Response to the European Commission’s Green Paper
“Preparing for a Fully Converged Audiovisual World – Growth, Creation and Values”

Submitted: 23 September 2013

I. Introduction

21st Century Fox (Transparency Register ref: 923493211619-15) is a diversified global media company with operations in four main industry segments: cable network programming; filmed entertainment; television; and direct broadcast satellite television. In addition to a global portfolio of cable and broadcasting networks and properties including FOX, Fox International Channels, National Geographic and STAR; film studio Twentieth Century Fox Film; and television production studios Twentieth Century Fox Television and Shine Group, 21st Century Fox also provides audiovisual content to millions of subscribers through its pay-TV services in Europe and Asia, including Sky Deutschland, Sky Italia and its equity interests in BSkyB and Tata Sky.

We employ nearly 6,500 people in our wholly-owned businesses across Europe, the Middle East and Africa, and tens of thousands more through those in which we have an equity stake. As we continue to strengthen our creative content businesses and distribution assets, so we must react and respond ever more quickly to rapidly-evolving technology and market opportunities. In this context, we are grateful for the opportunity given by the European Commission to take part in the public discussion triggered by the above-mentioned Green Paper on the implications of media convergence and on new means of consumption and delivery of media services.

Our submission is focused on the following key points and arguments:

- Successful market players in the European Digital Single Market will be the ones with a keen understanding of the fact that the European market is linguistically and culturally diverse and that business strategies need to reflect these specificities.
- The European Digital Single Market will only prosper and continue to grow at a fast pace if the contractual freedom of media players (licensors and licensees) to distribute content as makes the most sense commercially is preserved.
- Both the AVMS and the e-Commerce Directives remain fundamentally fit for purpose and do not require a re-opening at this stage.
- The “country-of-origin” principle should remain the cornerstone of the two Directives, based on respect for the commercial freedom of market operators. This principle plays an important role as a driver of EU integration and of the digital single market in the context of these two directives.
- Regulatory intervention going beyond existing competition rules could have a serious impact on the incentives to invest and innovate in the media sector. We would therefore like to caution against any rushed attempt at imposing ex-ante regulation.
II. Market considerations

The Green Paper suggests that US companies would somehow be better equipped to deal with the culturally-diverse nature of the EU market and that objective factors exist that specifically hinder EU companies to make the most out of the EU Single Market. While we recognize that a number of US companies active in the sectors of content production and distribution are indeed successful in the marketplace, 21st Century Fox questions whether this has anything to do at all with their national origin.

Success is determined above all by the quality of the content distributed, regardless of whether it is a Danish TV series or a Hollywood blockbuster. In addition to the quality of the content produced, success will be determined by the ability of certain distributors to respond to consumer demand by positioning their creative works in the marketplace on the basis of a keen understanding of the linguistically and culturally diverse nature of the European market. For this reason, even companies distributing content with potential pan-European appeal will mostly do so in a manner which will help maximise distribution and exposure of AV works. The digital single market will prosper only if commercial freedom to distribute content on a national, linguistic, multi-territorial or pan-European basis is preserved.

A good illustration is provided by Fox International Channels (FIC), which is present in virtually all of the 28 Member States and initially entered the European market pursuing a strategy of distributing the same channels and content to all countries both for TV and online. However, this strategy evolved, in response to the evident demand for localization, to catering for varying national preferences and linguistic differences. Today, FIC’s strategy aims to reach national/Member State based audiences of particular linguistic areas and the localization of the brand has proven to be the best way to gain market share and to substantially increase brand awareness.

The consultation document notes that “the media world today is one of competition for the attention of consumers” and that market players try to differentiate their offers by providing attractive content, “including on an exclusive basis or user-friendly interfaces”. 21st Century Fox and our affiliates are actively seizing these business opportunities, developing new services and experimenting with innovative offers to meet the new demands of mobile audiences often focused on easy and flexible access to creative works such as television series and films. As illustrations of our commercial strategy and proactive responses to the realities of a fully converged audiovisual world, we would notably like to emphasise the following three concrete examples:

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1 FIC is a broadcaster and content provider operating worldwide in the distribution of linear channels on satellite and cable platforms and also linear and non-linear services including via online transmission. It runs approximately 60 linear channels and it manages and operates worldwide distribution of channels and television distribution of brands such as National Geographic Channels, Fox Fox Life, FoxCrime, BabyTV, etc.
• “Hot from the US” – A service allowing fans of TV series to watch the latest episodes the day after the original US broadcasting. First launched as an offering in Germany by agreement with ProSieben, extension might follow in other European countries subject to commercial negotiations.

• “Touch”: In March 2012 Fox launched a new drama starring Kiefer Sutherland, called "Touch," in more than 100 countries simultaneously with a global marketing effort based on an advertising partnership with Unilever. It appeared on such outlets as Global Television in Canada, Sky 1 in the U.K., ProSieben in Germany, Yes TV in Israel and Channel One in Russia. In parallel, Fox International Channels launched "Touch" in 64 countries throughout Latin America, Asia and Europe.

• “Digital HD”: DIGITAL HD™ expands the digital acquisition model by combining numerous key benefits into one offering – high-definition content, early access to new releases, cloud storage and availability on a variety of connected devices. 600 Fox films have been made available through this consumer-friendly update of Electronic Sell-Through (EST) and a new initiative that allows consumers to download or stream their favorite Fox movies across multiple connected devices. It is being launched in about 50 countries.

More generally, the exponential growth in the market and ensuing consumer choice is well-documented: European Audiovisual Observatory data indicates EU consumers have access to more than 3,000 on-demand audiovisual services, while ScreenDigest research shows online video transactions for 20 EEA countries have soared to 58.8 million from 2006 to 2012 – an astonishing growth rate of 2350%.

III. Competition rules

In its consultation document, the European Commission also touches upon the questions of (i) availability of content and potential practices at wholesale level that could warrant regulatory intervention beyond the application of existing competition rules and (ii) potential obstacles on access to platforms. In this respect, it is our firm belief that the current competition rules are working effectively to promote and protect competition in the media sector by addressing concerns about anti-competitive agreements and abuse of market power.

Furthermore and with specific reference to national experiences, we think it is especially important here to point out that the Green Paper’s reference to the UK experience as an example of ex-ante regulation is in fact incorrect and misleading. Concretely, the British regulator OFCOM’s attempt to introduce sector-specific regulation in the form of a wholesale must-offer obligation on BSkyB in respect of its sport channels did not survive legal challenge2; in addition, after a two year long market investigation the Competition Commission concluded that there was no adverse effect on competition in relation to the

supply and distribution of pay-tv movie content\(^3\), that the opposite was true and that consumer choice had been expanding.

As stated by Competition Commissioner Almunia in 2010, regulation is the exception rather than the rule and the European Commission has a role to play in ensuring that regulation is imposed only where it is necessary.\(^4\) Regulatory intervention in cases where there is no breach of competition rules would have a serious impact on the incentives to invest and innovate in the sector.

Finally, it should be borne in mind that convergence is broadening the markets in which suppliers and distributors of content operate. The impact of the internet on the supply and consumption of content should not be underestimated. Barriers to entry are lowering and consumers are benefiting from a variety of new products and services that enable them to access a wide variety of content on a growing range of platforms. Therefore, the suggestion that regulatory intervention is required is not supported by the increasingly competitive landscape of the media sector.

### IV. Regulatory framework for providers of audiovisual media services

21st Century Fox would like to comment on three specific topics addressed by the Green Paper: (i) the interaction between the “AVMS” and “e-Commerce” Directives, (ii) the country-of-origin principle, and (iii) the trade-off between regulatory obligations and use of (scarce) public resources.

As a company involved in the production and distribution of audiovisual media services in both the “broadcasting” and “on-demand” environments, we understand the two-tier approach to regulation adopted in the EU’s AVMS Directive with regard to linear and non-linear services. Whilst a two-tiered approach to the regulation of linear vs. non-linear services is justified in the first place for reasons relating to consumer choices/user control, we believe that “treating like as like” should be a guiding principle more generally underlying the regulation of audiovisual media service providers.

Where market distortion can really be created is in fact where “traditional” providers of AV services end up competing with so-called “information society providers” falling not under the AVMS Directive but under the e-Commerce Directive. In our view, this issue can be dealt with practically in order to future-proof the regulatory framework and would not necessitate the re-opening of either of these two Directives. It should be achieved through a dynamic and forward-looking interpretation of the scope of the AVMS Directive based on recitals 21 (mass media services), 24 (“television-like” services) and 25 (editorial responsibility).

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As to the country-of-origin principle, it is our firm conviction that it should remain the cornerstone of both the AVMS and e-Commerce Directives and that it plays an important role as a driver of EU integration and of the digital single market in the context of these two directives. The jurisdictional value of this principle, coupled with commercial freedom to license content as licensors/licensees see fit, constitute the bedrock of a successful and growing audiovisual industry in Europe.

Finally, we note that the Green Paper clearly states that this consultation does not presuppose any specific outcome at this stage but that it might nonetheless “pave the way towards possible regulatory and other policy responses in the longer term”. As the European Commission engages in this reflection, we would like to posit that it should take into account the question of whether individual platforms make use of scarce (and thus valuable) public goods in delivering content. In our view, this aspect should be a crucial determinant in assessing public interest obligations. If a particular set of service providers are subject to additional regulation without a commensurate public benefit (e.g. spectrum), they should obviously be subjected to a lighter regulatory regime.

In the event that the European Commission eventually decides to re-open the AVMS Directive – an option we do not recommend at the moment for the reasons outlined above – the revision should focus above all on a reassessment of the need of legacy regulation in a converged media environment. In other words, while “treating like as like” would remain the guiding principle of such a review, it would recognize as a starting point the need to appropriately de-regulate the regime that has applied to so-called “traditional” media players ever since the first iteration of the “Television Without Frontiers” Directive back in 1989.

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We would like to thank the European Commission for launching this public consultation, look forward to further discussions and remain at the Commission’s disposal for any specific questions.

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Stellungnahme zum

GRÜNBUCH
über die Vorbereitung auf die vollständige Konvergenz der audiovisuellen Welt: Wachstum, Schöpfung und Werte - COM(2013) 231

Die Arbeitsgemeinschaft Dokumentarfilm / AG DOK, mit mehr als 800 Regisseuren, Autoren und Produzenten einer der großen Berufs- und Interessenverbände des unabhängigen Filmschaffens in Deutschland, bedankt sich für die Möglichkeit, zu den im „Grünbuch“ aufgeworfenen Fragen Stellung zu nehmen.

Da wir bereits seit einigen Jahren Erfahrungen mit dem Aufbau einer (zeitweilig auch durch das MEDIA-Programm der EU geförderten) unabhängigen und in mehreren europäischen Ländern agierenden online-Plattform (www.onlinefilm.org) sammeln konnten, können wir den Konsultationsprozess mit eigenen praktischen und durchaus konkreten Erfahrungen bereichern. Allerdings werden wir uns nicht zu allen Fragen äußern; Problemfelder, die eher technischer Natur sind, mögen von den jeweiligen Fachleuten bearbeitet werden.

Zunächst aber seien uns einige grundsätzliche Vorbemerkungen zu den Prämissen der aktuellen Konsultation erlaubt.


- Zum anderen ist sicher auch die technische Begrenztheit der Übertragbarkeit gigantischer Datenströme zu berücksichtigen.


Voraussetzung dafür ist allerdings, dass die erwähnte Vielfalt zunächst einmal als Wert erkannt und gefördert werden muss. Es kann aus unserer Sicht nicht das Ziel sein, den US-Monopolen jetzt so etwas wie „europäische Multis“ entgegenzusetzen – vielmehr kommt es darauf an, die bereits vorhandenen Strukturen so zu stärken, dass sie überhaupt erhalten bleiben und nicht von den Großen an die Wand gespielt und zur Aufgabe gezwungen werden. Vor dieser Situation dürften leider viele der kleineren online-Anbieter auf dem digitalen Marktplatz stehen.


Solange der Einzelhandel dann auch noch die Entscheidungshoheit über den Endverkaufspreis beansprucht (wie I-Tunes oder Amazon das ja tun, die ohne Einwilligung des ursprünglichen Rechte-Inhabers nach Gutdünken irgendwelche dumping-Preise oder flat-rates aufrufen), ist in diesem Bereich keine Refinanzierung von Inhalten möglich.

Hinzu kommt, dass Internet-Handels-Ketten ihre marktbeherrschende Stellung zum Unterlaufen urheberrechtlicher Bestimmungen nutzen. So gibt Amazon zum Beispiel DVDs, die der Firma zum Verkauf überlassen wurden, oftmals ohne vertragliche Grundlage und ohne dafür eine gesonderte Vergütung zu zahlen, über seine Video-Verleih-Tochter „Love-Films“ in den gewerblichen DVD-Verleih.

Aus unserer Sicht sind zur Eindämmung solcher Missbräuche und zum Schutz der Rechteinhaber schärfere Schutzbestimmungen erforderlich.

**Die Fragen im Einzelnen:**
1. Auf welche Faktoren ist es zurückzuführen, dass sich US-amerikanische Unternehmen trotz sprachlicher und kultureller Hürden erfolgreich auf dem fragmentierten EU-Markt etablieren können, während Unternehmen aus EU-Mitgliedstaaten sich diesbezüglich schwertun? Auf welche Hindernisse stoßen Unternehmen aus der EU?

Zum einen auf urheberrechtliche Probleme (copyright versus author’s right).


Natürlich – und zum Glück – gibt es auch immer wieder international erfolgreiche europäische Filme.

Aber wenn globale Verwertbarkeit fehlt, so ist das in gewisser Weise auch ein Preis der vielen kulturellen Identitäten Europas, die wir schätzen und zu denen wir uns auch bekennen sollten. Dass solche Filme oft nicht für andere Länder interessant sind, muss dabei wohl hingenommen werden.

Außerdem akzeptieren die beiden wichtigen Märkte USA/Canada und GB so gut wie keine synchronisierten Filme und auch keine Untertitel, was es sehr schwer macht, Filme dorthin zu exportieren. Meist ist aber bereits die Machart oder das gewählte Thema des Films der Grund, warum die Filme nicht reisen, nicht einmal innerhalb Europas. Hinzu kommt, dass amerikanische Unternehmen, die in Europa aktiv sind, in der Regel so kapitalstark sind, dass sie es sich auch leisten können, mit den vielen bürokratischen Hürden mitzuhalten und den hohen Marketing-Aufwand für die Herausbringung in den verschiedenen Territorien zu bezahlen.

Außerdem haben sie den Content in der Regel bereits über den viel größeren und sprachlich einheitlicheren amerikanischen Binnenmarkt refinanziert – ihnen geht es nur noch um eine zusätzliche Gewinn-Mitnahme. Dadurch ist es möglich, die Angebote zu dumping-Preisen auf den Markt zu bringen. Ein zusätzliches Problem entsteht dadurch, dass europäische Produzenten gezwungen werden, sich dieser Preisgestaltung anzupassen, obwohl die Hersteller sich das eigentlich gar nicht leisten können.


Meist gehen sie aber auch in den Angeboten der Kleinen verloren, da diese nicht über eine genügend große Marktdurchdringung und damit auch nicht über genügend Kunden verfügen.

3. Gibt es Hindernisse, die eine Regulierung des Zugangs zu Plattformen erforderlich machen?

Aus Sicht der Filmhersteller ist das oben erwähnte Diktat der Verkaufspreise durch die Plattformbetreiber (das inzwischen ja auch zu Boykottaufträgen verschiedener Kleinverlage gegenüber Amazon geführt hat) ruinös, zudem sollten gezielte Urheberrechtsverletzungen (wie sie von Amazon gezielt begangen und von youtube zumindest wissentlich geduldet werden) mit massiven Sanktionen belegt werden.

4. Sind die derzeitigen Anforderungen der AVMD-Richtlinie die beste Möglichkeit, Herstellung, Distribution, Verfügbarkeit und Marktattraktivität europäischer Werke zu fördern?


Wenn die Anbieter nicht verpflichtet werden, europäische Filme zu marktüblichen, an den Herstellungskosten orientierten Preisen zu erwerben, und wenn es weiterhin möglich ist, sie nur in versteckten Programm-Nischen einzusetzen, wird die Abwärtsspirale für die Vielfalt europäischer Inhalte nicht aufzuhalten sein.

5. Wie wird die Konvergenz und ein sich wandelndes Verbraucherverhalten das derzeitige System der Inhaltefinanzierung beeinflussen? Wie tragen die verschiedenen Akteure in der neuen Wertschöpfungskette zur Finanzierung bei?

Bisher sind die Investitionen in die Konvergenz noch zu hoch, und es wird hauptsächlich versucht, mit der Zweitverwertung von Inhalten Geld zu verdienen. Nur ein geringer Teil dieser Einnahmen erreicht allerdings, wie bereits ausgeführt, die Produzenten.

Das Verbraucherverhalten im Netz wandelt sich nur sehr langsam von der Umsonst-Mentalität zu der Bereitschaft, für online-Inhalte auch etwas zu bezahlen. Es bedarf noch erheblicher Anstrengungen, um die Gesellschaft zu überzeugen, dass Online-

10. Gibt es angesichts der Konvergenz der Medien bereits Anzeichen für Marktverzerrungen, die auf die Unterscheidung zwischen linearen und nichtlinearen Diensten im Rechtsrahmen zurückzuführen sind? Wenn ja, wie könnten diese Verzerrungen am besten behoben werden, ohne die dem EU-Rechtsrahmen für audiovisuelle Mediendienste zugrunde liegenden Werte zu verletzen?

Am Beispiel Youtube ist sehr gut zu beobachten, wie sich ein völlig unreguliertes Angebot gegenüber allen regulierten Konkurrenten durchsetzt. Teilweise wird der Youtube-Content sogar von „anständigen“ Anbietern übernommen. Youtube zahlt für die Übernahme der Inhalte nichts, nimmt aber denen, die die Filme produziert und (co)finanziert haben, Zuschauer und Werbung weg.

Urheberrechts-Beschwerden werden von Youtube teils tagelang ignoriert, ein rechtliches Vorgehen gegen den Konzern ist so gut wie unmöglich, weil es keine europäische Zustell-Adresse gibt. Wer sich dagegen zur Wehr setzen will, muss zu einem hohen Preis Anwaltsbüros in den Vereinigten Staaten von Amerika einschalten – was sich kleine europäische Rechteinhaber gar nicht leisten können. Die europäischen Youtube-Angebote finden dadurch in einem rechtsfreien Raum statt – die EU scheint bislang nicht in der Lage, ihre Bürger vor ständigen Rechtsverletzungen durch diese Plattform zu schützen.

Hier ist eine Marktmacht entstanden, die sich europäischem Recht unterwerfen muss, wenn sie hier weiterhin wirtschaftlich tätig sein will – und zwar am besten gleich mit der Mutter „Google“ zusammen. Da durch das Zusammenwirken von Google und Youtube bereits eine kartellähnliche Situation entstanden ist, sollte über drastische Regulierungsmaßnahmen nachgedacht werden.

11. Muss die Definition des Anbieters von audiovisuellen Medien und/oder der Geltungsbereich der AVMD-Richtlinie angepasst werden, um einen Teil der oder alle Verpflichtungen der AVMD auch für diejenigen einzuführen, die gegenwärtig nicht unter die Richtlinie fallen, oder können die Werte auf andere Weise geschützt werden? Welche Bereiche sollten schwerpunktmäßig der Selbst- bzw. Koregulierung unterliegen?

Gut gemeint – aber das Problem liegt in der regional begrenzten Wirksamkeit der AVMD Richtlinie. Wie will die EU denn Server in Russland, China, Belize oder auf Tonga regulieren???
12. Wie würden sich Veränderungen des Regulierungsansatzes im audiovisuellen Bereich auf das Herkunftslandprinzip und damit auf den Binnenmarkt auswirken?

Solche Fragen können – wenn überhaupt – nur im breiten internationalem Einvernehmen gelöst werden.

14. Welche Initiativen könnten auf europäischer Ebene zu einer verbesserten Medienkompetenz in ganz Europa beitragen?


15. Sollte die Möglichkeit der Festlegung von Auswahlmöglichkeiten durch Filtermechanismen, u. a. bei Suchfunktionen, durch öffentliches Eingreifen auf EU-Ebene geregelt werden?

Auf jeden Fall! Google manipuliert die Suchergebnisse eines jeden Einzelnen massiv und bevorzugt eigene Angebote bei der Anzeige, um dort Umsatz zu generieren. Den Suchmaschinen gehört auf die Finger geschaut – insbesondere wenn sie eine Marktdurchdringung haben wie Google. Eine Minimalforderung wäre, dass der Konzern die Algorithmen sowie die Listen der Filtersoftware offenlegen muss.


Naturally. Was nicht gefunden werden kann, findet auch nicht mehr statt.


19. Wer sollte letztlich bestimmen, ob kommerzielle Einblendungen oder andere neuartige Techniken am Bildschirm akzeptiert werden sollen?

Dieses Recht ist mindestens in Höhe von 50% der Grundvergütung zusätzlich zu vergüten. Die Selbst-/Koregulierung muss zumindest insoweit verändert und zurückgenommen werden, dass Verstöße drastische finanzielle Folgen haben.

20. Sind die derzeitigen Bestimmungen der AVMD-Richtlinie geeignet, um den Herausforderungen im Bereich des Schutzes von Minderjährigen in einer konvergierenden Medienwelt zu begegnen?

Nein, keine nationale oder europäische Richtlinie ist dazu geeignet – das funktioniert nur über die Erlangung von Medienkompetenz - und durch die Schaffung eigener Wertmaßstäbe in den Köpfen junger Zuschauer.


22. Welche Maßnahmen würden eine wirksame Altersüberprüfung bei Nutzern audiovisueller Online-Inhalte ermöglichen?

Dirigistische Eingriffe lehnen wir ab, weil sie nur über eine totale (bzw. totalitäre) Kontrolle des Internet-Zugangs durchgesetzt werden können. Deshalb gilt auch hier die Antwort auf Frage 20.

23. Sollten durch eine Änderung der AVMD-Richtlinie insbesondere Fragen im Zusammenhang mit der Bewertung von Inhalten, der Klassifikation von Inhalten sowie mit Tools für die elterliche Kontrolle für alle Übertragungskanäle geregelt werden?


24. Sollten Nutzer besser darüber informiert werden, wo und wie sie sich zu Inhalten äußern oder sich über sie beschweren können, und sollten sie besser darüber aufgeklärt werden, wie sie diese Möglichkeiten am besten nutzen können? Sind die derzeitigen Beschwerdemechanismen angemessen?

Ja, als Teil der Medienkompetenz-Ausbildung.
25. Sind die Mittel, mit denen Beschwerden bearbeitet werden (finanzielle, rechtliche oder andere Mittel), angemessen, um ein adäquates Feedback auf Meldungen über schädliche oder illegale Inhalte zu gewährleisten, insbesondere wenn Kinder betroffen sind? Welche Aufgaben/Zuständigkeiten sollten den Behörden, nichtstaatlichen Organisationen und Anbietern von Produkten und Dienstleistungen übertragen werden, damit sichergestellt ist, dass Personen, die schädliche oder illegale Inhalte melden oder Beschwerden einreichen, in ordnungsgemäßer Weise adäquates Feedback erhalten?

Die Zeitspanne, innerhalb der die Plattformbetreiber auf eingehende Beschwerden – damit sind auch urheberrechtliche Beschwerden gemeint – reagieren müssen, muss verkürzt und gesetzlich vorgeschrieben werden. Im Internet-Zeitalter sollte sie nicht länger als zwölf Stunden betragen. Andernfalls müssen spürbare und schmerzhafte Sanktionen greifen.

Der Versuch, alle gefährlichen Inhalte aus dem Netz zu entfernen, ist so, wie er betrieben wird, zum Scheitern verurteilt - es sei denn, man riskiert die Freiheit des Netzes und damit der freien Rede insgesamt.

Frankfurt/Main, den 30. August 2013

Für den Vorstand der AG Dokumentarfilm

Thomas Frickel, Vorsitzender und Geschäftsführer
Stellungnahme der AG Kino – Gilde deutscher Filmkunsttheater e.V. zum Grünbuch über die Vorbereitung auf die Vollständige Konvergenz der audiovisuellen Welt: Wachstum, Schöpfung und Werte

Die Europäische Kommission und das Europaparlament sind gegenwärtig dabei, eine Reihe von Aktivitäten zu entwickeln, die vorrangig den audiovisuellen Sektor betreffen. Dazu gehören u.a. die Mitteilung über staatliche Beihilfen für Filme und andere audiovisuelle Medien, ein Grünbuch über den online-Vertrieb von audiovisuellen Werken in der Europäischen Union sowie das Grünbuch über die Vorbereitung auf die vollständige Konvergenz der audiovisuellen Welt, das Gegenstand dieser Stellungnahme ist.

