on the review of the AVMSD and seeks stakeholders' views on how to make Europe's audiovisual media landscape fit for purpose in the digital age.

Although we understand this assessment of the Directive as part of the REFIT exercise, any potential review or reopening of the Directive cannot be done without an analysis of whether there is a need for such a reopening from a market and consumer's perspective. We are not aware of any relevant market distortions under the current situation and believe that an impact assessment is absolutely necessary to evaluate if there is a real need or not to reopen such an important piece of legislation before the Commission decides to present any proposal in this direction. In any event the Commission has committed under the Better Regulation Agenda, to always conduct an impact assessment "for Commission initiatives that are likely to have significant economic, environmental or social impacts", such as the review of the AVMSD.

It is obvious that since the adoption of the Directive in 2007, the media landscape has changed and the traditional TV set is now only one of the means to watch audiovisual content. Connected TV, set-top boxes, but also PCs, laptops, tablets and smartphones are increasingly used. **However, media market trends also show the continued centrality of traditional platforms, in particular television. If consumers are increasingly using their smartphones to access media content and turning their attention to social networks, this has not significantly impacted audiences for linear TV, which still shows its enduring appeal, even for the younger generations.**¹¹

In this new environment, consumers receive information from a combination of TV, radio, print and online, where traditional news brands are still dominating. However, intermediaries such as search engines and social networks are imposing themselves as gateways to access to news content, therefore increasing their market dominance and pressure on traditional media players, in particular on the advertising market.

The press publishing sector in Europe has fully embraced this digital revolution by increasing investment in digital technologies to ensure access to professional journalistic content by all consumers at any time, in all formats and on all platforms. While we can observe a slow erosion of print readership and an increasing audience for digital press content, publishers business models in the digital environment still depend on print activities in terms of revenues: the increase in paid-for business models is still very low (around 10%, compared

¹¹ WIPO Standing Committee on Copyright and Related Rights "Current market and technology trends in the broadcasting sector", SCCR/30/5, June 2, 2015

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_5.pdf

Reuters Institute for the Study of Journalism, Digital News Report 2015,

<http://www.digitalnewsreport.org/>

to 90% for advertising); while for print the ratio is on average 50/50 for advertising and sales revenues). Pressure is also escalating on advertising revenues (print and digital) because of the increasing (and sometimes unfair) market dominance of global technological players, whether search engines, social networks and mobile operators.

From a press publishers' perspective and in light of the current market situation, we see a clear need to maintain the status quo and to ensure continuity in the AVMS Directive, in particular as regards the following key aspects:

- Ensuring that audiovisual media content, which is not the principal purpose of the service remain out of the scope of the Directive and its potential review. There must be no other extension of the scope, e.g. to still images (cf. Questions 3.2 (e)).
- Maintaining the quantitative advertising rules for television broadcasting in order to preserve media pluralism and consumer protection.
- Keeping the distinction between linear services and non-linear services with a 'granular' regulatory approach, as is currently the case under the Directive.
- Ensuring that certain content providers (e.g., public service broadcasters) are not granted privileged status with regard to their findability on hybrid platforms or other end-devices, which would thus affect the availability of access to other types of content on an equal and non-discriminatory basis.

In relation to these aforementioned important issues, we consider that the provisions on the services to which the Directive applies (television broadcasting and on-demand services) are not only relevant, effective and fair but also necessary to safeguard press freedom in the digital world. The fundamental principle of press freedom is also enshrined in Article 4(1) of the e-commerce Directive: "*the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.*" Moreover, the current balance needs to be maintained between the different types of media involved.

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:

There should be no extension of the AVMSD to editorial videos that are not the principal purpose of editorial media offers.

It is important to underline from the outset, that the press sector in Europe, in all its forms, cannot be regulated in the same way as broadcasting and other audiovisual services which are based on state licensing, prior authorisation and supervision of content by authorities, co-regulation and specific, strict commercial communications restrictions. It is therefore essential to preserve press freedom on digital platforms by keeping audiovisual content which is not the principal purpose of the service out of the scope of application of the AVMSD. Incidental videos (such as the supplementary videos which are increasingly being used) not being the principal purpose are regulated as any other editorial media and information society service. In particular, the explicit exclusion of electronic versions of newspapers and magazines as set out in the AVMS Directive's Recital (28) – is indispensable in order to ensure a free, independent and pluralistic press. It would be inappropriate for the use of audiovisual content such as a video clip which complements publishers' written content – i.e. which is not the principal purpose of their offering – to be subject to the same rules as broadcasting services, which are based on state licencing, prior

authorisation and notification requirements. These rules derive from a completely different way of consuming the content and the (former) spectrum scarcity and thus cannot be applied to free services in open networks such as the digital offers of publishers containing merely incidental audiovisual content.

