GREEN PAPER - PREPARING FOR A FULLY CONVERGED AUDIOVISUAL WORLD: GROWTH, CREATION AND VALUES

CHILI’S SUBMISSION

Chili S.p.A., an independent EU based provider of VOD services appreciates the possibility to contribute to the Commission consultation on “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”.

As underlined by the Commission, the convergence of media services, characterised by a progressive merger of traditional broadcast services and the Internet, has completely changed the audiovisual media landscape, especially the way in which these services are consumed and delivered. One of the most relevant changes is the recent development of OTT platforms for the distribution of audiovisual contents. OTT platforms allow delivery video and audio, via Internet, to any users connected devices (such as TV, Tablet, PC and smartphones), anywhere and anytime. Unlike IPTV, which provides services only to the customers of the vertically integrated broadband operator, OTT platforms are “open access systems” providing online contents and applications to any user, through non-proprietary devices and access platforms. They are, thus, characterised by “offer neutrality” with respect to the devices and broadband services used to access the audiovisual contents.

Chili S.p.A, after the spin-off from Fastweb in June 2012, became one of the few (certainly the largest) independent “VOD-only” European OTT platform to offer IP-based delivery of content. Most of the EU VOD provider are, in fact, controlled by traditional broadcasters and operated as a side business of more established, traditional TV businesses (free-to air or linear pay TV services). In many cases, the main objective of the operators running this kind of business is to preserve as long as possible the revenues stream by maintaining their Customer Base with the proposal of new options rather than fully developing new services such as VOD.

Operators like Chili instead, who have VOD as their core business, are key to the implementation of a fully converged world: their technical and commercial efforts are beneficial to the creation of the most favorable market environment for the growth of the online content distribution.

As known, VOD services involve developing and making available a library of premium content (movies, documentaries, series etc.) so that users may select and view what they want when they want it. It may involve rental of the content (content is made available to the users for a limited time) or the so-called “electronic sell-through” (“EST”), in which the content is made permanently available to the users that have made the transaction, either after a download of the content itself or through different mechanisms such as the digital locker in which content is stored in the cloud but accessible by the users that have acquired it.

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1 “I Servizi e le piattaforme applicative per le comunicazioni interpersonali e i media digitali”, Programma di ricerca Screen, Servizi e contenuti per le reti di nuova generazione, page 89.

“Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services”- Final Study Report, 13.12.2011, Attentional Ltd, page 78.
from a multitude of devices. Chili offers a library of 2400 movie titles - which by the end of the year are estimated to increase to 3000 movie titles- available for rental and electronic sell through, supplied by the major national and international production and distribution companies. The prices are between a range of 0,95 / 5,95 euros per movie for rental and 6,95 to 19,95 euros for EST.
While we agree with the Commission that the demand of VOD services will increase consistently by 2016 and that the majority of consumer internet traffic in volume is expected to be represented by video\(^2\), we believe there are still relevant barriers that prevent a full development of online content distribution.

1) **What are the factors that enable US companies to establish a successful presence in the fragmented EU market despite language and cultural barriers, while EU companies struggle? What are the factors hindering EU companies?**

Based on the experience of Chili in the past years, one of the main factors that enable US companies to establish a successful presence in the EU market compared to EU companies, despite language and cultural barriers, is their capability to leverage on their large domestic economies of scale and their established relationship with right-holders which in turn grants them advantageous commercial conditions in the acquisition of content.

Thanks to these advantages, US based VOD operators are able to establish European operations with very good catalogues of movie titles and with a flexibility (ensured by their relationship with the Studios and other right-holders) allowing them effective commercial strategies.

EU VOD providers instead still face several restrictions limiting their capability to build a catalogue and to adapt their commercial strategies to the demand and the market. This in turns limits the capability of EU-based VOD operators to expand internationally and to operate on larger scale.

The restrictions we refer to are: i) the commercial practices put in place by traditional rights-holders (studios and broadcasters) in relation to licensing of content rights, ii) the existence of disadvantageous tax regimes and iii) the denial of mobile operators to supply OTT platforms with the possibility to offer Mobile Payment services to their users.

The commercial practices currently put in place by rights-holders in licensing content rights limit the quantity of content available for online distribution and/or impose commercial conditions (price, platform exploitation, timing, etc…) which restrain the possibility for the VOD platform to distribute digital content in competitive and innovative ways.

We refer mainly to the extensive use of exclusive deals and holdback clauses.

This has very much to do with the fact that online rights are still managed in many cases in bundle with other forms of distributions (linear broadcasting mainly). Traditional broadcasters, thanks to their established relationship with the right-holders, manage to acquire exclusivity over online content

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The Commission underlines that consumer spending on digital video (movies and TV series delivered over the Internet) reached 364.4 million in 2011 (+41.8% vs. 2010) in Europe within a market of physical and digital videos amounting 9493.8 million euro (-4.6% vs. 2010). Furthermore, the unmet demand for VOD services from pay-TV operators from other Members States is estimated to be in the range of 760 million euro to 1,610 million annually.
distribution (in particular for current movies), therefore making the same content unavailable to independent VOD providers.

In countries where traditional broadcasters have a very high bargaining power, the number of current movies potentially made unavailable for VOD is very high, as traditional broadcasters require exclusive deals also for internet distribution when negotiating rights for other windows or platforms. Those titles then are not always exploited fully for the VOD market, but very often made available in a limited way so to strengthen the traditional business of the broadcaster (i.e. as a catch-up TV proposition or as a library available only to the subscribers to pay TV services).

As a result, despite a very strong demand for VOD, a specific and full online offer in many countries is not developing.

This situation determines a strong disadvantage of VOD platforms compared to more traditional and offline businesses. Whereas in fact rights for physical Home video have never been dealt on “exclusive” basis, VOD is subject to this kind of deals, mainly because it has been perceived by traditional broadcasters as a threat of different competitors emerging. The acquisition of exclusive rights for internet distribution in bundle with traditional broadcasting rights is therefore conceived as a defensive measure specifically aimed at slowing down the development of these platforms. This reduces enormously the capability of VOD players to build attractive legal offers, as current movies are possibly the most relevant driver in the VOD business.

The existence of different tax regimes in Europe is another element that provides an advantage to US VOD platform establishing European operations. Such a difference has, in fact, determined the so-called “fiscal shopping” by big US players, determining unfair competition and market distortions. US VOD players can, in fact, in developing their EU operation, establish their headquarters in the countries with the most favorable tax regimes (typically Ireland or Luxembourg). Establishing their headquarters in countries with low taxes and using transfer-pricing methods, companies such as I-Tunes and Acetrax can subject also the revenues made in other EU countries to the lower tax regime. As a result, these companies apply a VAT to their overall revenues in the range of 14 to 16%, whereas an Italian VOD provider is subject to a VAT of 22%. This situation gives these players a considerable competitive advantage, allowing them to adopt aggressive commercial policies and fostering a price competition unbearable for EU OTT operators.

A similar competitive distortion is created by the discrepancy between administrative burdens required by different countries in the management of VOD services. As a result, US operators can adopt a less complex client’s registration system – which, for instance, does not require the acquisition of the client’s fiscal code – compared to the one that the players established in Italy are required to use, thus, accelerating the activation of the service and allowing more flexibility in marketing initiatives.

Finally, the capability to use easy and effective payment and micropayment services is critical for the success of VOD operations. Mobile payment services, for instance, enable the use of mobile phone to buy a digital product or service, without the need to own and use a credit card or bank account. Basically, the amount spent is charged directly on the prepaid phone credit or, in case of subscription, on the phone account of the clients.

These payment services are currently used to buy different services, such as newspapers or games, but are not used to buy audiovisual contents, due to the fact that mobile operators require from VOD platforms a remuneration equal to 30-35% of the price of the content purchased. Such a high remuneration rates is not
sustainable, as it is much higher than the margin earned by the VOD player from the sale/rent of the movie. It is clear that such a behavior hides an unavailability of the mobile operators to negotiate with VOD providers.

The behavior of the mobile operators may be due to the existence of an alleged trade-off between the purchase of entertainment services and the use of SMS services, especially for prepaid card consumers. Mobile operators would therefore be interested in limiting the capability of their customers to use their phone credit for costly entertainment services, since SMS involve much higher margins for them.

The above obstacles are frustrating the emergence of VOD services and the possibility for innovative and competitive players like Chili to develop online content offers.

Hence, we urge the Commission to take into consideration the need for measures that create a level-playing field between EU and US companies and to allow EU VOD operators to develop their business at national level and then grow internationally.

2) What are the factors affecting the availability of premium content? Are there currently practices relating to premium content at wholesale level which affect market access and sustainable business operations? Is there a need for regulatory intervention beyond the application of existing competition rules?

As correctly noted by the Commission, “success may depend on the ability to consistently offer premium content to viewers and that exclusive deals between platform operators and content providers may restrict the possibilities of third parties to provide such content to their audience and, thus, constitute barriers to entry for new players”\(^3\). Based on Chili’s experience, besides exclusivity (which we already discussed in the answer to the previous question), the two main contractual practices that affect the availability of premium content and sustainable business operations of the VOD platforms are: (i) the windowing system, whereby specific content (movies, TV, drama, series) is made available for distribution on different platforms at specific times and (ii) the fixing of selling prices of cinematographic works by right-holders.

As a result of private contractual agreements between the producer (in its quality of licensor of the economic exploitation rights of the content) and the distributor or sale agent, the windowing system is still widely adopted. According to it, in Italy, the first exploitation of movies is generally made available through release in movie theatres, then after three months through home video and VOD.

This mechanism is obsolete and seriously hampering the circulation of digital works as it discriminates amongst platforms, reduces to a great extent the possibility for new media platforms to achieve the necessary earnings and the necessary economies of scale and constitutes another source of opportunity for the development of grey market and piracy, jeopardizing both the development of a thriving European market for online content and destroying value for the producers and distributors.

In fact, the consumers that are familiar with new technologies and informed in real time of the availability of a new movie find alternative ways such as illegal download to access it. According to various studies\(^4\), the illegal consumption of movies is particularly high in the first period of exploitation of cinematographic works.

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\(^3\) Green paper, European Commission, page 6;

Windowing is not only affecting the timing of the distribution but is also limiting the distribution of cinematographic works as such. Let’s consider for instance independent movies that do not get distributed in the theatres and that still cannot be distributed through VOD before the theatrical window has expired.

As mentioned above the second critical issue is the capability of right-holders to de facto fix the selling price of the movies through the practice of the “minimum prices”. The price paid by the VOD platform to the right-holders is in fact based on a minimum retail price agreed upon the parties that is multiplied for the number of actual transactions. This means that the VOD platform cannot set the retail price below such “minimum agreed price”.

Besides hampering the capability of the platform to adapt to market trends and to willingness to pay of the end-users, this practice is a barrier to the development of VOD as such. The minimum price for the online distribution of movies is, in most cases, identical to the one set for their commercialisation in physical format (DVD). This determines that the final retail price for the online version is the same as the physical version, despite the fact that in many cases the DVD version has enhanced features (more language tracks, additional content etc.) which are not made available to VOD platforms. Therefore, despite the online distribution costs are much lower than the physical one, the end-users are not only deprived of the advantages connected to such cost minimisation, but penalised, as they are forced to pay the same price for a less complete version of the good/service. Indeed, fixing the same prices for the digital and physical good is in contrast with the expectations of consumers using online services who have a different willingness to spend compared to buyers of DVDs. In such a context, the impossibility to implement policies of price discrimination for the online distribution has clear negative effects on the market trend and discourages the development of dematerialised goods.

4) Do the current AVMSD requirements provide the best way to promote the creation, distribution, availability and market appeal of European works?

The aim of the AVSMD directive (hereinafter “the Directive”) is to ensure the protection of European works by preserving their presence in the distribution of works by audiovisual services. To this purpose, the Directive has set a number of obligations on broadcasters and on media service providers for their promotion and distribution.

Articles 16 and 17 of the Directive respectively require broadcasters (hereinafter “linear services”) to reserve a majority proportion of their transmission time for European works and a minimum proportion (at least 10%) of their transmission time for European works created by independent producers, excluding both the time appointed to news, sports events, games, advertising, teletext services and teleshopping. Alternatively, Member States may require broadcasters to allocate at least 10% of their programming budget to independent productions.

Article 13 of the Directive provides that on-demand audiovisual media services (hereinafter “non-linear services”) should promote the production of and access to European works. Such promotion could be carried out, amongst others, through financial contributions to the production and rights acquisition of European works or by ensuring a share and/or prominence of European works in the catalogue of programs.
Although the above articles achieved the aim of increasing the presence of European works in linear services\(^5\), they do not seem to be the best way to promote the creation, distribution and market appeal of the European works, especially referred to VOD distribution.

Two trends appear to be specifically relevant:

(1) as reported by the European Commission in the Green paper, although the “Members States are broadly fulfilling the current legal requirements set by the articles above, their efforts are concentrating on domestic productions”\(^6\). As a matter of fact, the European works featured in linear and non-linear services to comply with the Directive are mostly national works, produced and shown in the same Member state. Non-domestic European works only make up 8.1% of broadcasting hours in the EU\(^7\) and the proportion of independent works has decreased consistently in the recent years\(^8\). Hence, there is very limited circulation or joint development of European works and this hinders European productions to take full advantage of the single European audiovisual market, with its ability to raise higher level of funding to invest in quality creation and to produce strong European content for internal circulation and for export;

(2) despite the legal protection provided by the Directive which allowed the increase of European transmission hours in linear services and a high presence of European works in non-linear services, viewing hours of European works have decreased\(^9\).

Consumption of European content has not increased in line with availability. The reasons for this are, on one hand, the dynamism of American production and the success of US drama and comedy and, on the other

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The report states that for linear services “the average transmission time dedicated to European works by all reported channels in the EU-27 was 63.8% in 2009 and 64.3% of 2010” and for non-linear services, that “the proportion of European works in terms of transmission hours (64.5%) were close to those provided for catalogues as a whole (65.1%)”.


\(^8\) Green paper “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”. European Commission, page 8.

“Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services”- Final Study Report, 13.12.2011, Attentional Ltd, page 144.


“Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services”- Final Study Report, 13.12.2011, Attentional Ltd, page 133.

The Study reports that “the proportion of European works and of recent independent European works increased between 2007 and 2010 (from 63.2% to 66.4% and from 81.8% to 85.2% respectively)” whereas “the proportion of independent European works decreased between 2007 and 2010 (from 31.1% to 29.4%(...)”.

\(^9\) Although aggregate levels are stable, a number of major European broadcasters have favored European productions (mainly domestic) and reduced their commissions to independent producers.


The study reports, “European works had increased their proportion of qualifying hours – 66.3%, up from 62.4% in 2007 – but viewer hours declined. In other words, while the correlation remains strong, the strength of the preference for European works has declined.”
hand, the growing preference of young adults for US content compared to European one.\(^{10}\) This is particularly evident in the consumption of video in non-linear services. Despite the fact that Chili has a wide selection of European movies in its library (45%), much higher than what foreseen by the Directive, the most watched movies are by large the extra-European ones (80%) compared to European ones (20%). Moreover, the 5 most viewed movies of the Chili library are extra-European.

On the basis of the above considerations, it has to be concluded that the viewing of European works is not driven by the massive presence in the libraries (or transmission hours) but more and more based on the quality of European works and the possibility to access this content with reasonable ease.\(^{11}\)

Hence, the measures set by the Directive seem to be no longer the most appropriate to ensure the safeguard of European works and cultural diversity. Chili believes that such relevant policy objectives may be achieved more effectively by placing emphasis on the **promotion** rather than on the **protection** of European works. The promotion of European works could be achieved by creating mechanisms allowing a broader online distribution of these works such as, for instance:

- subjecting the financing mechanisms for European works to a wide non-linear distribution: i.e. financed titles should be forced to negotiate distribution on VOD platforms in the same day/date as the theatrical release;
- implementing mechanisms that force producers of European works to release their title through VOD if they do not manage to arrange theatrical distribution within a specific timeframe.

10) **Given convergence between media, is there evidence of market distortion caused by the regulatory differentiation between linear and non-linear services? If yes, what would be the best way to tackle these distortions while protecting the values underpinning the EU regulatory framework for audiovisual media services?**

On the basis of the specific nature of on-demand services, the AVMS Directive has made a distinction between linear and non-linear services and placed lighter obligations on the last ones. As provided by the Directive\(^ {12}\) and highlighted by the Commission in this paper, such difference is based on “the much higher...
degree of consumer control in on-demand services, justifying less stringent regulation in certain areas”\(^\text{13}\). However, we understand that the Commission believes this difference is becoming to some extent undefined\(^\text{14}\), that “if, in a converging world, linear and non-linear provision of similar content were to be treated as being in competition, then the current differences in regimes could clearly distort that relationship”\(^\text{15}\) and that it may be necessary to tackle this distortion by aligning the regulation of the linear and non-linear services.