Alle Bereiche beschäftigen sich vor allem auch mit der Entwicklung von Kultur und Medien in der digitalen Welt. Die AG Kino – Gilde e.V. will sich technischen Entwicklungen und einem veränderten Konsumverhalten nicht verschließen. Die Digitalisierung macht neue Vertriebswege möglich, die die Auswertung des Mediums Film unterstützen können.

Mit Blick auf die Konzentration der Kommission auf den Internet und Online-Bereich möchte die AG Kino - Gilde e.V. einige grundsätzliche Anmerkungen zur Auswertung von Filmen machen:

1. Filme sind Wirtschafts- und Kulturgut

In allen Papieren der EU-Kommission - so auch in dem vorliegenden Grünbuch – werden Filme und audiovisuelle Medien vorrangig als Wirtschaftsgüter gesehen, die im europäischen Binnenmarkt und darüber hinaus „gehandelt“ werden. Filme sind aber nicht nur Handelsware sondern transportieren auch Werte und Traditionen aus verschiedenen Kulturkreisen innerhalb Europas.

Soweit sich das Grünbuch in erster Linie auf wirtschaftspolitische und technologische Fragestellungen konzentriert, kommen inhaltliche Aspekte von audiovisuellen Werken zu kurz. Wird Film und Filmproduktion allein unter dem Stichwort der wirtschaftlichen Verwertung betrachtet, würde dies eine massive Beschneidung der kulturellen Vielfalt in Europa bedeuten, da sich Produzenten dann allein auf die Verwertbarkeit ihres Produktes und nicht mehr auf die kulturelle Bedeutung konzentrieren. Folge wäre ein rein kommerzorientiertes Angebot, dass die Vielfalt Europas nicht mehr abzubilden vermag.


Die Anerkennung des Mediums Film als Kulturgut bedeutet auch, dass die Kommission das Subsidiaritätsprinzip ernst nehmen muss. Kultur- und Medienpolitik sind eine Domäne der Mitgliedsstaaten und es ist darauf zu achten, dass auf nationaler Ebene Gestaltungsspielräume erhalten bleiben, um den kulturellen Eigenheiten und Bedürfnissen der Menschen vor Ort Rechnung zu tragen.
2. Vielfalt der audiovisuellen Welt bewahren

Aus unserer Sicht ist zu kritisieren, dass das Grünbuch ausschließlich von online- und Internet-Konvergenz spricht. Es mag in technischer Hinsicht erstrebenswert sein, audiovisuelle Inhalte über einheitliche europäische technische Standards im Internet zu verbreiten. Es ist aber nicht vertretbar, dass durch diese Überlegungen ganze Wirtschaftszweige in ihrer Existenz gefährdet werden.


Über die Jahrzehnte sind immer wieder neue Auswertungsmedien dazugekommen. (Fernsehen, Video, DVD, Pay-TV, etc.) Die Festlegung von Auswertungsfenstern für die jeweiligen Medien auf nationaler Ebene hat dazu beigetragen, dass jeder Bereich eine reelle Marktchance hat, ohne den jeweils anderen zu verdrängen. Dieses empfindliche Gleichgewicht muss auch künftig gehalten werden. Ansonsten würde es zu einer „Kannibalisierung“ der unterschiedlichen Auswertungswege kommen, die am Ende auch dem geförderten europäischen Filmen schadet.


Wenn das Kino durch flexible Freigaben oder eine Verkürzung der Auswertungszeit mit Internet-Angeboten konkurrieren muss, hat dies zum einen unabsehbar negative Folgen für den wirtschaftlichen Bestand der Filmtheater. Ein Wegbrechen der Einnahmen aus der Kinoauswertung würde aber auch die Vermarktung der europäischen Filme erheblich schwächen und damit ihre Relevanz in der Öffentlichkeit. Die Folge wäre eine Vielfalt, die keiner wahrnimmt. Filme, die keiner sieht existieren nicht! Vielfalt, die keiner wahrnimmt ist nur behauptete Vielfalt!

Im Sinne der unter Punkt 1. genannten kulturellen Vielfalt setzen wir uns daher nachdrücklich dafür ein, dass die Konvergenz der audiovisuellen Welt nicht nur Online-Angebote umfasst, sondern auch andere relevante Vertriebsformen schützt.

Mit Blick auf das Subsidiaritätsprinzip fordern wir die Beibehaltung nationaler Regelungen im Hinblick auf die Auswertungsfenster.

1 Grünbuch Nr. 2.1. (Seite 5/6)
3. Medienbildung


Die AG Kino – Gilde e.V. ist derzeit Partner des Bundesministeriums für Bildung und Forschung in einem Projekt zur Filmbildung von Kindern und Jugendlichen in und durch Kinos. Auf nationaler Ebene ist anerkannt, dass das Kulturgut Film auf vielfältige Weise wahrgenommen werden kann und diese Wahrnehmung schon bei Kindern geschärft werden muss.

Es ist elementar für unsere Kultur und unser Zusammenleben in Europa, anzuerkennen, dass Filme und audiovisuelle Medien nicht nur im Internet stattfinden. Folglich appellieren wir an die EU-Kommission bei den Bemühungen um Online-Konvergenz auch die Auswirkungen auf die weiteren Auswertungsmedien zu bedenken!

Berlin, 21. August 2013

Der Vorstand der
AG Kino - Gilde e.V.
BFI response to

European Commission Green Paper:
Preparing for a Fully Converged Audiovisual
World: Growth, Creation and Values
Executive summary

- The issue of the competitiveness of the European audiovisual sector needs to be seen in a global context and not just through the prism of competition from the United States. There are opportunities for partnership around the globe to improve the competitiveness of Europe and to maximise employment and drive economic growth.

- A range of public interventions at member state and at European level - funding, regulation and competition policy - will remain critical in ensuring that a diversity of films and moving images are available to audiences in a digital age. This does not mean jettisoning existing frameworks of support and nor does it require a major extension to the Audiovisual Media Services Directive (AVMDS).

- The EU needs to focus on “non-premium content”, not just on “premium content.” For example, issues in relation to audience access to independently produced films and moving images are at the heart of many of the challenges described in this paper.

- The BFI is not aware of compelling evidence which suggests changes are required to the Audiovisual Media Services Directive (AVMSD). We believe that the market failures which relate to linear services, and which the AVMSD is designed to help address, will persist in a digital age and that therefore the Directive continues to play a valuable role. However, we have not seen any compelling evidence from the Commission or others in favour of an extension of scope of the AVMSD.

- The BFI believes that the UK’s regulatory and guidance regime regarding parental controls is broadly fit for purpose. Ofcom offers detailed guidance for parents and we do not see a new for intervention at a European level.

- Media literacy is becoming increasingly crucial in a digital age to help ensure that people of all ages, especially the young, are able to make informed choices about the kinds of content that they access. The EU needs to play a much more active, concrete role in providing support for the development of media literacy, thereby helping for example to maximise the appreciation of material held in public archives.

- The BFI would welcome a funding intervention by the EU, perhaps via Creative Europe, or through other EU interventions to help ensure that services are much more accessible for disabled people.

- The BFI looks forward to contributing to future EU debates on convergence, growth, creation and values. Although it is beyond the scope of the current consultation, we would also underline the need for a copyright regime which balances protection and access as key to the ability of the EU audiovisual sector to grow over the coming years and decades.

About the BFI

In 2011 the BFI became the lead organisation for film in the UK. It is now a Government arm’s-length body and distributor of Lottery funds for film.

Our mission is to ensure that film is central to our cultural life, in particular by supporting and nurturing the next generation of
filmmakers and audiences. The BFI serves a public role which covers the cultural, creative and economic aspects of film in the UK.

It delivers this role:

- As the UK-wide organisation for film, a charity core funded by Government
- By providing Lottery and Government funds for film across the UK
- By working with partners to advance the position of film in the UK

Founded in 1933, the BFI is a registered charity governed by Royal Charter. The BFI Board of Governors is chaired by Greg Dyke.

In October 2012, the BFI published 'Film Forever, Supporting UK Film 2012-2017', which set out its strategy for the next five years, following an extensive industry consultation. It described the activities underpinning the BFI’s three strategic priorities:

- Expanding education and learning opportunities and boosting audience choice across the UK
- Supporting the future success of British film
- Unlocking film heritage for everyone in the UK to enjoy.

To that end, the BFI helps ensure public policy including European policy supports film especially British film.

The BFI’s three strategic priorities are echoed in some of the themes addressed in the current consultation. The BFI welcomes the opportunity to respond to this consultation.

QUESTIONS FOR PUBLIC CONSULTATION:

(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?

The BFI recognises that US companies benefit from the scale and cultural and linguistic homogeneity of its home market, as opposed to the cultural and linguistic fragmentation which characterises Europe and which will continue to be a challenge in a digital era.

In addition, and as a consequence of these factors, the US has a small number of powerful incumbent companies which have ownership of large libraries of films which helps to underpin investment in new films, thereby creating a virtuous circle between production and distribution.

Moreover, the availability of risk capital in the United States, especially for companies operating online, and a more legal framework for intellectual property that is more fit for purpose, has resulted in the growth of very large “born-digital” companies which are increasingly dominant in the digital world. While we realise that the Commission has said that copyright is not a core concern of the current consultation we would underline the need for a regime which balances protection for rightsholders with access for the public. In particular, we would like to see Internet Service

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1 http://www.bfi.org.uk/about-bfi/policy-strategy/film-forever
Providers, search engines and other firms in the technological sphere playing a more active role in helping to protect rightsholders against copyright infringement and theft.

Another advantage for the studios is that they own distribution rights because they are vertically integrated and therefore they can plan releases on a multi territory basis. In Europe rights of distribution are fragmented and therefore make the development of non-linear services more difficult. Greater EU support for marketing and distribution initiatives, for example through Creative Europe, might be a way of helping to address this. The low box office share of European films within the European Union - 35% - is in part attributable to this. Moreover, the share held by EU films in the US is far lower. The European Audiovisual Observatory estimates that based on the top 250 films in 2012 in the USA and Canada a share of 7.9% of the box office was taken by EU films, of which about two-thirds is earned by UK or UK-USA films. France and Germany account for most of the rest.

We strongly believe in the objective of building companies of scale in the audiovisual sphere in Europe able to compete in global markets - this will help deliver jobs and growth and will also help drive creativity and innovation.

Equally, we are aware that in a globalised world characterised by constant merger and acquisition activity, there is little, if any, scope for regulators to ensure that such companies, once built, remain in EU ownership for a sustained period of time. It is therefore essential that attention is paid to ensuring the conditions exist for firms operating in the audiovisual field to grow and prosper and remain domiciled in the EU. One important pre-condition for this is an intellectual property regime that is fit for purpose.

However, we believe that competition is no longer just from the United States but is now global. For example, the Commission needs to consider the long-term implications of the growth of the creative economies in the BRIC countries and the F7 countries. While the Hollywood studios have access to China for example, most EU films are not released in that rapidly growing market. The EU could play a more active role with regard to its trade briefing in helping to secure such access.

The growth of such economies should not just be viewed as a challenge but also as an opportunity. For example, in the UK, many US companies have become valued partners, making a wide variety of culturally British films here (Harry Potter, James Bond etc), while also investing in the infrastructure thereby creating UK jobs and driving growth – for example at Leavesden Studios – and providing the infrastructure to support indigenous film.

The European Commission should focus on the global opportunities for partnership in the audiovisual sphere and how this might be bolstered through policy interventions of various kinds.

(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

2 http://www.obs.coe.int/oea_publ/market/focus.html
3 Ibid.
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?

Premium content is defined in the Green Paper as “major sport events and successful recently released films, so-called blockbusters”.

As well as our responsibilities linked to being the lead agency for film, the BFI’s remit is focussed on content which lies beyond this definition of premium content - in the context of the issues raised in this paper we are principally concerned with audience access to independently produced films and moving images whether sourced from Europe or from elsewhere in the world.

The BFI therefore urges the Commission to give equal consideration to how access to such “non-premium forms of content” can be enhanced. In this context, the planned Creative Europe initiative, which will operate under the aegis of the DG for Education and Culture, has a critical role to play and we look forward to continuing to contribute to the development of the detailed work plan. Support for development, distribution, exhibition, training and access to finance will, together with the development of new search tools, remain critical in helping to ensure that “non-premium content” is accessible to European audiences and that cultural diversity is maximised.

There is a need to take account of the implications of change in a digital world - for example, the rise of connected televisions, continuing growth of smartphones and tablets - which are having a very significant impact on the way in which people access audiovisual works.

The idea of a “Long Tail” of content which enhances audience choice, in particular by drawing on film heritage material stored in national archives, is yet to be fully realised. We would urge the Commission to examine the reasons for this and to consider ways in which the obstacles might be addressed - for example by providing increased funding for digitisation of European works and doing more to promote awareness of the range of work on offer, for example through media literacy or through support for improved rights’ management practices.

We are not qualified to comment on detailed issues relating to the supply of premium content but we are not aware of significant market failures which solely relate to the availability of such content.

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

The BFI has not identified any evidence which suggests there issues which require fresh statutory intervention at a European level. We believe that the European and UK regulatory regimes governing access to platforms are broadly fit for purpose.

In particular, we believe that Ofcom, the independent regulator and competition authority for the UK’s communications industries is effective in its discharge of its duties in these areas. Ofcom acts in the interests of citizens and consumers
and rightly takes an evidence-based approach to regulatory issues in this domain.

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

The BFI believes the Audiovisual Media Services Directive is broadly fit for purpose. We are not aware of evidence suggesting the need for material change.

Indeed, the AVMSD voluntary regime of quotas is of declining relevance in a digital age when audiences, especially the young, are increasingly watching a wide range of works via “on-demand” services – especially through streaming services, including catch-up. This does not mean however that regulation for linear services is no longer required, as significant numbers of people are still watching television in a linear fashion – most particularly in relation to live events such as sport for example.

However, the ability to find and promote particular kinds of works will remain an issue in the digital age. The UK Government has recently published a White Paper entitled Connectivity, Content and Consumers which includes a consideration of the way in which the prominence of Public Service Broadcasters on Electronic Programme Guides (EPGs) can be maintained in a digital world as the nature of those guides changes.4

The BFI recognises the importance of adapting such interventions so they enable audiences to find access to a variety of films and moving images in the digital era. We are not persuaded there is a case for intervention at the European level apart from promoting good practices contributing to increased access to a diverse offer.

(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?**

The rise in the use of online services to access film and moving images has not yet resulted in the online companies and ISPs (Internet Service Providers) making a meaningful contribution to the financing of content. As a consequence, the decline in the value of physical media in Europe is not yet being offset by growth in digital revenues.

The diversity of film for audiences in the UK is still crucially underpinned by a series of public interventions – including the Film Tax Reliefs, Lottery funding direct grant in aid support, the BBC Licence Fee and gifted or discounted spectrum. These public interventions, which constitute forms of State Aid, play a vital and continuing role in helping ensure that the public and private sectors alike are able to help ensure that audiences in the UK have access to a wide range of films, contemporary and archive – at the cinema, on television and across all other platforms. The BFI National Archive for example has a vital role to play in helping to increase the diversity of films on offer to audiences in the UK and across the European Union. The plurality of film available to

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audiences in the UK is determined, in large part, by the interplay between these different interventions and the private sector. Such public interventions are even more important in a digital era when many traditional sources of revenue are shrinking as described above, thereby threatening the range of certain kinds of content available to audiences. It is estimated that in total Member States provide €3 billion per annum to support film in the European Union.\(^3\)

The BFI remains committed to continuing to explore how access to finance for companies to grow can be enhanced in the digital age, and how online companies can best contribute to this. It would be valuable for the Commission to organise work programme including a public event to explore these issues with all stakeholders.

(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?**

The BFI is not aware of any evidence suggesting the need for legislative intervention in this area in the audiovisual sector. We have been an active participant in the EC Licences For Europe initiative which is seeking industry led solutions to various cross-border licensing issues.

(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 a converging world these differences are of much less relevance than they were in an analogue age. Increasingly, different platforms are shaped by the same policy, regulatory and competition regimes.

There is a need to ensure that regimes are fit for purpose for all the different platforms they cover.

(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?**

The BFI does not have a view on this issue.

(9) **What specific research needs with regard to spectrum have to be addressed to facilitate such development?**

The BFI does not have a view on this issue.

(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?**

The BFI is very concerned about the lack of information on VoD markets at the present time. Because of company secrecy it is difficult to obtain aggregate market numbers (viewings, http://europa.eu/rapid/press-release_IP-13-388_en.htm
transactions, turnover) and still harder (almost impossible) to get title-by-title information equivalent to box office data.

This means that at the moment it is, for example, not possible to provide an answer to the question “what is the market share of UK films on VoD” – either in the UK or across Europe. As the share of VoD in total revenues increases, the inability to answer this and other similar questions will become increasingly policy-relevant. We would welcome proposals for European regulation in this sphere working closely with the European Audiovisual Observatory.

(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?

The BFI has not identified any evidence of the need to adapt definitions in this way. Any such changes to AVMSD would need to be underpinned by a significant body of evidence and we are not aware of any work undertaken by the Commission or other parties which has provided such evidence. We would welcome however a more rigorous approach to the collection of evidence by the Commission which would demonstrate the extent to which the provisions of AVMSD are being respected.

As we argue in relation to parental controls below (see answers to Q. 20 and Q.21) self-regulation is increasingly important in a digital age as many traditional levers of regulation, such as quotas, will be of less relevance in a digital age. The same applies for models of co-regulation.

(12) 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?

The country of origin principle has worked well as it has provided clear legal certainty for those operating cross-border services. We are not aware of any evidence which suggests that the country of origin principle requires changing. Any such change could give rise to unintended consequences. For example, if regulation were governed by the regime in the country of reception, then cross-border broadcasters could be subject to media regulatory regimes, even within the European Union, which are not consistent with the principles of democratic pluralism and freedom of expression.

(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?

While this question runs beyond the specific remit of the BFI we believe as a general principle that increasing convergence in a digital era means that there will inevitably be a need to maintain a watching brief as to how different parts of the legislative framework – originally intended to regulate services delivered in different ways – interact with one another. Maintaining such a watching brief will help to ensure that there is not unnecessary duplication or alternatively a contradiction, between different parts of the regulatory regime.
(14) What initiatives at European level could contribute to improve the level of media literacy across Europe?

Media literacy is becoming increasingly important in a digital age as people take more responsibility for what they consume rather than regulators having the power to shape their choices. As the AVMSD states: “Media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies.” The BFI strongly endorses that view. However, in the UK Ofcom reports that only 42% of the internet population are “critically aware.”

There is therefore a need to ensure that the EU provides much more effective levels of financial support for the development of media literacy – for example through the planned Creative Europe initiative and any other relevant programmes.

Article 33 of the AVMSD gives the Commission a periodic reporting obligation on levels of media literacy in Member States. We would like to see this obligation rigorously enforced.

The ambition to increase media literacy, particularly among children, is at the heart of the BFI’s educational interventions, including initiatives, such as Film Nation, which will be delivered by partners.

The BFI would like to see concrete funding support from the EU to help advance media literacy, and for the EU to take a much more active role generally in supporting the development of media literacy among all sections of the population – but in particular, children, young people, parents and carers. The development of media literacy, for instance, helps people to have a greater appreciation of material which is held in their national archives.

This is particularly important for the future because media literacy helps underpin the development of self-regulation which is becoming much more important in a digital era for reasons the Commission has identified. We welcome emerging thinking that suggests that “film literacy” may be a new funding strand of Creative Europe or be incorporated in other EU Education and Lifelong Learning interventions.

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

The BFI is not aware of evidence suggesting a need for this. We note however that the AVMSD provides for interventions which would ensure prominence for European content made available via on-demand services and this is further evidence of the positive contribution that the Directive plays.

(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'?

While the BFI strongly supports the principle that audiences should have access to a broad and diverse range of audiovisual works, we are not aware of evidence suggesting a need for regulatory intervention at a European or national level to help support this objective.

(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?

Yes we think these rules will still be relevant.

For example, linear television services supported by advertising will continue to be a major part of the landscape and we think that it is in the public interest that there continue to be a European regulatory framework which governs them where they are cross-border services. Once again this is an argument underlining the positive role that the Directive continues to play in its existing form.

We would draw attention to a valuable recent study commissioned and published by Ofcom (August 2013) on advertising on the Future of Commercial Communications on TV and TV-like Services which may be helpful to the Commission.\(^\text{10}\)

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

The BFI does not have a view on this issue.

(19) Who should have the final say whether or not to accept commercial overlays or other novel techniques on screen?

The BFI does not have a view on this issue.

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

This is a very complex and challenging area, particularly as the ability of minors to access potentially harmful or audiovisual offensive content is potentially greatly increased in a digital age, since the variety of devices capable of receiving such material is greatly increased.

There is a need to consider the full range of technological tools and self-regulatory tools which might help protect minors while also protecting freedom of expression.

For example, the British Board of Film Classification, working in partnership with the Dutch regulatory NICAM, plans to introduce a self-regulatory system designed to enable the person uploading user-generated content, or viewers of that content, to provide classification advice.\(^\text{11}\) It would be valuable to explore whether this system could be more widely rolled out across Europe. Mediaset in Italy has agreed to trial the system.

\(^\text{10}\) http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Future_of_Commercial_Comms.pdf
\(^\text{11}\) http://www.bbc.co.uk/newsbeat/23282679
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?

See answer to Q. 20 for our general approach. In the UK, the Government published a paper in 2012 on the issue of parental controls on the web and there is an ongoing debate with web companies as to the extent to which they block or filter harmful and offensive content.

Ofcom as the regulator for the UK Communications industry has undertaken detailed research in this area. This research suggests that many parents and carers are more concerned about the amount of time that children spend in front of electronic screens, as opposed to undertaking other leisure activities, rather than the impact of what they view on those screens.

Ofcom has issued detailed advice about the issue of parental control tools. We believe that interventions of this kind at a national level are appropriate and have not identified a need for European intervention other than to encourage roll out of voluntary systems as suggested in our response to Q,20 above.

Ofcom has also underlined the importance of media literacy in helping people, including the young, to make informed choices about the kinds of material which they access. In particular it has noted that changing patterns of media use have "implications for how we consider children’s media literacy, as the requirement for media literacy skills begins at a young age, and the types of devices children need to be proficient on, and the opportunities for them to encounter media content, increase."

The BFI strongly endorses Ofcom’s view and as set out in our response to Q.14 we are strongly committed to advancing media literacy in the UK and across Europe.

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

See answers to 20 and 21.

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

We believe these issues should be addressed at national level as described in the answers to questions 20 and 21.

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?

The complaints mechanism seems to work well at a national level in the UK. It is administered by Ofcom and we are not aware of any significant evidence suggesting that it needs to be amended or strengthened.

(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?

See answer to 24.

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

See answer to 24.

(27) What incentives could be offered to encourage investment in innovative services for people with disabilities?

The BFI is strongly committed to ensuring that every citizen has access to the widest possible range of films and moving images. Research published by Ofcom covering the year 2012 indicates that among people with either a visual or a mobility impairment, internet use starts to fall behind that of the non-disabled consumers after the age of 35, and for those with a visual impairment it gets progressively lower with age. This represents a significant barrier in the digital age. We would like to see some financial support mechanisms developed across a range of relevant EU initiatives to help drive investment in innovative services for disabled people. In particular, a financial support mechanism within Creative Europe or through other interventions could be valuable – perhaps one that is similar to the Pilot Projects strand but which is tailored to the specific needs of the disabled, with a focus on different kinds of disability.

Ends.

\[\text{http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-12/Consumer_Experience_Research1.pdf}\]
Response to the Green Paper
“Preparing for a fully converged audiovisual world: growth, creation and values”

About CEPI
The European Coordination of Independent Producers (CEPI) was founded in 1989 to organise and represent the interests of independent film and television producers in Europe.