Recital 28 stating that the scope of the Directive should not cover electronic versions of newspapers and magazines and the respective Article 1(a)(i) are compromises which the European legislator has made in order to regulate broadcasting on the one hand and to safeguard freedom of the press and freedom of expression on the other hand. Furthermore, Recital 22 also underlines that the definition of an audiovisual media service should exclude all services the principal purpose of which is not the provision of programme, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. This approach is reiterated in Article 1(a) (i).

These important provisions are currently being assessed by the Court of Justice of the EU (CJEU) in the New Media Online Case¹² after a reference for a preliminary ruling by the Austrian Supreme Administrative Court regarding the Directive's scope of application to video sections on newspaper publishers' websites. In this pending case, the Advocate General Szpunar has already delivered an important and positive opinion regarding the use of videos on newspaper websites.

The Advocate's interpretation should be considered compatible with the intention of the legislature which should not be interpreted broadly so as to include within the scope services which are not in direct competition with television broadcasting. A broad interpretation would include a large number of websites with audiovisual content, the basic purpose of which is not to offer audiovisual services within the meaning of the Directive.

Therefore, an attempt to excessively broaden regulation might render the Directive ineffective, even for the area in which it was in fact intended. Whether or not a service falls within the scope of the Directive should be determined by the nature of the service and not the architecture of the internet portal on which it is offered¹³.

The websites of newspapers and magazines which include audiovisual material should not be treated as audiovisual services, since the legislature's intention is to exclude from the scope of the Directive all kinds of internet information portals which are multimedia in nature, that is to say contain audiovisual content among other things. A different treatment of certain internet portals of an informative nature, merely because they are owned of magazines or newspapers, would result in unequal treatment.

Considering this approach, it is essential to maintain the exclusion of press services in the digital environment from the AVMSD and any future review in order to avoid affecting press freedom but also the effectiveness of the Directive.

1) The exclusion of other types of services from the scope

The question of whether other digital services providing audiovisual content should be regulated (including search engines, social networks and other intermediaries) has been opened as part of the debate on the review of the AVMSD. The AVMSD does not apply to these platforms and intermediaries, which are regulated primarily by the E-commerce Directive, which exempts them from liability for the content they transmit, store or host, under certain conditions.

¹² C-347/14 New Media Online OJ 2014

¹³ C-347/14 New Media Online OJ 2014

These services would fall within the scope of the current AVMSD, if they are identified as non-linear services according to the criteria established in the Directive. Recital 24 indicates that 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.

It is not the purpose of the Directive to include services which are not in direct competition with television broadcasting. Furthermore, the Digital Single Market Strategy foresees an assessment of the role of platforms and of online intermediaries to be launched end of 2015.

However, existing restrictions which apply to non-linear services, in particular as regards qualitative advertising, might be considered as creating a situation of unfair competition with those new digital platforms and intermediaries. In this context, the role of self-regulation as regards qualitative advertising on non-linear services could be considered, rather than further legislative restrictions, which may not create a level playing field, in particular in the advertising market.

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:

Intermediaries such as search engines and social networks are imposing themselves as gateways to access to news content, therefore increasing their market dominance and pressure on traditional media players, in particular on the advertising market.

However In order to decide whether certain rules should apply to them, there is a crucial need of identifying the nature and context of such rules. Recital 22 of the current AVMSD underlines that the definition of an audiovisual media service should exclude all services **the principal purpose of which is not the provision of a programme**, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. This approach is reiterated in Article 1(a) (i). Furthermore the AVMSD expressly indicates in Recital 28 that the scope of the Directive should not cover electronic versions of newspapers and magazines.

This exception is essential in order to preserve press freedom on digital platforms by keeping digital press and editorial videos out of the scope of application of the AVMSD, including

accompanying audiovisual services not being the principal purpose of the service. A potential inclusion of the digital press into the scope of the Directive would be a threat to press freedom and hamper the financial sustainability of the press, In addition, it would be against Article 4 of the “e-commerce Directive” which provides that: “*Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect*”¹⁴.