Nevertheless, we would like to point out that the difference between the degree of consumer control on linear and non-linear is still very clear. The fact that non-linear and VOD services are accessed through the same device (TV set) as linear TV doesn’t change the fact that it is the consumer, in VOD platforms to choose the content he or she wants to watch, rather than the broadcaster. In any case, it should also be remarked how currently linear services enjoy a stronger competitive position compared to non-linear services and due to the specific features of the European market, they will be maintaining such an advantage if specific measures are not taken to allow a healthy development of the VOD services. Therefore, given that, such a regulatory alignment would give rise to a further advantage for the traditional broadcasters unless it is coupled with measures to tackle the issues outlined above, and specifically aimed at removing the exclusive/holdback clauses and the windowing system.
1. General considerations

Even five years ago, high-definition, high-quality video content was not being delivered over the Internet. There is now a flurry of providers of Internet-delivered video programming which enable consumers to access a broad array of video content at various price points whenever and on whatever broadband Internet-enabled device they want. We believe that this is at least partly thanks to the light regulatory touch reflected in the Audiovisual Media Services framework, which has seen the online market and innovation flourish, while traditional TV viewing remains robust and much-loved by consumers.

The future will bring even more change. A few years from now, the number and variety of online video and TV offerings will simply dwarf today’s. The marketplace will feature new forms of content, access and payment choices for the consumers. Video programming will increasingly become a two-way interactive and multi-device experience. Soon consumers will be able to watch all the content they want and pay for it on any and all of their devices. We are already seeing production companies create content with mobile screens specifically in mind. We also see exciting potential for local content and local TV to utilize these new platforms to develop and enhance the way they can reach and engage with audiences everywhere.

A starting point is to recognize that we are still at an early stage in the development of connected TV and platforms, and that these platforms are not a substitute for traditional video offerings but, rather, a complement to traditional broadcast, cable, and satellite services. The current legislative framework has served its facilitating role well. The speed of technology introduction and service innovation shows no sign of diminishing. As convergence takes hold and consumer patterns continue to evolve, regulation should not be extended into these developing markets unless the need for extending regulation can be clearly identified and the new regulations are adapted to address a specifically identified problem while minimising their negative impact.

In fact, we should approach the issue of online video ‘tabula rasa’ rather than through the lens of a legacy regulatory frameworks. Broadcasting rules have been built around industry and service structures of the 1980s-1990s and sometimes earlier. While some of these rules may still be relevant for unidirectional, traditional TV services using commercially valuable spectrum, media consumption nowadays increasingly consists of an application coexisting with on demand services and being rendered on an ever increasing variety of form factors for personal, family and group consumption. Online services, by their innovative and often international nature in particular, and the level of control and interaction they give users, deserve a fresh approach. Extending legacy regulation would be inappropriate for many of the new services that have been made possible by convergence, and would be practically, economically and politically difficult to enforce given the global nature of IP networks.

As we move forward, we should start a fresh policy debate so as to seize the many opportunities these platforms present and foster the innovation they promise. Yet, while the current online video distribution marketplace is dynamic and vibrant, we need to keep a watchful eye as content and Internet service providers adapt to these changes.

Policies that ensure unfettered access to Internet content and services are critical to the health and vibrancy of a market that enables innovation and benefits consumers. In turn, the advent of these connected platforms provides a welcome boost to consumer demand and adoption of next generation access to the Internet, thus reinforcing the business case for rolling out high-speed broadband throughout the EU.

The future of video also depends on companies adapting to sustainable, innovative business models, by embracing collaborative approaches to developing open, standard media formats, as well as ensuring
that if and when they are deployed, broadband traffic management practices do not discourage or impede consumer consumption of the vast and innovative online video offerings that are possible and that consumers have come to expect.

In conclusion, we should look anew at the best way to maximise the benefits of convergence for consumers, the economy and society, while ensuring that the necessary safeguards are in place. As we explain further in this submission, this can be achieved by ensuring that consumers can choose freely from a wide selection of attractive options for digital television and multimedia services on a range of connected platforms and devices, including thanks to the respect of neutrality principles across the value chain; by promoting industry-led solutions to interoperability and other issues of detail; and by fostering a light-touch, future-looking and ‘digitally-fit’ regulatory regime which provides the industry with a genuine competitive dynamic, the flexibility and freedom to innovate, and the confidence to invest.

2.1 Market considerations

1. What are the factors that enable US companies to establish a successful presence in the fragmented EU market despite language and cultural barriers, while many EU companies struggle? What are the factors hindering EU companies?

More Single Market (and less legacy) as the pre-condition for success by any company in this sector

In our view, the issue of success in the online video market is not so much one of the nationality of those providers seen as successful, but rather one of scale and know-how – and it reinforces the rationale for enhancing the European Single Market in order for European companies to be able to truly seize the opportunities at hand.

Unlike the European Union, the United States benefit to a large extent from a genuine single market of 300 million consumers. It enables companies to be able often to recoup production and distribution costs, achieve significant scale and build sufficient know-how in just the US market, so as to afford them enough resources to invest and apply that know-how in other markets. Having English as a common language helps of course, but it is not the main factor, as can be seen from the successful development of Spanish language content destined to the US market, both in traditional broadcasting and online services. The US environment also benefits from a single regulatory environment, embracing a deregulatory approach to online video, rather than a fragmented regulatory landscape which characterised the EU, some of which still seeks to impose aspects of legacy broadcast television regulation to online distribution of video programming. The US regulatory environment provides market actors more flexibility and ability to innovate and grow. As an example, even in a market seen as sophisticated as the UK, a strict reading of the UK’s Communications Act could suggest that online video platforms who distribute scheduled programming are required to obtain a full broadcast license — the same that an over the air broadcaster needs to obtain. There is no such stifling, burdensome requirement in the US framework, nor indeed in many other jurisdictions around the world.

Once scale is achieved, once a website or user interface has been adapted and translated for another market and/or other language, it also becomes to an extent easier to replicate the process for more markets and languages.

Challenges for all

Regardless of these supposed advantages, US companies face significant challenges operating in the EU, which stifle European companies in the same ways, and present them with significant hurdles toward gaining critical mass outside of their national territory.

As a case in point, the country of origin principle remains one of the main achievements of the Audiovisual Media Services Directive and its predecessors. It has brought many benefits and should continue to do so. But there remain a number of uncertainties concerning its application which render
multi-country provision of AV Media services in the EU problematic. Indeed, just as one simple example, when providing a service across borders, there is no sure answer as to which national rule applies to EPG. Simply put, different countries have different requirements for EPG listing, and it is not clear when you launch a pan-EU service whether you should follow the EPG rules in the country of origin, or elsewhere. Consequently, a service needs to be adjusted to take account of local EPG rules, for instance the manner in which national public service broadcasters are ordered, etc. As an example, a service which includes linear content and is provided from the UK will seemingly be required by strict rules to have a different user interface for German users, with the German EPG showing; in other member states yet, providers are able to order channels in the way they deem best. (by contrast, there are no EPG requirements in the US)

On the ground, regardless of any regulation, consumers do have expectations of how they want the content presented to them, and platform providers would in any case respond to that demand by adapting in the best way possible to local consumer / user needs. But the current regulations force a specific method around EPG listing, removing the flexibility for providers to develop the best possible response to consumer demands; yet, with different rules from one country to the other. These are onerous burdens for any company, large or small, and they do little to genuinely improve consumer experience or protection, whilst severely eroding the benefits of the Single Market.

We would urge policymakers to apply the Directive in such a way that the Country of Origin principle is properly respected, with no undue barriers being erected, and also more clearly understood, such as through guidance on the exact criteria to determine place of establishment, removing dichotomies and conflicting requirements between different national laws. There should be stronger processes overall for avoiding or challenging the imposition of requirements from a non-home (origin) country. A way forward could be for the Commission to become involved in both assessing and authorising any proposed exception to the country of origin principle, so that the impact on the Single Market is minimised.

Reinforcement of the single market, together with a more pragmatic, results-driven approach coupled with self-regulation would go in the right direction, whereby a larger, unified market characterised by a lighter touch regulatory time would allow online video platforms to flourish and become successful internationally, as experience elsewhere has shown.

More broadband Internet access

An important component of success for the sector as well as for consumers will be good Internet connectivity. Deploying broadband Internet access throughout the EU is a precondition for users being able to make the most extensive and efficient use of online media offerings. In other words, a precondition for a healthy Online Video marketplace is: more broadband Internet, more broadband Internet, more broadband Internet. We emphasise in this context that the any-to-any connectivity provided by the Internet is key to achieving benefits from broadband, and that broadband without Internet access would not ensure that consumer demand is met, with consequent damage to take-up of broadband.

Indeed, the ambitious Digital Agenda broadband targets remain very relevant today. In the absence of public funding of networks, this investment should be done primarily by the private sector with the stability and incentive to invest. We need a telecommunications framework that is fit for the digital age, unencumbered by unnecessary regulatory burdens. Yet it needs to be robust enough to foster a dynamic, competitive and innovative market, notably through wholesale and retail open access safeguards that will ensure the genuine dynamic of competition in the telecommunications sector which is necessary to provide sufficient incentives for market players to invest and deliver fast broadband throughout Europe. We should also note that technological evolution opens up avenues, such as the

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opportunity post analogue switchover for some of the TV frequencies to be used for broadband delivery complementing the new digital TV services taking the place of linear analogue.

In conclusion, the few American and European providers already active and successful in this space have played an important pioneering role, and not only through their technological innovation: these early entrants and successes helped build users’ understanding, confidence and comfort with these new technologies and these new ways of consuming content and culture. They have paved the way for a second wave of market actors to benefit from increased consumer demand for online delivery. Addressing the remaining challenges by moving to a genuine Single Market and promoting a resolutely user- and creation / innovation-driven policy framework together with EU-wide broadband Internet access, is the best way to ensure the success of the sector, for European and overseas providers alike, to the benefit of consumers and citizens.

(2) What are the factors affecting the availability of premium content? Are there currently practices relating to premium content at wholesale level which affect market access and sustainable business operations? If so, what is the impact on consumers? Is there a need for regulatory intervention beyond the application of existing competition rules?

The ability for citizens and consumers to access and enjoy the content of their choice without undue hindrance remains a fundamental public policy aim that we should protect and foster. In the ‘traditional’ AV media distribution channels, there have been questions in the past over the freedom of content providers to distribute using various channels rather than being forced into exclusive arrangements to the detriment of online platforms, or about the acquisition of premium content. We would encourage continued vigilance in this area, so that the market power of certain entities is not unduly used to hinder the ability of online video distribution platforms to get access to quality programming.

However, we do not believe that there is any need for further legislative or regulatory intervention in the current state of affairs. The current approach keeps the market actors ‘honest’ and resolutely encourages competition, innovation and generally the growth of the sector, without the trappings of an automatic, ill-judged application of legacy legislation.

(3) Are there obstacles which require regulatory action on access to platforms?

The market for online video and platforms generally exhibits a strong plurality of market players and competition between them, on individual platforms and, more importantly between platforms. Convergence will increase, rather than decrease competition by enabling new market entry points for content companies which have not had the opportunity to be delivered through broadcasting infrastructure, due to the cost of delivery and/or the scarcity of infrastructure. Similarly, it provides novel avenues for traditional market players to innovate and develop new services and ways of disseminating content online, and for telecom operators to diversify their activities by providing their own IPTV or Video on Demand (VoD) services.

But just as the use of the Internet has brought us more choice and competition, it has inadvertently also effected new challenges. In the digital age, and especially when it comes to information and content delivered over the Internet, unhindered access to online platforms and services is a prerequisite. Because of the convergence between broadcast platforms, online platforms and telecommunications operators in delivering IPTV and VoD, the role of various actors with ‘gatekeeping’ roles in the AV Media and wider Internet value chain has become more important.

With this rapid evolution, we share some of the concerns expressed by the EU High Level Group on Media Pluralism in its recent Recommendation about “new developments in the online access to information. The dominant position held by some network access providers or internet information providers should not be allowed to restrict media freedom and pluralism. An open and non-
discriminatory access to information by all citizens must be protected in the online sphere, if necessary by making use of competition law and/or enforcing a principle of network and net neutrality."  

The European Parliament also noted in its 4 July 2013 Resolution on Connected TV that for converged media services, “access to and the rapid findability, listing and recommendation of services will most likely determine their success”. The parliamentarians then called on the Commission to “evaluate the extent to which it is necessary to revise the Audiovisual Media Services Directive and other current requirements laid down in network and media regulations (e.g. the telecommunications package) with respect to the rules on findability and non-discriminatory access to platforms, for content providers and content developers as well as for users, expanding the concept of platforms, and to adopt the existing instruments to new constellations; whereas it should be ensured in so doing that consumers can benefit from increased choice and access to audiovisual media services and that content providers can benefit from more choices in how to distribute their content while maintaining contact with their audience”.

Echoing the Parliament’s recommendation, we submit that policymakers should tackle these issues in two ways: enforcing net neutrality rules, and addressing wider concerns over ‘gateway neutrality’ as they arise.

**Net Neutrality rules**

First, rules enforcing net neutrality are already long overdue. According to the joint investigation conducted by BEREC and the EC, a significant proportion of European citizens are affected by undue restrictions on the use of many online content and services, such as Voice over IP (VoIP) or Peer to Peer (P2P, a technology commonly used to distribute media content). These arbitrary restrictions are increasingly ‘enforced’ technically by operators, and are now spreading to other areas such as, worryingly, the cloud and online video. This has been illustrated in the recent debate in Germany for instance, over the question of whether network operators should be allowed to favour their own online video and IPTV content compared to the other online services, with the obvious detriment this would have for competitors and for consumers’ choice. Similar practices are starting to emerge with regards to cloud computing, in France for example.

Here again, the question points to the clear need to preserve the benefits of the open character of the Internet (net neutrality), even as cable TV networks and new managed services continue to develop in parallel with the Internet.

We recognise that on the one hand, network operators should be able to innovate and offer BOTH unrestricted Internet access AND other services such as IPTV or Video on Demand, or other value-added offers (‘managed services’), for example guaranteed quality of delivery for gaming or video applications. They should also be able to experiment with tiered pricing, where users pay for how much Internet access volume they consume and at which speeds (not for what, in content terms, users consume or produce).

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5 Managed services, which can include the provision of VoD or IPTV, are services providing access to content, services or applications through electronic means, marketed by a network operator which guarantees certain specific features thanks to the processes it uses on the network it operates. Some of the classic features include reliability guarantees, minimal latency, jitter (variation in time between packets), guaranteed bandwidth, security level, etc. According to the above definition derived from BEREC, providing users with access to the Internet does therefore not constitute a managed service, and managed services are separate from Internet access, even if they make use of the Internet Protocol.
But on the other hand, operators should not be able to unduly favour their own content, applications and services, or the content, applications and services of third parties with whom they have negotiated arrangements, while discriminating against third party unaffiliated content, applications and services. When users buy ‘Internet access’, users themselves should decide how they use it. Network operators should not be able to choose what content, applications and services users can access and distribute, or pick who succeeds or fails in the markets for Internet content, services and applications.

In practice, this means that we should not get to a situation where online innovations are limited because it becomes artificially more expensive to access and use them, or because online providers are ‘forced’ into concluding a deal for distribution via a ‘tiered Internet’ or managed service with an access provider, due to the quality of delivery of the open Internet having become increasingly and comparatively sub-standard compared to ‘managed services’. Such cases would have significant negative impact on innovation and content creation, growth and user choice.

Media pluralism and cultural diversity are at risk in a world of several possible clustered, closed subsets of the Internet, where content can be accessed only if included in a commercial deal between the operator and a particular content provider. The global wealth of knowledge and content available would be directly affected by threats to net neutrality and the open character of the Internet.

The lack of regulatory clarity so far is detrimental to all in the value chain:

- Content, application and services companies, including the traditional broadcasters who are successfully embracing the Internet, have little visibility on where and how their online content and services will be accessible, when delivered over the Internet, due to the existence and potential of arbitrary restrictions of use imposed by network operators. It is particularly stifling for SMEs who have no idea whether the apps etc. they develop will be ‘allowed’ by a given ISP in a given country.

- Telecom operators who have no intention of behaving unfairly, but need to be able to innovate and manage their network for technical reasons, lack the clarity to be able to deploy traffic management tools in a way that is deemed acceptable and commercially non-discriminatory.

- European citizens have a right to access and distribute the (lawful) content, services and applications of their choice. Citizens’ fundamental rights to receive and impart information and ideas, to assemble and associate should all apply equally online as offline. Today, this remains unclear.

These risks and the existing bad practices have already been recognized by the guardian of the European Convention of Human Rights, the Council of Europe, which adopted a Ministerial Declaration on Network Neutrality and Freedom of Expression. As the European Parliament highlighted, “net neutrality is proven to be insufficiently safeguarded by transparency and competition”: therefore, we need balanced, but specific and unambiguous principles in place to protect the open character of the Internet, which will stop existing restrictions and prevent their expansion to new areas, especially video content in the context of the present consultation.

The European Commission should unambiguously address the issue without delay, with the adoption and protection of a very clear principle of open and non-discriminatory access to the Internet across the EU, in furtherance of the principles contained in the Electronic Communications Framework as revised

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6 http://www.coe.int/t/dghl/standardsetting/media/
in 2009. These rules should also state clearly which traffic management and commercial practices are unacceptable.

Additionally, the development of managed service platforms should be balanced with the need to foster the availability, quality, and affordability of Internet access, both fixed and mobile, and the development of, and investment in, the Internet access service. End-users and online service providers should have the freedom to choose among the types of services most appropriate to them, whether they be Internet access service, managed services, or both. These principles should ensure that:

1. **Network operators should be allowed to offer managed services, standing separate from Internet access service, provided that the development of such offerings is not to the detriment of Internet access, or its performance, affordability, or quality.**

2. **Take-up by end-users or by content and application providers (CAPs) of commercial offers to support managed services should be on a voluntary and non-discriminatory basis.**

Without these safeguards in place, there is a real risk that the problem already widely experienced with VoIP and P2P will persist and its expansion to other, crucial online services such as video and the cloud will be legitimised, to the detriment of plurality and the free flow of information.