Today the Coordination represents approximately 8,000 independent production companies in Europe. All together, our members supply over 16,000 hours of new programming each year to broadcasters in Europe, ranging from single documentaries and special event programming to game shows, light entertainment, and high-cost drama serials. As the producers form the basic support of the audiovisual industry, it is necessary to articulate the interests of those producers within a single European organisation.

For more information visit www.cepi.tv

Introduction
Independent TV and film producers create and develop some of the most innovative, popular and challenging programmes on television, ensuring a diversity of programmes as well as allowing new talented professionals to enter the television and film industry.

The digital shift and the way the market is responding to it are having a strong impact on the way our production companies address today’s market challenges and opportunities. The new media environment in which our SMEs are required to develop their businesses has led to significant changes in the way content is created and assets are developed. A wide range of solutions are assessed on a regular basis in order to foster the engagement of as many consumers/viewers as possible.

Public service and commercial broadcasters are the leading purchasers of our content (TV formats, TV series, and documentaries) but cooperation with new digital platforms is also a developing phenomenon within our sector that is currently under assessment. Indeed, our
producers are starting to offer their specific content and to adapt it to the new and innovative TV services currently available such as telephony and high speed internet access services.

The sector is becoming increasingly more interactive and is delivering a whole new range of options through a greater diversity of online services, in turn increasing earnings from subscription fees. The development of our sector is also the result of the crucial importance that independent producers ascribe to responding to new consumer demands, which has allowed us to flourish and to respond to the significant challenges that the market faces as a consequence of the financial downturn. Emphasis is placed upon the need to be proactive and innovative.

Some preliminary remarks

In view of what CEPI has already underlined in the response to the EU Commission Green Paper on the online distribution of audiovisual works, we would like to recall the importance independent production companies place on obtaining access to new markets in order to provide creative and healthy content for Europeans’ TV and computer screens.

The diversity of the content our producers provide works as a guarantee for innovation and creativity for SMEs, which is in itself a crucial factor in protecting the current development of the audiovisual sector. In fact, this offering of original content through frameworks that encourage innovation and investment is crucial to the sector.

These elements are certainly in line with what was stated in the EU 2020 Strategy for a Digital Agenda and the following Green Paper - Preparing for a fully converged audiovisual work: growth, creation and values. We are glad to have an opportunity to provide some relevant information which can help the Commission to address the challenges and opportunities highlighted with regard to establishing a Digital Single Market.

We certainly endorse the Commission’s view underlined in the Green Paper’s introduction, where it is stated that “technology already allows the user to create, distribute and access all types of content irrespective of time, place and device.”

CEPI members are in regular contact with their respective national broadcasters to make sure there is an easy way for content to be licensed by the independent producers to the different platforms which are developed at the national level, from catch-up TV platforms to mobile devices. These non-linear opportunities available are currently under assessment.

This is instrumental to our companies’ attempts to maximise their investments as well as to engage with an even larger number of viewers. The importance of the copyright aquis and the principle of contractual freedom are also crucial in allowing producers to offer their innovative content and to exploit it to the greatest possible effect, and to benefit from the

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1 EU Commission Green Paper on the online distribution of audiovisual works
3 EU Commission Green Paper “Preparing for a fully converged audiovisual world: growth, creation and values”, page 3
new forms of content production and distribution. In this way, the two forms of linear and non-linear services provided are complementary.

CEPI would also like to take this opportunity to thank the Commission for its efforts in this area and would like to express its strong interest in collaborating even further in the Commission’s initiative Licenses for Europe, which we find integral to the questions raised in this paper.

**Growth and Innovation: market considerations and financing models**

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

The nature of the European market as defined by the European Commission in the Green Paper is that of a fragmented market. The film and TV sectors have developed and flourished in accordance to local tastes, national and regional linguistic differences, and diverse national cultures. This has fostered a wide range of TV and film products that have helped to build up a culturally diverse range of content that has both made Europe competitive and fostered cultural diversity. In the context of such a diverse and rich cultural landscape we we regret the focus of the Green paper on ‘premium content’; indeed it is this diversity that characterises and strengthens the European cultural sector.

In response to consumer needs and market demands, CEPI’s production companies have found a way to compete with some of the big players on the global stage. This has taken two forms: Firstly by responding and adapting to the ever-developing technological changes that can be witnessed in the market. CEPI members are constantly engaging with new initiatives to provide content in ways that respond to consumer expectations in the new digital age.

Secondly, it has been about the value our production companies have put on attending very important trade marketplaces. Here the trade of rights to foster new digital experiments has allowed our producers to properly assess and address what the market is asking for. It looks like VOD operators initially worked with models based on revenue sharing, but more and more this is now shifting towards offering minimum guarantees for some rights acquisition. This shows that

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4 Preserving and Fostering European Cultural Diversity, TFEU, Art. 167
the market’s trends and consumers’ behaviour are the driving forces behind our companies’ practices.

Our SMEs’ competitors are not only US Companies that manage to establish themselves in Europe; we face constant and global competition. By attending trade markets our producers gain a day by day understanding of how certain content can fulfil consumers’ preferences in more than one territory. This allows European SMEs to be competitive at a global level. This puts us into direct competition with countries such as China who recently announced its intention to become a market leader through the dedication of five percent of its GDP to the creative industries by 2016. The growing presence of China cannot be underestimated and this was laid bare at the recent MIP TV festival in Cannes in 2013 where they dominated.

Whilst our SMEs might not be equipped with the right marketing tools and financial means to address several specific markets at once and under the specific conditions associated with said markets (high digitization costs, high costs for dubbing and language translation), the way US companies have managed to establish a successful presence is facilitated by the substantial availability of financial support mechanisms. Indeed, the return on investment both in their market and in Europe has significantly facilitated their presence in Europe with minimal regulatory risks.

Furthermore, the decrease in the consumption of physical videos is also identified as a possible reason behind the incentive for US platforms to develop successful distribution models in Europe. This is demonstrated by the enormous success of platforms such as Amazon, LoveFilm, and Netflix.

In response to this, our independent producers strongly emphasise the incredible added value of the former MEDIA Programme and future Creative Europe 2014–2020. These will provide support for marketing and distribution tools for TV/film online platforms and in turn make them far more competitive.

In addition, these new players’ business models provide no financial support for content production. Nevertheless, if the distribution platforms would contribute to the pre-financing of TV/film content, this would represent a crucial point for our enterprises to reflect on when considering new ways forward in the financing of movies/TV programmes and their distribution. In this way the cultural diversity and originality of content in Europe would be safeguarded, and European businesses could strengthen their output and competitiveness.

This should be done whilst ensuring that this does not become a mechanism where the traditional platforms’ (the broadcasters) are circumvented or worse where the traditional platforms decide to trade the independent producers’ catch up/VOD rights directly with the new media platforms. This would have a negative impact on our industry, especially when it is considered how often production companies in Central and Eastern European countries completely lose their VOD/catch-up rights and cannot further exploit their content online on other platforms. We therefore believe that these rights should be retained and licensed by the independent producers.

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5 To check the market trends MIPCOM Report 2013, Buyers trends at MIPCOM.
It is clear that the effects of the digital shift on the reversion of rights - particularly for online works - are ongoing. Following an assessment within CEPI of our members’ experiences, there are cases where our producers have already started discussions on the best ways to exploit their content online. For example, documentary series, which would not otherwise have been exploited through singular selling of individual episodes, are being exploited again as aggregated content by genre. Competitive threats feared due to US prominence could be overcome by cooperation, where both the US platform and the production companies find a mutual benefit and old and new can coexist. This would produce the effect of incentivising market development in Europe.

Thus, it is the case that we do not think the ‘barrier to entry’ would be a useful measure to address unfair competition. The flexibility of the market is instead a crucial point for the development of our companies, and the blocking of global companies would only hinder the wide range of offers that our companies could offer in and outside Europe. Buying trends are changing and production companies are clearly addressing this. When referring to drama for instance, it appears the high quality of European drama is currently borderless (e.g. some popular UK series exported in the US)\(^6\).

So we believe it is not about blocking but about being vigilant and proactive enough to allow for the development of a healthy ecosystem where enterprises – SMEs especially - can operate and further develop their businesses according to the market. This means making a competitive Europe where SMEs can count on the best innovation and research tools possible, and develop and overcome existing technical barriers.

Both Horizon 2020 as well as Creative Europe 2014-2020 will try to provide solutions to this. Indeed, for SMEs, digitising costs can severely and substantially affect the film budget and cannot be necessarily afforded in a time of financial crises, but we are confident the combination of both programmes will be a great support.

The AVMS Directive is a relatively new legal instrument so it would not be recommendable at this point of the consultation to drive for a change/re-opening of the Directive; especially if it addresses how/if new players should be regulated. The market is addressing the issue naturally, identifying real demands for certain kind of services as it develops. Producers can certainly use their contractual freedom and the specificities of contracts to outline how the new business opportunities should work, enabling them to provide their content online and only under certain conditions.

Furthermore, the AVMS Directive was amended in late 2007, with a transposition deadline of December 2009, and codified in March 2010. The majority of Member States were late in transposing the Directive and the Commission is clearly still gathering information, to the point that 2015 has been identified as a possible starting date to evaluate the Directive.

\(^6\) MIP COM Report, ibidem
Interoperability of connected TV

4 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?

As explained in the previous section, the fact that producers address the specific national/regional market is a decision which is taken with careful attention to make sure the market’s and consumers’ demand are addressed.

It cannot be ignored that films are considered to be prototypes. Film and TV production is a business in which failure and success cannot be easily anticipated. Indeed, a TV/film programme is not a simple product which can be sold across national borders as it would be done with a car. The cultural specificity which characterises the AV sector is something which has had a deep impact on the way our producers decide to do business and especially in the way they think that a particular product (either TV format or film) would be better and more successfully shown in one territory rather than another.

Furthermore, consumers’ preferences are first of all for national content; this is followed by international blockbusters and then non-national content (both online and offline). When our producers have identified a real demand in a foreign market they have always proactively addressed it.

The Green Paper mentions the "consumer of the future". This is described as an individual who lives in one country and would like to access another country’s national content. This is a concern which CEPI’s producers already address in cases of clear demand.

Secondly, as mentioned previously, once the content is identified and in the development phase, the reason why TV/film producers address a certain market (in one or more than one territory) follows a very specific and carefully planned exercise. This involves progressing from the development phase (set up of the script/ identifying the distributors, finding the right crew, etc.) to the production phase. In this context producers make a very detailed analysis of the markets they intend to address and ensure (in co-operation with distributors) that the content developed at the national level could also be appealing or marketed in another cultural context, with a reasonable chance of success. In doing so, producers have to also make sure they secure suitable financial means prior to production to reinvest in further activities.

A similar process takes place in the production of a TV programme/series/fiction/drama or entertainment show. Our producers, in co-operation with broadcasters and under specific contracts, make sure that the content provided is broadcast and supplied according to the market needs of a specific territory. In other words, it is certainly the intention of both the broadcasters and the producers to make sure they address as many viewers as possible, in order to launch new services and build new relationships with the consumers.

In addition, it cannot be underestimated that at the moment the existing platforms and
aggregators of content are more interested in national and regional content, than in cross-border platforms. A flexible market and the continuous digital progress are indeed changing the way production companies often work but this is happening gradually and naturally without the intervention of regulatory measures. Such measures could place unnecessary pressure on this development and have counterproductive results.

There is a strong degree of diversity in the way VOD rights/catch-up rights are worked with across the CEPI spectrum.

In many cases the specific terms of trade allow a better exploitation and exchange of these rights, having an increasingly positive effect on the work of the industry. It is in these Members States that producers are more inclined to experiment with new opportunities to offer their content to online platforms (commissioned by commercial/PSB or independents), providing experimental programmes which end up constituting a valid and interesting new offer of content.

But the Commission should also take into consideration that there are also clear cases where the terms of trade have still not been developed accordingly and where often our producers will not be in control of their VOD rights/catch-up rights. In these cases cross border licensing could be detrimental to their businesses.

Ultimately, it is also important to remember that a TV/film format will travel well across borders if it has been successful at the national level. However, the costs of digitizing, language translation and dubbing are extremely high. Either we would like to use a platform/content aggregator or we would like to enable a broadcaster to make more of our content available across borders.

The clearing of rights is currently under discussion in working group one and working group three of the Licenses for Europe initiative set up by the EU Commission, so we trust some more clarity will follow this intense debate which started last February.

This assessment should be accompanied by specific market analysis which can highlight the real consumer demand at stake as this is still not clear to the members of CEPI. From what CEPI could gather during discussions in working groups one and three, the same platforms/platform aggregators have not identified a clear request from the consumers on the specific demand of services which the Commission is concerned about.

**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?
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?

12 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?

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

The challenges and opportunities that follow the digital shift are also happening in a period where economic conditions and the financial downturn have seriously impacted upon the ways in which new business models are developed. New business opportunities (non-linear) have not yet been properly assessed. In particular our independent producers find themselves in a position where they are still not clear on all the pros and cons of the development of this new market: whether economic growth and works creation are increased or whether the online businesses represent real additional value for our independent producers’ work.

While new online opportunities can represent tremendous potential and while the words cloud computing and new business opportunities sound very appealing, it has to also be recognised that traditional media platforms are still a crucial element for our SMEs’ production and development opportunities. The safeguarding of linear services is still vital for the products we provide across Europe. Indeed, when traditional platforms (public service broadcasters/commercial broadcasters, catch-up TV platforms etc.) undergo development in the areas of rights retention/content distribution, our independent production companies can largely benefit from these business models being safeguarded in line with what was established in the AVMS Directive.

This of course ensures that a variety of innovative and exciting new programming can be explored, fulfilling important European goals such as fostering media pluralism and promoting cultural and linguistic diversity, as well as developing a healthy AV sector as a whole. Such effects have an enormous social and economic impact on society. It is within this background and social context that the development of non-linear services and new business opportunities should be placed. The new media services will have to represent a complementary opportunity within this framework to avoid what the Commission is currently concerned about; the distortion of the market.

In order to understand if a distortion of the market exists, concrete market assessments should be undertaken. In doing so, it might be important to recall the economic downturn and the financial crisis that is affecting the European Union and the effects that this has had on the AV sector. Such effects can result in even more difficult conditions if the market is distorted.

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7 AVMS Directive, which the contractual freedom exercised by our production companies finds a very good regulatory framework which allows a 10% of their content to be broadcast and/or partially financed by the PBS/Commercial broadcasters
It cannot be underestimated that our SMEs rely enormously on the financial investment that traditional platforms provide for the development of the industry (linear and non-linear). The closure of important traditional platforms\(^8\) could affect the way our independent producers decide to orient their content production, and could influence considerably their risk taking in the forthcoming months and years.

The decision to invest and produce will be developed in accordance to the market’s demand and consumers’ needs. However, we can certainly underline that the development of local and regional media content, where content and language continue to play a key role in the market, will characterise the new sustainable model under development.

The importance of ensuring a fair level playing field is then crucial. Nevertheless, it is too early to assess whether the new online services would flourish under a modified or re-adapted AVMS Directive, as the Directive itself is at an early stage of implementation.

CEPI believes that the Directive is still fit for purpose and that it is still a valid legislative tool to foster promotion, creation and distribution of AV works. The current framework has encouraged innovation and investment for our SMEs. In fact, it is already established that European on demand services should be promoted where practical and with appropriate means for the production and access to European works.

According to the AVMS Directive implementation report\(^9\), a certain number of countries have not yet developed a specific monitoring method in their primary legislation but have included a monitoring system to help them observe VOD services before regulating them on the basis of Article 13. This demonstrates that the transposition of the AVMS Directive is at an early stage which will create difficulties when changing the regulatory framework.

Two important considerations also have to be made. First of all, the report underlines that Members States have set up an initial pre-system of monitoring to anticipate what was established in Article 13. The report itself explains this is a way to observe the “market practice and only after to impose suitable obligations.” Furthermore, in Article 13 it was very much underlined that the proportion of European works on catch-up TV services was much higher (96.2 percent of total hours) than the proportion on VOD services which account for only 45.1 percent.

It is clear to CEPI that the market is still under observation and whilst it is easier to assess the way our producers trade their rights on catch-up TV platforms using contractual freedom/terms of trade to regulate these aspects with the relevant broadcasters, it is still to be determined if they have managed (and where and when) to further position their VOD rights on other, non-traditional, platforms. An alteration to the regulatory framework undertaken in such a sensitive moment of market changes and development would not be recommended. Nonetheless it would be worth discussing a ‘concretisation’ of the quota for

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\(^8\) Joint opinion of the Audiovisual Social Dialogue Committee, 17\(^{th}\) June 2013, CEPI co-signed with EBU, ACT, AER, FIA, FIM, IFJ and UNI Global Union

\(^9\) First Report on the Application of Article 13,16 and 17 of Directive 2010/13/EU for the period 2009-2010: Promotion of European works in EU scheduled and on demand audiovisual media services
European works with regard to non-linear services, which currently has neither been made concrete nor quantified.

In the same report an interesting observation is also made in accordance to Article 17 which refers to “the EU average proportion being reserved for independent production broadcast to have decreased from 34 percent in 2009 to 33.8 percent in 2010,” underlining the need for effort on the part of the Member States’ to reverse this trend. In the provision of data which refers to the overall declared qualifying transmission hours for independent production and European works indicated in the report, CEPI believes that the Commission should be careful of these findings and make sure that the correct transposition of the Directive will continue to take place across the European spectrum. Indeed the over qualifying transmission hours indicated in the report as European works and independent European works are respectively between 50-90 percent for the first category and 15-40 percent for the second category and both refer to the total qualifying transmission hours.

What data is indicated by the Member States in their monitoring reports, based on what is provided by the corresponding national public and private broadcasters, does not seem to always be a correct reflection of the hours transmitted\(^\text{10}\). For this reason we would hope that the Commission would take care of important factors rather than concentrating its attention on possible changes of the AVMS Directive which are based on market elements which have not been precisely assessed yet.

With reference to the “country of origin” approach, which provides for national authorities and the EU Commission to react should internet service providers try to circumvent the rules, we are still strongly supportive of this principle and we regret these rules are not applied to providers which are established outside Europe. The country of origin principle does in fact guarantee the freedom of establishment for service providers, the freedom of movement of services, and the freedom for consumers and businesses to access services originating in the Members States, but reinforces this with the legal certainty of the law of the country from which the service is provided.

In other words, the Member States will not restrict the services from a provider established in another country if it complies with the home country rules. This is a fundamental principle that in these years has protected and supported our SMEs facing legal complexities and which should be better developed hand in hand with a clearer assessment of the E-Commerce Directive.

The forthcoming European funding programme Creative Europe 2014-2020 will certainly be instrumental to achieving these goals and will provide some excellent opportunities to assess how European values will be protected in the new online ecosystem and through concrete examples/projects. A way to incentivise this aspect could also be through an extension of the current VAT system to online distribution of AV content which would lead to a much fairer and

\(^{10}\) In CEPI’s response to the EU Commission consultation on the independence of European Regulatory bodies, where significant problems relating to the enforcement of national-level implementation of the Directive where some regulatory bodies have failed to develop satisfactory methodologies for monitoring and collecting data related to the quotas provided by the Directive.
more level playing field\textsuperscript{11} where VAT tax would not vary in accordance to the different Members States and/or to the status of the content sold (online and offline).

Last but not least it is also important to address the matter of copyright infringement for AV works distributed online. There will not be a fair, competitive and well developed Digital Single Market if this issue is not addressed accordingly, nor could a change of the AVMS Directive protect our SMEs from these important concerns. Due to this situation, producers have to invest extra capital for the development of AV works online, in a market which is suffering heavily from piracy in a manner that makes investment less favourable. This is an unfortunate reality that our producers have to deal with on a daily basis.

**Protection of minors/Accessibility for persons with disabilities**

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

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?

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?

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?

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

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

The protection of minors and improving access to content for people with disabilities are important objectives that CEPI fully supports.

\textsuperscript{11} Report adopted on October 13, 2011 by the European Parliament which states in Section 11: “Takes the view that the VAT rates for cultural goods should be the same, regardless of the method of selling them (online or offline); considers that such an alignment would contribute to the development of ecommerce and would provide the same cultural and educational benefits for consumers by promoting the development of the booming digital sector,”
Reflecting the diverse European landscape and different social and cultural norms, systems and mechanisms concerning the protection of minors differ across the EU Member States. We therefore believe that self-regulation is the most effective and appropriate way of addressing and fulfilling consumer expectations regarding the protection of minors. This is supported by a study produced for the European Commission in 2003\textsuperscript{12} and the EU Council of Ministers’ Recommendation on Protection of Minors (last updated in 2006).

The provision of clear information from platforms and aggregators regarding the content they offer is something that CEPI believes is key in ensuring that consumers are able to make informed choices. The majority of platforms and aggregators do provide such information to consumers. With this in mind, we therefore conclude that the current framework provided by the AVMS Directive is a satisfactory foundation for the protection of minors.

CEPI considers the development of new technologies and means of accessing content as a key facilitator in allowing all users, including people with disabilities, greater accessibility to content and services. We would welcome public initiatives to promote such increased accessibility and to further develop current methods that ensure that people with disabilities are able to access audiovisual content in a cost-effective manner.

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We remain available for further information so please do not hesitate to contact us:

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\textsuperscript{12} ‘Empirical Study on the Practice of the Rating of Films Distributed in Cinemas Television DVD and Videocassettes in the EU and EEA Member States’ May 2003 (Olsberg SPI, KEA European Affairs and KPMG).
NOTAT

Til EU Kommissionen

Filminstituttets bemærkninger til Grønbog om audiovisuel konvergens

Hermed fremsendes Det Danske Filminstituts bemærkninger til EU Kommissionens Grønbog: "Forberedelse på en fuldt ud konvergeret audiovisuel verden: Vækst, kreativitet og værdier".

EU Kommissionens Grønbog adresserer en lang række udfordringer, som følger i kølvandet på den digitale udvikling og mediekonvergensen. Filminstituttets bemærkninger er følgende:

Ad 1. INDLEDNING
Filminstituttet hæfter sig ved Grønbogens overordnede spørgsmål, om hvordan vi kan udnytte konvergensudviklingen, til at skabe økonomisk vækst og innovation i Europa.

Filminstituttet vil gerne understrege, at det audiovisuelle marked i Europa i modsætning til f.eks. USA, både kulturelt og erhvervsmæssigt er stærkt fragmenteret med små og mellemstore sprogområder og små og mellemstore produktionsmiljøer, der inden for tv, film og de nye digitale tjenester skal udvikle Europa's konkurrenceposition i et digitaliseret mediamarked.

I den forbindelse er det helt afgørende, at medlemslandene fortsat har mulighed for at udvikle filmpolitikken og den audiovisuelle politik med afsæt i de specielle kulturelle og erhvervsmæssige udfordringer, der gør sig gældende i de 28 medlemslande, samt i forhold til de fælles bestræbelser om at udvikle det fælles marked for produktion og distribution af europæisk indhold.

Spørgsmålet, som stilles i Kommissionens Grønbog, bør anses som en påmindelse om, at Kommissionens bør give medlemslandene optimale muligheder for at iværksætte tiltag, der kan understøtte de europæiske audiovisuelle erhverv på en sådan måde, at vi samtidig udvikler Europas kulturelle og kunstneriske særkende og diversitet.

Ad 2.1 VÆKST OG INNOVATION - Markedsforhold
Den europæiske film- og mediepolitik har historisk været fokuseret på at fremme produktion og cirkulation af europæisk film og tv; Både for at understøtte den europæiske kulturelle identitet og diversitet og for at dæmme op for amerikansk markedsdominans. Traditionelt har følgende instrumenter været taget i anvendelse: Offentlig støtte til produktion og distribution, must-carry regler og kvoter for transmission af og investering i europæisk indhold, opkrævning af licens til nationale public serviceforetagender samt regler, der tilgodeser nationale operatorers adgang til distributionsinfrastruktur (f.eks. sendenet).

Mediekonvergensen udfordrer disse instrumenter – i særlig grad i kraft af de internetbaserede Video on demand-tjenesters fremkomst. I den forbindelse finder
Filminstituttet det helt afgørende, at der fra medlemslandenes og EU’s side sikres lige konkurrencevilkår i Europa for de europæiske VOD-tjenester og tjenester, der har oprindelse eller hjemsted i USA. Udfordringen er i denne forbindelse at skabe grundlag for, at begge typer tjenester kan involvere sig aktivt i investering og distribution af europæisk medieindhold og dermed aktivt tage medansvar for den fortsatte pluralisme i medieududdet i Europa og globalt.