Amending the AVMSD to extend it to audiovisual content which is not “TV like” or to providers hosting user-generated content would not be acceptable as it would lead to a considerable broadening of the scope of the Directive and lose its primary objective. These other services which would not fall under the “TV like” criteria or would host user generated content could be further assessed under the public consultation on platforms.

A potential inclusion of the digital press in the scope of the AVMSD would result in government control of the media as according to Recitals 94, 95 and Article 30 of this Directive, already existing independent regulatory bodies shall be responsible for the implementation of the Member States’ obligations under the current Directive. There should not be any regulatory authority controlling press content including videos which are not the principal purpose of the offer. Such content should remain out of the competence of the audiovisual regulatory body. Including media pluralism as part of the competence of such bodies would be incompatible with Member States’ exclusive competence in this area, infringing the principle of subsidiarity as safeguarded by Article 5 of the Treaty on European Union. It would furthermore threaten press freedom and editorial independence.

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 Directive¹⁵.

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 geographical scope of the AVMSD depends on the jurisdiction rules of the Directive, which are based on the country of origin principle. According to this principle, providers only need to abide by the rules of the Member State where they are located rather than in multiple countries.

¹⁴ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178/1

¹⁵ 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)

The country of origin principle which is also included in the E-commerce Directive is essential for the media sector at large in Europe because it provides legal certainty for the national and local audiovisual media service providers in each Member State. The country of origin principle, as introduced by the "Television Without Frontiers" Directive in 1989, was successively made the core of the European regulation by the adoption of the AVMSD with a view to the creation of an internal market for audiovisual media services.

The implementation of this principle has granted audiovisual media services providers with the legal security they need to develop services that are now available across national borders. This principle has been questioned in particular for services originating from outside the EU and targeting EU audiences which would not respect the AVMS rules. However, for these non-EU services, other solutions should be envisaged rather than questioning the country of origin principle on which many EU audiovisual media service providers rely for their activities and which is essential for growth and innovation in the EU.

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:

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)*

PLEASE EXPLAIN YOUR CHOICE:

The status quo as regards the geographical scope/country of origin rules is the best option since it ensures legal certainty and allows for growth and innovation in the audiovisual media sector.

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 communications¹⁶, 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:

Quantitative advertising rules

In the interests of maintaining a vibrant and pluralistic media landscape, where the broadcast media and the press can co-exist successfully in the Digital Single Market as vehicles of information, policymakers must realise the importance of maintaining a sufficient advertising share for the press in order to respect media pluralism. The 12 minute per hour limitation for advertising for broadcast programmes was not only established as a consumer protection measure but also to allow a fair distribution of advertising between different media. It is therefore important that this limit remains in place. Such a limitation should not in any case allow more flexibility to broadcasters regarding the timing for advertising (i.e. prime time) as this would also affect media pluralism and consumer protection.

The European Commission also pointed out in its Green Paper *“Television without Frontiers – on the establishment of a common market mainly for broadcasting, especially by satellite and cable”* (COM(84) 300 final) with regard to the authorization of broadcast advertising: *“For the advertising industry, the main point is to make possible and simplify the planning of advertising*

¹⁶ "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.

and to make the use of advertising cheaper in supra-regional and cross-frontier broadcasts, [...] For the broadcasting organizations, the main point is to allow the free flow of their advertising broadcasts and to secure their financial basis, which is dependent (or partly dependent) on advertising revenue [...]. For the press organizations, the main point is to maintain one of the main pillars of their activities and livelihood, namely their income from advertising.” (Green Paper, p.268).

This positive effect of this policy for the media has also been recognised at EU level. The European Parliament already pointed out in 1984, with regard to rules for advertising, that such rules can also “[...] ensure that revenue is apportioned fairly between the public and private sectors and the various mass media, [...]” (European Parliament, Resolution on a policy commensurate with new trends in European television, OJ C 117/2002, 40.4.1984.

The need to maintain the quantitative advertising rules for linear services is also relevant from a consumer protection perspective. Different market studies and analysis¹ have proved that traditional/linear TV consumption remains prominent in the European market and television has remained similarly resilient in the advertising market, where it maintains the highest share of advertising revenue across all media. The impact and effect of traditional broadcasting (compared to digital/non-linear services) on consumers and on society at large remains high and therefore justifies the maintenance of quantitative advertising rules.