**Gateway neutrality**

Beyond ensuring the respect of net neutrality principles, public authorities should also remain watchful of other existing and potential abuses of dominance over user / citizen access elsewhere in the Internet value chain, notably as they impact competition, news and media pluralism, and generally access to information and knowledge. This could take the form of an entity giving undue prominence through its editorial control to its content, or that of its commercial partners, to the detriment to the findability / discoverability of other, possibly competing content.

One could think of the question overall as "gateway neutrality": an important pillar in supporting media pluralism and the free flow of information, content and knowledge. Such neutrality would see that the providers of content or other digital services can be assured that their content will not only flow over networks in a neutral way, but also be discoverable by viewers in a neutral way.

(we come back on this notion in questions 15-16)

2.2. **Financing models**

(4) Do the current AVMSD requirements provide the best way to promote the creation, distribution, availability and market appeal of European works?

(5) How will convergence and changing consumer behaviour influence the current system of content financing? How are different actors in the new value chain contributing to financing?

As mentioned above, the advent of online content platforms has opened the door to unprecedented levels of creation – just think of the sheer amount of user created content, from film and music to blogs, which the Internet has enabled. But also and crucially, online platforms provide user-friendly devices and interfaces which facilitate and encourage consumer consumption of media and thus provide further avenues for monetising content. The same is true for the interactive abilities offered by Internet-connected media platforms, which can lead to monetisation (eg online games or extra content available as premium subscription, supplementing a TV programme).

There are also increasingly numerous examples of online platforms, such as Xbox or Netflix to cite just two, who are getting into content production, thus adding to diversity and sources of content financing. The first Netflix own production was filmed partially in Norway. XBox has local studios the UK, and are commissioning local content and events.
In our view, the gradual approach to regulation adopted in the AVMSD, which enables the growth and innovation in online, non-linear offerings thanks to a more lightly regulated regime, was an important factor in enabling these positive developments.

Any improvements in this area would again likely come from reinforcing the single market. The current strict rules covering European works obligations in the online video marketplace (which is really a global marketplace, adding to the rules’ inadequacy) in fact tend to impede rather than support the production, dissemination and availability of content.

In some countries, platforms can order channels and offer a catalogue of content freely, whereas in others there are strict rules on the amount of local content that needs to be available on a catalogue. The latter are antiquated, potentially damaging rules, which overlook the driving role of consumers in the new environment, where they are in a much stronger position to choose content, including how much local content they want. Indeed, on online platforms the consumer has a dramatically increased ability to choose and discover content themselves, rather than have the content ‘pushed’ at them as in traditional broadcasting. We see in practice that it is the quality of programming, not the geographic origin of the programming, which drives user interest in the programming. As an example, there has been significant increased interest and demand in BBC programming outside the UK because of the perceived high quality of the programming (the ability to produce quality programming is a recognised strength that we see many traditional broadcasters start to take advantage of in the online world). They also most often have the ability to switch between - or choose simultaneously (multi-home) from - different platforms. In such situation, the online platform provider should be able to decide how much local content they have in a catalogue, or how much they need to commission locally, because consumers’ genuine needs will truly drive the market and what platforms have to provide in order to remain competitive. In our experience, there is strong consumer demand in European markets for local content and local language – and if consumers buy it, the platform providers will stock it.

The most unfortunate impact of these European works obligations is that they represent a disincentive to make content available: the more such regulations there are in a geography, the less likely a platform is going to be able or willing to base or offer services there. So rather than encouraging the creation, dissemination and availability of local content, these rules push away the very providers who would otherwise have introduced new distribution channels into the country, and thus a new revenue source for content creation and new avenues for consumers to access that content.

Ensuring a truly competitive and innovative marketplace, free of abuses of ‘gateway’ positions, will serve consumers and contribute to financing of content far better and more sustainably than any burdensome rule.

2.3. Interoperability of connected TV

(6) Is there a need for EU action to overcome actual or potential fragmentation and ensure interoperability across borders? Is there a need to develop new or updated standards in the market?

Fragmentation in the form of product and service differentiation is the result of innovation and competition and actually benefits consumers. Services and equipment can be differentiated at many levels - by the type of content protection technology used, the varying bandwidths available from different transmission systems and devices; the different navigation menus and additional features, etc. Eliminating this type of fragmentation would require all of these features to be made exactly identical in every device and service, with obvious detriment to consumers in terms of choice and innovation. Moreover such restrictions would weaken the ability of hybrid device manufacturers, platform operators and service providers to compete with each other through the differentiation their offerings in content and technology.

Rather than focussing an EU action on interoperability, we would argue that what creates the type of fragmentation which is most stifling to consumers is in fact the presence of individual national regulations and requirements (we leave aside here the fragmentation mentioned in response to Qu. 3
caused by arbitrary restrictions to consumers’ use of the content of their choice online in the EU countries who do not benefit from the protections of net neutrality that the likes of Netherlands and Slovenia have in place).

The best solution when it comes to interoperability as such is for standards bodies to handle any genuine need, rather than a prescriptive, inflexible regulatory approach. Industry has demonstrated the validity of the paradigm of favouring voluntary and market-driven standards towards the converged audiovisual world. The basic standards enablers are in place today. There will be a continuous need to improve and update them, to further improve harmonization of those standards across the EU and to enable improved and richer services over time. This is an evolution that voluntary market-driven standardization will likely continue to best cater for.

We should avoid unnecessary regulatory intervention in favour of one or more technical standards, where this is not supported by all industry players. Any attempt to impose a “one size fits all” solution risks distorting competition and stifling the innovation / creation which remains essential to the sustained growth of media in Europe. Any genuine technical interoperability questions can already be addressed by the Forum for Advanced Media in Europe (FAME8) which provides a multi-stakeholder platform for discussing and resolving these issues.

2.4. Infrastructure and spectrum

(7) How relevant are differences between individual platforms delivering content (e.g. terrestrial and satellite broadcasting, wired broadband including cable, mobile broadband) in terms of consumer experience and of public interest obligations?

In terms of consumer experience and consumer viewing patterns, linear broadcasting continues to elicit strong consumer interest. For instance, according to the BBC, most viewers preferred watching the 2012 London Olympics on traditional TV rather than online, and generally the popularity of Internet accessed TV content is high: 23% of UK Internet users claimed to do this every week, according to a recent Ofcom report9. This was driven by the popularity of on demand TV catch up services, and overall 90% of viewing on TV sets still being to live broadcasting.

One key aspect of online is that there is tremendously more user control in online platforms, thus requiring fewer obligations than traditional TV broadcasting. As noted in section 3.1 of the Green Paper “the AVMSD makes a distinction between linear (television broadcasts) and non-linear (on-demand10) services, based on the much higher degree of consumer control in on-demand services, justifying less stringent regulation in certain areas.” This observation is still as valid as it was in recent years and in the most recent iteration of AVMS Directive, perhaps even more so now that audiences are increasingly used to dealing with (and personalising, filtering, and controlling) online platforms and content.

Another important consideration regarding consumer experience is that programming is expanding to take advantage of second and third screens. These second and third screens receive their material across WiFi and 3G/4G services. It is therefore important to ensure that spectrum is made available to deliver second and third screen experiences (and we should note here that online (’over the top’) video distributors do not use government/public spectrum like traditional over the air broadcasters and satellite providers do; nor do they use the public rights of way like cable operators do; and so online

8 http://www.difgroup.eu/index.php?mact=DocsAndMediaManager.cntnt01.details.0&cntnt01documentid=55&cntnt01dateformat=%25d%20%25b%20%25Y&cntnt01returnid=58
9 Communications Market report 2013; http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/2013_UK_CMR.pdf
10 AVMSD Article 1.1.g: “‘on-demand audiovisual media service’ (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.”
video distributors should not have the same set of public interest obligations that come with using that spectrum or those rights of way – as argued further below, a fresh approach is deserved).

(8) What frequency allocation and sharing models can facilitate development opportunities for broadcasting, mobile broadband and other applications (such as programme-making equipment) carried in the same frequency bands?

Microsoft generally encourages making more spectrum available, including dynamically and on unlicensed basis, and having a coordinated effort across all of EU to making spectrum available. This will be crucial to accommodate the increasing usage of second and third screens watching TV programming, new programme making equipment, and new in home M2M applications.

It will also be necessary to increase spectrum re-use – using smaller cells/hotspots and dynamic spectrum sharing. Dynamic spectrum sharing technology permits a more sophisticated approach to sharing: facilitating licence-exempt access whilst allowing regulators to retain the flexibility to adapt to changes in market demand. For example, industry has developed a standard to deliver complementary connectivity over the vacant channels in the broadcast television spectrum. We encourage the Commission to embrace this potential fully, by proceeding, as quickly as possible, to harmonise the enabling regulations across Europe.

3. Values

3.1 Regulatory framework

(10) Given convergence between media, is there evidence of market distortion caused by the regulatory differentiation between linear and non-linear services? If yes, what would be the best way to tackle these distortions while protecting the values underpinning the EU regulatory framework for audiovisual media services?

Traditional TV viewing remains strong across the EU, and dissimilar compared to online offerings in terms of user control, as rightly underlined by the European Commission:

“The Directive treats linear and on-demand services differently, taking into account the degree of user control over the service. On-demand services are thus subject to lighter regulation that matches the relative impact they have on society as a whole. In this manner, the Directive upholds core societal values, from protecting minors to ensuring accessible services for people with hearing or visual impairments. At the same time, it recognizes the pivotal role that user choice and responsibility play in the new on-demand environment.”

11 The number of wireless devices is growing exponentially. According to the European Commission numbers, by 2015 there will be 7.1 billion phones, tablets and other mobile devices connected to the Internet globally. Five years further down the line, the number of smart devices connected to the Internet is going to be staggeringly larger – particularly when wireless sensors and other machine-to-machine communication devices are counted. Unfortunately, the way spectrum is managed today, does not readily allow the flexibility to adapt to meet that projected demand. Gaps in coverage and network overload in busy areas are already resulting in poor service for end-users. These problems can be alleviated through spectrum sharing, as proposed in the European Commission’s Communication on promoting the shared use of radio spectrum. Fortunately the technology is now ready to make this happen. One example of how to ensure that radio communication devices can access wireless bandwidth when and where they need it, is through license-exempt use of White Spaces. These are the unused portions of spectrum in the TV bands including some of the channels freed up by the transition from analogue to digital TV broadcasting. Microsoft has been working on this technology for many years now and our trials and commercial pilots in the UK and Singapore, as well as in the US, have demonstrated that this is a viable option for addressing the projected wireless capacity shortfall. More detail is available on Microsoft.eu.

12 See for instance the Ofcom Communications Market report 2013; http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/2013_UK_CMR.pdf

13 European Commission, General fact sheet 68, ‘Modern rules for audiovisual Europe’
While there is no question that content and communications are converging, it would be premature to regulate such content and communications further through extending traditional broadcast TV rules to the online sphere with a broad brush, as is sometimes suggested. Distinct regulation between linear and non-linear content remains appropriate for the foreseeable future, both because the two are complementary and because they do not benefit from the same popularity or audience, access or infrastructure, and do not entail the same consumer expectations. The current AVMS framework remains therefore largely appropriate, and in particular provides welcome new opportunities for traditional broadcasters to diversify and innovate in their offerings.

(11) Is there a need to adapt the definition of AVMS providers and / or the scope of the AVMSD, in order to make those currently outside subject to part or all of the obligations of the AVMSD or are there other ways to protect values? In which areas could emphasis be given to self/co-regulation?

Microsoft believes that the Audiovisual Media Services Directive, including its scope and definitions, is still appropriate in its current form. Although its implementation could be enhanced as mentioned in response to Qu. 1 above, the Directive has been largely successful, both in delivering a dynamic and innovative market, and in delivering societal benefits. In particular we do not believe that any further online content regulation is warranted at this time.

The overall success of the AVMSD stems largely from the strategic policy and gradual regulatory approach followed in devising the current version of the Directive. The approach was correct at the time, and is still very much valid, whereby “[t]o support the development of new business opportunities without jeopardizing important public interests such as the protection of minors and human dignity, the rules for audiovisual media services have to be as concise as necessary and as flexible as possible. In addition to its graduated approach to regulation, the Directive achieves this by promoting Member State use of self- and/or co-regulatory measures while eschewing new licensing schemes. National legislators can thus choose more flexible regulatory arrangements where these enjoy stakeholder support, align with their national legal systems and promise effective enforcement. In this way, the Directive extends pertinent standards to on-demand services with a minimum of additional administrative procedures.”

A flourishing, still nascent market

The online video services market has not yet matured, but it is flourishing because, so far, regulators have largely left it to the market to respond to consumer demand while determining a fair and appropriate overall market framework for all players involved. Today’s fast-evolving technological landscape reflects sustained innovation and investment which resulted in a decade of unprecedented expansion of consumer choice. With it, there has been significant evolution in how consumers consume content – generally in a much more active manner - and in how much citizens can access news and information – from a wide plurality of sources, locally as well as internationally, tailored to their interests and needs, etc. in ways which were not possible before the mainstream adoption of the Internet.

It is important to recall that smart phones were introduced to the mainstream only 8 years ago and tablets and connected TVs only about 3 years ago. Thus, the speed of innovative products being brought to market has accelerated, with sustained, high consumer demand. This is also at least partly due to the fact that there is a high degree of competition in the provision of online content generally, with mostly little lock-in, low switching costs, and multi-homing possible (ability to use different platforms and services concurrently). These factors encourage innovation and increased consumer choice. The changes which have taken place tend to demonstrate that the current framework is able to deliver substantial benefits.

Further, many traditional broadcasters have developed successful online services thanks to the enabling nature of the current framework, such as BBC iPlayer to take just one of many examples. These

1414 EC, Modern Rules for Audiovisual Europe; op. cit.
innovations sometimes come with the added benefit of advertising revenues and other content monetisation opportunities: in the case of public service broadcasters, this is a new and welcome source of funding for public service.

EU citizens have been accessing the Internet for many years and have been consuming services from providers that do not fall under the definition of the AVMS providers over that time. This has not led to the deterioration of values. The measures highlighted in the Green Paper around the E-Commerce Directive and data protection legislation have greatly contributed to that end, in addition to the effective use of “editorial responsibility”. The fact that those services now extend their reach to a broader set of devices, including devices that also enable AV Media services, does not introduce a major change in that situation and accordingly, does not merit a change of the AVMSD.

A longer term strategic policy debate

In light of these observations, in our view no case of systemic market failure or social detriment has been established as to warrant substantial, new regulation of this market or the expansion of its scope and definitions. Mainstreaming into such a framework a set of legacy rules based on outdated market structures and correspondingly outdated policy prescriptions would merely stifle innovation to the detriment of consumers.

On the contrary, rather than suggesting an extension of legacy rules, a strategic policy approach should be taken to ensure that regulation is fit for purpose – fit for the ‘digital age’. It requires that policymakers be ready to revisit public policy and safety goals, challenge existing regulations, and the premise for them, to determine if they remain appropriate and justified.

Today’s innovations in online media and communications have largely been driven by the industry’s response to consumer demand. Because regulators in Europe and other regions decided to largely refrain from applying regulations to the new services, the sector has been able to deliver value to consumers in new and inventive ways.

Many of the traditional regulations that were adopted decades ago were intended to address, among other things, the scarcity of spectrum and high barriers to entry that resulted in limited choices in service providers and content. In the online environment, however, consumers enjoy an abundance of providers and programming choices beyond just “regular” television – on-demand films and programmes, interactive programming and user-generated content – which are available through any number of IP-enabled devices, such as connected TVs, game consoles, smartphones and tablets. Regulations intended to address the limited number of mass-market broadcasting platforms are not as relevant in an online environment in which consumers can seek a variety of content from many different sources.

User control, expectations and interactivity

Furthermore, online video services afford consumers with greater control over how and when they receive video programming. Whereas traditional services acted as passive conduits of preselected content, online services are user-centric, allowing consumers to time and place-shift content to accommodate their own schedules, identify programming that better serves local and personal interests, and utilize a variety of parental controls and other tools to filter unwanted content.

IP-based service providers are also increasingly layering their content with integrated applications for interactivity and immediate access to news, information, education and entertainment. These innovations are being developed and released to the public in a continuous process by thousands of content providers, including many within the EU. As these services are different from traditional television, consumers have different expectations about their capabilities, including having more control over how content is accessed and consumed, which means that wholesale adoption of TV-style regulations would not be necessary or appropriate.
International nature of online offerings

It is also difficult to imagine how extension of the AVMS framework concerning traditional broadcasting to online services would be effectively enforced in an environment with thousands of content providers within and outside the EU. Even if EU-resident providers could be identified for jurisdictional purposes, the ubiquity of access to foreign services would unfairly disadvantage domestic players, thereby reducing competition from entities that have the greatest local interest as compared to their non-European counterparts.

A fresh look at audiovisual media and converged industries generally

In its Resolution on Connected TV, the European Parliament helpfully recognised the need to revisit afresh the framework, and address today’s public policy imperatives, not yesterday’s, calling on the Commission to “provide a breakdown, of which regulatory mechanisms are still necessary against the background of convergence and which should perhaps be established in order to create a level playing field for all content and service providers, so as to ensure fair competition among content providers and guarantee users the chance to choose, from among a wide range of high-quality services”.