Ad 2.2. Finansieringsmodeller

Akkurat som det har været historisk gældende betyder lige konkurrencevilkår ikke nødvendigvis fravær af offentlig intervention, jf. punkt 2.1. Men det er klart, at en række af disse instrumenter bør tilpasses til et fuldt konvergeret medielandskab.

Efter ønske fra den danske kulturminister har Filminstituttet iværksat drøftelser med repræsentanter fra en bred interessentkreds, der tager sigte på at udvikle nye investerings- og forretningsmodeller for produktion og distribution af medieindhold. I arbejdet fokuseres der både på, hvordan de nye medietjenester kan bidrage til udviklingen af dansk kvalitetsindhold og på, hvordan de nye tjenester skal “inviteres inden for” som engagerede investorer og distributører. Hovedtemaerne er navnlig udvikling af nye finansieringsmodeler for udvikling og produktion samt for udvikling af nye vinduesstrukturer, der giver bedre muligheder for tilpasning til et digitaliseret og efterspørgsels-drevet mediemarked.

I den forbindelse er det afgørende, at de danske operatører fremadrettet sikres en fair konkurrenceposition i forhold til amerikanske nettjenester så som f.eks. I-Tunes og Netflix; samt at man fra dansk og europæisk side er åbne i forhold til at understøtte udviklingen af nye forretningsmodeller, der kan sikre dansk og europæisk indhold en passende plads på et marked, der i al sin væsentlighed er domineret af amerikansk indhold.

Ad 3.4. VÆRDIER - Beskyttelse af mindreårige

Med hensyn til Grønbogens afsnit om ”beskyttelse af mindreårige” henviser Filminstituttet til bidrag fra Medierådet for Børn og Unge, som er fremsendt særskilt.

Filminstituttet bemærker i øvrigt, at digital pligtaflevering ikke er omtalt i Grønbogen. Kommissionen har gennem en lang række tiltag sat fokus på at udvikle politikker på området, senest i Kommissionens udkast til meldeelse om statsstøtte til film og andre audiovisuelle værker, som pt. er sendt i høring.

I den forbindelse vil Filminstituttet gerne understrege behovet for, at der på såvel nationalt som transnationalt plan udvikles nye metoder og lovgivningsmæssige tiltag, der kan sikre bevaring af det digitale kildemateriale til audiovisuelt materiale - også i de tilfælde, hvor oprindelseslandet ikke entydigt kan bestemmes. Ligeledes bør der sikres tiltag, der kan understøtte kulturel og forskningsmæssig formidling af den europæiske kulturarv på en tidssvarende måde, tilpasset den digitale tidsalder.

/Claus Hjorth
To: European Commission
Directorate-General for Communications Networks, Content and Technology
Unit G-1 "Converging Media and Content"

Consultation: Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values

In the framework of the Europe 2020 Strategy, of the Digital Agenda for Europe, European Commission has launched a consultation on its “Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”, opening a public discussion on the implications of the ongoing transformation of the audiovisual media landscape, characterized by a steady increase in the convergence of media services and the way in which these services are consumed and delivered.

Convergence has been under way for many years, and is rapidly picking up pace. It becomes a reality and market players develop and adapt business models. Technology already allows the user to create, distribute and access all types of content irrespective of time, place or device. Content creators can find new ways to maximise their audience, monetise their works and experiment with creative ways to produce and offer content. Broadcasters can find more platforms to distribute their content and enhance their interactive offerings.

The Commission’s vision is to seize the opportunity of this changing technological environment to ensure the widest possible access to European diversified content for all Europeans and, the widest choice of high quality offers.

Europa International wishes to play its part in the European Commission’s consultation process by submitting this document. Europa International is a European organization based in Brussels and made up of the most important independent film sales agents from all over Europe. It represents 37 members, sales agents also called international distributors, dealing with more than 65% of the European films. Our main objective is to promote European cinema and help build a strong European film industry.
Europa International would like to remind about its members’ work. European sales agents’ work is based on the rights of films, selling it to the national/local distributors. The notions of territory and language are linked to those rights: the distribution agreement (heart of the deal) is based on 3 factors: the territory, the media and the term.

About the Green Paper, Europa International would like to insist on the 2 following points to take into account, regarding the “Cultural diversity”:

• **“Cultural diversity” as a value and the necessity of its promotion**: Europe’s cultural and linguistic diversity gives a competitive advantage in a global market. Cultural diversity as an intrinsic value has to be safeguarded in line with Article 167 TFEU. Europa International notes with surprise that among the values reminded in the green paper, cultural diversity is not mentioned. **Europa International asks for a clear statement that “Cultural diversity” is among the essential values to be maintained and safeguarded**, and not only as an aspect of the European audiovisual landscape.

• **“Cultural diversity” as a guiding principle of film policies and financing of creation**: The financing of audiovisual content and creation is the way to promote cultural diversity. Cultural diversity is at the heart of promoting European works either through financing measures or promoting distribution to a wider audience.

Among those general statements about the value and principle of cultural diversity, Europa International would like to insist on the legislative process regarding the AVMS Directive and its future due to the actual discussions at European level (Licences for Europe, Media convergence, new Creative Europe Programme), emphazing the following points:

○ **The main rationale for the regulation of audiovisual media services at EU level has been the Internal Market, with the country of origin principle at its core. This “single European TV market” has entailed a minimum set of common rules covering aspects like promotion of European audiovisual works.** Concerning broadcast services, **Europa International supports a genuine implementation in each Members State of the European Union regarding the AVMS Directive mandatory percentages of European and independent works to be broadcast by EU broadcasters.**

○ For non-linear audiovisual media services, broadcasters and on-demand service providers should both support the creation of European works with financial contributions and facilitate their distribution and viewing by providing prominence. **Europa International considers that the “wait and see” approach**
taken by most member States of the European Union is not an option and is not in
line either with the wording and/or the spirit of the AVMS Directive. Europa
International thinks that the European Commission should use all means in its
possession to ensure that non-linear audiovisual media services genuinely
contribute to the promotion of European works - before it is too late and
consumption patterns have already been established. Instead an early action is
necessary if we wish to have a possible impact on the audience behaviours.

- The specific issue regarding financial contributions from new players on the
audiovisual market should be addressed. This covers notably the following new
entrants: VoD service providers, device manufacturers (smart TVs, smart phones,
etc.), IPTV and cable distributors, OTT players, holders of UGC platforms. The
question of jurisdiction should also be addressed especially concerning the new
non-European players. Europa International asks the European Commission to
take into account those new entrants and players, in Europe and outside of Europe,
in order to be sure that everyone contribute to the financing, production and
distribution of European works.

Europa International would like to conclude by pointing out one of the concept of media
literacy, which should be one of the priorities of the European Commission, as a tool for a
respectful audiovisual and cinematographic environment, and in order to be able to face the
challenges, especially to fight against piracy.

Europa International hopes that its requests will be taken into account in the context of the
follow-up to the Green Paper and asks to be closely associated to any possible future
consultations in this area.

Europa International counts 37 members from 14 European countries.

- Autlook Film Sales
- Bac Films
- Celluloid Dreams
- Coproduction Office
- Croatian Films
- Doc & Film International
- Dea Planeta
- EastWest Filmdistribution
- Ellipsis Media International
- Fandango Portobello Sales
- Films Boutique
- Films Distribution
- Fortissimo Films
- Gaumont
- Hanway Films
- Intramovies
- Kinology
- Le Pacte
- Les Films du Losange
- Level K
- Lion Pictures International
- Memento Films International
- MK 2
- New Europe Film Sales
- Non Stop Sales
- Pyramide International
- Red Film Sales
- Reel Suspects
- SND Groupe M6
- Soul Food
- Svensk Filmindustri
- The Match Factory
- The Yellow Affair
- Trust Nordisk
- Urban Distribution International
- Wide Management
- Wild Bunch
QUESTIONS FOR PUBLIC CONSULTATION:
(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?
(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?
(3) Are there obstacles which require regulatory action on access to platforms?

(atelier 2)

"un acteur majeur dont l’irruption dans ce tête à tête diffuseurs/fabricants peut faire évoluer les règles du jeu: Google, dont le moteur de recherche et le système d’exploitation va probablement être adopté par un certain nombre de fabricants de télévisions. Si les téléspectateurs zappent un jour à travers leur moteur de recherche Internet Google et non plus en suivant les programmes publiés par les hebdomadaires TV, alors la problématique du référencement des programmes des chaînes de télévision par Google sera aussi cruciale que la problématique du référencement Internet pour les éditeurs de sites Web, ainsi que l’a noté Jean Réveillon. Dans quel ordre accédera-t-on aux chaînes, comment cette information, qui est loin d’être neutre, sera-t-elle hiérarchisée ?

L’un des enjeux technico-économiques majeurs de cette irruption des moteurs de recherche dans l’espace de la télévision est ultimement le basculement d’un mode de consommation des programmes audiovisuels sous forme de flux (qui permet des inter-programmes consacrés à la publicité) à un mode de consommation « à l’unité », qui réduit considérablement l’espace publicitaire disponible, fait une plus grande place au paiement, mais également donne la possibilité à des acteurs tiers (comme les moteurs de recherche) de récupérer des recettes publicitaires nouvelles (liées aux pages de choix ou à des liens subventionnés) sans pour autant qu’ils soient soumis à des obligations de financement de la production. Il y a lieu de réfléchir rapidement sur la nécessité de donner un statut juridique à ce tiers (il n’est ni éditeur de contenu, ni distributeur, mais probablement « agrégateur » ou « guide », catégorie juridique actuellement inexistante) afin de pouvoir l’assujettir à des règles et obligations.

Tout cela conduit également à considérer une problématique réelle: celle des enjeux techniques de transmission et de livraison du contenu Internet sur les téléviseurs, en fonction des moyens déployés par les différents fournisseurs Internet. Aujourd’hui l’usage d’Internet pour
visionner des programmes audiovisuels reste marginal, et la place qu’il requiert sur les réseaux Télécoms est déjà importante.

L’inflation des besoins risque d’entraîner une insuffisance des capacités de certains réseaux Télécoms, et l’on risque d’être aux prises avec des logiques de priorités différentes entre des usages plus ou moins rentables des capacités de transmission disponibles, comme l’a encore expliqué Alberto Morello. Qui fixera ces priorités, selon quelles règles, en fonction de quels principes ? La neutralité des réseaux par rapport aux contenus qu’ils transportent constitue de ce point de vue un dogme qui sera difficile à maintenir."

QUESTIONS FOR PUBLIC CONSULTATION:
(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?

(atelier 3)
"Erik Lambert a présenté amplement à ce propos les conclusions d’une très récente étude demandée par la Commission Culture du Parlement Européen avec le briefing suivant :

« Les usages les plus diffus et la loi sont en conflit. La tension peut être résolue de deux façons : soit avec une application plus rigide pour uniformiser la réalité à la loi ; ou en changeant la loi pour qu’elle s’adapte à la réalité »

En explorant ce dilemme les auteurs de l’étude (parmi eux Lambert lui-même) ont approfondi l’hypothèse d’un CFR (content flat rate ou forfait de contenu) comme réponse à la pratique « illégale » du peer to peer et à sa gratuité, plus que dangereuse pour le fonctionnement économique de l’industrie audiovisuelle. En individuant 42 problèmes (sic!) à résoudre pour une actualisation crédible et partagée de cette solution, l’étude suggère que le consentement de toutes les parties intéressées (opérateurs publics et privés) soit la pré-condition pour se lancer dans une semblable tentative. Et de même que la définition d’une politique de pricing raisonnable et proportionnée soit décisive pour l’applicabilité effective d’un dispositif comme le CFR.

Même l’approche aux nombreux obstacles juridiques (nationaux, européens et internationaux) que dans la situation actuelle s’interposent à l’actualisation de l’hypothèse examiné, et la mise au point d’une pédagogie efficace envers les consommateurs finaux, apparaissent comme des facteurs indispensables de support à un choix politique et réglementaire, qui reste ardue. En dernière analyse ce seront la simplicité et la clarté du mécanisme à décider de son succès possible. Mais il reste le fait que d’un coté il est inimaginable d’insister dans la criminalisation d’une large partie de la société (les consommateurs) de la part d’une minorité (auteurs et producteurs), sans des raisons accablantes et univoques ; d’un autre coté il est très probable que le CFR soit toujours une solution transitoire vis-
à-vis des nouveaux équilibres réglementaires et de marché encore imprécisables, et liés à des nombreux facteurs et variables indépendantes. Il faudrait donc être vigilant et faire en sorte que le financement du secteur industriel de l’audiovisuel (c. à d. sa survie) soit sauvégarde aussi bien dans l’éventualité d’une décision à court terme sur la matière, que tout au long de la période de transition vers un futur équilibre du système.

Pour Carlo Blengino, bien que juriste, il ne fait aucun doute que les règles doivent s’adapter à la technologie et aux pratiques sociales diffusées ; le contraire serait comme réglementer la circulation routière d’aujourd’hui sur la base des carrosses des siècles passés. La fin des copies et de leur reproductibilité matérielle marque la fin d’une philosophie du droit d’auteur aplatie sur le concept de copyright. Avec tous les excès que cette approche a généré contre l’intérêt même de l’industrie culturelle, et avec les nombreuses zones obscures, qui ne manquent pas dans le fonctionnement économique du secteur audiovisuel ou musical (de la problématique des « œuvres orphelines » jusqu’à l’incidence directe - jamais démontrée, jamais mesurée, comme rappelle Lambert – de la piraterie sur les recettes). Un système clair, simple et transparent d’enregistrement des œuvres, ainsi qu’uneopportune diversification des responsabilités et facultés des consommateurs par rapport aux productions professionnelles et à celles d’amateurs, semblent être parmi les premières mises au point nécessaires. Par contre certaines régulations récentes ne semblent pas préoccupées du tout d’harmoniser le poids des sanctions à la diversité des infractions ; et d’un autre coté n’apparaît pas toujours suffisamment garantie une distribution équilibrée des revenus du droit d’auteur, qui puisse protéger avant tout la rémunération réelle et proportionnée des auteurs mêmes (mais pas simplement des plus confirmés et « forts » parmi eux).

Face à l’ensemble des contradictions objectives, qui caractérisent la situation actuelle du marché et des usages les plus répandus, une approche réaliste est importante, ainsi que la vérification de l’efficacité des différentes stratégies en discussion; par exemple il est indéniable que l’offre de iTunes, avec sa simplicité, coût raisonnable et correspondant à la demande des utilisateurs de musique, a fait plus contre la piraterie musicale de beaucoup de menaces répressives et lamentations discographiques.

De même, à propos de télévision hybride, les choix de IPTV et wallen garden faites par quelques broadcasters (comme rappelé par Van Straten et autres) se sont révélés voués à la faillite parce que en pleine contradiction avec l’instance fondamentale de liberté de choix et navigation de la part des internautes. En ce qui concerne les doutes exprimés sur la neutralité effective des moteurs de recherche (i.e. Google et autres) comme drivers de la consommation de video on line, il a été réaffirmé la transparence des systèmes de ranking sur le Net, qui seraient immédiatement punis par les utilisateurs mêmes au moindre soupçon de manipulation des algorithmes de sélection et hiérarchisation des offres. Toute tentative de ce genre serait condamné comme manœuvre contraire à l’esprit et aux règles non écrites de Internet.
En conclusion, **Blengino** a considéré sans espoir l’opposition de la vieille réglementation de l’audiovisuel, fondée sur la rareté du spectre et des contenus, sur la dimension nationale et fragmentée des marchés de référence, et sur l’évidente market failure dans le secteur télévisuel (donc profondément anticoncurrentiel), vis-à-vis du dynamisme puissant, autonome et globale du monde Internet”.

(ateliers 3)

"**Donald Ranvaud** a témoigné, avec des exemples tirés de son activité personnelle de producteur et distributeur de cinéma, la nécessité de dépasser certains excès évidents dans la tutelle du droit d’auteur, qui vont à l’encontre du dynamisme productif du secteur : et cela en suivant certaines pratiques salutaires, mais non pleinement légalisées dans tous les contextes (nationaux et sectoriaux), comme le fair use (USA). Le besoin de visibilité des auteurs, surtout les émergeants ; et le besoin d’un ROI (return on investment) le plus rapide possible de la part des producteurs, surtout les indépendants : ce sont des motivations importantes en faveur du changement des paradigmes économiques et créatifs dominants aujourd’hui.

A propos d’innovation, **Yves Rolland** est intervenu pour rappeler que France Télévision, dont il est Secrétaire General, depuis longtemps conditionne son engagement dans les projets proposés par des producteurs indépendants à la présence d’une ou plusieurs déclinaisons du produit principal linéaire en forme numérique e/ou interactive.

**Petitgirard** a repris la parole pour souligner comme dans le paysage évoqué les « petites législations locales » apparaissent tout à fait insuffisantes pour résoudre les questions sur le tapis. **Van Straten** a répliqué que les instances de régulation et de contrôle de la distribution sur Internet ont un sens en face de phénomènes économiquement importants, non certes pour les UGC ou pour les activités individuelles et privées des internautes : il a rappelé à ce propos les différentes stratégies (légales et commerciales) adoptées envers YouTube de la part de Mediaset (refus de ses contenus propriétaires) et de la RAI (payement symbolique et visibilité du brand).

**Ranvaud** a affirmé, toujours sur la base d’expérience personnelle, que You Tube paye la créativité, et pas seulement de manière symbolique, même si encore insuffisamment. Et cela aide déjà dans la création de nouveaux contenus, et dans la découverte de nouveaux marchés”.

**QUESTIONS FOR PUBLIC CONSULTATION:**

(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?

QUESTIONS FOR PUBLIC CONSULTATION:
(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?

(atelier 3)

"Giulia Rodano a souligné comment, dans le « cas italien », les phénomènes liés à la convergence sont emmelés au problème de l’attribution controversée des fréquences pour le haut débit, et surtout au problème de la douteuse neutralité des dispositifs de réception prédisposés pour la Télévision Hybride. La garantie d’un accès vraiment libre par les utilisateurs du Net apparaît prioritaire par rapport à la tutelle des auteurs et des acteurs industriels plus ou moins « forts » du secteur audiovisuels. Cette problématique est imposée de facto par les développements de la technologie, qui change les choses et les comportements, que cela plaise ou non (ex. l’effet iPad sur la lecture du livre en papier)."

(atelier 2)

"Tout cela conduit également à considérer une problématique réelle : celle des enjeux techniques de transmission et de livraison du contenu Internet sur les téléviseurs, en fonction des moyens déployés par les différents fournisseurs Internet. Aujourd’hui l’usage d’Internet pour visionner des programmes audiovisuels reste marginal, et la place qu’il requiert sur les réseaux Télécoms est déjà importante.

L’inflation des besoins risque d’entraîner une insuffisance des capacités de certains réseaux Télécoms, et l’on risque d’être aux prises avec des logiques de priorités différentes entre des usages plus ou moins rentables des capacités de transmission disponibles, comme l’a encore expliqué Alberto Morello. Qui fixera ces priorités, selon quelles règles, en fonction de quels principes ? La neutralité des réseaux par rapport aux contenus qu’ils transportent constitue de ce point de vue un dogme qui sera difficile à maintenir.

Afin de répondre à l’inflation des besoins prévisibles en matière de capacités de transmission de flux audiovisuels sur Internet et les réseaux Télécoms, plusieurs solutions ont été avancées, les unes terrestres (multiplication des centres de diffusion sur le territoire afin de démultiplier les capacités de fourniture du même programme et de limiter les distances à couvrir) les autres satellitaires ou mixtes (ainsi Eutelsat propose une couverture associant audiovisuel et large bande pour les connexions par Internet, détaillée par Renato Farina).

En conclusion, à travers les différents enjeux techniques que soulève la télévision connectée, il ressort que les évolutions en cours vont nécessairement changer le type de relation entretenue entre éditeurs de chaînes, fabricants de télévision, moteurs de recherche Internet, obligeant chacun à une
prise en compte nouvelle des besoins des autres et des interactions qu’ils pourront nouer. Pour les chaînes et les éditeurs de services audiovisuels gratuits ou payants, il est essentiel de conserver les moyens techniques qui leur permettront de continuer à « focaliser le regard » des téléspectateurs (Christian Blankemburg), et à déterminer la structuration éditoriale de l’offre audiovisuelle qui leur sera proposée”.

(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?

(9) What specific research needs with regard to spectrum have to be addressed to facilitate such development?

QUESTIONS FOR PUBLIC CONSULTATION:
(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?

(atelier 1)

"Considérant que le droit est toujours en retard sur la technologie et les pratiques sociales, l’atelier souligne l’urgence qu’il y a à entreprendre, dès maintenant la refonte de l’encadrement juridique du secteur audiovisuel. Sous prétexte de liberté, «la télévision hybride » ne peut devenir une zone de non droit : en démocratie il n’y a pas de liberté hors du respect des principes généraux et des droits des personnes”.

(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?

(12) 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?

QUESTIONS FOR PUBLIC CONSULTATION:
(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?
(14) What initiatives at European level could contribute to improve the level of media literacy across Europe?
(15) Should the possibility of pre-defining choice through filtering mechanisms, including in search facilities, be subject to public intervention at EU level?

(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’?

(atelier 2)

"Le téléviseur était organe de réception et d’autorité. Il devient un outil pluriel sur lequel la fonction ancienne de « recevoir la télévision » n’est plus unique : le téléviseur est aussi une interface d’accès à Internet, avec toutes les ouvertures que cela comporte.

Cette évolution est d’abord un facteur de complication technologique : en effet chaque fabricant de téléviseur est libre d’exploiter comme il le souhaite cette connexion à Internet et d’installer dans l’appareil les outils logiciels qu’il souhaite afin d’assurer l’interactivité entre les flux vidéos et les flux Internet. A ceci près que les flux vidéos sont contrôlés par les éditeurs de télévision et donc ne peuvent ni juridiquement ni techniquement être contraints de s’adapter à n’importe quel type d’interactivité. Le jeu est donc complexe car les fabricants de téléviseurs ont besoin des chaînes de télévision, mais dans le même temps veulent s’en affranchir pour offrir d’autres types de contenus, comme l’a bien montré Bernard Fontaine dans sa présentation.

Les chaînes de télévision doivent donc s’accorder pour mettre en place des réponses communes et trouver des services enrichis à offrir, utilisant la connexion du téléviseur. Les Groupes de télévision payante, comme Canal+, exploitent depuis longtemps déjà la connexion de leurs décodeurs afin d’enrichir leurs services audiovisuels par de nombreux prolongements (multiples saisons d’une même série disponibles au moment de la diffusion de la dernière saison, par exemple) qui constituent un service hybride entre télévision et Internet. De même les télévisions publiques ont réfléchi à des enrichissements sensibles de leur signal audiovisuel par nombre de services ou données associées.

D’un point de vue technique, les outils d’interactivité audiovisuelle qui équipent les téléviseurs constituent un enjeu décisif et Alberto Morello, Président de l’Atelier 2, s’est attaché à détailler les principaux : les travaux du Groupe de coordination qui a été créé entre les diffuseurs publics allemands, France Télévision et Canal+ ont conduit à la promulgation du standard HbbTV, et tous les téléviseurs connectés vendus en France ou en Allemagne intègrent donc cette technologie pour accéder à Internet et à l’interactivité en même temps que le programme diffusé. En Italie, le standard de la télévision numérique mhp permet la télévision hybride, ou connectée, parce qu’il intégrait déjà l’interactivité, donc la possibilité de gérer un accès à Internet. Ainsi les télévisions italiennes ont-elles pu développer des solutions d’accès à Internet relativement protégées".
QUESTIONS FOR PUBLIC CONSULTATION:
(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?
(atelier 3)
"Michel Grégoire a choisi, au contraire, de souligner les réactions probables du monde publicitaire à la possible révolution dans les mesures d’audience – c’est-à-dire la quantification et la qualification des contacts, qui sont la marchandise principale achetée par les annonceurs publicitaires – liée désormais au passage à la télévision hybride. Si la Télévision ne sera plus celle d’aujourd’hui, inévidemment il faudra chercher et inventer des nouvelles formes de communication publicitaire, qui soient pour l’industrie des biens de consommations aussi fiables que celles actuelles, et qui puissent continuer à motiver les investisseurs."