The current rules reflect the fact that consumers of on-demand media may respond more easily than recipients of linear programmes should they find advertising slots too long. Any discussions on whether such quantitative restrictions of advertising volumes in one medium are outdated must also take into account that quantitative limits for advertising in one medium can, from a media policy standpoint, also have a positive control and distribution function with regard to the advertising financing of other media.

Examples on increasing advertising shares for traditional TV in certain countries:

	1986	2015	2013/2014
France	Press 58.1% TV 19.1%	Press 22.80% TV 36.95%	Press - 8.7% TV + 1%
Germany	Press 50% TV 9%.	Press 26% TV 28%	Newspapers - 2.8% Magazines - 3.6% TV +4%
Italy	Press 41,5% TV 48,9%;	Press 20,7% TV 63,2%	Press -1.6% TV +1.1%
Spain	Press 25.4% TV 24.2%	Press 15.3% TV 49.9%	Newspapers - 0.9% Magazines - 0.4% TV + 1.6%

The examples mentioned in this chart illustrate the growth in the advertising market share in the traditional broadcasting sector and the decrease in the press sector. Such a trend started around 1986 with the liberation of the broadcasting sector and has increased significantly since then. The more recent figures from 2013, 2014 and 2015 underline that this trend has persisted despite the growth of advertising in the digital and mobile environment which has not cannibalised traditional TV advertising revenues.

Qualitative advertising rules

The application of qualitative advertising rules in the AVMSD to all audiovisual media services including non-linear services is questionable as it could prevent the development of on-demand services and innovation and could interfere with freedom of expression and media freedom. Any stricter qualitative rules for non-linear services would lead to less competitiveness of European on-demand media services in the advertising market.

Furthermore, it could create important disparities and unfair competition with non-EU new digital market players which have increased their dominance in the European digital advertising market on the various platforms. In the open internet it cannot be justified to apply these problematic political advertising bans for linear audio-visual content.

In this challenging context, it would be important to re-consider the limits to qualitative advertising restrictions which currently apply to non-linear, taking into account the important role of self-regulation. ENPA and EMMA believe that self-regulation contributes to growth and innovation, while providing a means for the industry to ensure that public interest values are met. Self-regulation has proven to be a flexible and effective instrument, as an alternative to regulation in the field of commercial communications.

Self-regulation is therefore the most appropriate tool to address rapidly changing advertising techniques and can be applied effectively to the new digital arena. The flexibility of self-regulation enables industry to adapt the scope and content of its codes of conduct quickly and easily, to take into account the development of new advertising practices and to respond best to consumers' and political demands.

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:

In the interests of maintaining a vibrant and pluralistic media landscape, where the broadcast media and the press can co-exist successfully in the Digital Single Market as vehicles of information, policymakers must realise the importance of maintaining a sufficient advertising share for the press in order to respect media pluralism.

The 12 minute per hour limitation for advertising for broadcast programmes was not only established as a consumer protection measure but also to allow a fair distribution of advertising between different media. It is therefore important that this limit remains in place. Any other measure such as rendering the rules on commercial communications more flexible, notably those setting quantitative limits on advertising and on the number of interruptions or tightening certain rules on advertising to protect vulnerable viewers would put in risk the financial sustainability of the printed and digital press since advertising remains a key source revenue. Existing regulatory approaches, which have proven to be effective, should be maintained and developed, rather than introducing legislative advertising restrictions.

While there is a need to maintain the quantitative advertising rules for linear services because broadcasting has still an important impact on consumers and society, it would be important to assess whether the qualitative rules on non-linear services and the inclusion of potential new restrictions would create an imbalance in the advertising market compared to other new digital players (search engines, social network, mobile operators, etc).

ENPA and EMMA believe that self-regulation contributes to growth and innovation, while providing a means for the industry to ensure that public interest values are met. Self-regulation has proven to be a flexible and effective instrument, as an alternative to regulation in the field of commercial communications. We therefore believe that it is the most appropriate tool to address rapidly changing advertising techniques and can be applied effectively to the new digital arena. The flexibility of self-regulation enables industry to adapt the scope and content of its codes of conduct quickly and easily, to take into account the development of new advertising practices and to respond best to consumers' and political demands.