Broadly imposing legacy policies without regard to the specific nature and wide diversity of online content services could risk suppressing the pace at which video services are evolving. It would also negatively impact the consumer and economic benefits that come with them. No one can predict what the online video market will look like twenty, ten, even two years from now. In considering policies to address the convergence of legacy services on the one hand and emerging online business models on the other, Microsoft urges the Commission to ensure that the market, and not regulation, dictates the direction which the video marketplace takes.

In future, the Commission should consider removing existing regulations that are no longer needed in order to deliver fundamental policy objectives. In doing so, the EC would facilitate a levelling of the regulatory playing field for the benefit of both traditional broadcasters and new online content services. The rules in the future should indeed enshrine fundamental principles, which can stand the test of time, rather than be made up of ‘micro managing’ regulations that have been added now and then to cope with technological advances. The detail of how to meet the goals of these fundamental policy and legal principles should be left largely to stakeholders, through self-regulation and standardisation efforts.

A properly harmonised and more flexible framework of rules concerning prominence and EPG should be able to serve the need and demands of consumers and actual intent of the Directive, but without prescribing the specific means with which these goals would be met.

Thus, regulation should not be applied to a sector simply because it has been applied to its predecessor or distant older cousin. However, if the Commission believes that further enquiry is required, a detailed impact assessment should be conducted, studying the potential costs of a new converged regulatory framework based on legacy broadcasting rules, and its likely practical benefits for society and the economy. As part of a longer term, multi-stakeholder debate to craft a future-proof convergence policy framework, every attempt should be made to identify what rules may be necessary or on the contrary irrelevant in the converged, digital age and its fast-evolving viewing and consumption patterns and requirements.

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

As mentioned at the beginning of this submission, we need a harmonised approach and a genuine Audiovisual Media ‘single market’, with easy cross-border / multi-territorial provision of content, away
from the fragmentation that is still experienced today, which deprives consumers and citizens of choice and access to information.

We would argue that the country of origin principle, with its one stop regulatory approach to the free movement of services across the EU, is one of the greatest achievements of the AVMS Directive. It needs to be reinforced, if anything. The EU requires more single market, not less: a better, more consistent application of the country of origin principle, and removal of fragmented rules.

Generally, Microsoft strongly believes that the “country of origin principle”, which has already proven so successful in ecommerce and audiovisual media services, to the benefits of consumers and the economy throughout Europe, should be a guiding regulatory principle and extended across the convergence sectors of audiovisual media, information society and electronic communications services, avoiding to the largest possible extent any exemption to the country of origin principle (as argued under Qu. 1). Consistent application would greatly benefit the free flow of services, ensuring for all EU citizens reasonable protections and access to the widest range of online information, content and services from around the EU.

(13) Does increased convergence in the audio-visual landscape test the relationship between the provisions of the AVMSD and the E-Commerce Directive in new ways and in which areas? Could you provide practical examples of that?

With the natural evolution of these services in recent years, provision of digital content through online platforms does often involve both the E-commerce and AVMS Directives. But the two remain clearly distinct so far, in large part because of the difference in editorial responsibility: some online platforms are just information society services, allowing access to online media content, while others mix that nature with the provision of AV Media services, such as IPTV. Consumers have grown accustomed to these platforms and new ways of accessing information and media, with little consumer confusion of note; on the contrary, this distinction between services has allowed them to develop and innovate continually, to the consumers’ benefit.

As convergence develops, we should be starting from a clean sheet of paper and consider the overall ‘digital’ / convergence policy framework, rather than try to tweak TVWF/AVMS to fit the new landscape.

Because of the very nature of online services, they can straddle across various sectors. The Internet is characterised by a separation between network and application layers: rather than vertically integrated providers producing and delivering all online content and services, a flurry of app and service providers exist, separately to the network transmission provider. With convergence, the three types of market actors in the adjacent frameworks of electronic communications, information services and audiovisual media services all rely on network transmissions that use the Internet Protocol (IP networks): with that shift, the telecom services (voice, SMS), audiovisual media and information society services of all kinds will soon all be IP-based, (although it remains necessary to distinguish the Internet as an any-to-any platform from the platforms of the broadcasters and operators of transmission networks, even where those other transmission platforms use the IP protocol, given that they do not have the any-to-any characteristics of the Internet).

This structural change alters fundamentally market dynamics and the consequent socio-economic impact. This shift needs to be accompanied with a fundamental rethink of policy in the digital age, and the implications it would have for legislation. A stable single European market requires a future-proof regulatory framework. This will only happen once we move away from relying on a legacy of rules and practices, which were voice-driven for telecoms, and ‘analogue TV’ driven for audiovisual, and bilateral-cross-border if not strictly national: many of these rules are already or fast becoming unnecessary or unjustified in the current data growth, IP-based, Internet-centric era. Because the app market is usually very competitive and innovative, there is little apparent need for regulation, as the market should sort out most issues, as long as it respects basic competition and consumer protection. Only some crucial public policy and safety goals should be maintained as rules.
These are the priorities and approach which the Commission should keep front of mind: in future, the regulation of networks and the regulation of so-called ‘apps’ in this digital age simply cannot be based on legacy regimes – they need to evolve fundamentally towards a completely new, “next generation” policy and legislative framework for the convergence industries. Tinkering with existing legislation every few years so as to cope with technological and societal progress is just not good enough.

We would encourage the EU institutions to start a long-term policy debate, with the involvement of all relevant stakeholders, to think about the future Framework that Europe needs in order to become an ICT powerhouse of the 21st century, and welcome the innovation, growth, jobs and social welfare that will come with it.

3.2. Media freedom and pluralism

(15) Should the possibility of pre-defining choice through filtering mechanisms, including in search facilities, be subject to public intervention at EU level?

A basic requirement here should be that the user is aware of what type of filtering (if any) has been applied. This is key to the continued availability and discoverability and users’ accessibility of content. The current rules concerning prominence and EPG seem appropriate in this respect, although their application and consistency across Europe could be improved, as discussed above. Other safeguards are needed beyond transparency, however.

Neutrality across the Internet value chain

With convergence, both linear and non-linear media delivery happens often and increasingly through the Internet, rather than the somewhat less complex traditional broadcasting structures.

In this digital context, findability, discoverability and prominence rely on forms of neutrality, whereby gatekeepers who control various bottlenecks along the Internet value chain should let the information (in the form of data packets) flow through neutrally, without hindrance. They should not be able to unfairly abuse that privileged position to favour their own or their commercial partners’ services.

Filters, from search engines to app stores to traffic management tools, can be misused to hinder certain content from being made freely (neutrally) available, and the public may not always be properly informed that this is happening.

As mentioned above and as reported in May 2012 by the Body of European Regulators of Electronic Communications (BEREC), we already witness across Europe significant levels of filtering (through traffic management tools) being misused by telecommunications network operators to discriminate against certain Internet traffic, including video / content.

As recognised by the European Parliament (cited above) and others, transparency will not be sufficient to ensure discoverability (and use) of content: we need unambiguous net neutrality safeguards to be promulgated without delay (as detailed in response to Qu. 3).

Beyond network neutrality

Looking beyond neutrality at the level of (Internet) network access, we are moving to a situation where people rely on an EPG or its equivalent on other platforms/devices as their primary navigation device. In many digital environments, that filtering and discovery role is effectively taken by search (at least one of the major online video platforms currently claims that 49% of all of its traffic originates from search).

Today there are already market actors who have arguably the technological capability and substantial market power to exercise control over access to Internet content, together with a financial incentive to do so. Search engines determine the information that customers access online and can thus potentially deter market entry by artificially altering corresponding search results. Power over search can be

15 See Ipsos MORI for the BBC, online survey, November 2012.
enhanced when combined with power over search advertising, which is one of the main sources of revenue for the entire online content value chain: dominance over Internet search and search advertising, especially without transparency with regards to search methods, therefore have the potential for detrimental effects on consumers’ experience and the market ecosystem generally.

In order to preserve the Internet as a general purpose technology that supports in particular wide diffusion, availability and access to information and media services, beyond and on top of the application of ‘net neutrality’ principles at the level of Internet access, policymakers should consider similar open access requirements at other ‘bottleneck’ levels in the Internet value chain, including search, so that for example a search engine which is the primary source of news (or other types of information and media) within a specific environment would need to operate neutrally, without favouring its own content or that of commercial partners (such as its advertisers), giving them undue prominence.

This is important for the whole ecosystem of course, where content and application providers, whether they be ‘new’ or ‘old’ media, should not become locked-in or captured by a ‘gatekeeper’. It is particularly relevant for Public Service Broadcasters: the BBC for example, because of its regulatory framework and universality obligations, is unable to enter into exclusive or commercial deals with gateways to secure prominence for its public service content or services. It makes neutrality – at the network level and elsewhere in the value chain – the most fundamental, necessary and adequate safeguard to enshrine in law.

(16) What should be the scope of existing regulation on access (art. 6 Access Directive) and universal service (art. 31 Universal Service Directive) in view of increasing convergence of linear and non-linear services on common platforms? In a convergent broadcast/broadband environment, are there specific needs to ensure the accessibility and the convenience to find and enjoy ‘general interest content’?

These are important questions, but they are based on 20-year old provisions: we should ask ourselves whether these constructs are relevant and suitable in today’s technology and service landscape. It would be useful to start with a “clean sheet of paper” (as the Commission did originally in 1995), and analyse what fundamental public policy needs to remain, and consequently where and which regulation is necessary and justified.

A key consideration in terms of the fundamental policy objective of fostering plurality, accessibility and findability is that the Internet and now Connected TV significantly extend media pluralism and augment, rather than limit, the richness and availability of access to content. As Commissioner Reding put it a few years ago “the Internet offers opportunities to extend and value cultural diversity within the global village.” 16 Online services enable the citizen to access more of both professional and amateur (user) content from more countries than was possible in the pre-Internet top down model and where discovery was based on the decisions of a select group of editors / newsagents / television stations and the like. Thus, Connected TV and other hybrid devices greatly contribute to the long-term goal of media diversity and the free flow of information in the European Union, in ways that traditional broadcast TV simply could not.

Ensuring that there is a genuinely fair competitive dynamic in the market which enables appropriate access is an area which remains utterly relevant, and where the interpretation and application of regulations should depart from legacy considerations and address the current situation afresh. Concerns over the creation of “gateway” positions in relation to the introduction of digital TV

underpinned the Advanced Television Standards Directive of 1995, and made it all the way to the 2009 Electronic Communications Framework.

There are already provisions which mean that certain broadcast platforms are "open access" pursuant to Articles 5(1)(b) and 6 and Annex 1 of the Access Directive\textsuperscript{17}. Those provisions require that, where a platform offers conditional access services in connection with (linear) digital TV and radio broadcasting, Member States must regulate to require that the platform must “…offer to all broadcasters, on a fair, reasonable and non-discriminatory basis … technical services enabling the broadcasters’ digitally-transmitted services to be received by viewers or listeners” via that platform’s decoder base. Today these sorts of services, when delivered using telecommunications networks, including in some cases using the IP protocol, might be referred to as ‘managed services’, although they should not be amalgamated with Internet access and content/services/applications on the Internet. (See description above)

The market structures of today are very different, impacted as they are by convergence, so as to encompass a whole new array of market actors. There are already instances of unhelpful ‘gatekeeping’ practices over access to online services, and threats that these could extend if not curbed without further delay. The European Parliament itself emphasised to the European Commission that "care must be taken to ensure non-discriminatory access to platforms so that broadcasters and other providers, including small-scale providers in many cases, can participate in the market on an equal basis"\textsuperscript{18}.

When it comes to content and AV media, the Internet makes possible the diffusion to – and interaction with - any endpoint connected to the Internet, globally. It allows users to publish their own content, and to find content and information from anywhere in the world, potentially. This inherent plurality and richness of content, augmented with the development of user created content is unique to the Internet and the way it has functioned up to now.

It is time to evolve from the old concept of access: the question nowadays is to protect the ability to discover a service, whether it be media content or other applications and services available on the Internet. In the Internet age, protecting a user’s fundamental right and ability to access the content of their choice on the Internet is a prerequisite to protecting general interest content, as well as pluralism and diversity. The European framework should protect against abuses by gateway actors, whether at the level of broadcast platforms, network operators or other parts of the value chain which are crucial to the discoverability of content by users.

In order to foster this unique ability of Internet and Internet–connected devices to contribute to plurality and richness of content, the open character of the Internet should be unambiguously protected: no undue discrimination should get in the way of distribution of content.

Beyond the crucial bottleneck of access to the Internet, the accessibility and discoverability of AV media online can be effected at other layers of the value chain, for instance at the level of the search engine. In this context, one might also consider important to review the interpretation of the notion of editorial responsibility, especially with regards to search: if search results for content are ‘non-neutral’ and they impact negatively the discoverability, diversity and pluralism in access to content.

It is useful to note in this context that as a matter of corporate governance, the BBC’s governing body, the BBC Trust, has recently undertaken a review to satisfy itself that its app development does not favour Apple above other smartphone ecologies. This is not something which is regulated in a broader media landscape, but might be an approach that other PSBs should be encouraged to follow. Indeed, PSBs should strive to have their digital media content available to the widest possible audience, and thus on most if not all main online platforms and app stores, rather than pick favourites. That would be in the interests of competition, plurality and independence of the media, including the interest of the

\textsuperscript{17} http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002L0019:20091219:EN:PDF
\textsuperscript{18} EP Resolution of 4 July 2013, op. cit., article 2.
PSB since ensuring that there is are several such platforms will prevent them from being locked into a situation which enables abuse of dominant position.

3.3. Commercial communications

(17) Will the current rules of the AVMSD regarding commercial communications still be appropriate when a converged experience progressively becomes reality? Could you provide some concrete example?

As the European Commission has explained, thanks to the Audiovisual Media Services Directive users now (already) benefit from general requirements that make advertising and commercial messages readily recognizable, protect human dignity, and abstain from using surreptitious and subliminal techniques. In addition, it has become apparent through a number of studies that traditional broadcast TV still very much has a place for consumers / viewers / citizens, and they still use it as their primary source of AV Media. At the same time, the actual rate of adoption of connected TVs remains, arguably, slow, with only a small minority of consumers using their full connected functionalities.

It does not appear that there is any urgent need for a change in the current rules, or that it is obvious that a change would be warranted in the future. General light touch principles should continue to apply where the user is able to exercise much more control than with traditional broadcasting, whether because the content in question is not linear or perceived as ‘TV like’, or simply because accessing this content through an online platform gives users many more ways to decide, choose, tailor and protect / make safe their viewing.

In fact, as convergence takes hold and consumer viewing patterns change, there may be a need not to consider extending the regulation, but on the contrary revisit it to see if or how much of it may need to be reduced.

(18) What regulatory instruments would be most appropriate to address the rapidly changing advertising techniques? Is there more scope for self/co-regulation?

We would reiterate here the importance of not extending legacy frameworks, but rather think afresh about what should be the most relevant and effective methods of clearly distinguishing between advertising and programme content. As the European Parliament pointed out, policymakers should “consider whether the principle of the division between advertising and programme content can be maintained across all types of media or whether the aim of providing protection could be better achieved by making advertising and programme content clearly recognisable and clearly distinguishable across all types of media”.

Generally we believe that the current framework is appropriate. It is its application over time that can be adapted and enhanced. First, there could be better implementation and respect of the principles of making advertising clearly recognisable and distinguishable. There may be currently cases where the application of the rules could be improved. Depending on the ways in which a consumer discovers / finds content, and which platform s/he uses to do so, it is important that discoverability and findability are not impaired or unduly influenced by advertising. For example, search results for media services or products should not rank a given media product higher just because that media happens to also provide advertising revenue to the search platform. In any case, one would want any such advertising to be clearly labelled as such, separately and distinctly from other content on the same page / location.

19 European Commission: “TV, online, on demand – Modern Rules for Audiovisual Europe”;

20 European Parliament resolution on connected TV, 2012/2300(INI) - 04/07/2013;
Secondly, co- and self-regulatory initiatives could be developed where necessary, as they are best suited to adapt in a timely manner and internationally to changing market and consumer dynamics. There are several good examples in this area, such as the EU Online Behavioural Advertising self-regulatory programme.

3.4. Protection of minors

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

As mentioned above, we do believe that the current approach in the AVMS Directive remains valid. At this stage we do not see the need for extra rules to be added. The need to add another layer of even basic regulation would need to be clearly identified – which does not appear to be the case – taking into account the ability of consumers to exercise more control over online content than traditional broadcasting, by using parental controls and other technologies already offered by online services.

Any new challenge or major evolution of viewing / consumption pattern requiring new policy approaches would be best served by co- or self-regulatory approaches, as detailed below in response to Qu. 22-25.

(21) Although being increasingly available on devices and platforms used to access content, take-up of parental control tools appears limited so far. Which mechanisms would be desirable to make parents aware of such tools?

Awareness raising plays a crucial role in all online activities. Across the board, government and public authorities, including the European Commission, continue to have a role and responsibility in educating citizens and raising their awareness, both about tools such as parental controls, and about unsafe activity online generally.