(18) What regulatory instruments would be most appropriate to address the rapidly changing advertising techniques? Is there more scope for self/co-regulation?
(atelier 1)
"En conclusion de la matinée, le Président du CSA français Michel Boyon et le commissaire de l’AGCOM italienne Antonio Martusciello, ont apporté quelques assurances sur l’adaptation de la régulation du secteur. D’ores et déjà, les régulateurs travaillent à assurer la coexistence entre les «contenus régulés» et «contenus non régulés», flux d’images, qui se rencontreront sur l’écran des «téléviseurs connectés». Ils recommandent, dans cet environnement ouvert, la co-régulation: le régulateur fixe les principes dont l’application revient aux opérateurs dans une démarche d’autorégulation."

(19) Who should have the final say whether or not to accept commercial overlays or other novel techniques on screen?

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

QUESTIONS FOR PUBLIC CONSULTATION:
(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?
(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?

QUESTIONS FOR PUBLIC CONSULTATION:
(26) Do you think that additional standardisation efforts are needed in this field?
(27) What incentives could be offered to encourage investment in innovative services for people with disabilities?
EUROVISIONI 2011
DOCUMENTS FINAUX
En préambule au rapport sur les travaux de l'atelier je veux remercier Philippe Levrier pour son exposé introductif. Avec humour et pertinence il nous a rappelé que notre quotidien efface déjà le débat entre «prophètes de l'apocalypse» et «blasés des nouvelles technologies», sur la nature et l'ampleur des transformations que pourrait engendrer la «télévision connectée» - pour nos amis italiens «la télévision hybride». Derrière cette argutie linguistique se cachent les positions antagonistes des radiodiffuseurs et des opérateurs de l'Internet.

J'ai retenu de l'exposé de Philippe Levrier, que la convergence numérique, qui a mis fin à 3 raretés - celle des images, des écrans et des réseaux - pourrait en engendrer une nouvelle : la rareté des œuvres audiovisuelles. En effet, à ce jour, de nouvelles ressources ne sont pas venues abonder les ressources traditionnelles de l'industrie audiovisuelle menacées par la concurrence des opérateurs de l'internet.

La problématique des «contenus» - jusqu'alors le monde de l'audiovisuel parlait de programmes - a été omniprésente dans les travaux de l’atelier. La réussite de la rencontre entre «la toile» et la télévision exige que le contenu soit au centre de la réflexion.

Après avoir rappelé que la dynamique du secteur fait que les usages ne sont pas installés par la technologie mais par les comportements sociaux, l’atelier a souligné que la «Télévision hybride» est à inventer et la radiodiffusion de service publique à réinventer. Ainsi, l’organisation de la communication publique nécessite-t-elle d’appréhender les évolutions attendues, non de l’offre, mais de la demande.

Face aux pressions des plateformes à vocation globale qui imposent aux contenus une approche marketing, la sauvegarde des libertés fondamentales doit être au centre de la nécessaire refondation de la radiodiffusion de service publique. Cela d’autant plus que «la télévision hybride» va mettre fin au monopole des ordinateurs sur Internet.

Considérant que le droit est toujours en retard sur la technologie et les pratiques sociales, l’atelier souligne l’urgence qu’il y a à entreprendre, dès maintenant, la refonte de l’encadrement juridique du secteur audiovisuel. Sous prétexte de liberté, «la télévision hybride» ne peut devenir une zone de non droit : en démocratie il n’y a pas de liberté hors du respect des principes généraux et des droits des personnes.

Atelier 2 – « Télévision hybride : les enjeux techniques. »

Président : Alberto Morello, Directeur CRIT RAI et Président Comité technique UER
Rapporteur: Olivier Zegna Rata, Directeur relations externes Groupe Canal +

Le téléviseur a muté. L’objet lourd et épais qui trônait dans les salons et imposait même une répartition de l’espace autour de lui a changé de statut. Il s’est éparpillé, ou s’est fondu dans la décoration, et son fonctionnement même est transformé. Jusque là les diffuseurs avaient « la main » sur l’écran, ils pouvaient décider de l’extérieur de ce qu’il présentait. Les choses changent avec la possibilité pour les fabricants de prévoir eux-mêmes d’autres types de contenus, ou d’autres modes de circulation et d’accès aux contenus audiovisuels.

Le téléviseur était organe de réception et d’autorité. Il devient un outil pluriel sur lequel la fonction ancienne de « recevoir la télévision » n’est plus unique : le téléviseur est aussi une interface d’accès à Internet, avec toutes les ouvertures que cela comporte.

Cette évolution est d’abord un facteur de complication technologique : en effet chaque fabricant de téléviseur est libre d’exploiter comme il le souhaite cette connexion à Internet et d’installer dans l’appareil les outils logiciels qu’il souhaite afin d’assurer l’interactivité entre les flux vidéos et les flux Internet. A ceci près que les flux vidéos sont contrôlés par les éditeurs de télévision et donc ne peuvent ni juridiquement ni techniquement être contraints de s’adapter à n’importe quel type d’interactivité. Le jeu est donc complexe car les fabricants de téléviseurs ont besoin des chaînes de télévision, mais dans le même temps veulent s’en affranchir pour offrir d’autres types de contenus, comme l’a bien montré Bernard Fontaine dans sa présentation.

Les chaînes de télévision doivent donc s’accorder pour mettre en place des réponses communes et trouver des services enrichis à offrir, utilisant la connexion du téléviseur. Les Groupes de télévision payante, comme Canal+, exploitent depuis longtemps déjà la connexion de leurs décodeurs afin d’enrichir leurs services audiovisuels par de nombreux prolongements (multiples saisons d’une même série disponibles au moment de la diffusion de la dernière saison, par exemple) qui constituent un service hybride entre télévision et Internet. De même les télévisions publiques ont réfléchi à des enrichissements sensibles de leur signal audiovisuel par nombre de services ou données associées.

D’un point de vue technique, les outils d’interactivité audiovisuelle qui équipent les téléviseurs constituent un enjeu décisif et Alberto Morello, Président de l’Atelier 2, s’est attaché à détailler les principaux : les travaux du Groupe de coordination qui a été créé entre les diffuseurs publics allemands, France Télévision et Canal+ ont conduit à la promulgation du standard HbbTV, et tous les téléviseurs connectés vendus en France ou en Allemagne intègrent donc cette technologie pour accéder à Internet et à l’interactivité en même temps que le programme diffusé. En Italie, le standard de la télévision numérique mhp permet la télévision hybride, ou connectée, parce qu’il intégrait déjà l’interactivité, donc la possibilité de gérer un accès à Internet. Ainsi les télévisions italiennes ont-elles pu développer des solutions d’accès à Internet relativement protégées.

Reste un acteur majeur dont l’irruption dans ce tête à tête diffuseurs/fabricants peut faire évoluer les règles du jeu: Google, dont le moteur de recherche et le système d’exploitation va probablement être adopté par un certain nombre de fabricants de télévisions. Si les téléspectateurs zappent un jour à travers leur moteur de recherche Internet Google et non plus en suivant les programmes publiés par les heb/dos TV, alors la problématique du référencement des programmes des chaînes de télévision de manière globale mais aussi cruciale que la problématique du référencement Internet pour les éditeurs de sites Web, ainsi que l’a noté Jean Réveillon. Dans quel ordre accèdera-t-on aux chaînes, comment cette information, qui est loin d’être neutre, sera-t-elle hiérarchisée ?

L’un des enjeux technico-économiques majeurs de cette irruption des moteurs de recherche dans l’espace de la télévision est ultimement le basculement d’un mode de consommation des programmes audiovisuels sous forme de flux (qui permet des inter-programmes consacrés à la publicité) à un mode de
consommation « à l’unité », qui réduit considérablement l’espace publicitaire disponible, fait une plus grande place au paiement, mais également donne la possibilité à des acteurs tiers (comme les moteurs de recherche) de récupérer des recettes publicitaires nouvelles (liées aux pages de choix ou à des liens subventionnés) sans pour autant qu’ils soient soumis à des obligations de financement de la production. Il y a lieu de réfléchir rapidement sur la nécessité de donner un statut juridique à ce tiers (il n’est ni éditeur de contenu, ni distributeur, mais probablement « agrégateur » ou « guide », catégorie juridique actuellement inexistante) afin de pouvoir l’assujettir à des règles et obligations.

Tout cela conduit également à considérer une problématique réelle : celle des enjeux techniques de transmission et de livraison du contenu Internet sur les téléviseurs, en fonction des moyens déployés par les différents fournisseurs Internet. Aujourd’hui l’usage d’Internet pour visionner des programmes audiovisuels reste marginal, et la place qu’il requiert sur les réseaux Télécoms est déjà importante.

L’inflation des besoins risque d’entraîner une insuffisance des capacités de certains réseaux Télécoms, et l’on risque d’être aux prises avec des logiques de priorités différentes entre des usages plus ou moins rentables des capacités de transmission disponibles, comme l’a encore expliqué Alberto Morello. Qui fixera ces priorités, selon quelles règles, en fonction de quels principes ? La neutralité des réseaux par rapport aux contenus qu’ils transportent constitue de ce point de vue un dogme qui sera difficile à maintenir.

Afin de répondre à l’inflation des besoins prévisibles en matière de capacités de transmission de flux audiovisuels sur Internet et les réseaux Télécoms, plusieurs solutions ont été avancées, les unes terrestres (multiplication des centres de diffusion sur le territoire afin de démultiplier les capacités de fourniture du même programme et de limiter les distances à couvrir) les autres satellitaires ou mixtes (ainsi Eutelsat propose une couverture associant audiovisuel et large bande pour les connexions par Internet, détaillée par Renato Farina.

En conclusion, à travers les différents enjeux techniques que soulève la télévision connectée, il ressort que les évolutions en cours vont nécessairement changer le type de relation entretenue entre éditeurs de chaînes, fabricants de télévision, moteurs de recherche Internet, obligeant chacun à une prise en compte nouvelle des besoins des autres et des interactions qu’ils pourront nouer. Pour les chaînes et les éditeurs de services audiovisuels gratuits ou payants, il est essentiel de conserver les moyens techniques qui leur permettront de continuer à « focaliser le regard » des téléspectateurs (Christian Blankenburg), et à déterminer la structuration éditoriale de l’offre audiovisuelle qui leur sera proposée.

Participants:

- Bernard Fontaine, France Télévisions
- Christian Blankenburg, Directeur Relations Internationales, ARD
- Renato Farina, Directeur des Marchés Italiens, Eutelsat SA
- Jean Réveillon, Directeur Relations Internationales, France Télévisions
L’Atelier III, présidé par Yves Rolland, a produit un débat objectivement intéressant, permettant de confronter des points de vue assez divers et représentatifs de cultures professionnelles impliquées dans l’évolution du scenario technologique et économique lié à la télévision hybride, et surtout dans les reflets de ce scenario sur la création et sur le financement.

Laurent Petitgirard a ouvert les travaux, en tant qu’auteur et Président de la Sacem, en réaffirmant la nature à son avis « sacré » du droit d’auteur et refusant l’idée d’un monde où « tous seraient créateurs » : effet pernicieux de l’impact sauvage d’Internet, par exemple sur l’univers de la musique. Il a en outre commenté avec préoccupation les propos d’adoucissement de la protection des droits d’auteurs en faveur de droits discutables à la manipulation des œuvres de la part des « consommateurs interactifs » (e.g. le droit au remix des œuvres musicales), propos pénétrés en partie aussi dans la plateforme programmatique de la gauche française. Il a enfin rappelé que n’importe quel type de licence globale, dérogeant le droit moral de l’auteur, devrait de toutes façons garantir la liberté de ce dernier d’autoriser ou pas les utilisations de son œuvre; et produire en outre une répartition proportionnée des ressources récoltées grâce à elle.

Giulia Rodano a souligné comment, dans le « cas italien », les phénomènes liés à la convergence sont emmelés au problème de l’attribution controversée des fréquences pour le haut débit, et surtout au problème de la douteuse neutralité des dispositifs de réception prédisposés pour la Télévision Hybride. La garantie d’un accès vraiment libre par les utilisateurs du Net apparaît prioritaire par rapport à la tutelle des auteurs et des acteurs industriels plus ou moins « forts » du secteur audiovisuels. Cette problématique est imposée de facto par le développement de la technologie, qui change les choses et les comportements, que cela plaise ou non (ex. l’effet iPad sur la lecture du livre en papier).

Giorgio Van Straten a proposé comme problème principal pour l’introduction de la télévision hybride la question générationnelle: c’est-à-dire la moitié de l’Italie, plutôt adulte, qui n’utilise pas encore Internet et donc ne serait pas prêt e d’adopter et utiliser les nouveaux services. S’il y en aura, car la nouvelle TV connectée pourrait aboutir à peu de chose dans notre pays, comme cela a été à son avis le cas pour le numérique terrestre et les projets d’IPTV. Cela à cause d’un déficit de liberté et d’innovation dans ces mêmes projets, du moins en Italie. En se demandant qui contrôlera le destin des nouveaux développements technologiques, Van Straten a opté pour les fournisseurs de contenus, les seuls qui peuvent aller à l’encontre de la demande d’autonomie des consommateurs intéressés, tant dans les choix que dans les modèles de comportement (ex. multitasking et gratuité des consommations on line).

Donald Ranvaud a témoigné, avec des exemples tirés de son activité personnelle de producteur et distributeur de cinéma, la nécessité de dépasser certains excès évidents dans la tutelle du droit d’auteur, qui vont à l’encontre du dynamisme productif du secteur : et cela en suivant certaines pratiques salutaires, mais non pleinement légalisées dans tous les contextes (nationaux et sectoriaux ), comme le fair use (USA). Le besoin de visibilité des auteurs, surtout les émergents ; et le besoin d’un ROI (return on investment) le plus rapide possible de la part des producteurs, surtout les indépendants : ce sont des motivations importantes en faveur du changement des paradigmes économiques et créatifs dominants aujourd’hui.

A propos d’innovation, Yves Rolland est intervenu pour rappeler que France Télévision, dont il est Secrétaire General, depuis longtemps conditionne son engagement dans les projets proposés par des producteurs indépendants à la présence d’une ou plusieurs déclinaisons du produit principal linéaire en forme numérique e/ou interactive .

Petitgirard a repris la parole pour souligner comme dans le paysage évoqué les « petites législations locales » apparaissent tout à fait insuffisantes pour résoudre les questions sur le tapis. Van Straten a répliqué que les instances de régulation et de contrôle de la distribution sur Internet ont un sens en face de phénomènes économiquement importants, non certes pour les UGC ou pour les activités individuelles et privées des internautes : il a rappelé à ce propos les différentes stratégies (légales et commerciales)
adoptées envers YouTube de la part de Mediaset (refus de ses contenus propriétaires) et de la RAI (payement symbolique et visibilité du brand)

Ranvaud a affirmé, toujours sur la base d’expérience personnelle, que YouTube paye la créativité, et pas seulement de manière symbolique, même si encore insuffisamment. Et cela aide déjà dans la création de nouveaux contenus, et dans la découverte de nouveaux marchés.

Erik Lambert a présenté amplement à ce propos les conclusions d’une très récente étude demandée par la Commission Culture du Parlement Européen avec le briefing suivant :
« Les usages les plus diffus et la loi sont en conflit. La tension peut être résolue de deux façons : soit avec une application plus rigide pour uniformiser la réalité à la loi ; ou en changeant la loi pour qu’elle s’adapte à la réalité. »

En explorant ce dilemme les auteurs de l’étude (parmi eux Lambert lui-même) ont approfondi l’hypothèse d’un CFR (content flat rate ou forfait de contenu) comme réponse à la pratique « illégale » du peer to peer et à sa gratuité, plus que dangereuse pour le fonctionnement économique de l’industrie audiovisuelle. En individuant 42 problèmes (sic!) à résoudre pour une actualisation crédible et partagée de cette solution, l’étude suggère que le consentement de toutes les parties intéressées (opérateurs publics et privés) soit la pré-condition pour se lancer dans une semblable tentative. Et de même que la définition d’une politique de pricing raisonnable et proportionnée soit décisive pour l’applicabilité effective d’un dispositif comme le CFR.

Même l’approche aux nombreux obstacles juridiques (nationaux, européens et internationaux) que dans la situation actuelle s’interposent à l’actualisation de l’hypothèse examiné, et la mise au point d’une pédagogie efficace envers les consommateurs finaux, apparaissent comme des facteurs indispensables de support à un choix politique et réglementaire, qui reste ardue. En dernière analyse ce seront la simplicité et la clarté du mécanisme à décider de son succès possible. Mais il reste le fait que d’un coté il est inimaginable d’insister dans la criminalisation d’une large partie de la société (les consommateurs) de la part d’une minorité (auteurs et producteurs), sans des raisons accablantes et univoques ; d’un autre coté il est très probable que le CFR soit toujours une solution transitoire vis-à-vis des nouveaux équilibres réglementaires et de marché encore imprécisables, et liés à des nombreux facteurs et variables indépendantes. Il faudrait donc être vigilant et faire en sorte que le financement du secteur industriel de l’audiovisuel (c. à d. sa survie) soit sauvegardé aussi bien dans l’éventualité d’une décision à court terme sur la matière, que tout au long de la période de transition vers un futur équilibre du système.

Pour Carlo Blengino, bien que juriste, il ne fait aucun doute que les règles doivent s’adapter à la technologie et aux pratiques sociales diffuses ; le contraire serait comme réglementer la circulation routière d’aujourd’hui sur la base des carrosses des siècles passés. La fin des copies et de leur reproductibilité matérielle marque la fin d’une philosophie du droit d’auteur aplatie sur le concept de copyright. Avec tous les excès que cette approche a gênée contre l’intérêt même de l’industrie culturelle, et avec les nombreuses zones obscures, qui ne manquent pas dans le fonctionnement économique du secteur audiovisuel ou musical (de la problématique des œuvres orphelines) jusqu’à l’incidence directe - jamais démontrée, jamais mesurée, comme rappelle Lambert – de la piraterie sur les recettes). Un système clair, simple et transparent d’enregistrement des œuvres, ainsi qu’une opportune diversification des responsabilités et facultés des consommateurs par rapport aux productions professionnelles et à celles d’amateurs, semblent être parmi les premières mises au point nécessaires. Par contre certaines régulations récentes ne semblent pas préoccupées du tout d’harmoniser le poids des sanctions à la diversité des infractions ; et d’un autre coté n’apparaît pas toujours suffisamment garantie une distribution équilibrée des revenus du droit d’auteur, qui puisse protéger avant tout la rémunération réelle et proportionnée des auteurs mêmes (mais pas simplement des plus confirmés et « forts » parmi eux).

Face à l’ensemble des contradictions objectives, qui caractérisent la situation actuelle du marché et des usages les plus répandus, une approche réaliste est importante, ainsi que la vérification de l’efficacité des différentes stratégies en discussion ; par exemple il est indéniable que l’offre de iTunes, avec sa simplicité, coût raisonnable et correspondant à la demande des utilisateurs de musique, a fait plus contre la piraterie musicale de beaucoup de menaces répressives et lamentations discographiques. De même, à propos de télévision hybride, les choix de IPTV et wallen garden faites par quelques broadcasters (comme rappelé par Van Straten et autres) se sont révélés voués à la faillite parce que en pleine contradiction avec l’instance fondamentale de liberté de choix et navigation de la part des internautes. En ce qui concerne les doutes exprimés sur la neutralité effective des moteurs de recherche (i.e. Google et autres) comme drivers de la consommation de video on line, il a été réaffirmé la transparence des systèmes de ranking sur le Net, qui seraient immédiatement punis par les utilisateurs mêmes au moindre soupçon de
manipulation des algorithmes de sélection et hiérarchisation des offres. Toute tentative de ce genre serait condamné comme manœuvre contraire à l'esprit et aux règles non écrites de Internet.

En conclusion, Blengino a considéré sans espoir l’ opposition de la vieille réglementation de l’audiovisuel, fondée sur la rareté du spectre et des contenus, sur la dimension nationale et fragmentée des marchés de référence, et sur l’évidente market failure dans le secteur télévisuel (donc profondément anticoncurrentiel), vis-à-vis du dynamisme puissant, autonome et globale du monde Internet.

Paolo Lutteri a raconté, à l’aide d’images amusantes « piratées » d’Internet, les doutes et les espoirs générés dans son expérience personnelle et professionnelle par la perspective de la télévision hybride. Un mix sincère d’attentes, de paris, de peurs, d’interrogations : « les medias interactifs vont promouvoir une multiplicité de voix... la responsabilité individuelle s’accroît... il est nécessaire de renforcer l’engagement public et privé pour entamer un nouveau cercle vertueux... les professionnels de la communication et de l’audiovisuel ont aujourd’hui un rôle social fondamental... »

Michel Grégoire a choisi, au contraire, de souligner les réactions probables du monde publicitaire à la possible révolution dans les mesures d’audience – c’est-a-dire la quantification et la qualification des contacts, qui sont la marchandise principale achetée par les annonceurs publicitaires – liée désormais au passage à la télévision hybride. Si la Télévision ne sera plus celle d’aujourd’hui, inévitablement il faudra chercher et inventer des nouvelles formes de communication publicitaire, qui soient pour l’industrie des biens de consommations aussi fiables que celles actuelles, et qui puissent continuer à motiver les investisseurs.

Enfin, Kristof Zanussi a brièvement exprimé quelques-uns de ses cauchemars récurrents, provoqués par les futurs, obscur développements de la création audiovisuelle : en commençant par la prétention de ses étudiants de se proclamer créateurs en empochant simplement leur smartphone, en passant par le diagnostic (attribué à certains économistes) de la publicité comme cancer de l’industrie audiovisuelle, jusqu’à l’inquiétant retour du fantôme -- peut être pour lui pas très lointain -- des créateurs « salariés » sans créer.

« . . . . l’expérience montre qu’on ne peut indéfiniment s’opposer à des usages fortement demandés par le consommateur. » ( Avril 2011 - Rapport de Dominique Richard, conseiller régional des Pays de Loire, au ministre de la Culture et de la Communication Frédéric Mitterrand, sur les perspectives du secteur audiovisuel à l’horizon 2015 )

Participants:

Laurent Petitgirard, Président CdA Sacem
Krzysztof Zanussi, Réalisateur
Giorgio Van Straten, CdA Rai
Paolo Lutteri, Membre du Conseil EGTA, SIPRA
Michel Gregoire, Membre émérite EGTA
Carlo Blengino, Centre NEXA sur Internet & Società, Politecnico di Torino
Eric Lambert, Directeur Silver Lining Project
Giulia Rodano, Conseiller Reg. Lazio, Resp. Nazionale Scuola e Cultura dell’IDV
Donald Ranvaud, Rain Production
GREEN PAPER

Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values

Contributions to the Public Consultation by EuroVoD

Paris, 26 August 2013

To: European Commission, Directorate-General for Communications Networks, Content and Technology, Unit G1

Short Presentation of EuroVoD

Created in 2010, EuroVoD is a network of independent European Video on Demand platforms, specialized in art-house films and independent cinema. Started as a rights holders’ initiative – behind the platforms there are more than 200 rights holders implicated as shareholders – this Pan-European network builds a collaborative management model, where small and medium enterprises team up in order to pool resources, exchange know-how, increase the transnational circulation of European films, defend cultural diversity and develop Video on Demand as a new, legal channel for distribution of audiovisual content as well as a new financial resource for production of European films.

With members in 14 countries: Flimmit (Austria), UniversCiné Belgium, Netcinema (Bulgaria), Blind Spot Pictures (Finland), UniversCiné (France), Good !Movies (Germany), Icelandic Cinema Online (Iceland), Fandango and Cecchi Gori Home Video (Italy), Volta (Ireland), Ximon (the Netherlands), Vodkin (Poland), Filmin (Spain), leKino.ch (Switzerland), Distrify (the UK), the network is constantly growing and already covers a global European audience of more than 385 million people to whom EuroVoD offers more than 10 000 films.

EuroVoD is the official organizer of Streams – the European Online Film Festival.

www.eurovod.org
www.streamsfilmfestival.com

Answers to the questions for public consultation

A general remark:

Regarding the EU common cultural policy, Article 3 of the Treaty on the European Union declares that the Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced. Article 167 of the Treaty on the functioning of the EU states that the Union should 'contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same
time bringing the common cultural heritage to the fore’. Its action aims at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: improvement of the knowledge and dissemination of the culture and history of the European peoples; conservation and safeguarding of cultural heritage of European significance; non-commercial cultural exchanges; artistic and literary creation, including in the audiovisual sector.