This is why the qualitative rules should be abolished or not be expanded to non-linear services. As set out above, given that new restrictions applying to non-linear services could have a negative impact, e.g. by creating an imbalance in the advertising market, self-regulation could potentially play an essential role as opposed to further legislation.

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 AVMSD provides an appropriate level of protection when it comes to protection of minors, people with disabilities and prohibition of hate speech/discrimination. The Directive also allows Member States to adopt stricter rules and goes beyond this level of protection at national level. The existing distinction between linear and non-linear services does not justify the need to strengthen the rules for non-linear, as the latter involves a certain level of control, including parental control, regarding the possibility to access certain content, which is not possible for broadcasting.

If it is true that the younger generation is increasingly and actively using new digital services, including audiovisual content, it is still important to make a distinction between non-linear services and other services, which are not in the scope of the Directive.

Non-linear services are already subject to certain rules regarding the protection of minors, hate speech and discrimination, under the AVMSD. National audiovisual authorities also have the competency to deal with complaints addressed to them on this basis. Moreover, the courts decide on a case-by-case basis about the lawfulness of expressions and their dissemination. However extending these rules to other audiovisual services not covered by the Directive would go beyond the core objective of the Directive and could have a serious impact on freedom of expression.

In any event, media content and advertising should remain excluded from the application of the prohibition of discrimination as provided in Recital 13 of Directive 2004/113¹⁷: *“The prohibition of discrimination should apply to persons providing goods and services, which are available to the public and which are offered outside the area of private and family life and the transactions carried out in this context. It should not apply to the content of media or advertising nor to public or private education”*.

Regarding the services which are not covered by the AVMSD, the E-commerce Directive foresees the possibility for Member States to apply measures related to public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons.

There is no evidence of the need for further legislation beyond the current framework to protect users / viewers. Under the current Communication on Better Regulation, the Commission is committed to **always consider alternative policy instruments** when designing policy options (while legislative action has to be supported by an in-depth impact assessment). The Directive itself encourages the use of self- and co-regulation systems, recognising that they can deliver “a high level of consumer protection”.¹⁸ It is therefore important that the Commission takes all these various factors into account before taking any further action in this field.

In the press publishing sector, self-regulation is playing an essential role to ensure that independent journalism is still possible with the respect of professional ethical rules and codes of conduct. In the framework of the ‘Coalition to make the Internet a better place for

¹⁷ Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 180.

¹⁸ Para 44 of the preamble of the AVMSD

kids', leading technology and media companies are developing voluntary commitments to make it safer for children to surf online.

Furthermore, the inclusion of media literacy programmes in schools (newspapers in education) aims at ensuring that children can also have a better understanding of news and information in both the analogue and digital environments. The development of educational programmes aimed at explaining to the younger generations the use and potential danger of social networks and search engines, including audiovisual content, is also important to consider in this debate.

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:

This distinction is important because the level of control, including parental control, as regards the access to potentially harmful content is still very different between traditional TV and on-demand audiovisual services. As set out above, we do not see any concrete evidence of the need for more legislation in this regard. Self-regulation regarding non-linear services is one possible non-legislative solution to ensure appropriate protection for minors, while avoiding further legal restrictions which could create a competitive disadvantage compared to other services which are not covered by the Directive.

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

YES – NO – NO OPINION

COMMENTS: The existing level of child protection provided in the AVMS Directive is sufficiently effective as regards harmful content. The distinction between linear and non-linear – and the current “graduated regulation’ approach in this regard - should therefore be maintained, whilst also considering the important role of self-regulation and media literacy as efficient alternatives to stricter legislative measures.

What are the costs related to implementing such requirements?

Costs:

COMMENTS:

What are the benefits related to implementing such requirements?

Benefits:

COMMENTS:

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

YES – NO (If yes, please explain below)

COMMENTS:

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:

We have stated before that it is of utmost importance not to extend the scope of the AVMS Directive. Videos which are not the main purpose of the service fall under the E-Commerce Directive and therefore – quite rightly - state licensing requirements and other restrictive measures do not apply. Extending the AVMSD beyond television (or ‘television-like’) programmes to cover other online content and non-linear services such as the digital press (the provision of which is regulated by the e-Commerce Directive), would be contrary to press freedom and the need to preserve editorial independence of press content and services.

We are therefore very concerned to see the proposal to extend the scope to “other online content and even non-audiovisual content such as still images. Such an extension would cover basically any information society service we know today and would lead to the end of the freedom of the press and freedom of expression (not only) in a digitised world. We therefore strongly urge you to disregard from any such extensions of the scope.