In addition, in many if not most cases, we believe that the online content industry has gone to great lengths to inform consumers, and point them to parental control tools. The gaming sector provides a good example of success, whose good practices are now being taken up by some online platforms. Its experience should be further explored by policymakers if they feel that the wider audiovisual media and cultural sector would benefit from enhanced parental controls. The Interactive Software Federation of Europe (ISFE) published the *Videogames in Europe Consumer Study* in 2012, a multi-country survey designed to provide a better understanding of the societal context in which games are being played today in 16 European countries. It showed that 29% of parents make use of parental control tools for 6 to 9-year-olds and 27% for 10 to 15-year-olds – a substantial proportion of users.

All gaming consoles, handheld game devices and operating systems for PC are equipped with parental control systems, enabling parents to block access to content that is unsuitable for their children and/or restrict access during certain hours. There are varying methods for parents to control access: select, case by case, which type of games children can play; restrict access to the Internet; control the amount of time that children can spend; control the ability to interact with other players.

In Microsoft’s case, family-focused information is presented prominently from the homepage of our online gaming portal *Xbox Live*, with a dedicated main tab entitled ‘Enjoy With Family’. This entire section of the site includes in particular information about parental controls and console safety settings. The Family Settings on Xbox 360 let the user decide who in the household can play games, and who can watch movies or TV shows based on titles or content ratings. You can even set limits on playtime for individual family members, and set up a friends list to control exactly whom your child interacts with online. The same site section provides information on parental controls for the PC, enabling parents

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21 [www.isfe.eu/videogames-europe-2012-consumer-study](http://www.isfe.eu/videogames-europe-2012-consumer-study)
22 [See http://www.xbox.com/Live/Family](http://www.xbox.com/Live/Family)
easily to choose websites, games, and programmes their children can access, and even to set time periods when they can use the computer. The same information and settings are available prominently on the Xbox console’s user interface; they give the user control both on gaming and on other activities on the platform, such as entertainment. We believe that being ‘best in class’ in providing users with the ability to protect themselves and their families is an important competitive differentiator.

(22) What measures would be appropriate for the effective age verification of users of online audiovisual content?

(23) Should the AVMSD be modified to address, in particular, content rating, content classification and parental control across transmission channels?

Microsoft would like to point here to the judicious advice given by the European Parliament in its Resolution on Connected TV where it encouraged the Commission to “consider to what extent a reform of media regulation so as to move towards incentive and certification schemes and strengthen co- and self-regulatory approaches can enable the regulatory objectives of the Audiovisual Media Services Directive to be attained in a lasting fashion, while at the same time maintaining the necessary flexibility for fair competition among media service providers.”

We very much agree that well thought-out co- and self-regulatory approaches can deliver much more than regulation in protecting genuine public policy and safety goals, while being more future proof. A good example of what can be achieved through co- and self-regulatory approaches in an area closely related to audiovisual media is the PEGI system which covers games, including those played online.

The Pan-European Game Information (PEGI) age rating system was established (with some initial co-funding from the European Commission) to help European parents make informed decisions on buying computer games. It was launched in spring 2003 and replaced a number of national age rating systems with a single system now used throughout most of Europe, in 30 countries - ‘a considerable achievement’ as Commissioner Reding stressed in the past in relation to PEGI.

The system is supported by the major console manufacturers, including Sony, Microsoft and Nintendo, as well as by publishers and developers of interactive games throughout Europe, totalling several hundred signatories. The PEGI Council advises on improvements to the system, and is composed of representatives of ministries, ratings and cultural bodies from around Europe.

The age rating system was developed by the Interactive Software Federation of Europe (ISFE), and it deals both with physical as well as online content, such as games provided on a website. PEGI Online was added to the scheme in 2007 to address online games in particular. It covers areas from privacy to inappropriate content, and the PEGI Online website www.pegionline.eu offers extensive information about the nature, categories and potential risks of online gaming. It contains useful tips for safer online game play and offers the possibility for consumers to complain and report abuses. PEGI for Apps was also launched recently, and is available for free to app developers on the Microsoft Windows Phone platform in particular. Serious checks and balances ensure the adequacy and respect of the ratings, with breaches of the PEGI Code of Conduct incurring substantial fines. The PEGI age rating labels are recognised by 93% of consumers according to Nielsen research.

PEGI is, importantly, not just about ‘age’ rating, but about context: the ratings include a description of the type of (inappropriate) content that might feature in the game, such as violence, or bad language. That extra contextual information provides a superior protection and level of information to parents, and consumers generally.


The global dimension

An important aspect of PEGI’s work is to internationalise the ratings. Another consequence of the growing popularity of mobile and online games is the global nature of that market.

App platforms still have local storefronts for customers, but it became clear that app publishers are in need of a one-stop-shop – or something close to that – to get age classifications for their products. Currently an international working group, including rating boards from Europe, US, Australia, Brazil and others, is developing a solution for this under the working title IARC (International Alliance for Rating Content).

This is another reason why self-regulatory schemes such as PEGI provide a good alternative to regulation: not only do they allow flexibility and rapid evolution to match evolving consumption patterns and behaviours, but they also allow for international or global standards to be devised, far more quickly and efficiently than any intergovernmental treaty-making endeavour would. Since online content is inherently cross-border, it would be fallacious – and detrimental to European companies – to introduce or expand standards within EU legislation only. Instead a global approach is needed, where self-regulation is far better placed to achieve public policy aims.

(24) Should users be better informed and empowered as to where and how they can comment or complain concerning different types of content? Are current complaints handling mechanisms appropriate?

(25) Are the means by which complaints are handled (funding, regulatory or other means) appropriate to provide adequate feedback following reports about harmful or illegal content, in particular involving children? What should be the respective roles/responsibilities of public authorities, NGO’s and providers of products and services in making sure that adequate feedback is properly delivered to people reporting harmful or illegal content and complaints?

We would point here again to the pioneering and successful self-regulatory experience of PEGI in the games sector, which provides a complaints mechanism for both rating and advertising. Policymakers should seriously consider how such a scheme, funded and managed by responsible market actors can be replicated across the ICT and media value chain. There is no reason why this approach should work only for games and not for wider content, and particularly AV Media services and products.

3.5. Accessibility for persons with disabilities

(27) Do you think that additional standardisation efforts are needed in this field?

Standardisation efforts in this area are ongoing and positive already. Regarding digital TV accessibility, all major manufacturers committed in 2007 to introduce and maintain accessibility requirements for their respective products, remote controls and accompanying documentation. Standardization work on text to speech is in final phase and innovations such as navigation through gesture and speech are additionally increasing the amount of accessible features in TV receivers and hybrid devices.

Industry innovation is the right direction as it can bring better solutions more rapidly than any inflexible regulation. Additionally, it provides more easily for these solutions to be taken up not just in Europe, but around the world – a must when we are dealing with the inherently cross-border, global Internet.

Policymakers should encourage converging solutions between different parts of the world, for instance US accessibility requirements for online video being consistent with the EU’s practices, which will give industry economies of scale and flexibility, while benefitting consumers with solutions that work wherever they are or travel.
(28) What incentives could be offered to encourage investment in innovative services for people with disabilities?

Existing technical specifications and standards are more than adequate to meet current accessibility needs - the major issue in the EU at present is predominantly an operational issue relating to the adoption and implementation of these existing standards.

Continued flexibility given to content producers and platforms should produce platforms which are accessible by as many users as possible, in innovative ways (being user-friendly is key for online platforms and online services, and often ensures that inherently ALL users are offered great services). Public service broadcasters could also be encouraged to produce accessible content, as their efforts will encourage wider adoption of accessible technologies by the market.

Fostering interoperability and common standards in this area is important, and industry is working towards that. As just one example, Microsoft is involved along with many other industry players in developing an interoperable captioning/subtitling system in the W3C’s Timed Text Working Group. This effort will bring together various systems developed by the Society of Motion Picture and Television Engineers (SMPTE), Digital Entertainment Content Ecosystem (DECE) and EBU under the W3C’s Timed Text Markup Language (TTML) specification. This unified standard will incorporate both Unicode text and PNG graphics for descriptive captions/subtitles for the hearing impaired, and other types of subtitles such as foreign language translations and written commentaries. Public service broadcasters and other content producers/providers should be encouraged to support the W3C TTML standard to increase the accessibility of online video content.

Work concerning companion screen applications is also currently on-going in standards bodies. Much of this will be of benefit to the accessibility community.

Also worth noting is the tremendous industry innovation that is transforming the audiovisual entertainment consumption experience. Just within the last two years, we have seen the introduction of second screen experiences, natural language search, navigation by speech, gesture control and cloud DVR, to name a few. Most of these recent innovations were aimed at improving the flexibility and usability of entertainment access for the general consumer. However, people with disabilities have benefitted greatly from these innovations and the intensified competition they have generated in the marketplace. We encourage policymakers to continue to foster such innovation and healthy competition by minimizing interventional policies in this area.
Elektronische Kommunikationsdienste in der Welt der Apps – Herausforderungen für die Regulierung

SBR-Diskussionsbeitrag 3

Mag. Johannes Gungl
Ing. Mag.(FH) Alexander Gratzer, M.A.
Dr. Ernst-Olav Ruhle
Dr. Natascha Freund, LL.M.

März 2013

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1 Einführung


Dieser Wettbewerb schlägt sich auch auf die Umsatzzahlen der Mobilfunkunternehmen durch. So schrumpfen in einigen Ländern die Umsätze der Mobilfunkunternehmen aus Textnachrichten rasant. In Spanien lag der Rückgang der Umsätze aus SMS bei 10\% im Zeitraum 2009 bis 2011, in Italien bei 2\%.\textsuperscript{6} Von Oktober 2011 bis August 2012 fiel die SMS-Nutzung unter den finnischen iPhone Kunden um 14\%, während die Nutzung mobiler Daten im selben Zeitraum um 68\% wuchs.\textsuperscript{7} Aufgrund der Tatsache, dass Apple in seinem Betriebssystem iOS 5.0 seinen Nachrichtendienst iMessage in den bestehenden SMS/MMS Dienst der Netzbetreiber integriert hat, ist in den kommenden Jahren mit einem weiter beträchtlichen Anstieg der iMessages zu Lasten von SMS und MMS der Netzbetreiber zu rechnen.

Bei den genannten Applikationen besteht somit ein ausgeprägtes Substitutions- und damit Wettbewerbsverhältnis zu den Diensten traditioneller Mobilfunkunternehmen. Für Österreich liegen, genau wie für Deutschland, derzeit keine offiziellen Zahlen vor, es ist jedoch davon auszugehen, dass aufgrund der Smartphone-Penetration von 36 \% im Q1/2012 und durchschnittlich 25 installierten Apps\textsuperscript{8} sowie 2,14 Mio. Smartphone-Tarifen\textsuperscript{9}

\textsuperscript{3} Vodafone Group Plc, Annual Report for the year ended 31 March 2012, Seite 3; http://www.vodafone.com/content/dam/vodafone/investors/annual_reports/Vodafone_Annual_Report_12.pdf.
\textsuperscript{6} The Economist, Joyn them or Join them, 11.8.2012 unter Berufung auf Analysys Mason.
\textsuperscript{9} RTR Telekom Monitor Q3/2012.


\(^{10}\) Die Autoren danken Hr. Mag. Jörg Kittl für wertvolle Hinweise zu einer früheren Version dieses Beitrags.

2 Parallelen und Unterschiede in Bezug auf Dienste von Netzbetreibern und Dienste von Applikationsanbietern

2.1 Messaging-Portale werden mobil


Abbildung 1: Nachrichtenverlauf in der Applikation „Facebook Messanger“

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Aufgrund der hohen Nutzerzahlen dieser Systeme\textsuperscript{13} stellen sie zwischenzeitlich eine Substitution zu klassischen SMS Diensten dar.\textsuperscript{14}


2.2 WhatsApp


WhatsApp funktioniert ähnlich einem Instant Messenger, jedoch wird der Kommunikationspartner über die E164 Nummer adressiert. Bei der Anmeldung gibt man seine eigene Rufnummer an, diese wird über eine SMS verifiziert. Danach werden die Nachrichten in einer eigene Applikation („App“) geschrieben, funktionieren ansonsten jedoch annähernd genauso wie eine herkömmliche SMS.


\textsuperscript{15} http://www.whatsapp.com/about, 18. Oktober 2012
Abbildung 2: Nachrichtenverlauf in der Applikation „WhatsApp“

Abgesehen von den Nutzungsgebühren des jeweiligen Netzbetreibers für die Internet-Nutzung fallen für die einzelne Nachricht keine weiteren Gebühren an. Für die Zurverfügungstellung der Applikation wird iPhone Nutzern derzeit ein einmaliges Entgelt i.H.v. EUR 0,89 verrechnet\(^{16}\). Für Nutzer anderer Betriebssysteme ist die Software im ersten Jahr gratis, danach fällt eine jährliche Abonnement-Gebühr i.H.v. USD 0,99 an\(^{17}\).


2.3 iMessage

Apple verfolgt mit seinem Nachrichtendienst iMessage eine sehr ähnliches Konzept, ging bei der Integration des Dienstes jedoch einen bedeutenden Schritt weiter und integrierte ihn mit Einführung der Betriebssystemversion iOS 5.0 schlichtweg in die bestehende SMS/MMS Applikation des Mobiltelefons.


Der Endkunde trifft somit bei der Übersendung in aller Regel keine bewusste Wahl, über welches konkrete Protokoll (SMS/MMS oder iMessage über das öffentliche Internet) er die Nachricht übertragen möchte\(^\text{19}\). iMessage unterscheidet sich für den Endkunden in der Nutzung somit de facto nicht vom herkömmlichen SMS bzw. MMS Dienst.

2.4 Gemeinsamkeiten und Unterschiede der Applikationen

Die genannten Applikationen nutzen also v.a. den Breitbandzugang des Mobilfunknetzbetreibers. Mit diesen Applikationen werden netzbetreibereigene Dienste im Bereich Messaging und SMS konkurriert.

Die beiden beschriebenen Applikationen sind somit ökonomisch gesehen Substitute der netzbetreibereigenen Dienste, in diesem Fall der SMS/MMS, mit dem Unterschied, dass sie vom Smartphone-Hersteller bzw. einem Dritten (z.B. ein Diensteanbieter) angeboten werden. Darüber hinaus erfolgen diese Applikationen unter anderen Voraussetzungen als die „klassischen“ vom Netzbetreiber angebotenen Diensten, denn


\(^{19}\) Eine direkte Auswahlmöglichkeit besteht für den Endkunden nicht - er kann lediglich in den Einstellungen des Mobiltelefons das Service iMessage gänzlich deaktivieren.
die Nutzung des Dienstes erfolgt in der Regel auf einer Basis, die als „as is“ oder „as available“ bezeichnet wird. Die Bedingungen, die der Nutzer akzeptieren muss, umfassen auch Haftungsausschlüsse, teilweise Datenschutzregelungen, Bestimmungen zum anwendbaren Recht bzw. zum Gerichtsstand (häufig außerhalb der EU) etc. In der Konsequenz bedeutet dies, dass der Nutzer oftmals Bedingungen akzeptiert, die weder transparent sind noch nach mit in der EU geltenden Maßstäben kompatibel sind.


sofern AGBs der Nutzung zugrunde liegen, handelt es sich oft um AGBs nach dem Recht von Drittstaaten, die weder Gemeinschaftsrecht entsprechen noch von der Regulierungsbehörde auf ihre Übereinstimmung mit dem TKG 2003 geprüft worden sind. Insbesondere kundenspezifische Daten zum Kaufverhalten werden gesammelt und ausgewertet oder z.B. zu Bewegungsprofilen verarbeitet und können vom Anbieter auch für andere kommerzielle Angebote genutzt werden. Aufgrund der Tatsache, dass Endkunden derartige AGB oft nicht lesen oder verstehen, ist die Behörde zur Vorabkontrolle gesetzlich angehalten.

vor dem Hintergrund der eben beschriebenen Problematik mit der Zustimmung zu den AGB ist darüber hinaus auch die Anwendung von Datenschutz- und Kundenschutzregelungen nicht sichergestellt. Wie bereits ausgeführt, unterliegen derartige Angebote oft keiner nationalen Überprüfung.


Die Konsequenz hiervon ist, dass die Angebote von Diensten und Applikationen (vom Netzbetreiber bzw. Applikationsanbieter), die für die Nutzer grundsätzlich austauschbar sind, unter ökonomisch unterschiedlichen Voraussetzungen erfolgen. Applikationsanbieter unterliegen einer wesentlich „leichteren“ Regulierung und können sich durch die „lockereren“ Regeln im Umgang mit Nutzern und dessen Daten Wettbewerbsvorteile
verschaffen, die ihre Marktposition (weiter) stärken. Die zentrale Frage dabei ist, ob sich die genannten Dienste und Applikationen als elektronische Kommunikationsnetze bzw. – dienste einordnen lassen und welche Konsequenzen dies für die rechtliche Beurteilung dieser Angebote hat.
3 Welchen gesetzlichen Regelungen unterliegen Applikationen und „neue Dienste“?