In this respect, it is essential that ‘cultural diversity’ appears clearly in the Green Paper as an ‘intrinsic value’ which has to be safeguarded and enhanced.

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?**

It is important to underline the difference between Hollywood studios – ‘majors’ – and US independent companies, since the films they produce and distribute do not follow the same release and exploitation schemes. Hollywood productions have ‘successful presence in the fragmented EU market’ for three main reasons: a) they are very well identified by audiences throughout the world; b) they dispose of significant financial resources for marketing and promotion on a global level; c) they have access to a sophisticated distribution network of locally based divisions (e.g. Warner UK, France, etc.), possessing excellent knowledge of the major European markets they operate in. Thus Hollywood studios address efficiently and successfully the fragmented EU market by adapting their marketing and promotional strategies, accordingly to the cultural and linguistic specificities of each territory and audience. On the contrary, independent US companies struggle in the same way as European ones – they cannot take advantage of the three assets mentioned above.

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?**

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

There is one particular factor affecting the availability of content (not only premium) – the necessity of subtitling/dubbing. These are expensive investments, especially for independent SMEs and represent an obstacle for the transnational circulation of European audiovisual works. Incentives for producing subtitling and dubbing could help increasing the availability of European content online.

Another factor is the lack of interoperability between exploitation standards (e.g. Microsoft and IOS systems, or IPTV formats). This obliges platforms to invest in transcoding of the content files in various formats and pay for the hosting of several files (sometimes up to 20) of the same audiovisual work in order to be able to exploit it on different channels/devices. This limits considerably their financial ability to provide more content more rapidly.
Another very important obstacle is piracy. Regarding premium content, rights holders can feel threatened by Internet, because of potential illegal exploitation. The argument that sooner or later any film becomes available on pirate websites does not mean we should or could not fight against piracy. Strong regulatory intervention is needed in this matter. If we combat successfully this real threat for our industry (and, in fine, for the consumer’s choice), more premium content will be available on legal platforms.

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

Articles 13, 16 and 17 of the current AVMSD provide the basic legal framework for promoting the creation, distribution, availability and market appeal of European works. The notions of ‘ensuring a share and/or prominence of European works in the catalogue of programmes’ and ‘reserve a majority proportion of their transmission time (…) for European works’ are essential. If the current AVMSD is to be updated, it is crucial to ensure that these articles are faithfully transposed in the new legal instruments.

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?**

New technologies and changing consumer behaviour have started to influence the current system of content financing: the DVD market decreases while VoD progresses; TV broadcasters face competition of non-linear services – their publicity revenues are shrinking, which threatens their investment abilities in new audiovisual productions.

Some EU member states (France) have built a complex and sophisticated system for financing cinema and audiovisual production, which has guaranteed exceptional results in terms of both quantity and quality (France is the first European production country with 279 feature films produced or coproduced in 2012, according to the CNC). However, the digital evolution represents a challenge for this system. In order to be able to safeguard ability for production, competitiveness and cultural diversity in Europe, it is important to adapt our current tools.

New players – ISPs and global VoD platforms (some of them extra-European) – have to contribute to film financing, as TV channels are obliged to do. They also have to propose a share of European films in their catalogues (the report ‘Mission Acte II de l’exception culturelle’ by Pierre Lescure, May 2013, suggests obligations of must-carry/must-offer for ISPs who take advantage of audiovisual content for selling their services and who should contribute to production and ensure availability of European content in accordance).

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?**

Yes, there is a strong need for EU action in order to develop standards that are interoperable. One example among others – our Austrian member Flimmit offers their services on 10 different devices with 8 different systems (HbbTV, ce-HTML, Samsung SDK, etc.) and these figures are going up. Same is the situation with our other members who propose a ‘multi-
device’ distribution scheme of their brands. If manufacturers continue applying different standards, SMEs (be they rights holders or VoD operators) will be obliged to bear a considerable financial burden, which is totally unnecessary and inefficient.

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?**

The differences are relevant at least for geographical reasons – in Europe there are different types of settlements, especially in countries with mountains. In cities, consumers can easily have access to TV signals or Internet, but in the countryside, especially in remote places, the access to an Internet connection still can be limited.

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?**

9. **What specific research needs with regard to spectrum have to be addressed to facilitate such development?**

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?**

Given the fast development of non-linear services and their increasing share in consumers’ practices, Article 13 of AVMSD could be adapted and reinforced by including an obligation for a quota/percentage of European works proposed in the catalogues.

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?**

Global providers, mainly US-based, operating in the EU, should also be subject to all of the obligations of the AVMSD when providing content to consumers in the EU. In this way there will be less distortion for EU players who face competition with them. This would also increase the financial resources for European productions, as well as their visibility and availability.

12. **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?**
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?

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

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

It is important to create clear and fair rules for web search engines. Providers should not pre-define or limit access to information (except for services that doesn’t respect the law), the algorithms should treat all services in an equal way. This has to be applied also to new devices and their search engines – Connected TVs, tablets, etc.

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'?

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?

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

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

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

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?
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?

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?

26. Do you think that additional standardisation efforts are needed in this field?

27. What incentives could be offered to encourage investment in innovative services for people with disabilities?
Commentary of the Trade Association for the Film and Music Industries (Film and Music Austria (FAMA)) on the:

**Consultation by the European Commission - Green Paper on Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values**

Thank you for the opportunity to comment on the *Green Paper on Preparing for a Fully Converged Audiovisual World*. No doubt the broad posing of questions will deliver interesting answers for the future structuring of the portability of audiovisual content.

Basically, FAMA welcomes the intention of the Commission to open up further business activity for audiovisual content, provided that we are not talking about an "all you can eat for free" model, but a market-based, ie. in principle a pricing model for film utilisation that differentiates and is product-related, and does not operate on the basis of "one size fits all", but takes into consideration that fundamentally, the industry is best situated to specify its offer after evaluating the public demand. An undifferentiated approach that is not oriented on real demand leads to the endangerment of tried and true business models that have proven themselves for almost a century, and by association leads to a threat against the economic as well as cultural significance of an entire industry for the benefit of a conjectured public interest. Even though they are to a large extent dependent on audiovisual content, the business models of large internet-based media platforms are different than those of the film industry.

One of the points of criticism in the Convergence-Green Paper is the undifferentiated use of the term audiovisual content. It must be emphasised that there is a big difference between the genres feature film, television series, television entertainment, documentary, etc, just as there is naturally a significant difference in the exploitation of catalogues and new upcoming productions. Catalogue titles - especially English-language blockbuster movies (cinema releases) are certainly widely available (in English) and are already now by and large convergent. The issue of financing of new content must especially be addressed in light of the new digital market players.

**Introductory report on the Austrian situation:**

FAMA represents over 3,000 organisations in the film sector alone, all in the segment of audiovisual creation: from cinematic feature films, documentary films, television features, documentaries and reports, up to advertisement films, image films and educational films, altogether the entire sector of commissioned film production, of which the latter activities named are hardly addressed by the Green Paper.

A large share of the organisations are one-person enterprises or SMEs; they are subject to exceptional circumstances that are significantly different from those of large European film nations like the UK, France and Germany, namely a small domestic market, the dominant position of the public broadcaster ORF, currently
below average investments by private broadcasters in the audiovisual production by independent producers, the meager equity base, the low market share and the low budgets of Austrian films in the cinema market. Furthermore, the German-language region which Germany and Austria share creates special circumstances, for example, that almost all films are dubbed for the cinemas. A likely reason that the domestic market share of Austrian films is lower than in those countries where non-national films are only subtitled or offered in the original language is the lack of competitive advantage for films in the native tongue. Above summary of the sector shows that the nature of Austrian cinema releases is on the one hand characterised by in the festival circuit very successful arthouse productions - see the amount of Austrian festival awards, most recently the Oscar for the Best Foreign Language Film for Michael Haneke's AMOUR, as well as by individual titles of the comedy genre, partly very successful documentary features in the dok.film niche and of course the dominant made-for-television film segment. The latter is currently suffering the consequences of the financial duress of the public broadcaster, as well as difficulties with German partner stations - incidentally also encountered by German audiovisual producers.

Due to the common language market, Germany is the major co-production partner, in cinematic film production and even more so in the made-for-television film segment. The financing of Austrian film productions for the cinema with average budgets of +/- € 2 million essentially comes from national and regional aid, as well as from the co-production investment of the television broadcaster, but also through pre-sales by distribution companies and other financing partners. Financing from banks is in fact uncommon.

Nevertheless, what is true for Austria is also true for Europe: film is always a high-risk investment. The film product cannot be standardised in terms of content, and each individual film is a prototype with its own business concept, high investment costs that are partially not recoverable and a still strong business model, based on a chain of exploitation. It also cannot be denied that in the cinematic film segment, yet even stronger in the television segment, dominant "regional content" makes up a share of the output, ie. content, that is not automatically suited for export or at least not for an undifferentiated "multi-territorial" dissemination to all territorial markets in the European region. Such content is partly strongly oriented on the national utilisation in specifically defined target areas, as films - in contrast to certain music genres - cannot just be transferred one-to-one to different markets, but need adaptation in terms of marketing strategies and sometimes in terms of content (cultural differences, such as youth protection regulations). Regarding European preferences: these are well-documented and basically follow the patterns found in the valorisation chain of conventional media, ie. cinema, home entertainment, digital media and pay- or free-TV. Put simply: the consumer preference is first of all national content, then international non-EU blockbusters, and everything else takes third place, including non-national EU content.

One must also take into consideration the relatively high costs for subtitling and dubbing and a continuing low demand for non-national films with the exception of US blockbusters which dominate all European markets, ie. the cinemas, the primetime of
private broadcasters and partly the public broadcasters. They also have a dominant presence on the existing VOD and streaming platforms regarding demand. An indicator of this last statement is especially the access figures for blockbusters on the numerous illegal (piracy) platforms.

Legal VOD platforms have seen a significant development over the past few years. However, with a few exceptions, the market is mainly concentrated on big providers from the telecom and mobile communications sector and is certainly capable of further development. Access from Austria to a German-language site based in Germany is often not possible, due primarily to various requirements, eg. youth protection, but above all due to the small size of the Austrian market. Clearly, this narrows the attractiveness of the still developing VOD market. Naturally, FAMA as a trade association is following this development with interest and is currently in discussions on creating a national platform or incentive models for the valorisation of national content online. Comparisons with models such as the French Univercinené, the Dutch Vimox and the successful Austrian platform, Flimmit, are helpful and exemplary.

The Green Paper mentions/criticises - as in other papers of the EU Commission - the differentiation and linguistic and cultural fragmentation in the European film market. This is a fact, nevertheless from a cultural standpoint, nothing negative.

As the audiovisual sector is a complex network of different large, middle and mainly small enterprises (in Austria) with a high degree of specialisation and know-how from project development through to the very fundamental film-marketing and distribution, film in Austria is necessarily and rightly oriented towards international co-productions and inevitably, as a result of the high levels of financing needed, disposed to share the financial risk of the process with existing structures such as world sales, national distributors, sponsoring, pre-sales/minimum guarantees and very seldom bank-induced financing models. These structures must persist for the financing of audiovisual content and may not be destroyed by less matured multi-territorial business models, however important these may become in the future.

QUESTIONS FOR PUBLIC CONSULTATION:

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?

There are complex and library-filling answers to this question. The US-American culture which has established itself worldwide latest since the end of the Second World War, was first able to consolidate itself in its own large English-speaking market, and nowadays supplies a market in which more people speak English than in the native-language countries; in other words, in the realm of blockbuster cinema, US
culture has largely established itself as the worldwide hegemonial universal culture. Additionally, because of the size of this market which was able to establish itself in its own territorial and culturally homogenous space, an entire industry developed, which concentrates all areas from bank financing, development, production through to the nearly equally costly marketing under one media roof. Simply put, in the United States some market players are "too big to fail", in Europe many "too small to succeed." Moreover, also the large internet platforms established themselves primarily in their own market before expanding to other markets. As a general rule, the European markets are too small to start to think about a similar development in Europe.

Consequently, above explanation also implies that the large platforms which are also expanding into the European space have an accordingly financially sound and oligopolistic presence - conditions that are unlikely to be available to European vendors.

Film producers are used to thinking and acting in terms of multi-territoriality and are necessarily constantly interested in possibilities of licensing and distributing their content multi-territorially in order for it to reach as many European viewers as possible - independent of the platform. If there is resistance to this, then it is EU-specific and affects EU enterprises to the same extent as US enterprises active in the EU market. It must be accepted that EU countries are culturally and linguistically heterogeneous and that the entire European market consists of many languages, cultures, regional preferences, customs and social preconceptions, as well as regional differences regarding bandwidth infrastructure and speed, payment systems, etc. Anyone wishing to succeed in the European market must overcome these barriers in order to set up an accomplished EU-wide presence.

(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?

It is not quite comprehensible why the Commission is so focused on premium content here - ultimately without even defining what is meant by that. Blockbusters? Let us assume that - at least as far as content is concerned - also European film counts as "premium content." Currently, we see no obstacles in making premium content available Europe-wide within the worldwide (also in the USA) applicable release windows. Content on online platforms is generally non-exclusive and can therefore be licensed within the framework of contractual freedom. Regulatory intervention is neither necessary - unless the principle of freedom of contract is to be surrendered - nor compatible with the free market.

If there is a negative effect in the European infrastructure, it is the lack of uniformly reduced VAT rates. The VAT Directive (2006/112) does include some AV-related
services like cinemas radio and TV broadcasting services, but all other services which actually perform the same function, ie. the electronic distribution of content, are currently still subject to full value added tax obligations. Therefore, if there is something that it would make sense to harmonise, then it is exactly the correction of different fiscal treatment of one and the same creative work depending on the publishing medium. By the way, also the question of why media like DVDs and Blu-Ray are treated differently from a fiscal point of view should be addressed.

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

The AVMD Directive rightly already considers nonlinear programming and is therefore principally appropriate for establishing the substantive conditions also in competition to the traditional broadcasters.

As it is a regulatory directive, the AVMD Directive is in principle not automatically designed to foster the production, distribution and marketing activities of European works. Nevertheless, it does include the - although for nonlinear services unquantified - fixation of a “European Quota.” It is certainly worth discussing a verifiable concretisation and quantification of the same.

As long as the European players in the European market are not interested in contributing to the financing of new content while traditional “analogous” distribution markets (the physical video market) collapse, the financing of new projects is made more difficult. Every regulatory measure with an optimistic view on future convergence perspectives that restrains the traditional possibilities of producers based on contractual freedom is completely counterproductive and puts the entire financial base frame of complex film financing for independent film producers at risk.

It must be pointed out, however, that principally other EU funds, especially the new aid tool Creative Europe, are more fitting for the fostering of the distribution of European works, than a regulatory directive like the AVMD-Dir.

(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?

Convergence and the attention towards online platforms currently influence the financing of content enormously, as generally speaking, the internet platforms are not involved in the chain of financing. Some European regulations, for example in France or Poland provide for co-financing by the telecommunications sector by law. To which extent this co-financing actually contributes towards financing is not known hereabouts.
Online platforms are mainly still in the pioneering stage and therefore only contribute marginally to the distribution of audiovisual content among the traditional distribution channels.

The primary problem in the collaboration with online platforms is not so much the question of license participation under the assumption that the long-tail theory functions here (it does not really), but the to-date completely lacking readiness of these platforms (in contrast to all other market participants) to participate in the financing of films. Furthermore, the success of the big platforms can be explained by the fact that they are initially able to establish themselves successfully in their own (mostly potent US) territory and can expand on the basis of this commercial success - see Netflix. The other way around is no doubt difficult or unlikely. This is also connected to the relatively high costs involved in the promotion of these platforms and the ultimately necessary investments in "re-nationalisation" despite their multi-territorial character, as most consumers prefer internet services in their own language and with their own cultural features.

Basically, one can proceed on the premise that online platforms are actually program creators in the sense of the AVMD Directive and should therefore in general contribute to the financing - particularly in this respect, but also especially where there are specific aid programs with public funds contributing to these platforms. These platforms may finance themselves through different business models - in practice frequently through advertising or flat-rate models and not by licensing the end-product to the consumer, yet above all it is important for the audiovisual industry that the portals are legal and act in accordance with authors' rights, that right holders are licensed and of course that the platforms contribute to the financing of European content, analogous to the broadcasters. A substantial funding role will no doubt be in store for the EU and its programs.

Regarding financing models, the Green Paper declares that "new players and new potential investors" tend to invest in original content. We see no signs of this in the market, and if so, it applies to series produced in-house, such as the oft-cited "House of Cards" by Netflix. Possibly, it is more correct to state that the platforms (eg. search engines and their UGC channels) tend to take on producer attributes when their core business markets are de facto saturated.

(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?

As mentioned above, the EU puts the fragmentation of the European markets in a number of AV-relevant papers up for discussion - often disregarding the fact that the UNESCO Convention on Cultural Diversity which is also binding for the EU, sees and protects this diversity as a future asset for European content policy. The cultural political goal of the European Commission cannot be a monoculture. No doubt it is important to bring European films to the attention of respective national
populations. Besides that, there are more and more technical means for interested parties, as more and improved possibilities are being created via digital receivers (usually fee-based with a flat rate) to consume national content everywhere and on all devices.

As the results of the Working Group for Licenses shows, there are already best practices in a number of EU countries that could be adapted for other markets. This is technically possible and should indeed be pushed for; there is certainly quick progress on this front and it will develop wider audiences and therefore find according interest from the industry. Regulatory intervention by the EU is not necessary.
FIAD – International Federation of Film Distributors’ Associations

The International Federation of Film Distributors’ Associations (FIAD) represents national organisations of film distribution companies whose main activity is the release of cinematographic works in cinemas. FIAD’s members cover the entire range of companies: small and medium-sized companies specialised in art house films, as well as larger companies focused on mainstream films. The members operate in 16 countries where they cover 90 to 100 percent of the theatrical market.

Film distributors are the intermediates between film producers and cinema exhibitors and play an important role in film financing and promotion. Distributors give films the profile they deserve with the release in the first – theatrical – window of rights exploitation. Depending upon the contracts they have with producers, the distributors may have rights for part or all of the following markets: cinema, physical video, video on demand, television and internet.

Introduction

FIAD welcomes the opportunity to contribute to the discussion on the increasingly converging audiovisual world. We acknowledge the Commission’s view that there is an ongoing transformation and a steady increase of converged media services. It is clear that the digital shift has a big impact on the way the audiovisual market functions and has created some challenges but also many opportunities. More and more cinematographic works are offered online, either directly to end-users or working in cooperation with service providers or content aggregators pursuing different business models and delivery platforms. These new services provide consumers with a wider choice of content through a variety of distribution platforms. We recognise that in these financially difficult times, this online market place can be a vehicle for increased economic growth. However, many different models, content and delivery modes are currently being explored by market operators. Which distribution channel and which format will be most successful and favoured by consumers still remains to be seen.

FIAD will try to answer the questions in the Green Paper it is best positioned to answer and will touch on some of the crucial aspects which have to be kept in mind when considering any policy initiatives in this area. We would like to thank the Commission for its efforts and look forward to continued collaboration in future initiatives in these important policy areas.
**Growth and Innovation: market considerations**

The ability of US companies’ to address the EU’s fragmented market successfully is due to their substantial financial possibilities in comparison to their European counterparts. The US market is a big and far more homogeneous market than the European market which gives US companies a very large financial base and a home market to develop platforms which they can then export internationally. When these companies start operating in Europe they have already received - and still attract - significant investments and funding, which allows them to roll out their services simultaneously in multiple territories. Furthermore, US companies recognised early on that the decline of physical video consumption could be exploited by providing their developed online distribution services in Europe. The combination of both these factors is demonstrated by the success of platforms such as Amazon, LoveFilm and Netflix.

We agree with the Commission’s vision “to seize the opportunity” provided by the converging technological environment to “ensure the widest possible access to European diversified content for all Europeans and, the widest choice of high quality offers.” However, the more fragmented EU market might pose extra challenges for companies which want to launch new multi-territorial platforms. European markets are made up of multiple cultures, languages, and local tastes which give each European country a distinct identity. These differences have shaped European consumer preferences in legacy media such as cinema and linear television and there is evidence that the same patterns are being witnessed in online consumption. Preferences are for national content first, followed by international blockbusters (Hollywood) and then finally by non-national content. Whilst US companies have a product which crosses-borders easily, the same cannot be said for the European audiovisual sector which has developed in accordance with Europe’s differences. The sector is predominantly small- and medium-sized enterprises which provide tailored services offering content targeting at national markets. The Commission is therefore correct in its observation that the European market is fragmented by culture and language.

Whilst we consider this cultural heterogeneity to be one of the major strengths of the European audiovisual market, for a service wishing to provide a platform outside of their country of origin, this can prove the “barrier” the Commission refers to. Although this is not necessarily a “barrier” per se, it is indeed a challenge; in order to successfully meet national demand it is necessary to adapt to each national context with specific marketing and content targeted at national consumer preferences. Each of the individual European linguistic markets carries its own challenges and individual cultural specificities, requiring specific investment in marketing and distribution. Furthermore, there are added barriers caused by divergences in broadband infrastructure, speed and payment systems. To provide an EU wide service therefore necessitates significant financial investment.

These cultural differences also demonstrate that the obstacles to the development of a single market for cross-border audiovisual content are not found in the legal infrastructure. Currently contractual freedom allows rights holders to negotiate individual licenses with online platforms to provide content on a territorial basis. This freedom reflects the variation in consumer and commercial demand in Europe as well as the diverse requirements of the European cultural community including their financing needs.

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2 European Commission. 24 April 2013. p. 5
All parties are best served by arms-length commercial negotiations based on the principle of contractual freedom and the exclusive rights established and protected by copyright law.

In the Green Paper the Commission states that “the consumer experience with audiovisual media services delivered online still remains often one of limited choice” and points out that geographical restrictions limit possibilities. Although the above mentioned fragmentation can be considered to limit choice, we believe consumers are generally well-served. They continue to have access to a growing number of services, both from broadcasts and online platforms, and they are able to view the content they want.

We are aware that some US content aggregators are pushing for the removal of the territorial sale of TV, film and music so that they can purchase this content at a lower price in order to reduce the overall costs of expanding their pan-European distribution services. This will not serve the European market and changes to the European regulatory model and copyright protections will only serve US services in the long run. It risks creating a less competitive market where the originators of content lose control of their distribution channels to new US gate keeping chains who extract value from our investment.

Therefore, any new policy must have the objective of supplying European consumers with culturally and linguistically diverse content. Undermining contractual freedom by for example imposing pan-European licenses will have little impact on the development of competitive European online services. The only demand for this kind of cross-border content can be found in communities living abroad. Whilst the provision of content to these communities is no doubt important, this would ultimately just enhance cultural separateness. Instead, the European Commission would have a greater impact by increasing funding to innovative online services which will support the supply of culturally specific marketing and content.

**Growth and Innovation: financing models**

Outside the major (Hollywood) studios, films are in general partly financed by local distributors’ guarantees. These distributors select films which will meet local audiences’ expectations and ensure the appropriate marketing in order to attract them. The Green Paper states that “the trend for VoD platforms to invest in original content shows that these new players are potential new investors in audiovisual content.” Although converging media and online platforms open up a lot of new opportunities, apart from isolated examples such as certain in-house practices undertaken by Netflix, they generally do not create the financing or, indeed, the audience for the audiovisual content. It is crucial to have a clear understanding of the market, existing relationships, and future potential, for any policy development in this area.

The European cinematographic production, financing and distribution practices reflect a complex network of large, medium- and small-scale enterprises, each specialized in specific parts of the audiovisual production and distribution chain. Because each film is a unique work, a prototype, film making is also a research and development intensive business which involves developing scripts, casting, location scouting, and production designs. These activities are crucial for a proper preparation of the

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3 European Commission. 24 April 2013. p. 5
4 European Commission. 24 April 2013. p. 8
film and result in large expenses even before a single frame of film is shot. In many cases, the film does not even progress to principal photography due to the lack of necessary financing. This means the project is abandoned and the investors have to absorb the loss.

Apart from these high start-up costs, filmmaking is also a high risk market. As mentioned, each film is a prototype and unlike most commodities, consumers’ interest in any film is extremely hard to predict. It depends on many, often capricious factors such as popular fashions, social climate, the cultural ‘zeitgeist’ and even the weather. Consequently, no producer or distributor can accurately predict the success or failure of a film prior to its release. Considering the high risk and level of financial investment required, most European audiovisual entities will seek to share the risk. In general this is done by selling distribution rights by platform, language and/or territory to local distributors specialised in marketing and distributing audiovisual content in the various territories and exploitation channels.