Maintaining the current status quo or imposing on television broadcasting services the same level of protection as on-demand services (levelling down) would be the best option, insofar as it reflects the actual situation of the audiovisual media market, recognising on the one hand the important impact of traditional “linear” broadcasting as well as the specificities of on-demand/non-linear services, which in any case should not be further restricted. Changing the current legal framework by introducing further harmonisation or by levelling up the protection is unnecessary and would pose a risk to the press sector, as previously explained.

There should be no legislative changes without solid evidence of the need for legislative intervention, supported by an in-depth impact assessment. It is also important that non-legislative alternatives are given proper consideration, in line with better regulation principles. Finally, extending the scope of the AVMSD to other online content, including non-audiovisual content, for instance still images would be unacceptable as it would result to an expansion of the scope to include any press product.

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 works¹⁹ and independent productions²⁰. 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 notification requirements 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:

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:

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

¹⁹ For European works: a majority proportion of broadcasters' transmission time.

²⁰ For European works created by producers who are independent of broadcasters: 10% of broadcasters' transmission time.

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:

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 Productions²¹ (instead of "an adequate proportion"). For on-demand services, further harmonisation could be envisaged: by introducing one compulsory method (among e.g. the

²¹ Works transmitted within 5 years of their production.

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:

The AVMSD has proven to be an efficient tool with regard to the promotion of European works, the press however remains as one of the most effective ways for the promotion of cultural diversity. To this end, it is essential that the scope of this Directive does not cover printed and digital press as the best promotion of European works is flourishing in the framework of free media.

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 application of the country of origin principle is essential for ensuring legal certainty, growth and innovation for the European audiovisual media market. The AVMSD already foresees the possibility for Member States to intervene in certain cases, including e.g., where non-EU audiovisual media services do not respect the Directive. Such situations can be solved by other means without putting into question the country of origin principle.

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

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

COMMENTS

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:

For an audiovisual media service provider based in the EU, it is most likely that the country of origin principle is the best solution in terms of costs/benefits since the providers can more easily respect and rely on the law of the Member State in which they are located and which is based on their language, culture and other essential national specificities in the media sector.

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)*

PLEASE EXPLAIN YOUR CHOICE:

Maintaining the status quo by keeping the country of origin is the best way to ensure a competitive digital single market for all European audiovisual media services. It allows innovation, legal certainty and respects cultural diversity and media pluralism.

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:

The AVMSD does not explicitly require Member States to set up an independent regulatory body, or define the terms of this independence. However, Recital 94 and Article 30 of the same Directive presume that the regulatory entities responsible for implementing its provisions are “independent regulatory bodies”. Furthermore, Article 30 AVMSD, construed in the light of recital 94, highlights the long-term policy objective of creating incentives for Member States to establish independent regulatory bodies to make use of the advantages of those types of regulators. Article 30 of the AVMSD already provides important legal certainty for the media sector in the different Member States.

Revising Article 30 would actually increase the risk of further government control of the media, including the press (although newspapers and magazines are explicitly excluded from the scope of the AVMSD), rather than addressing the issue of the independence of audiovisual regulatory authorities. Furthermore, including media pluralism as part of the competence of the audiovisual regulatory authority in a potential review of Article 30 would not be compatible with Member States’ exclusive competence in this area and would directly threaten press freedom and editorial independence, as well as self-regulation.

The 2011 INDIREG study for the European Commission (on “Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive”) identifies key characteristics of independent regulatory bodies in the light of the objectives of the AVMSD. On this issue, it has shown that while the AVMSD does not contain a strict formal obligation for the Member States to create an independent regulatory body if one does not already exist, this does not mean that there is no legal effect at all.

Firstly, Article 30 of the AVMSD explicitly requires the Member States to have their independent regulatory bodies play a role in the obligation to collaborate with each other and with the European Commission. Furthermore, the basic requirement of independence

of AVMS-regulatory bodies could find a broader legal basis in Article 10 ECHR which safeguards freedom of expression and Article 288 para. 3 TFEU, which reads that “a Directive [...] shall leave to the national authorities the choice of form and methods” especially when read in connection with the objectives of the AVMSD.