Für die rechtliche Einordnung der Applikationen unter gesetzlichen Regulierungsbestimmungen kommen für die hier zu behandelnde Problemstellung das Telekommunikationsgesetz und das E-Commerce-Gesetz in Frage. Im Folgenden ist zu untersuchen, ob die genannten Applikationen in den Anwendungsbereich des E-Commerce-Gesetzes (ECG) und/oder des TKG 2003 fallen. Insbesondere stellt sich die Frage, inwieweit das Herkunftslandprinzip zur Anwendung gelangt bzw. wie dieses iZm mit dem TKG 2003 zu verstehen ist. Im Konkreten stellt sich die Frage, ob sich ein Diensteanbieter in jedem Land, in dem er tätig ist, seinen Dienst anzeigen muss oder ob es ausreichend ist, wenn er den Dienst in jenem Land anzeigt, in dem er seinen Unternehmenssitz hat.

3.1 Richtlinie 2000/31/EG i.V.m. dem ECG

In Umsetzung der „Richtlinie über den elektronischen Geschäftsverkehr“ wurde in Österreich das E-Commerce-Gesetz (ECG) erlassen.19

Das ECG regelt einen rechtlichen Rahmen für bestimmte Aspekte des elektronischen Geschäfts- und Rechtsverkehrs. Es behandelt die Zulassung von Diensteanbietern, deren Informationspflichten, den Abschluss von Verträgen, die Verantwortlichkeit von Diensteanbietern, das Herkunftslandprinzip und die Zusammenarbeit mit anderen Mitgliedstaaten im elektronischen Geschäfts- und Rechtsverkehr.20

Gemäß § 3 Z 1 ECG ist ein Messaging-Dienst ein Dienst der Informationsgesellschaft, da er unter anderem Informationen über ein elektronisches Netz übermittelt.21 Der Diensteanbieter unterliegt mit seinem Dienst somit dem Anwendungsbereich des ECG. Er hat somit dessen Verpflichtungen einzuhalten und kann auch die daraus resultierenden Rechte, wie insbesondere das Herkunftslandprinzip gemäß § 20 ECG in Anspruch nehmen. Das Herkunftslandprinzip hat zur Folge, dass sich die rechtlichen Anforderungen

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22 Vgl. § 1 abs. 1 ECG.
23 § 3 Z 1 ECG definiert Dienst der Informationsgesellschaft wie folgt: ein in der Regel gegen Entgelt elektronisch im Fernabsatz auf individuellen Abruf des Empfängers bereitgestellter Dienst (§ 1 Abs. 1 Z 2 Notifikationsgesetz 1999), insbesondere der Online-Vertrieb von Waren und Dienstleistungen, Online-Informationsangebote, die Online-Werbung, elektronische Suchmaschinen und Datenabfragemöglichkeiten sowie Dienste, die Informationen über ein elektronisches Netz übermitteln, die den Zugang zu einem solchen vermitteln oder die Informationen eines Nutzers speichern.
an einen in einem Mitgliedstaat niedergelassenen Diensteanbieter nach dem Recht dieses Staats richten. Mit anderen Worten, wenn der Diensteanbieter alle gesetzlichen Bestimmungen seines Herkunftslandes einhält, wie z.B. Datenschutzbestimmungen, Konsumentenschutzbestimmungen oder Regelungen zur sonstigen rechtlichen Verantwortlichkeit der Anbieter (§3 Z8 ECG) kann er keinen strengeren lokalen Regeln unterworfen werden. Die Aufsicht über die Dienste hat am Herkunftsort für alle Bürger der Europäischen Gemeinschaft zu erfolgen.24


Als erstes Ergebnis ist daher festzuhalten, dass nach dem ECG grundsätzlich das Herkunftslandprinzip zur Anwendung gelangt. Demzufolge ist das Recht jenes Landes anzuwenden, in dem das Unternehmen seinen Sitz hat. Vor dem Hintergrund des § 4 Abs. 2 ECG kommt für den Fall, dass die Applikationen auch als Telekommunikationsdienste einzuordnen sind, das österreichische TKG zur Anwendung, unabhängig davon, wo das betreffende Unternehmen seinen Sitz hat. Folgt man dieser Annahme nicht, könnte argumentiert werden, dass für die Einordnung der hier zur Diskussion stehenden Applikationen § 4 Abs. 2 ECG zwar vorsieht, dass das TKG 2003 bei Telekommunikationsdiensten jedenfalls zur Anwendung kommt, das bezieht sich jedoch ausschließlich auf Fälle, in denen nach dem Herkunftslandprinzip österr. Recht zur Anwendung kommt. Man könnte somit argumentieren, dass ein Unternehmen, das über das Internet Kommunikationsdienste anbietet, dem Gewerbe- und

25 ErläutRV 817 BlgNr 21.GP


### 3.2 Österreichisches TKG

Ein Unternehmen, dass die rechtliche Kontrolle über die Gesamtheit der Funktionen, die zur Erbringung des jeweiligen Kommunikationsdienstes notwendig sind, ausübt und diese Dienste anderen anbietet, wird gemäß § 3 Z 3 TKG 2003 als Betreiber eines Kommunikationsdienstes qualifiziert. Dass ein Anbieter von Applikationen die rechtliche Kontrolle über die Gesamtheit der Funktionen, die zur Erbringung des jeweiligen Kommunikationsdienstes notwendig sind, ausübt, wird wohl zu bejahen sein. Dies ist wohl

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27 Sonst würde sich jeder Anbieter ein Land wählen, das eine für ihn „günstige“ Regelung zum Gewerberecht hat, sich dort niederlassen und dann Dienste in sämtlichen EU-Ländern anbieten, ohne sich der jeweiligen landesspezifischen Regulierung unterwerfen zu müssen.


Zusammenfassend kann festgehalten werden, dass die Voraussetzungen des § 3 Z 3 TKG 2003 gegeben sind und somit die Stellung als Betreiber bejaht werden kann; inwiefern die Voraussetzung des Kommunikationsdienstes erfüllt sind, wird sogleich zu prüfen sein.29

28 Vgl. RTR: Richtlinien für Anbieter von VoIP Diensten, S.4ff, s. https://www.rtr.at/de/tk/RichtlinienVoIP
29 Das deutsche Telekommunikationsgesetz definiert wie folgt: (1) Gemäß § 3 Ziffer 24 dTKG sind „Telekommunikationsdienste“ in der Regel gegen Entgelt erbrachte Dienste, die ganz oder überwiegend in der Übertragung von Signalen über Telekommunikationsnetze bestehen, einschließlich Übertragungsdienste in Rundfunknetzen. Insofern unterscheidet sich die Definition nur hinsichtlich der Formulierung „gewerblich“ im österreichischen TKG gegenüber „gegen Entgelt erbracht“ im deutschen TKG sowie im Begriff selbst („Kommunikationsdienst“ im österreichischen TKG 2003, „Telekommunikationsdienst“ im deutschen TKG); (2) Als Telekommunikationsnetz gilt gemäß § 3 Ziffer 27 dTKG die Gesamtheit von Übertragungssystemen und ggf. Vermittlungs- und Leitwegeinrichtungen sowie anderweitigen Ressourcen einschließlich der nicht aktiven Netzbestandteile, die die Übertragung von Signalen über Kabel, Funk, optische und andere elektromagnetische Einrichtungen ermöglichen,


Zu prüfen ist, ob es sich bei den angebotenen Apps um Nebendienstleistungen handelt. Soweit dies bejaht werden kann, würden die Apps demzufolge aus der Begriffsdefinition des § 3 Z 9 TKG 2003 ausgenommen werden. Diese Dienstleistungen wären zwar grundsätzlich als Wiederverkauf eines Kommunikationsdienstes anzusehen, würden aber nur einen kleinen Teil eines inhaltlich anderen und vom Hauptzweck eines Kommunikationsdienstes verschiedenen Vertrages (z.B. Beherbergung, Bereitstellung von Büroräumlichkeiten, branchenübergreifende Kundenbindungsprogramme, regionalisierte Marketingdienste) darstellen, der nicht darin bestünde ganz oder


30 Das Begriffsmerkmal der Gewerblichkeit setzt nicht unbedingt Entgeltlichkeit voraus. Gewerblichkeit bedeutet wirtschaftliche Tätigkeit.


4 Konsequenzen


Für Unternehmen, die als Betreiber von Kommunikationsnetzen oder Anbieter von Kommunikationsdiensten einzuordnen sind, kommen die folgenden Bestimmungen des TKG 2003 in Frage. Die nachstehende Aufzählung enthält jene Paragraphen, die sich im weitesten Sinne als „Pflichten“ von Netzbetreibern und Diensteanbietern einordnen lassen. Somit sind, nach dem Ergebnis in Kapitel 3, auch Applikationsanbieter diesen Pflichten und Vorgaben unterworfen:

- Anzeigepflicht (§ 15 TKG 2003)
- Maßnahmen zur Sicherheit und Integrität (§ 16a TKG 2003)
- Dienstequalität (§ 17 TKG 2003)
- Anzeige von AGB und Entgelten (§ 25 TKG 2003)
- Besondere Informationspflichten (§ 25b TKG 2003)
- Finanzierungsbeitragspflichten (§ 31 TKG 2003 und § 34 KOG)
- Marktanalyse/SMP/Remedies (Wettbewerbsregulierung nach §§ 35 TKG 2003)
- Informationspflichten (§ 90 TKG 2003)
- Datenschutz (§ 92-97 TKG 2003)

„Klassische“ Netzbetreiber sind diesen Regelungen des TKG unterworfen. Wesentliche Bestimmungen, die hierzu zählen, seien nachfolgend kurz erläutert:

a) Anzeigepflicht (§ 15 TKG 2003)

Zunächst gilt gem. § 15 TKG 2003, dass

„die beabsichtigte Bereitstellung eines öffentlichen Kommunikationsnetzes oder -dienstes sowie dessen Änderungen und dessen Einstellung […] vor Betriebsaufnahme, Änderung oder Einstellung der Regulierungsbehörde anzuzeigen“

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32 Die Vorratsdatenspeicherung nach § 102a TKG 2003 käme grundsätzlich auch in Frage, allerdings falls die Applikationen nicht unter die Definition der Dienste, für die die Vorratsdatenspeicherung vorzunehmen ist.
ist.\textsuperscript{33} Per heute haben Unternehmen, die solche Applikationen oder ähnliche Dienste anbieten, wie z.B. Google\textsuperscript{34}, Apple, Amazon, WhatsApp, etc. keine Anzeige nach § 15 TKG 2003 übermittelt.

b) Sicherheit und Integrität (§16a TKG 2003)


c) Dienstequalität (§ 17 TKG 2003)

Nach § 17 Abs. 1 TKG 2003 haben Betreiber von öffentlichen Kommunikationsdiensten „vergleichbare, angemessene und aktuelle Informationen über die Qualität ihrer Dienste sowie über die zur Gewährung der Gleichwertigkeit beim Zugang zu öffentlich zugänglichen Telekommunikationsdiensten für behinderte Nutzer getroffene Maßnahmen zu veröffentlichen und der Regulierungsbehörde auf deren Anforderung vor der Veröffentlichung bekannt zu geben."

Applikationen, die ökonomische Substitute zu bestehenden Diensten darstellen, müssten der gleichen Regelung unterfallen. Heute sucht man allerdings derartige

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\textsuperscript{33} In der Anzeige sind Name und Anschrift des Bereitstellungsorts, gegebenenfalls Rechtsform des Unternehmens, eine Kurzbeschreibung des Netzes oder Dienstes sowie der voraussichtliche Termin der Aufnahme, Änderung oder Einstellung des Dienstes bekanntzugeben.


Veröffentlichungen vergebens und mangels angezeigten Dienstes fehlt es auch an einer entsprechenden Aufforderung der Regulierungsbehörde an solche Anbieter. Zu beachten ist, dass die Vorgaben zur Qualitätssicherung Betreiber von öffentlichen Kommunikationsdiensten trifft, also auch, wenn sie ihren Dienst über das Netz eines Dritten realisieren.

d) Geschäftsbedingungen und Entgelte (§25 TKG 2003)


Des Weiteren führt § 25 Abs. 2 TKG 2003 aus, dass „Änderungen der Allgemeinen Geschäftsbedingungen und Entgeltbestimmungen vor ihrer Wirksamkeit der Regulierungsbehörde anzuzeigen sind und in geeigneter Form kundzumachen sind."

§ 25 Abs. 4 TKG 2003 regelt die Anforderungen an die AGB. Hier gilt wiederum, dass die AGB von Applikationsanbietern einer derartigen Prüfung durch die Regulierungsbehörde nicht unterliegen. Ihre Konformität mit österreichischem Recht ist daher nicht sichergestellt.

e) Universaldienst (§§ 26 ff TKG 2003)


f) Informationspflichten (§ 90 TKG 2003)

§ 90 TKG 2003 regelt Informationspflichten von Betreibern von Kommunikationsnetzen oder -diensten, wonach umfangreiche Berichtspflichten gegenüber der Regulierungsbehörde bestehen. Auch hier ist die Situation so, dass Applikationsanbieter, die ihre Netze und Dienste nicht anzeigen diese Pflichten de facto nicht befolgen, während „klassische“ Netzbetreiber und Diensteanbieter z.B. folgende Informationen bereitzustellen haben

- Auskünfte für die systematische oder einzelfallbezogene Überprüfung der Verpflichtungen, die sich aus diesem Bundesgesetz oder aus einer auf Grund dieses Bundesgesetzes erlassenen Verordnung oder eines Bescheides ergeben,
- Auskünfte für die einzelfallbezogene Überprüfung der Verpflichtungen, wenn der Regulierungsbehörde eine Beschwerde vorliegt oder sie aus anderen Gründen eine Verletzung von Pflichten annimmt oder sie von sich aus Ermittlungen durchführt,
- Auskünfte in Verfahren auf Zuteilung von Frequenzen oder Kommunikationsparametern,
- Auskünfte für ein Verfahren gemäß § 36 bis 37a,
- Auskünfte für die Veröffentlichung von Qualitäts- und Preisvergleichen für Dienste zum Nutzen der Konsumenten, sowie
- Auskünfte über künftige Netz- oder Dienstentwicklungen, die sich auf die jeweils bestehenden Dienste auf Vorleistungsebene auswirken könnten.
g) Aufsichtsmaßnahmen (§ 91 TKG 2003)

Der Regulierungsbehörde stehen aber auch Aufsichtsmaßnahmen nach § 91 TKG 2003 zur Verfügung, welche sie gegenüber Betreibern, welche das TKG 2003 anzuwenden haben, geltend machen kann. Wer jedoch nicht als Anbieter registriert ist, entzieht sich daher auch den Maßnahmen, welche die Regulierungsbehörde nach § 91 TKG 2003 ausüben könnte.

h) Datenschutz (§§ 92 ff TKG 2003)

Datenschutz und Datensicherheit ist bei vielen Anwendungen ein bedeutendes Thema. Die Frage um die Sicherheit von Applikationen wie WhatsApp (s.o.) verdeutlicht dies. Hier bestimmt § 95 TKG 2003, dass besondere Anforderungen an die Datensicherheit bestehen, die jeden Betreiber eines öffentlichen Kommunikationsdienstes jeweils für jeden von ihm erbrachten Dienst treffen. Gemäß § 95 Abs. 2 TKG 2003 hat

„der Betreiber eines öffentlichen Kommunikationsdienstes in jenen Fällen, in denen ein besonderes Risiko der Verletzung der Vertraulichkeit besteht, die Teilnehmer über dieses Risiko und - wenn das Risiko außerhalb des Anwendungsbereichs der vom Betreiber zu treffenden Maßnahmen liegt - über mögliche Abhilfen einschließlich deren Kosten zu unterrichten“.

Diese Vorgabe wird von Applikationsanbietern nicht erfüllt. In weiterer Folge regelt § 95a TKG 2003 Sicherheitsverletzungen. Nach Abs. 2 hat im Fall einer Verletzung des Schutzes personenbezogener Daten

„der Betreiber öffentlicher Kommunikationsdienste unverzüglich die Datenschutzkommission von dieser Verletzung zu benachrichtigen. Ist anzunehmen, dass durch eine solche Verletzung Personen in ihrer Privatsphäre oder die personenbezogenen Daten selbst beeinträchtigt werden, hat der Betreiber auch die betroffenen Personen unverzüglich von dieser Verletzung zu benachrichtigen“.

Gemäß Abs. 6 haben Betreiber öffentlicher Kommunikationsdienste ein Verzeichnis der Verletzungen des Schutzes personenbezogener Daten zu führen. Es hat Angaben zu den Umständen der Verletzungen, zu deren Auswirkungen und zu den ergriffenen Abhilfemaßnahmen zu enthalten und muss geeignet sein, der Datenschutzkommission die Prüfung der Einhaltung der Bestimmungen gemäß Abs. 1 bis 4 zu ermöglichen. Auch diese Verpflichtungen werden von Unternehmen, die ihre Dienste angezeigt haben, erfüllt, Applikationsanbieter sparen sich hingegen diesen Aufwand.
i) Finanzierung der RTR-GmbH (§ 34 KOG)


- Ihre Dienste unterliegen keiner Qualitätskontrolle. Die Regulierungsbehörde kann die Einhaltung von Qualitätsmaßstäben nicht kontrollieren und Missstände nicht beanstanden; Beschwerden von Kunden hierzu „gehen ins Leere“.


- Mangels der Möglichkeit der Anwendung der relevanten Bestimmungen im TKG 2003 besteht für diese Unternehmen keine Verpflichtung entsprechende Informationen an die Regulierungsbehörde zu übermitteln. Dies senkt ihre Kosten im Vergleich zu den Anbietern, die TKG-konform die Informationen ermitteln und bereitstellen und führt zu einem Weniger an Transparenz auf dem Markt.