The Commission recognises that exclusivity deals have led to high revenues but also that they can restrict the possibilities of third parties to provide such content to their audiences and could lead to monopolies which distort the market. However, this sale of exclusive distribution rights on the basis of territories and channels with staggered time releases is the crucial basis for the (non-subsidy based) financing for independent film-making. This structure does not only make investment from producers and distributors possible, it also attracts other private investors who will be looking at the guarantee provided by the distributor as an indication that there will be a good opportunity to recoup costs based on the exclusive distribution. So the reliance on future territorial licensing contracts and revenues also unlocks access to the rest of the equity and debt financing. When looking at the new opportunities created by the digital shift one should therefore not look at the territorial pre-sale and staggered time releases in isolation: without it, also other financing will likely be withdrawn or not offered, meaning many films will not be made.

The market will adapt to convergence and changing consumer preferences and we see some of these changes already happening in this still relatively young market. It is still premature to accurately judge the potential evolution of the financing system and value chain. Although we see isolated examples of new funding channels it is too early to say how these will evolve. As a consequence it is difficult at this point in time to share the view that the online distribution of content is a potential new revenue stream for the pre-financing of production.

Regulatory Framework

At this time FIAD considers it inadvisable to re-open the Audiovisual Media Services Directive to take account of converging media. Now is not the right time given that the online market is young, the AVMS Directive has not been fully implemented and self- and co-regulatory measures are still being assessed.

FIAD recognise that online distribution has the potential to be a vehicle for audiovisual market growth. However, the current online market is regarded by FIAD’s members as a possible future venture rather than one which is already established, such as linear services. Distributors are still assessing the potential advantages and disadvantages of new online delivery services. Due to their relative infancy, there is still low demand and it is not clear yet what financing role these new services will play. With this

5 European Commission. 24 April 2013. p. 6-7
in mind it is perhaps too early to consider how the Directive can be adapted to what is a potential future, rather than a present, reality.

Traditional linear platforms still dominate the market in terms of delivering high quality content to European citizens. This is also true for cinemas which remain the main medium through which films are distributed. Cinemas are the foundation of the European distribution industry and they determine the success of a film. The success of traditional linear platforms is facilitated by their inclusion in the Directive which ensures the production of new content in line with important European values such as cultural and linguistic diversity. To avoid distortion, the continued value of traditional linear services to the audiovisual sector should not come at the expense of a new and undeveloped market.

However, not only is the market new but also the implementation of the Directive. The AVMS Directive replaced the Television without Frontiers Directive in 2007 and full transposition was expected by March 2010. However, the majority of Member States were late in transposing it. This was demonstrated by the First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010: Promotion of European works in EU schedules and on-demand audiovisual media services published in September 2012. The report concluded for example that in regard to Article 13, which applies European works quotas to on-demand services, “belated transposition of the Directive in the Member States and very uneven development of the on-demand service markets make any analysis and comparisons difficult.”\(^6\) It is clear that implementation is not complete and the Commission is still collecting information.

Article 13 also demonstrates that the Directive is still valid in the changing digital environment. It is already established that, where practical, on-demand services can be subject to the regulations. Rather than re-open the Directive it may instead be possible to complement what is already in place with self-and co-regulation. Self- and co-regulatory measures are still being tested in order to protect the values of the AVMS Directive. As a consequence it would be advisable to examine ways in which distributors can complement the Directive before pursuing change. One area the Green Paper also mentions where there is already some development is in improving access to content for persons with disabilities. Our members recognise the importance of this goal and we have taken measures to ensure protection online. We provide audio-description for the visually impaired and closed captioning (special subtitles) for the hearing-impaired. These are often costly and we would welcome discussion, funding and support to ensure we can deliver high quality content to those with limited access.

The AVMS Directive itself recognises the importance of exploring self- and co-regulation. The Directive highlights that “experience has shown that both co-regulation and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection.” These actions are much more effective because they obtain the active support of the service providers. As a consequence, the Directive advises Member States to “recognise the role which effective self-regulation can play as a complement to the legislative and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of the Directive.”\(^7\)


More time and further dialogue is therefore needed about what best practices are being developed and how the industry can work together to strengthen the principles in the AVMS Directive online. A self-regulatory approach will give the added flexibility in order to react to a new market where it is not certain which direction it will take. We also agree with the Commission’s statement that “given the global and complex nature of the internet, self-regulation seems an appropriate complement to the regulatory approach.”

Therefore, FIAD suggests that the Directive is still relevant in the current digital climate. The legal framework has been beneficial to the audiovisual industry and it already has provisions in certain areas to cover non-linear services. Furthermore, it is too early to review the Directive as it has not been fully implemented and furthermore, self-regulatory and co-regulatory measures have not been fully examined yet.

**Conclusion**

FIAD agrees with the Commission that the increasingly converged audiovisual market opens up many new possibilities and poses challenges at the same time. It is clear that the audiovisual sector needs to be aware and take advantage of these new opportunities, and industry and policy makers need to assess the existing framework.

At the same time we should not be too eager to progress at the potential expense of the current foundation of the European audiovisual industry. The new converged market is relatively young and still developing rapidly, and at the same time the market is still very much dependent on the more ‘traditional channels’ like linear broadcasts and cinema. It is these channels which make the continued creation and distribution of audiovisual content possible. These should not be put at risk by trying to force new converged opportunities.

That is why FIAD would not recommend any changes to the regulatory framework for now and would rely on self-regulatory measures and continued support for the new models.

The support provided by the EU through the Creative Europe Programme and other channels to foster innovative ways to create and distribute audiovisual content across borders is crucial. This facilitates the industry’s development leading to the improvement of quality and the continued creation of new ways to serve consumers. At the same time we have seen that the development of new online business models for the content industries is dependent on competitive markets as well as the continued existence of and respect for copyright. It is the combination of the innovative spirit, support and copyright protection which enables the European market to reach the stated “widest possible access” and the “widest choice of high quality content”.

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8 European Commission. 24 April 2013. p. 12
We remain available for further information where necessary.

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Joint Submission in response to the European Commission Green Paper
‘Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values’

The International Federation of Film Producers Associations (FIAPF – ID 12561298754-14) is a trade organisation dedicated to the defence and promotion of the legal, economic and creative interests of film and audiovisual producers throughout the world. FIAPF’s members are 32 national producers’ organisations from 28 countries across the globe from Europe, Asia, Pacific, North America, and Latin America.

The members of the International Video Federation (IVF - ID 7013477846-25) are associations representing businesses active in all segments of the film and audiovisual sector in Europe. Their activities include the development, production, and distribution of films and audiovisual content as well as their publication on digital media and in online channels.

FIAPF and IVF welcome this opportunity to submit comments on the European Commission’s Green Paper ‘Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values’. Our members are increasingly pursuing new opportunities presented by convergence, be it by offering audiovisual works online directly to end users or in cooperation with third parties. These new services are bringing greater choice to consumers, both in terms of content on offer and in the variety of platforms and ways to access and consume audiovisual content.

We are seeing rapid growth in the online market for audiovisual works in Europe, with consumer spending on digital online video increasing by a phenomenal 97.1% in 2012 compared to the previous year\(^1\). Given the challenging economic circumstances, these new revenue streams are clearly welcome. However, the gains in revenue from digital online video are not yet able to compensate for the continued reduction in revenue from the physical video market. Annual consumer spending on physical video is estimated to have contracted by over €3600m compared to pre-crisis levels, whereas European consumer spending on digital online video amounted to just a fraction of this in 2012, at €673.7m\(^2\). These fluctuations in revenue streams affect our members’ capacity to finance and produce new audiovisual content: less funds are available to pre-purchase future video publishing rights (offline and online) prior to

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\(^1\) Total European consumer spending on digital online video was estimated at €673.7m in 2012 compared to €341.8m in 2011 (Internal Video Federation Yearbook 2013 – www.ivf-video.org).

\(^2\) Total European consumer spending on physical video totalled €11,268.5m in 2007 compared to €8,269.8m in 2011 and €7,652.8m in 2012 (International Video Federation Yearbook 2013 – www.ivf-video.org).
the actual making of the film, thus affecting producers’ ability to close production budgets. There is also a negative effect on revenues flowing back into production, distribution and publishing activities.

Our members do not consider online distribution of audiovisual content to be merely a potential future revenue stream or as a way to amortise investments as alluded to by the Green Paper (page 8). They are increasingly looking to new online distribution channels to contribute to the advance financing of films and audiovisual content in a manner similar to that already provided by the pre-sale of rights to theatrical, home entertainment and television distribution channels. In other words, they are looking to online distribution platforms and services to share in the financial risk of production, marketing and distribution. This is a strategic necessity in order to ensure that the widest possible choice in terms of platforms, titles and price points is offered to consumers.

Our members continue to invest in and experiment with the online distribution of audiovisual content. At present, many different varieties of models, content and delivery modes are being explored by market operators in the European Union and it remains to be seen which modes of consumption will be favoured by consumers going forward. We therefore urge the Commission to maintain the necessary flexibility both in terms of policy and legislation at EU level which will enable our industry to identify the most popular and sustainable models which can return our market segment to growth.

Below we set out our contribution to those questions in the Green Paper which we consider of direct and immediate relevance to our members.

2. **Growth and Innovation**

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?**

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?**

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

Our members operate within and their livelihoods are tied to the EU marketplace. They are continuously looking for new opportunities to license and distribute audiovisual content so that it reaches as many European consumers as possible, through as many platforms and distribution channels as may be available, and at the highest quality standards achievable. Empirical observations of the companies active in this business (often SMEs) suggest that the obstacles to developing an EU-wide presence have very little to do with legal infrastructure. Rather, these obstacles are shared by EU and US companies alike, and are due to the rich cultural and linguistic diversity of Europe and the particular economic model dictated by a European market made up of multiple languages, cultures, local tastes and societal
preoccupations. In addition, strong regional differences in terms of broadband infrastructure, speed and preferred payment systems create further barriers which any market player would need to overcome in order to build a successful EU-wide presence in the online environment.

It is well documented that the consumption pattern of audiovisual content online in any national European culture today broadly replicates the patterns seen with legacy media such as cinema, home entertainment on digital media and linear television: roughly speaking, consumer preference is for national content first, international non-EU blockbusters second, and anything else third, including non-national EU content.

We regret that the Green Paper appears to focus its attention on ‘premium content’ in a European content landscape whose strength is precisely cultural diversity and a wide range of different types of content. The production and commercial value of a work can vary both within and outside of the country of production. Each film is a unique work, and consumer interest in a film will vary according to opaque and volatile factors, such as national tastes, popular fashions and fads, social climate, current themes in the ‘national conversation’, and even the weather. Consequently, no producer, distributor, publisher or television network anywhere in the world can accurately predict the success or failure of a film, and companies cannot rely on the mere availability of their service or content to be successful. In order to create consumer demand, companies need to engage actively in promoting each individual title, as well as adjust and promote their offer according to local tastes.

Consumer demand for audiovisual works online is negatively affected by online content services’ inability to benefit from reduced VAT rates. The current list of goods and services to which Member States may apply reduced VAT rates is set out in Annex III of the VAT Directive (2006/112/EC). This list includes admissions to cinemas and the reception of radio and television broadcasting services – whereas all electronically supplied services and content are currently subject to full VAT.

In accordance with the principle of “treating like as like”, our members consider it essential to avoid a situation whereby the same creative work (i.e. a film) is subject to discrepant fiscal treatment between, on the one hand, its viewing in cinemas or on TV and, on the other hand, the same film being published on a physical carrier or accessed via an online service. We would therefore urge the Commission to recommend that the list of goods and services included in Annex III of the VAT Directive be extended to include on-demand audiovisual media services as well as audiovisual content published on DVDs and Blu-ray. This view is also shared by the European Parliament which, as recently as December 11, 2012, concluded once again that “digitally distributed cultural, journalistic or creative content should be subject to the same VAT rate as the equivalent product in a physical format or offered offline”.

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?

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3 European Parliament resolution of 11 December 2012 on completing the Digital Single Market 2012/2030(INI)).
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?

We believe that the current AVMSD requirements provide the appropriate means to ensure the promotion of European works regardless of the nature of the service. The flexibility of Member States to determine the appropriate method to do so for on-demand audiovisual media services is essential given the ongoing rapid development of the market for these services and the variety of business models that are currently being explored in the market place.

Whilst the Commission’s first report on the application of the AVMSD\(^4\) was unable to draw conclusions on the promotion of European works by on-demand service providers due to insufficient data, the Commission did ‘welcome the presence of a relatively high share of European works in on-demand services’. Furthermore, the report also noted that ‘the rule on the promotion of European works in linear services is generally working well, although it has a limited effect on the circulation of programmes throughout the EU as it does not ensure the distribution of non-domestic European works’. This provides further confirmation that European consumers have a strong preference for national content over European non-national content.

We believe that the Creative Europe programme will continue to play an important role in promoting the circulation of and providing access to non-national European works through initiatives to support their distribution within other countries participating in the programme. Ongoing support for the necessary subtitling and dubbing of works will be particularly important in this context.

As noted above, whilst convergence has helped to create possibilities for new revenue streams, new platforms are currently providing little in the form of upfront investment for the financing of films and audiovisual content. In addition, the ongoing changes in consumer behaviour mean that it is not viable to leave the weight of the film production pre-financing responsibilities on the ‘classic’ distribution channels (theatrical, physical carriers, TV).

The ability to secure pre-financing for films and audiovisual content is essential for European film-making. The unique nature of each film and the inability reliably to predict its success or failure dictates an entrepreneurial model in which all the risk is concentrated upstream (financing, production, marketing, distribution, and publishing), with little predictability as to recoupment of or indeed a return on that investment. More films fail than succeed.

For any film industry to succeed, even relatively, anywhere in the world, there needs to be a critical mass of films on offer to the consumer. Only with sufficient consumer interest in film

will a proportion of productions be able to attract sufficient interest and generate revenues over and above their production, marketing and distribution costs to compensate for the losses of unprofitable film productions. With just under 1,300 new films produced last year\textsuperscript{5}, Europe barely achieves this critical mass. Its films are vulnerable to market failure and need all the opportunities to access new markets and new platforms in order to recoup investment in producing, marketing and distributing the film.

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? |
| 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? |
| 12. 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? |
| 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? |
| 14. What initiatives at European level could contribute to improve the level of media literacy across Europe? |

The IVF and FIAPF consider that the European legislator was broadly successful in its attempts to future-proof the AVMSD and that the Directive contains sufficient flexibility to remain effective in the face of market developments. One example of this flexibility is the instruction to Member States in Recital 24 that ‘the concept of “programme” should be interpreted in a dynamic way taking into account developments in television broadcasting’. We do not believe that the AVMSD needs to be reopened at this stage.

It is our view that there is neither economic nor legal rationale for introducing lex specialis to applicable law (extension of the country-of-origin principle).

\textsuperscript{5} Marché du Film, Focus 2013 - World Film Market Trends, European Audiovisual Observatory, 2013.
The Cable and Satellite Directive helped clarify the legal status of this particular part of the broadcast and communications sector. However, the legislation did not have the effect of stimulating the launch of new broadcasting services based on a cross-border, pan-European model. This is because the demand for such services has not materialised in the EU. We remain convinced that providing improved national/local access to European content achieves greater cultural diversity, better performance for individual works and higher consumer satisfaction.

The KEA Study produced for the European Commission in October 2010 confirmed that the existence of satellite channels of international scope remains limited and related mostly to information, adult-content and minority-language channels.\(^6\)

Our members support initiatives at European level to increase media literacy and facilitate access to and the evaluation of audiovisual content. The 2008 Resolution of the European Parliament on media literacy in a digital world\(^7\) provides a number of suggestions which remain useful today, and we would encourage the Commission to pursue initiatives that are based on best practice and which target all sectors of society, regardless of age or ability.

### 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? |
| 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? |
| 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? |
| 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? |

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\(^7\) 2008/2129(INI).
Irrespective of the means by which content reaches the consumer, audiovisual content classification systems provide indisputable benefits to consumers by providing information on, and in certain cases a warning of, the recommended age for the viewing of specific content. These systems are usually specific to individual countries, reflecting each country’s individual societal and cultural preoccupations. Certain elements (e.g. violence, language) are of concern to all nationalities whereas other elements (nudity, religion) draw quite different reactions depending on nationality. The age at which all content is permitted also differs substantially, from 18 years in some countries to 15 years in others.

Questions of suitability for different age groups are largely a matter of what is considered appropriate to a particular time, country and distribution mode. The social, cultural and legal treatment of these questions varies from country to country and evolves with the passage of time. Therefore, to efficiently serve their purpose, content classification schemes must reflect these differing national, social and cultural preoccupations. The strength of these cultural and societal differences was confirmed by the 2003 Empirical Study on the Practice of the Rating of Films Distributed in Cinemas Television DVD and Videocassettes in the EU and EEA Member States, prepared for the European Commission. The study reached the conclusion that there was no, or negligible, demand for harmonisation of rating systems by the industry concerned and by consumers.

We recommend that, in the absence of mandatory rules, all content aggregators and distribution platforms provide information to consumers about the content offered on their services, thus enabling consumers to make an informed choice about the content they access/purchase. Most content aggregators and distribution platforms do provide such information and there are examples of dedicated online classification systems such as the British Board of Film Classification’s digital video ratings.

We believe that industry self-regulation is the most appropriate way to meet the public policy goals of protecting minors and human dignity. This is in line with the Council of Ministers’ Recommendation on Protection of Minors of 1998 as updated in 2006, which also endorsed the promotion of self-regulation as the most appropriate way to address the different national, social and cultural preoccupations.

FIAPF and the IVF believe that the current rules of the AVMSD provide an appropriate basis for addressing the protection of minors. We note that Member States are able restrict access to on-demand audiovisual media services from other Member States for reasons of public policy, including the protection of minors. In addition, the AVMSD requires that Member States ensure that companies offering on-demand audiovisual media services that ‘might

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8 ‘Empirical Study on the Practice of the Rating of Films Distributed in Cinemas Television DVD and Videocassettes in the EU and EEA Member States’, May 2003, Olsberg|SPI and KEA European Affairs in association with KPMG.
seriously impair the physical, mental or moral development of minors’ do so in ‘such a way that ensures that minors will not normally hear or see the service’.

Effectively, this means that it is the duty of the media service provider to implement systems limiting access to the content considered inappropriate by the relevant authorities. The provision of information about content, media literacy, education, and parental responsibility are all very important factors to be encouraged, and are the options preferred by the members of our organisations over the introduction of age-verification technology. We are of the opinion that age verification for online content is a disproportionate approach, given for example, that in some EU Member States the watershed exists as a guide to parents as to what is appropriate for children to watch but there is no system limiting access to inappropriate content after this time. Furthermore, the development of effective age verification mechanisms faces serious challenges related to technical and data limitations. This is only compounded by the need to respect e-privacy and the difficulties this can present for ensuring that access to content is limited to users in the appropriate age group.

3.5. Accessibility for persons with disabilities

26. Do you think that additional standardisation efforts are needed in this field?

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

Improving access to content for persons with disabilities is an important objective and one which we believe is being facilitated by the advent of new technologies.

Our members are involved in numerous initiatives aimed at improving access to content by people with disabilities. These include special subtitles for the hearing-impaired (closed captioning) and sound tracks for visually-impaired (audio-description). We would welcome public initiatives to promote and fund these initiatives, including seeking to identify cost effective methods of improving accessibility going forward. Our members are keen to ensure that all users are able to access the films and audiovisual content which we finance, produce, distribute and publish, and we would welcome further dialogue and cooperation with the stakeholders concerned on this subject.

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We thank the Commission for the opportunity to contribute our views to the relevant elements of the Green Paper ‘Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values’. We remain at the Commission’s disposal for any further information and/or elaboration of the views expressed above.

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30.09.2013

The International Union of Cinemas / Union Internationale des Cinémas (UNIC) is the trade association representing European cinema exhibitors and their national associations in 28 territories. We represent cinemas of all sizes and locations across the European Economic Area, Russia, Turkey and Israel, equal to approximately one quarter of global cinema admissions and box office revenues.

UNIC welcomes the opportunity to submit a short statement on the European Commission’s Green Paper “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”. While the Green Paper primarily examines questions specifically related to regulating broadcasting and on-demand services, certain principles that are important to cinema exhibition are also touched upon. The following short comment relates to questions one – five in the Green Paper.

UNIC welcomes the fact that the European Commission recognises and identifies the Internet as a growth market for audiovisual content. Cinema exhibitors support the development of a healthy and legitimate Video On Demand (VOD) market, provided that film release practices that are to the benefit of the entire film industry are respected and maintained.

Despite the Green Paper’s focus, it is however surprising that the relevance of theatrical exhibition is not mentioned. Box office returns for European cinema exhibition have remained stable over the past five years (€ 6.47 billion in 2012), whereas returns in home entertainment over the same period have decreased significantly. The fast growing but still by all means comparably modest market share of VOD in the past years cannot make up for total losses in home entertainment¹. Consequently, cinema exhibition in most European markets commands a growing share of total film industry revenues.

In Europe, releasing a film in theatres in general continues to create 10 – 15 times more economic return than releasing it on VOD. Importantly, an exclusive theatrical release significantly increases the success of a film that is subsequently released on VOD. UNIC finds it unfortunate that the Green Paper does not recognise this positive relation between the different version markets, as this is the basis for the overwhelming majority of release strategies that exist in the film industry.

Regarding the Commission’s question on access to European markets, UNIC strongly believes that the key obstacles to accessing pan-European theatrical,

¹ See Annual Yearbook IVF: http://www.ivf-video.org
broadcasting and on-demand markets are primarily of a cultural and linguistic nature and that these barriers exist equally for European as well as for non-European companies.

Furthermore, US studios have a long track record of distributing their films internationally, and as a result have developed organisational structures that support their activities. This structural advantage – and of course the significantly larger scope of their operations – may give them an advantage in international VOD distribution compared to their European counterparts. European film companies continue to primarily create and distribute their content with a view to specific linguistic and cultural markets. International creative development and distribution support, such as that provided by the future Creative Europe programme, can therefore help European film companies to be more successful when developing films for and accessing new markets.

The challenge of developing an EU-wide presence, whether in theatrical distribution, broadcasting or VOD, is in UNIC’s view not related to legal obstacles. It is first and foremost a result of diverging consumer demand across territories which in turn reflects the cultural and linguistic diversity of the European Union.

Because of this diversity and the resulting fragmentation of European audiovisual markets, it is essential that the industry (and in some cases national regulators) should be able to decide strategically when and where titles should be released, depending on each territory and platform. Such practice enables the film sector, for example, to create value along a film’s life cycle – from theatrical on to broadcasting, DVD and VOD, etc.

The Audiovisual Media Services Directive acknowledges this practice to be an essential element of contemporary media economics. It is essential that this principle is maintained in EU rules and regulations.

While we leave it up to our partners from distribution and production to further comment on necessary reforms in broadcasting and VOD regulation, in relation to the above points UNIC believes that the Audiovisual Media Services Directive contains sufficient flexibility to remain effective in the context of current market developments. A re-opening of the Directive is not needed at this time.

We of course remain at the European Commission’s disposal should it have any comments or questions and look forward to working with you in the future.

Yours sincerely,

Jan Runge
CEO
Union Internationale des Cinémas
The Motion Picture Association (MPA) welcomes the opportunity to submit comments to the European Commission’s public consultation on the Green Paper “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”. MPA is a trade association that represents the interests of six major international producers and distributors of films, home entertainment and TV programmes.¹

Film has always been at the forefront of innovation. The audiovisual sector has pioneered technological innovation through partnerships with technology and consumer electronics firms, for example the DVD, Blu-Ray, Digital Cinema, 3D and, most recently, the UltraViolet digital access system. Meeting consumers’ demand for new and innovative content in various forms and through a variety of distribution platforms is at the heart of our industry.

We are now clearly in an age when consumers have more options than ever before—both in terms of the array of content available and the way in which they may choose to consume it. The Green Paper rightly notes that this is a time of “on-going transformation of the audiovisual media landscape”. Demand is evolving and the market is responding to meet that demand.

The Green Paper asks a series of questions relating to market developments and their implications for the regulatory and policy framework. While it is noted that “the consultation does not presuppose any specific outcome”, the MPA would like to emphasize that the dynamic growth of the market has in large part been enabled by the evolution of the current framework. While there are areas which could benefit from further reflection or focus, we would urge the European Commission to seek to maintain the necessary flexibility in EU regulatory and policy frameworks to enable this growth to continue.