Based on these provisions, INDIREG underlines that Member States are obliged to put in place a regulatory framework that is structurally capable of implementing the aims of the AVMSD in an impartial manner. Impartiality in this notion has to be effective against influences coming from the direction of the government or other political actors, as well as against influences coming from the media sector. To ensure this, a minimum requirement of independence is needed.

A non-legislative approach as suggested in the Commission’s consultation on this issue could be a constructive way forward, which “would imply the reinforcement of the Commission’s existing instruments by strengthening the monitoring activities to verify on the ground in each Member State the quality of regulatory independence or through formalisation of the cooperation between audiovisual regulatory bodies.”

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

YES – NO (If yes, please explain below)

COMMENTS:

Some difficulties have been identified in certain Member States, especially in Central and Eastern Europe. However, those do not justify a reopening of Article 30 but rather a targeted approach of the Commission in those countries and further coordination among the national audiovisual regulatory authorities in ERGA (European Regulatory Group for Audiovisual Media Services).

A potential inclusion of the digital press in the scope of the AVMSD would result in government control of the media as according to Recitals 94, 95 and Article 30 of this Directive, already existing independent regulatory bodies shall be responsible for the implementation of the Member States’ obligations under the current Directive. There should not be any regulatory authority controlling press content including videos which are not the principal purpose of the offer. Such content should remain out of the competence of the audiovisual regulatory body. Including media pluralism as part of the competence of such bodies would be incompatible with Member States’ exclusive competence in this area. It would furthermore threaten press freedom and editorial independence.

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:

Although questions concerning the independence of audiovisual regulatory authorities have been raised in relation to some Member States, in particular in Eastern Europe (Hungary, Romania, Bulgaria), these specific national issues cannot result in a revision of Article 30 which might also endanger press freedom, editorial independence and self-regulation. Other non-legislative approaches should rather be explored.

A potential inclusion of the digital press in the scope of the AVMSD would result in government control of the media as according to Recitals 94, 95 and Article 30 of this Directive, already existing independent regulatory bodies shall be responsible for the implementation of the Member States' obligations under the current Directive. There should not be any regulatory authority controlling press content including videos which are not the principal purpose of the offer. Such content should remain out of the competence of the audiovisual regulatory body.

Including media pluralism as part of the competence of such bodies would be incompatible with Member States' exclusive competence in this area, infringing the principle of subsidiarity as safeguarded by Article 5 of the Treaty on European Union. It would furthermore threaten press freedom and editorial independence

Must Carry/Findability

In the context of the regulatory framework applicable to the telecoms operators, under the Universal Service Directive²², 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 Directive²³, Member States can also set rules on the inclusion of radio and TV services in

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

²³ 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

electronic programme guides (EPGs)²⁴ 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:

“Must-carry” rules require cable companies or telecom operators to carry specified radio and TV broadcast channels and services where a significant number of consumers use them as their principal means to receive radio or TV broadcasts.

The Universal Service Directive is part of the EU's telecoms rules and requires Member States to ensure a minimum level of availability and affordability of basic services, and guarantees a set of basic rights for the benefit of consumers. Under this Directive, EU countries may set reasonable "must-carry" rules for public policy reasons which must be clearly defined (for example media pluralism) if the transmission networks concerned are the principal source of radio or TV broadcasts for a significant number of customers. Such "must-carry" obligations must be proportionate and transparent.

If the need for “must carry” rules came in a context of a limited capacity of networks, it is questionable whether such principles should be transposed in the digital environment where open networks prevail rather than spectrum scarcity. In this context, the issue of accessibility of public interest information or content is a much broader concept than the “must carry” rules and raises many different questions regarding equal access to various types of content but also regarding net neutrality and search neutrality.

The possibility to grant certain content providers (e.g. public service broadcasters) privileged status with regard to their findability on these new hybrid platforms is against the principle of net neutrality, as it would affect the availability of access to other types of content on an equal and non-discriminatory basis, and should therefore be rejected. **It would be very problematic to include this issue in any review of the AVMSD** since it would also touch upon media pluralism and freedom of expression.

It is also important that electronic versions of TV guides continue to be excluded from the scope of the Directive and remain free. It could affect the exclusive competence of Member States to deal with this issue, which depends on the specificity of their media market. The notion of “public interest content” would also be very difficult to define at European level because of the different national approaches on cultural diversity and media pluralism.

²⁴ 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.

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: This question cannot be limited to the notion of public interest content for the reason we have explained above. It relates to the much broader issues of search neutrality and access to various types of content on equal and non-discriminatory basis on all platforms.