- Die Unternehmen leisten keinen Finanzierungsbeitrag zum Universaldienstfonds. Netzbetreiber und Diensteanbieter, die ihre

36 § 34 KommAustria-Gesetz (KOG) BGBl. I Nr. 32/2001 idF. BGBl. I 125/2011.
Leistungen angezeigt haben, zahlen daher einen höheren Beitrag und erleiden einen Wettbewerbsnachteil.

- Die Behördenfinanzierung erfolgt nur durch Unternehmen, die ihre Netze und Dienste angezeigt haben. Applikationsanbieter sparen auch diese Kosten.

- Die Unternehmen nehmen nicht an den Verfahren zur Marktanalyse teil. Dadurch kann ein verzerrtes Bild über Marktkräfte und Angebote entstehen.

- Kunden können sich nicht auf die Schutznormen zum Verbraucherschutz berufen. Gleiches gilt in Bezug auf den Datenschutz.

- Bestimmungen zur Datensicherheit und Sicherheitsverletzungen werden nicht überprüft und gegebenenfalls nicht eingehalten.

Daraus lässt sich folgern, dass die Applikationsanbieter durch die Nicht-Vornahme der Anzeige über den Betrieb von elektronischen Kommunikationsnetzen und das Angebot von elektronischen Kommunikationsdienstleistungen einen erheblichen finanziellen und nicht-finanziellen Vorteil gegenüber jenen Unternehmen lukrieren, die ihrer Anzeigepflicht nachgekommen sind und daher den Vorgaben des TKG 2003 Folge leisten.38 Die „Nicht-Regulierung“ der Applikationsanbieter hat somit Nachteile für den Wettbewerb, für die mit den Applikationsanbieter konkurrierenden Unternehmen und auch für die öffentliche Hand, die die Einhaltung ihrer gesetzlichen Vorgaben nicht garantieren kann.

5 Schlussfolgerung


Die Weigerung eines Applikationsanbieters den Regeln des TKG 2003 zu folgen kann Verwaltungsstrafen nach sich ziehen. Im Folgenden seien einige wenige genannt:

- Ein Anbieter, der zur Anzeige verpflichtet wäre kann gem. § 109 Abs. 4 Nr. 1 TKG 2003 mit einer Verwaltungsstrafe von bis zu 58.000 € belegt werden.
- Eine Verwaltungsstrafe in gleicher Höhe kann anfallen, wenn AGB gemäß § 25 TKG 2003 nicht angezeigt werden.
- Bis zu 37.000 € können fällig werden, wenn die Maßnahmen zur Sicherheit und Integrität verletzt werden (§ 16 a TKG 2003).
- Bei Nicht-Einhaltung der Bestimmungen zur Dienstequalität kann die Regulierungsbehörde eine Strafe von bis zu 37.000 € verhängen.


Dies bedeutet im ersten Schritt, dass die Behörde Applikationsanbieter auffordern muss, der Anzeigepflicht nach § 15 TKG 2003 betreffend das Betreiben von elektronischen Kommunikationsdiensten und -netzen nachzukommen. So sollte dies nicht fruchten, sind entsprechende Verwaltungsstrafen festzulegen und zu implementieren.


*****
Kontakt

SBR Juconomy Consulting AG
Parkring 10/1/10
1010 Wien
T: +43 1 513 51 40 80
F: +43 1 513 51 40 95
E: ruhle@sbr-net.com
freund@sbr-net.com
STELLA COM has done as a neutral consultancy company an analysis on the document "Preparation for a Fully Converged Audiovisual World: Growth, Creation and Values (FCAW)" from 24.04.2013 and giving comments and answers to the questions.

In general STELLA COM has more experiences in the technology and businesses plans of broadcasting/OTT technologies, but with the view of our customers from the telecommunication and advertisement branch we have also looked in area of data protection and media politics.

In the Greenbook document FCAW we become the impression, that the author is more interested in video/TV area and not the audio/radio world, in which quite a lot hybrid business models are available for a long period. Therefore we have looked in the Q/A also in such business as well, and where possible and relevant we have given a separate remark.

Also it seems that the Greenbook is triggered by the telecommunication industry to allocate more spectrum below 700/800 MHz. STELLA COM wants to remark, that due the fact, that the broadcasters wants for a logical step in the near future for the transition from terrestrial HDTV transmissions with MEPG-4 to HEVC or to higher Format like UHDTV (with HEVC encoding) allocate new frequencies in the "terrestrial broadcast" spectrum from today and any discussion of other spectrum use should be out-of-scope of this Greenbook.

A last personal remark we want to give here, that this Q/A document here was prepared in the last 5 days and therefore some paragraphs need a fine-tuning, but we hope the general statements and remarks are coherent.
Market considerations

Q1:

What are the factors that enable US companies to establish a successful presence in the fragmented EU market despite language and cultural barriers, while many EU companies struggle? What are the factors hindering EU companies?

A1:

1.) Culture and Language

Looking to the land map of Europe you can find out that the US-states (here down without Hawaii) are more than two times bigger as Europe. Looking secondly on the whole map of North-America on the territory of the US with Alaska/Hawaii and main parts of Canada you will find out that the people in these areas have a similar culture and a mother language which is English. Sure – we know that speaks several dialects with also different phrases and expressions.

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Looking to the map of Europe and now also to the borderline and as well, being a member of these states, you will find out that with a crossing of these borders the language is "changing" with only few exceptions (e.g. Germany <-> Austria; Monaco <-> France). Also the culture influenced by the long history (different religions, different authorities, etc.) and also the different position in the land map (north, south, next to the Atlantic, no sea, mountainous, etc.) gives the people in these countries different "intercommunication", therefore also a different culture, businesses and living.

Reason by the modern living in these European countries due businesses, travelling, studying at Universities, the communication networks (social networks) and the Internet itself let more and more people having more and more better language skills in English – especially the younger generation. As the content of US blockbusters providers attract more the younger generation in the US also these blockbusters can be "understood" in Europe as well – in the sense of content and language.

Now looking on vice versa situation: A content creator (e.g. broadcaster) in the Czech Republic (example) produce a series about a family with their friends and living in Prague – for sure the main language and audio-stream is Czech. This series will be broadcasted via different networks (terrestrial, Internet, etc.) in the Czech Republic, but to find viewers in Spain or Greece will be more or less impossible. Also for a content buyer from Spain it will be risk to translate this czech series – therefore the buyer needs to have several guarantees and safeties. Similar is the situation on the radio/music market!

By reason of these language and cultural "effects" any opening the market for an exchange of media/audio/music/film content will help US companies and providers to sell their content to the European – with some small exceptions for British, Irish and French content.
This means not to blockade the US companies from the European market, but there should be a support for "traditional" content - not only on the transport networks - but also on language translation and marketing, as these local and regional content providers have only a small budget.

2.) Technology
The content provider can use all directions to encode/transcode the material (film, music, etc.) in a proper way to reach all relevant devices in the market. The limitation is political or cost-effective driven.

On the other hand end users will find several end devices in the market which differ from country to country due different software and DRM systems. For example MHP services are available in Italy, but not in Poland.

To open the border to deliver any content onto each device in each EU member state means also an increased fragmentation of the end device market. This means also more costs for the transportation, the support and the after-sales service. Additional to the operational costs the legal issues needs to be declared. Europe needs to have a unified Standard!

Separate to this another example is given here: A movie from a OTT service from the Netherlands could be illegal copied in Romania. A penalty in the Netherlands could be 5,000 €, but this penalty in Romania could mean that the person needs to trapped in prison for many years. This means general law enforcement needs to be declared by each country.

3.) Infrastructure
For a high-equipped infrastructure with hundreds of servers, transmitters, DSLAMs, routers, satellite transponders, etc. needs a high budget. This means if a content provider wants to have a big coverage of several regions and/or countries means also a big investment. For small companies there is no chance to expand in a wider area, for bigger companies only with one and more shareholder in the background. As these bigger companies have mostly shareholders in the US and UK, means also that the content will come from these countries and the income will go in these countries. Therefore any support on the infrastructure means more income for the shareholders in the US and UK – maybe with limited exceptions from France and Germany.

4.) Standards (in general)
Broadcast-related:
Unfortunately some years ago several interactive TV projects in several countries were started with different standards (e.g MHP in Italy, Norway, Austria and Germany [Germany and Austria stopped MHP some years ago] or the Red-Button interaction in the UK) and today several European broadcasters have (or will) adopt HbbTV. For Italy the future situation is unclear, when they will switch from MHP to HbbTV (if!). This means with global view on the standardization activities there is no need to guide this activity by the EC, only a strong recommendation should be given
by the EC to follow the most accepted interactive TV application – which is so far HbbTV (well – the name should be changed, it is really not trendy).

**OTT:**
Besides the broadcast-related interactive services broadcast content is after a live event also available On-Demand via Internet connection (mobile phone, Hybrid-STB, connected TV-set, Laptop, etc.). Additional features like EPG, different subtitles, advertisement information, local news, VoD, Music-On-Demand ... can be displayed or listened. Different web browser (Webkit, Opera,...) and/or operation systems (IOS, Android, ...) helps the user to get an access to these services. But each device manufacture is favoring only one of these solutions for his end device. This could mean that in one household three, four or five different solutions are integrated in the user smartphone, tablet or TV-set and the user will be disappointed to find his favorite OTT VoD from his smartphone not on his connected TV set or could have barriers to combine services from the end devices (e.g. Multiroom-Services). There is no real chance to mandate only one system for all these different devices and services; as also these devices are not appointed for one specific market – the devices with the OTT services are appointed for a global market – a world market. Therefore we propose to open the device platforms for all services and not limiting these platforms on manufactures interests – as also these platforms can be not attractive for the users.

**SmartTV:**
SmartTV is a service on a connected TV-set or STB with specific offers for media services for end users which can be find in a SmartTV portal. For refinancing these services the manufacture of the end devices have contracts with the content provider to integrate the content provider's app in the portal. The services could be a service from a broadcaster but also from a VoD provider for movies or music video clip services, a games provider, regional news service agencies, newspapers apps and typical service like Youtube, Facebook, Snapchat and Twitter.
To control or standardize these SmartTV applications and services means also to react quite fast if any new trend poping-up – therefore there is no need to mandate one or the other app.
But for each device with internet connection it is possible to readout the users behaviors. This could be for controlling the bandwidth and/or the memory of the device but also to collect statistics about the usage of the device (e.g. watched TV channels, switch-on and switch-off times, watched ads, used links for advertisement, ...).
The readout and analyzing of the device usage data need to be "controlled" by the EC or national authorities.

**Q2:**
What are the factors affecting the availability of premium content? Are there currently practices relating to premium content at wholesale level which affect market access and
sustainable business operations? If so, what is the impact on consumers? Is there a need for regulatory intervention beyond the application of existing competition rules?

A2:

To consume "Premium" content by a consumer depends on:

• the end device
• the national content right issues
• the rules and market footprint of the content provider
• the infrastructure of the network

No role plays the infrastructure (internet access, network, servers, etc.) and the bandwidth. These facts can be solved by the consumer himself (by installation of internet access via fibre, satellite or mobile connections). Similar it is for a Pay-TV service – the consumer can simply handle this issue.

The national content right issue means that some content providers don't allow to consume its content outside its territory (country) and a consumer can't watch/listen to the service although the consumer maybe a subscriber to the pay service and maybe in a foreign country for his holidays. This is also the case for content from public broadcasters, which will be "blocked" at the border.

As this issue regards not a big crowd of consumers, but need to be regulated.

On the other hand if the content provider defines which content can be consumed in which country (e.g. British private broadcaster allows people to watch the content in France). This a legal business model and should be not regulated by any authority.

A third point is, that some manufacture for STB and TV sets have integrated their portal in their devices with the SmartTV service, it allows the consumer only to watch/listen to content which is integrated in these portals. But parallel the user can compass this lack by using a PC or Laptop. The user is disappointed of the limited content at the TV or from the STB.

Therefore a regulation of SmartTV services is necessary!

Q3:

Are there obstacles which require regulatory action on access to platforms?

A3:

Yes, there is the non-open SmartTV platform, which don't allows that third party content wont or couldn't accessed by the policy of the device manufacture (see also before; A2). It is not comparable like (example) the Android-market, where the user can easily download a preferred app and install it on the homescreen where he wants to positioned it. This simple function the user is looking for his STB or connected TV set.
**Financing models**

**Q4:**

Do the current AVMSD requirements provide the best way to promote the creation, distribution, availability and market appeal of European works?

**A4:**

This question arises here quite late. In the "audio world" where e.g. iTunes and Amazon build up a music/audio platform for years, there never coming up such question. Only with the more "visual" trend with tablets and connected TV sets it is really not fair to ask for building up hurdles for the "newcomers". But as the "American way of live" of music and videos finds more-and-more a wider dominance in the European market (with some exceptions) there should be a general support of national culture – we speaking here of music and films/documentaries/series. Supporting here means in the sense of not collecting money from the "new-comers" like Netflix and others and to share it with some content creator, but creating supported platforms with easily access for the content owner and the consumer. A national broadcaster or a culture-influenced authority can open a OTT platform to upload content from third parties. How this integration could be launched, should be discussed separately.

**Q5:**

How will convergence and changing consumer behaviour influence the current system of content financing? How are different actors in the new value chain contributing to financing?

**A5:**

Besides the regular Pay-Service-user, who already has a subscription for a TV/Radio service, the crossing of the barrier for any new user to any Pay-Service is quite critical today:

In the first step the user is looking for alternatives instead of signing any subscription for a Pay-Service. If the alternative lacks on quality or the using of the alternative access is too complicated maybe the user will sign to a regular Pay-Service. This could also mean that he is regularly looking for alternatives although he is become a new Pay-TV subscriber. If he is happy with his subscription and the offered content, but he wants to spend less money, maybe he is looking to cancel other services.

In general it is a normal market situation in which "old" subscribers approve from time to time for adding new services or cancel one of their subscribed services. The trend for the cord-cutting, which can be recognized significantly in the US, can't be recognized in Mid-Europe, but in some countries in South-Europe – influenced by the
economic crisis in these countries. These people looking for alternatives – like for example sharing a subscription with a neighbor, which is not at all legal.

More interesting are the new comers on content providers on the market, which offers streaming services. The content can be watched/listened on a connected device, tablet, laptop and smartphone. For the video/film industry the situation is not so easy compared with the music industry. The music from the US/UK will be listened more or less everywhere in Europe. Therefore it is easier to launch a music-streaming-service in Europe, additional to the fact that the music will be rather accepted than movies/films the monthly subscription (if!) is "payable" by new subscribers – especially for the young generation. For a wider market movies need to be translated, the infrastructure costs for the provider is higher. The provider needs adaptive transcoding solutions and this means also more cost for a subscription. For the ROI the provider needs more time and the provider need more marketing activities and budget to convince people to change their subscription.

Having said that, in this case no regulation and/or support on a financing model by the EC is necessary!

**Interoperability of connected TV-sets**

**Q6:**

Is there a need for EU action to overcome actual or potential fragmentation and ensure interoperability across borders? Is there a need to develop new or updated standards in the market?

**A6:**

Looking in the past the MHP was introduced in Germany, Austria, Norway and Italy and today in the most markets MHP is gone. In the UK also a "Red-Button" function was developed with MHEG. Today - some countries adopted HbbTV (personal remark: not a good marketing buzz word!), but some countries have their own solution and some will stay on their old solution!

Comparing this to the mobile telecommunication market it seems that the TV industry have not learned how to generate fast trends. The mobile communication market had started for years with UMTS/3G, now there is the switch to LTE/4G. It is assumed that in five/six years there will be a new standard. All countries in Europe (also UK and Italy) have adopted or will adopt LTE in the next month. Why is the TV industry not acting similar?

Looking to the radio market: more and more countries adopting DAB, also the car manufactures integrating more and more DAB radio devices in their cars (also the british manufactures). Well – it was a hard way to come to this position! But why is the TV industry different?
The mistake is not based on the ideas of the manufactures. The rules are coming and the standards are pushed from the different views from the broadcasters and the authorities. Unfortunately there are no neutral control instances like the cartel offices in each country (or in the European Commission). Authorities and broadcasters (mainly the public) working hand in hand on national requirements, rules, laws and suggestions, but don't have a brighter view on Europe!

**Yes** – we need a neutral control instrument in Europe to regulate the technology for the media market. Example for the issues for such control mechanism could be:

- Unified recommended standard (minimum standard)
- Rules on personal Data protection
- Control of advertisement rules
- Access free for all content providers
- Payable for all consumers
- Transparent
- Downwards compatible (with some exceptions due hardware restrictions)
- Others … (should be discussed!)

Surely the national authorities can exclude services from the hybrid platforms (e.g. fascism, pornographic, violent criminal content, etc.), but technically the devices should base on similar specifications! The mobile devices standards and regulation delivered a good solution – similar interests, similar number of provider and similar number of manufactures…but more consumers.

Recommendation: Opening the market with only one technical standard and controlling only the applications, the content and the data protection of the user.

**Infrastructure and spectrum**

**Q7:**

How relevant are differences between individual platforms delivering content (e.g. terrestrial and satellite broadcasting, wired broadband including cable, mobile broadband) in terms of consumer experience and of public interest obligations?