In the on-going Google competition case at EU level, publishers from Germany and Spain, supported by the vast majority of publishers from across Europe, have expressed the view that it is time for the Commission, as a highly respected competition authority, to enforce EU Competition rules effectively. Only a clear ban on Google's preferential treatment of its own services and content within its quasi search monopoly can put an end to the anti-competitive conduct and would restore competition, innovation and consumer choice in the digital market.

From a broader perspective, we agree with the Commission's commitment to fair competition and a level playing field in online activities. It is important to acknowledge that the DSM Strategy has identified problematic areas regarding platforms controlling access to markets and remuneration, using strong bargaining power and promoting their own services to the disadvantage of competitors. The Commission's commitment to launch a comprehensive assessment of the role of platforms is therefore the appropriate context in which the question of access to content can be addressed from a broader perspective.

Furthermore, a strong EU principle based approach on net neutrality would still be necessary in particular in the future revision of EU telecom rules in 2016. Although the European Parliament has pushed to enshrine this principle in the final agreement on the EU regulation on the single market for telecoms, there are still open questions as regards the measures allowing the provision of specialised services which might create fast lanes and preferential treatment for major media players which can afford to pay for those services.

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 question of access to public interest content should not be part of the review of AVMSD since it relates to a broader question related to the role of platforms, intermediaries and telecom operators.

This issue might therefore be considered in the assessment foreseen before the end of 2015 or as part of the main review of the telecoms package in 2016. In any case, it would not be appropriate to limit it to "public interest content" because it is too narrow and, moreover, this would conflict with Member States' exclusive competence regarding culture, media pluralism and freedom of expression.

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

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

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:

In order to ensure the public's right to information on events of major importance, Member States may draw up a list of events that they deem to be of major importance for their citizens. The list of events and the measures must be approved by the Commission.

In 2011, FIFA and UEFA introduced a complaint before the General Court against the decisions taken by the Commission with respect to the Belgian and UK lists of major events. This concerned the inclusion of the entire final tournament of the FIFA World Cup and the UEFA European Championship in these lists.

The EU's General Court has recognised the possibility of restricting fundamental freedoms for overriding reasons of public interest, which in this case is the public's right to information as an element of freedom of expression and information. The General Court, for example, recognised the validity of the Commission's decision on the Belgian and UK lists of events of major importance regarding the inclusion of the entire tournament of the FIFA World Cup and UEFA European Championship. This ruling confirms the importance of keeping this approach on the basis of Article 14 of the AVMSD. This approach ensures that freedom of expression and public's right to be informed are fully respected.

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

YES – NO (If yes, please explain below)

COMMENTS

There is an increasing trend as regards sport events' organisers, but also as regards events of a different nature which have relevance for society, to more and more restrict access to the press and journalists, and to report on those events.

The origin of these restrictions in some cases lies in the exclusivity of the agreements between the sport federations and the broadcasters, or in the need for sports organisations to find new revenue sources, which results in them looking for other means (such as via copyright law) to protect these events and monetise journalistic reporting via video, photos or written content.

Preferred policy option:

a) *Maintaining the status quo*

b) Other options (please describe).

PLEASE EXPLAIN YOUR CHOICE

The preservation of the existing approach in Article 14 of the AVMSD supported by the jurisprudence of the CJEU aims at preserving the public's right to be informed regarding events of major importance for society.

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:

This provision concerning short extracts was introduced in the AVMSD in 2007 to be used in news programmes, whereby any broadcaster established in the European Union has access to short extracts of events of high interest to the public broadcast on an exclusive basis. These short extracts must be used solely for general news programmes and may be used in on-demand audiovisual media services only if the same programme is offered on a deferred basis by the same media provider.

The provisions on short news reporting under the AVMSD, while not applicable to the newspaper and magazine publishers are important insofar as reporters from all media need access to such reports, and this is especially relevant for newspapers and magazines which are not implicated in exclusive rights deals in the first place

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

Any change weakening the current rules would have a negative impact on the possibilities for the media in general to provide the public with information.

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

There is no need to change the AVMSD provisions as regards the right of reply. It should also be noted that Member States' press laws also provide for this right to reply as regards the press, with the EU having no competence to legislate. (The AVMSD clarifies that "this Directive should not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media").

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.

ⁱ See footnote 11