**A7:**

Traditional networks for broadcasting are satellite, cable and terrestrial networks. With the new encoding standards today UHDTV and 3D transmissions with bitrates from 20 Mbit/s are in a good quality are possible/acceptable. This means also that these "new" contents are possible for a live transmission via DSL. Not forgettable that more and more users connecting their home entertainment devices (e.g. 3D TV set) with the internet.

To consume UHDTV on a smartphone makes no sense if we talk about display sizes from about 10 to 14 cm. But as also tablets are equipped with SIM cards for mobile communications, the situation could users also offer such new video services.
Technically, from the spectrum economy and form the eyes physiology it would be sufficient to transmit Live video streams for mobile devices (smartphone, tablets) with maximum quality format HDTV and integrated adaptive streaming solutions with around 10 Mbit/s. For higher quality format standards like UHDTV the transmissions via satellite, cable and DSL are preferred with HEVC inclusive adaptive streaming solutions.

The traditional "terrestrial" counties (e.g. Spain, Italy, France), if they won't give the terrestrial broadcast networks, need in the near future more spectrum for the transitions from SDTV to HDTV and also HDTV to UHDTV (and/or 3D). Therefore any intervention in the spectrum below 700/800 MHz should be not pursued before all transitions are completed.

Q8:
What frequency allocation and sharing models can facilitate development opportunities for broadcasting, mobile broadband and other applications (such as programme-making equipment) carried in the same frequency bands?

A8:
The "White Spaces" technologies seem to be a good solution to have spectrum co-existing between broadcast, mobile communication/broadband and production services (microphones, intercom, camera links, etc.). The new technology should be approved on interferences and switching methods between all available services. The guidelines and applications of the "White Spaces" uses should be discussed on a national basis only.

Q9:
What specific research needs with regard to spectrum have to be addressed to facilitate such development?

A9:
See A8

Regulatory Framework

Q10:
Given convergence between media, is there evidence of market distortion caused by the regulatory differentiation between linear and non-linear services? If yes, what would be the best way to tackle these distortions while protecting the values underpinning the EU regulatory framework for audiovisual media services?
A10: The analyses from the UK show that only about 2% of the daily viewing is non-linear TV – similar or mainly less will be the situation in other countries. The UK viewers mainly watched recorded video the day after or two days after, and here the content is mainly stored on the DTR at home. The situation with second screens usages is quite similar – the figures play a non-reasonable role in the market. Looking into a time frame of 5 years there will be no remarkable change of these figures.

More critical is the data protection of the user behaviors for the usages of non-linear video consumption (audio as well) from content which is stored in the cloud. The provider can easily read out the accesses to the cloud-servers and parallel data from the end devices. A regulation framework on the data protection of the users is necessary!

Q11: Is there a need to adapt the definition of AVMS providers and/or the scope of the AVMSD, in order to make those currently outside subject to part or all of the obligations of the AVMSD or are there other ways to protect values? In which areas could emphasis be given to self/co-regulation?

A11: No – in our opinion.

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

A12: Relevant content providers and/or content creators from Europe can be controlled, but the control mechanism are not clear – who will control the content which reach Europe from China, Iraq, Egypt or other countries?

This content will not be critical for a mass market, but should be controlled as well. Also the enforcement for any fines is undefined.

Therefore the AVMSD regulation work in the sense of the definition is correct, but the control mechanism should be approved.

Q13: Does increased convergence in the audio-visual landscape test the relationship between the provisions of the AVMSD and the E-Commerce Directive in new ways and in which areas? Could you provide practical examples of that?
A13:

It could difficult, if a content provider (e.g. broadcaster) will send out a movie with additional information via hybrid services. These services maybe link on other content with violence or pornographies in some parts and or could be misunderstood if the basis is historical. Is in this case the broadcaster responsible, while he linked the user to video sequence - or the original producer of the linked content?

It can be foreseen that such cases are not notable many, but a regulation could give the user information, where or by whom he can claim.

Q14:

What initiatives at European level could contribute to improve the level of media literacy across Europe?

A14:

I can't see any initiative which covers all the European Member states, the content creators, the public and private TV broadcasters, Radio stations, Streaming service Provider, Media Agencies and Regulators. On the national basis there are several initiatives active, but a unified organization or initiative could help. The work in this initiative needs a strong timeframe and concrete roles for their issues and also at the end strong guidelines or directives, on which every European person or organization can claim on.

**Media freedom and pluralism**

Q15:

Should the possibility of pre-defining choice through filtering mechanisms, including in search facilities, be subject to public intervention at EU level?

A15:

Some manufacture and service providers have already filter mechanism integrated in their products (e.g. connected devices) and their services. If these products or services reach a dominant number (e.g. 20%) of all products in the same family group or accesses by the users of one country, there should be a regulation to re-configure the platforms and services to fulfill a transparent media freedom for all users in this specific country.

Q16:

What should be the scope of existing regulation on access (art. 6 Access Directive) and universal service (art. 31 Universal Service Directive) in view of increasing convergence of
linear and non-linear services on common platforms? In a convergent broadcast/broadband environment, are there specific needs to ensure the accessibility and the convenience to find and enjoy ‘general interest content’?

A16:
No – if there will be additional "general interest content" available besides the original content transmitted by a broadcaster or content provider, the content provider can integrate a link for this content (e.g. inside the EPG, HbbTV, etc.). For this reason the broadcaster is intended to integrate such links! If there is other similar content available (e.g. produced by a news magazine), it is up to the user to search in Internet for more available content – like today if somebody gets a tweet about an interesting story, the user can search for more background or other information in the Internet by preferred search engines.

Commercial communications

Q17:
Will the current rules of the AVMSD regarding commercial communications still be appropriate when a converged experience progressively becomes reality? Could you provide some concrete example?

A17:
In the opinion of STELLA COM : Yes!
What happens on the display it is up to the user to decide. If there is an overlay on the TV display by weather information or an alarm message by local police due smog in that region -> no content provider or broadcaster can’t and shouldn’t claim!
In the other case, if there will be via a non-linear content every five minutes an ad for 30 seconds we can't believe that any user will consume this content for a longer period – if really, the number of the users will be not numerable.
More relevant concerns will be on the data protection. Via HbbTV it is today possible to get more information from the users TV sets about his behavior and interests, as the TV-set has all the time an interconnection via Internet. So a broadcaster or advertisement agency could read out the data from the TV-set. Therefore here the EC should set up an instrument to control the mechanism for all the hybrid services (e.g. HbbTV, Smart-TV, MHP)!

Q18:
What regulatory instruments would be most appropriate to address the rapidly changing advertising techniques? Is there more scope for self/co-regulation?
A18:
This is a very good question! In our opinion there should be a kind of a neutral European Test Lab, which could study the standards and technologies. They could start own testing procedures. After they found eventually anything critical, they could ask the standardization bodies or national regulators for guidance. If the concerns will be not covered in a concrete timeframe, the service needs to be switched off by an adjustment by national authorities or the EC!

The inputs of these tests could come from concrete claims of national organization bodies, private initiatives, competing providers, regulatory authorities and other standardization bodies or own Test by this European Test Lab.

Q19:
Who should have the final say whether or not to accept commercial overlays or other novel techniques on screen?

A19:
See A18

Protection of minors

Q20:
Are the current rules of the AVMSD appropriate to address the challenges of protecting minors in a converging media world?

A20:
We assume that the AVMSD covers the relevant aspects in a proper way, but a centralized European authority is necessary where people and/or private initiates can report the relevant drawbacks – maybe within national authorities with similar functions.

But control the doing of youngsters in the Internet World will be impossible. The authorities can only give guidance for the youngsters and parents. The central role lies by the parents! Parents should be trained how they can control the devices and the access of their kids! Other protecting mechanism will fail after a certain while.

Q21:
Although being increasingly available on devices and platforms used to access content, take-up of parental control tools appears limited so far. Which mechanisms would be desirable to make parents aware of such tools?
A21: This will be quite difficult and in several cases impossible. If the parents have no acknowledge on the IP business and can't handle a Computer, they will never have a chance to control the usage of their kids with their PC, Smartphone or tablet – also if the teacher will give the parents a flyer or inform them by a seminar.

Q22: What measures would be appropriate for the effective age verification of users of online audiovisual content?

A22: Only if the parents will register their kids to a separate kids/youngster browser. The browser will only show separate links/content from verified organizations. Other solutions seem not to be appropriate.

Q23: Should the AVMSD be modified to address, in particular, content rating, content classification and parental control across transmission channels?

A23: No, this makes no sense to us. It would be easier to develop new devices (e.g. smartphone) with only functions/apps for kids. If there would become elder they could get a software update on their device (or a new device) for a full access to all services and applications.

The "youngster device" could be, before they will get it from a sales point, configured by the parents, teacher or other responsible people with certified services/apps and maybe from time to time updated with new features (driver license lessons information, contraceptive information, etc.).

Q24: Should users be better informed and empowered as to where and how they can comment or complain concerning different types of content? Are current complaints handling mechanisms appropriate?

A24: No, the solution is mentioned above, A23.
Q25:
Are the means by which complaints are handled (funding, regulatory or other means) appropriate to provide adequate feedback following reports about harmful or illegal content, in particular involving children? What should be the respective roles/responsibilities of public authorities, NGO's and providers of products and services in making sure that adequate feedback is properly delivered to people reporting harmful or illegal content and complaints?

A25:
Open for discussion!

Q26:
Do you think that additional standardisation efforts are needed in this field?

A26:
No – standards will not help. Our intention is to have a EC directive with guidelines.

Q27:
What incentives could be offered to encourage investment in innovative services for people with disabilities?

A27:
There quite lot information available from private and public organizations and initiatives, what could help the disability person – e.g. on Speech-to-text services. Technical solutions to "bring" such services via Internet (DSL/mobile communication/satellite/etc.) to the disability persons or better say end devices are also available.

We can't see that any service provider will sponsor such services, therefore we recommend that national government bodies should invest in these services after an analysis about the costs, the harness, the coverage and number of "subscribers". These analysis should be compared with available services in the Internet. Afterwards it should be decided to invest more in updates of these existing services or to launch a new project for additional services via connected devices. But our personal opinion is to invest more in existing services via classic Internet. Here easily these services can be updated, maybe copied by neighbour countries or additional services build around.

- END -

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About TVCatchup

Having been founded by current Chairman, Bruce Pilley in 2007, TVCatchup is the UK’s first and leading independent online TV provider. It operates as a cable TV service, qualifying under UK law, retransmitting free-to-air, linear channels to a range of Internet-enabled devices, from desktop computers to mobile devices, without the need for a set-top box.

As a cable service funded by nominal pre-stream advertising, it has commercial relationships with certain content providers and also makes use of provisions in UK law to retransmit public service broadcasters’ (PSB) channels. Additionally, the company is voluntarily seeking to enter into partnerships with all the PSBs and for example has recently reached agreement with S4C, the Welsh PSB. We are also engaging with the Department of Culture Media and Sports in the formulation of its AVMS strategy in the converging world.

In general

We welcome the publication of the Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values. We support the need to understand the implications of the convergence of traditional broadcast services and the Internet. We believe that it is important to safeguard the broadcast industry and concurrently to stimulate innovation to ensure its future. In particular, we fully agree that there is a “need for private economic actors to further innovate” and that there is therefore a need “for policy makers to ensure the right framework conditions”. We believe that without the requisite policy framework, innovation within the EU will be stifled, making it easier for lesser or possibly even unregulated overseas companies to enter and prosper at the expense of European players.

The UK’s Ofcom published its annual Communications Market Report on 1st August 2013. The report highlights the use of tablets and smartphones both as primary and secondary devices for audiovisual media. The rise of tablet ownership, combined with the increasing use of mobile devices for accessing the Internet, has led to a significant and growing proportion of the consumption of audiovisual media taking place on such devices.
The distinction between the concepts of ‘lean back’ and ‘lean forward’ are perhaps becoming outdated as means of distinguishing consumer needs states: a range of devices, from large TVs to small smartphones, are used to view short- and long-form content. Meanwhile, the principle use of secondary devices is for undertaking activity unrelated to the audiovisual media: only a small percentage use them for online activities associated with it.

**Growth and innovation**

The success that US players have on addressing the European market can be explained broadly by three key factors. These are, first, access to venture capital; second, opportunities to exit within the venture’s originating nation; and, third, a large, unified local market.

Much has been made in the media particularly of the first two factors. A recent example: in 2012, Aereo, a new online AVM service emulating TVCatchup, was launched with $20m of venture funding led by IAC/InterActiveCorp, the US Internet company set up by the creator of the Fox TV network, Barry Diller. A culture of innovation permeates the US economy and business success provides the financial means for new endeavours.

Meanwhile, an early European AVMS innovator, LoveFilm – an amalgam itself of a number of other European ventures – was ultimately acquired by Amazon. The largest online AVMS players in Europe today are mostly well-funded US companies.

While endeavours are being made by both public and private entities to overcome the limitations that European enterprises encounter, new European enterprises, as much as US companies, face costly legal challenges in attempts by traditional broadcasters to maintain the status quo in the AVMS industry. It is a strategy designed to drain innovative companies of both financial and management resources in protracted lawsuits, with the intention of inhibiting or obstructing the innovator, while developing their own offerings. The traditional broadcasters have mostly been shown to lack the agility necessary to innovate quickly and cost effectively, and to develop new services that take advantage of the converging TV and Internet realms. Meanwhile, PSBs make inefficient use of public funding in developing their services. These compete directly with commercial offerings from new enterprises that don’t benefit from guaranteed public funding.

At the same time, access to PSB funded content is constrained in many respects by the need for viewers to subscribe to a viewing card (in the case of BSkyB) or membership of a selective usergroup (as in the case of Virgin Media) by way of access to their specific gateways (a BSkyB set top box or the web portal of
Virgin Media in these particular examples). This begs the question of whether PSBs are failing to reach as wide a general audience as their funding requires of them, of whether they are turning a blind eye to commercial operators who charge them for inclusion of their content on their platforms. Ultimately, the playing field will never be level whilst there is such ambiguity surrounding the purpose of PSB, whose objectives have already been defined by the EU.

In particular, the 1997 Amsterdam Protocol, an integral part of the European Union Treaty, recalls that "the system of public service broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism", and the Council of Europe's Committee of Ministers adopted a special Declaration on the guarantee of the independence of public service broadcasting (2006), and another one on the remit of public service media in the information society then about to be adopted (2007).

In the UK, the definition of PSB funding was clearly defined by Lord Reith, first Director General of the BBC, who stated in "Into the Wind" (1949): "to carry into the greatest number of homes everything that was the best in every department of human knowledge, endeavour and achievement and deter whatever was, or might be, hurtful".

Thus, the extension of reach and availability of PSB funded content is entirely consistent with the deployment of technological innovation in a fully converged world to enable a wider, but identical in every respect, public, to view what they already - at least in the UK - pay a significant license fee to view.

While we most emphatically welcome competition in the interests of better serving the viewing public, we firmly support the creation of a policy framework to level the playing field. Public service broadcasters receive funding in order to reach their markets; innovative enterprises, such as TVCatchup, meet the demands of tax and licence paying viewers to receive the broadcasts in the way that such broadcasts were originally intended and in accordance with the public's wishes. Where PSBs refuse to engage with innovators, or worse still, obstruct them, the interests of the public are being sidelined, aided albeit inadvertently by the lack of clarity in the role of PSBs. This constitutes, in our view, a serious market anomaly, which will be detrimental for the industry in the long term and so requires regulatory or legislative intervention.

Values

We welcome the Commission’s desire to foster respect for the values underpinning AVMS regulation within a converged environment, especially with regard to the more assiduous protection of minors.
Protection of minors

We fully support the European Commission’s ‘Strategy for a Better Internet for Children’. It is clear that there is a pressing need to provide better safeguards for children accessing the Internet. However, sweeping legislation such as the proposals recently outlined in the UK may provide ineffective measures while simultaneously interfering with legitimate access.

We believe that the EC’s approach, encouraging the industry to create appropriate measures, might be the most effective. The Commission should continue to drive the industry to innovate in this field under a broad strategy.

Whilst access to live content is, of course, determined by the time of broadcast - thus preserving the existing "watershed" protection for minors - such protection neither applies to video on demand (non live, or VOD content) nor to any advertising to which minors may be exposed.

Whilst the watershed protection is adequate for the transmission/retransmission of live broadcast content from suitably regulated broadcasters, this would not apply to content sourced from an unregulated source (e.g. a source located outside of the EU). We therefore propose child protective measures (e.g. parental controls) in respect of both such broadcasters and VOD content.

Another concern raised is that of the suitability of advertising associated with children's content, both within the video presentation and within the website. For example, many console games are advertised that depict gratuitously violent or excessively salacious content, much of which is either contextually linked to the computer via "cookies" generated through access of that same computer by others. Google exploit such technology extensively, and legislation should provide for the international supply of advertising. We have countered that threat at TVCatchup by withdrawing all advertising from channels specialising in children's content, but we believe that legislative attention is needed to protect minors from less scrupulous operators.

We are particularly keen to see more work done under Pillar 1 to develop high-quality content online for children and young people. We believe that the Commission should provide some stimulus for companies to create, promote and distribute such content, as well as for platforms and services dedicated to its distribution. The Commission is also well-placed to encourage companies throughout the value chain to engage in this endeavour. Where there are dependencies, for example in the licensing of age-appropriate content, the Commission might do well to require companies to cooperate supported by appropriate sanctions to be imposed against those who fail to comply.