¹ Paramount Pictures Corporation, Sony Pictures Entertainment Inc, Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.
In summary, the MPA would like to emphasise that:

- The AVMS Directive has evolved in such a way as to enable growth in the offer of new services. The rapidly changing nature of the market is such that it is difficult to assess where changes might be made. Indeed, any change to the regulatory framework and in particular definitions could risk impeding market development.

- There is a clear role for self-regulation and voluntary measures at a time in which the industry is in rapid flux, enabling the flexibility needed to adapt business models to market demands.

- Europe is indeed characterized by cultural and linguistic diversity. “Success” in Europe therefore depends on the ability to tailor content to local/national requirements and preferences. The flexibility to continue to negotiate appropriate distribution deals on a national, linguistic, multi-territorial or pan-European basis is vital to the continued growth and success of the audiovisual content market.

- The EU has a clear role to play in encouraging the sustainability of the content market in Europe for future generations by continuing to focus on the applicability of the rule of law on the internet, and by putting the fight against infringements and content piracy at the heart of its policy. The MPA also believes that an understanding of the value of copyright, and of the legal offers available, could play a role in media literacy programmes.

It is in this light that the MPA wishes to make some general comments to the Green Paper.

1. **The market for content is flourishing**

Since the introduction of the revised AVMS Directive, the market for the provision of content, as well as the “types” of content on offer, has grown exponentially. As the first Implementation report (COM/2012/0203) notes “since its creation, the regulatory framework has allowed the market to grow from a small number of service providers to more than 7,500 broadcasters today. It has also enabled the development and growth of video-on-demand services”.

Indeed, the explosion in offer reaches far beyond the figures cited in the report and is in rapid flux. According to the European Audiovisual Observatory, European consumers have access to more than 3,000 on-demand audiovisual services: Online content offers are blossoming. By way of example;
• From 2006 to 2012 online video transactions for 20 EEA countries have soared to 58.8 million (a 2,350% growth rate) (Screen Digest).

• Total spending on video online transactions soared to 673.7 million euros in 2012, almost doubling from the previous year (IVF).

• In the UK alone more than 38,706 unique film titles are available online (http://www.findanyfilm.com).

As the Implementation report notes, “From a citizen’s perspective, access to channels and choice of audiovisual services has increased significantly.” And the market continues to grow and to experiment.

We are very far from an age pre-dating the first Television Without Frontiers Directive in which viewers had the choice of only a small number of national (and some spillover) channels received via the TV screen. This is an age characterized by the availability of a wide variety of content – whether audiovisual, books, music, video games – consumed through a variety of fixed and portable devices and with ever increasing degrees of individual control and choice.

That this offer is available is in part thanks to the good operation of the regulatory framework and its sufficiently broad scope. Therefore no change seems to be necessary. For the audiovisual sector, the AVMS Directive has provided a solid framework enabling the development, the offering and the potential growth of new services. The number and variety of non-linear services is continuously growing, forming more and more part of the palette of offerings of creators and distributors. However, the revenue streams generated by these e.g. on-demand services and digital online content are still relatively small. The choice regarding the way in which content will be consumed in the future will however be made by consumers, and the trends of development and the change in demand in this regard are still to be seen. These facts and the higher level of consumer control over non-linear services should remain reflected in the level of regulation and justify a more flexible approach. Making non-linear services subject to the same level of regulation as linear ones would increase costs and discourage development.

The MPA believes that self-regulation should be encouraged beside the maintenance of existing domestic and EU laws which already provide a solid framework of protection. This should be complemented by the more practical and effective approach of the development of voluntary measures, self-regulatory initiatives, codes of conduct, best practices etc. These measures could contribute to helping the industry identify the successful and sustainable business models that meet consumer preferences and ensure that the sector is put on an incremental growth trajectory.
2. Future-proofing regulation – the AVMS

The AVMS Directive was in large part designed to cater to this new environment; the “two tier” graduated regulation approach justified precisely for reasons relating to differences in the degree of consumer choice and control exerted. As we have noted, this distinction continues to be valid.

It is clear that there are currently differences with regard to the obligations applicable to operators falling under the provisions of the AVMS Directive and “information society providers” to whom the provisions of the E-Commerce Directive apply.

As we have noted, however, the market is at a key moment in the development of new services and new formats. We believe that this will continue to evolve and, indeed, needs to do so in order to meet consumer demands. As the market itself will not be static we believe its development would be harmed by static definitions.

The MPA believes that the AVMS Directive itself contains sufficient flexibility to remain relevant in the fact of market developments. The current definitions within the Directive were intended to be future-proof. Recital 24 notes that “the concept of programme should be interpreted in a dynamic way, taking into account developments in broadcasting.” Recital 26, in turn, already points to flexibility in further interpretation of the concept of “editorial responsibility.”

Some discussion and initial thoughts have already emerged from the recent UK OFCOM decision that Top Gear and Food Programmes on YouTube do not constitute “TV-like services” (based inter alia on lack of credits, (short) length of clips). We expect that guidance will continue to evolve where necessary alongside the evolution of available formats. The MPA believes that further discussion on the concept of “editorial responsibility” within the meaning of the directive may also prove helpful going forward. Is it reasonable to assume, for example, that there is no editorial role involved in the case of an online service aggregating and organizing content and monetizing this through placement of advertising?

The MPA agrees with the conclusion of the first implementation report that “altogether the European regulatory framework for audiovisual media services has served citizens and businesses well.” We believe that the directive was already designed to adapt to changes in the delivery and consumption of content. While continuing debate on the interpretation of key concepts within the AVMS could be useful as the market develops, we would caution against a premature revision or the introduction of further “fixed” definitions which could impede market developments.

Depending on the directions and tendencies of future market developments there could be room for debate as to whether the high level of regulation of linear services continues to be justified in a multi-access environment.
3. A flourishing market does not mean a homogenized market

The Green Paper questions how to establish a “successful presence” in an EU market characterized by language and cultural diversity. It appears to suggest that Europe could be treated as a single distribution market “in the absence of territorial access restrictions”.

As we have noted, consumers now have access to more content than ever before. This does not mean that the same content is sought, or consumed in the same manner, across markets.

Whatever the origin of the content may be a/the criteria for “success” should relate to the ability of distributors to position their works in the marketplace on the basis of a keen understanding of the diverse nature of the European marketplace. This diversity and cultural variegation is a factor that characterizes the European market which is not due to legal restraints but is rather the consequence of cultural, societal and taste differences. The Commission also recognizes in the Green Paper (page 5) that the cultural and linguistic diversity of the European market is a potential competitive advantage for European undertakings in the global playing field.

Content providers are constantly seeking new opportunities to licence and distribute their content to as many consumers as possible, and through as many platforms and distribution channels as possible. There are no barriers to this. However commercial demand for such licences appears to be limited at this stage of market development.

The experience of the Cable and Satellite Directive also reveals that even when offered a diverse choice, audiences continue to be more drawn to programming tailored to their individual tastes and in their own language.

Even works created with an international audience in mind have to go through substantial local adaption (dubbing, subtitling, marketing, rating, etc.) to meet national consumer demand, and not all works will be suitable for all markets.

The flexibility to continue to negotiate appropriate distribution deals on a national, linguistic, multi-territorial or pan-European basis is vital to the continued growth and success of the audiovisual content market.
4. Looking to the future

As the Commission engages in its reflection on the challenges for the audiovisual sector in the future, the MPA would encourage further thought as to how to sustain a flourishing market for content in Europe.

We would strongly urge the European Commission to continue to focus on the applicability of the rule of law on the internet, and to put the fight against infringements and content piracy, at the heart of its policy. The MPA also believes that an understanding of the value of copyright, and of the legal offers available, could play a role in media literacy programmes.

We are constantly exploring options to educate young people about the movie industry and the value of creativity. We are in the process of launching an online educational campaign in Italy that will focus on the importance of copyright by highlighting and promoting cinema’s positive values, creativity, and stories, through online interview with Italian creators and directors, a series of master classes in Italian movie schools and an online contest.

We believe that the Industry and the policy community have a role to work together to educate the next generation. We believe that without this understanding, there is a real risk that future generations will enjoy less, rather than more, access to high quality content in the new environment.

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We thank you for your attention and remain at your disposal should you have any questions.

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Pact response to European Commission Green Paper on Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values

September 2013
Executive summary

Pact welcomes the opportunity to comment on the European Commission’s green paper on preparing for a fully converged audiovisual world. We support the Commission’s objective in opening a broad discussion about the impact of convergence on audiovisual media services.

As the UK trade association for independent TV, film and digital media companies, this submission provides an overview of the likely impact of convergence on independent production companies.

In general, Pact considers that it is too soon to conduct a comprehensive review of the AVMS Directive given that this is a relatively new piece of legislation and that the true impact of convergence on the market is not yet clear.

Pact supports the principle that where possible, it is better for the market to be left to evolve and adapt solutions to the opportunities and issues raised by convergence than for regulation to be introduced, as this might have a negative impact on future growth.

However, there are examples of light-touch regulations in the UK, such Section 285 of the 2003 Communications Act which underpins the Terms of Trade, which have supported sector growth in a way which allows industry players to mutually adapt agreements as required.
Introduction

1) Pact is the trade association that represents the commercial interests of the independent television, film and digital media production sector in the UK. The sector produces and distributes approximately half of all new UK television programmes\(^1\) as well as content in digital media and feature film.

2) Pact works on behalf of its members to ensure the best legal, regulatory and economic environment for growth in the sector.

3) The UK independent television sector is one of the biggest in the world with revenues of nearly £2.8 billion in 2012.\(^2\)

4) The British independent TV production sector is extremely successful internationally. The UK is the second largest exporter of TV content in the world (after the USA)\(^3\) and at £838m in 2012, international revenues now account for 30% of total sector revenues in independent TV production.\(^4\)

5) As well as submitting this response on behalf of our members, Pact has contributed to the response of the British Screen Advisory Council (BSAC) to this consultation.

6) Pact’s address is: 3rd Floor, Fitzrovia House, 153-157 Cleveland Street, London, W1T 6QW.

7) Pact’s ID number on the European Transparency Register is 69129338988-95.

8) For further information about Pact’s work in this area please contact Pact’s Head of Policy, Emily Davidson, at emily@pact.co.uk or on 020 7380 8232.

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\(^1\) Ofcom, Communications Market Report 2010: independents produced more than 50% of qualifying network programming by hours and 46% by value

\(^2\) Pact Census Independent Production Sector Financial Census and Survey 2013, by Oliver & Ohlbaum Associates Limited, July 2013

\(^3\) Mediametrie Television Year in the World 2013

\(^4\) Pact Census 2013
Green Paper: Preparing for a Fully Converged Audiovisual World

**Growth and Innovation**

**Question 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?

*American TV companies benefit from a large homogenous domestic market with economies of scale and scope*

1.1 Film and television production is a hits-based business. Investors – including broadcasters, producers, distributors and others - take a risk when investing in a TV programme or film in the hope that it will be commercially successful.

1.2 Where US programme-makers can have an advantage over their European counterparts is in their large domestic market, which provides economies of scope and scale with regards to programme production and investment.

1.3 However UK content also travels well around the world. The UK is now the second largest exporter of television content in the world, behind only the US.

1.4 America is also the largest export market for British content, facilitated by the common language. However, trade of TV content within Europe is also extremely high – accounting for 29% of total UK TV export revenues in 2011.5

1.5 In addition, the UK and the Netherlands now lead the USA in terms of the export of TV formats. Formats such as ‘Who wants to be a Millionaire’ and ‘Pop Idol’ were developed in the UK and received international success, as did the Dutch format ‘Big Brother’. The table below shows how export sales have developed in recent years.

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5 Pact/UKTI TV Exports Survey 2012
European TV content producers are guaranteed 10% of airtime on European broadcasting channels

1.6 European independent content producers have an advantage to their home audiences over non-European producers due to the regulatory framework set under the AVMS Directive, which obliges all European broadcasters to show a minimum of 10% of European content on their channels. Pact strongly supports the maintenance of this legislative requirement so as to support opportunities for European independent programme-makers.

1.7 In the UK, the legislation stipulates that all public service broadcasters (PSBs) must ensure that a minimum of 25% of their programme schedules are produced by independent production companies. In the UK, the definition of an independent production company is determined by ownership, as set out in the 2003 Independent Production Order.

The UK television sector has flourished under the framework of existing legislation and it is important that this is maintained

1.8 In the UK, Section 285 of the Communications Act requires the sectoral regulator, Ofcom, to issue guidance in the form of Codes of Practice which stipulate that there should be clarity in which rights are purchased by a broadcaster as part of a commission deal. In order to implement this legislation, Pact has negotiated Terms of Trade with the UK PSBs which specify the deal terms for programme commissioning and rights ownership between UK independent producers and public service broadcasters.

1.9 It is now 10 years since the introduction of this successful, light-touch regulation and the UK TV broadcasting sector is continuing to thrive. The
independent production sector has grown from a cottage industry to one with sector revenues of almost £2.8 billion. UK broadcasters now very rarely fully-finance programme production, which has facilitated their access to high-quality programmes at lower cost, particularly during the economic recession.

1.10 However, although the television supply market has evolved significantly since the Terms of Trade came into force in 2004 and new entrants have entered the market, the factors which led to their introduction remain relevant.

1.11 Cable and satellite broadcasters are now investing more in original UK programming. In 2011, COBA\(^6\) members spent £168 million on content from independent producers. As noted in the Commission’s Green Paper, new market players such as VoD distributors are trying to differentiate their offerings by providing – and sometimes investing in – original content which is having an impact on the entertainment landscape.

1.12 However, we consider that the market has not yet changed sufficiently so as for the rationale for the legislative intervention in the UK to have become redundant.

1.13 We note the Commission’s analysis that in 2009, EU broadcasters invested around one third of their revenues in content. In 2010, the five British PSB networks and their spin-off channels represented 90% of UK broadcaster spend on first-run originated output, a situation that remains largely unchanged from pre-2002 levels.\(^7\)

1.14 Pact welcomes the additional investment in UK content by cable and satellite broadcasters, which has increased competition in the programme supply market and led to new creative opportunities for UK independent producers. However, given that the PSBs remain overwhelming the main investors in UK original content, we believe that the buyer concentration which led to the introduction of the Terms of Trade in 2004 remains a significant issue.

Many European programme-makers are SMEs who do not have the same resources to invest in content production and distribution as US companies backed by large studios.

1.15 Although there has been some consolidation within the independent TV production sector in the UK recent years, the majority of independent producers remain SMEs. In fact, as shown in figure 1 below, the market share

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\(^6\)COBA members are: BSkyB; Chinese Channel; Discovery Networks; Fox International Channels; MTV Networks UK; NBC Universal International; QVC; SBS Broadcasting; Sony Pictures Television; Turner Broadcasting; UKTV and the Walt Disney Company.

\(^7\)The role of Terms of Trade in the Development of the UK independent production sector, O&O for Pact, June 2011
of medium-sized independent producers (those with a turnover of £10m - £70m per annum) increased between 2008 and 2010.

Figure 1: UK primary commissions expenditure

Share of spend on UK externally produced primary commissions segmented by turnover band of producer, 2008 to 2010

The UK legislation and the AVMS Directive is sufficiently flexible to allow for changes in the market

1.16 As well as being mutually beneficial to both producers and broadcasters, another factor in the success of the Terms of Trade in the UK is the flexibility in which the legislation has been drafted which enables them to evolve as necessary through a process of market negotiation. This has already taken place on several occasions.

1.17 In our opinion, the ongoing market-led negotiations between producers and broadcasters in this area is illustrative of the success of the Terms of Trade as an example of light-touch regulation which can respond to the demands of the market.

1.18 At a European level, the AVMS Directive is a relatively new legislative instrument which is suitably flexible so as to allow individual member states to adapt policy and legislation according to their national requirements.

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8 Note:*Primary commissions expenditure data excludes all expenditure on news and sports programmes and rights but includes expenditure on all regional and nations and regions programmes
Source: Ofcom Communications Reports, BARB, Company reports, O&O / Pact Census 2011, Oliver & Ohlbaum analysis
Green Paper: Preparing for a Fully Converged Audiovisual World

1.19 Where possible Pact favors a market-led approach to addressing changes which have occurred as a result of convergence, and a light-touch regulatory approach has proved successful in developing a strong independent production sector in the UK.

1.20 We therefore do not consider that it is advisable at this time for the European Commission to open-up a debate on the AVMS Directive.

*European member states are not always able to compete with generous tax reliefs overseas*

1.21 The UK has a thriving film industry. In 2012, UK film production value was £929m.\(^9\)

1.22 The UK film tax relief provides important financial assistance to enable film production in the UK by both indigenous producers and by attracting inward investment, from Europe, the USA and around the world.

1.23 Pact strongly welcomes the introduction of new tax credits for high-end TV production and animation, which were introduced earlier this year following UK legislation and approval under EU State Aid rules.

1.24 These reliefs provide invaluable assistance to sectors which would otherwise struggle to compete with international competition.

1.25 Pact notes that several European countries offer similar tax incentives to attract film, television and new media production in their territory.

1.26 However, European reliefs cannot compete on rates with international incentives outside of Europe – such as Canada – where there is no maximum threshold on the total amount of production budget on which the relief can be applied. Within Europe, this is capped at 80%.

1.27 Pact understands that the European Commission is considering responses to the State Aid for Film Draft Communication and we urge the Commission to take into account the responses which it receives to this consultation process when finalising the State Aid Communication.

\(^9\) BFI Statistical Yearbook 2013
We urge the European Commission to consider extending the Cinema Communication to include all audiovisual works

1.28 One of the ways in which the Commission could further support European production companies is by extending the Cinema Communication to include all audiovisual works.

1.29 This would enable TV production companies across Europe to more easily access production incentives, including fiscal incentives such as tax reliefs, in different member states.

Question 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?

1.30 Pact supports the delivery of original UK content across all platforms, provided that the intellectual property rights of the content creator are protected.

1.31 We are unable to comment on the factors and practices relating to the availability of premium content in the UK and elsewhere in Europe.

Question 3: Are there obstacles which require regulatory action on access to platforms?

1.32 Pact is unable to comment on this issue.

Financing Models

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

1.33 As noted above, Pact considers that it is important that Member States retain the powers to set the regulatory framework in each European country.

1.34 The current AVMS Directive requirements enable each national Government to establish regulations which promote the creation, distribution and availability of European works within each territory.

1.35 We consider that the AVMS Directive is still an effective mechanism for promoting European works, for example with the 10% minimum European independent production quota and by offering flexibility for each Member
State to determine how it defines and independent producer within the options outlined in the AVMS Directive.

1.36 We welcome the flexibility of the AVMS legislation which enables Member States to take into account criteria such as ownership of the production company, the amount of programmes supplied to the same broadcasters and the ownership of secondary rights when defining an independent production company in legislation.

1.37 As outlined above, in the UK the definition of an independent producer is tied to ownership.

1.38 Pact considers that it is important that European legislation remains sufficiently flexible so as to enable each Member State to determine which definition best suits the audiovisual market in their country.

1.39 With regards to the market appeal of European works, by enabling individual Member States to introduce fiscal incentives to support production of content in their territory which promotes its culture (as with the film, high-end TV and animation tax reliefs in the UK), the legislation is sufficiently flexible so as to enable a greater amount of production and therefore increase the likelihood of this having a wider market and commercial appeal.

1.40 With this in mind, we do not consider that further regulatory action at a European level is required.

**Question 5: How will convergence and changing consumer behavior influence the current system of content financing? How are different actors in the new value chain contributing to financing?**

1.41 In the UK, where production companies are co-investors in their content, there is a complex value chain of different investors which enable a production to get made.
1.42 Typically in this value chain (which is most relevant to the way in which UK PSBs commission content) producers, broadcasters, distributors and others such as companies responsible for merchandising, share the risk in the programme production.

1.43 New players entering the market, including non-PSB broadcasters and new delivery platforms such as YouTube and Netflix tend to operate under a model whereby they fully-fund the content creation, but then do not retain the rights.

1.44 This investment in new original UK content is greatly to be welcomed; when an independent producer retains control of their intellectual property rights they are able to generate additional returns by selling their programmes or formats in secondary markets.

1.45 It is important that new investors in original UK content exploit the rights to this in secondary markets, including internationally, to ensure that content creators are able to generate additional returns on the content which they had created (which producers use to invest in the development of new original content ideas).
Green Paper: Preparing for a Fully Converged Audiovisual World

**Interoperability of connected TV**

**Question 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?

1.46 Pact is unable to comment on this issue in detail. However in general, we consider that markets should be left to set standards in interoperability.

**Infrastructure and spectrum**

**Question 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?

1.47 Traditionally there have been important differences in the way in which terrestrial and satellite broadcasting is regulated, compared with content delivery services which do not require a broadcasting licence.

1.48 All content made for television broadcast in the UK must comply with the Ofcom Broadcasting Code. Content made specifically for transmission on a TV-like service is regulated in the UK by the Authority for Television on Demand (ATVOD).

1.49 Independent producers will ensure that the content which they produce complies with these rules.

1.50 Given their privileged position on the terrestrial broadcasting platform and the electronic programme guide (EPG), Pact considers that it is still important and appropriate that public service broadcasting channels are subject to different public interest obligations to other broadcasters, including the need to ensure that a minimum of 25% of all content which they broadcast is made by an independent producer.

**Question 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?

1.51 Pact is unable to comment on this issue.

**Question 9:** What specific research needs with regard to spectrum have to be addressed to facilitate such development?

1.52 Pact is unable to comment on this issue.
Regulatory Framework

Question 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?

1.53 The AVMS Directive is a relatively new piece of legislation and as such, it is difficult for Pact to comment on whether there is any market distortion as an effect of this difference in the way in which linear and non-linear services are regulated.

Question 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?

1.54 Non-linear services are an extremely important means of delivering and in a small number of cases, financing audiovisual content. As such, it is important that these new services are not unnecessarily restricted.

1.55 For this reason, Pact supports the position put forward by BSAC, the House of Lords Communications Committee and Cepi that it is currently too early to assess the implications of convergence and the new EU regulatory framework under the AVMS Directive on the market for non-linear content services.

1.56 This is because new business models and commissioning and acquisition structures for non-linear audiovisual content are in their infancy. The risk of legislating at this stage would be that regulations would be introduced before the market has fully developed.

Question 12: 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?

1.57 As noted above, we do not consider that it is the right time for a change in regulatory approach of the audiovisual media sector at a European level.

1.58 If any changes are introduced, it is important that the country of origin principle is not undermined, as this continues to play an important role in supporting the single market.

Question 13: Does increased convergence in the audiovisual 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?
1.59 Pact is unable to comment on this issue.

**Question 14:** What initiatives at European level could contribute to improve the level of media literacy across Europe?

1.60 Pact is unable to comment on this issue.

**Media freedom and pluralism**

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

1.61 Pact is unable to comment on this issue.

**Question 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’?

1.62 Pact considers that the market will adapt to consumer tastes and requirements in order to ensure that they can conveniently and quickly access content that is of interest to them.

1.63 In our opinion, there is therefore no need for regulatory intervention beyond the rules that are currently in place such as securing EPG prominence as a PSB benefit in the UK.

1.64 Furthermore, where regulation is deemed to be necessary, Pact considers that this should remain at the discretion of each Member State.

**Commercial communications**

**Question 17:** Will the current rules of the AVMSD regarding commercial communications still be appropriate when a converged experience progressively becomes reality?

1.65 Pact is unable to comment on this issue.

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

1.66 Pact is unable to comment on this issue.

**Question 19:** Who should have the final say whether or not to accept commercial overlays or other novel techniques on screen?
1.67 If commercial overlays are likely to affect the editorial content or viewing experience associated with a particular piece of audiovisual content, then Pact considers that the producer should have a say on whether or not the commercial overlay is appropriate.

**Protection of Minors**

Questions 20 - 25

1.68 Pact is unable to comment on these issues.

**Accessibility for persons with disabilities**

Questions 26 - 27

1.69 Pact understands the importance of ensuring that audiovisual content is accessible for all, particularly content which is broadcast on public service broadcasting channels.

1.70 However, we are unable to comment on the specific questions of standardisation and incentives for accessibility of persons with disabilities as raised by the Commission in this Green Paper.
European Commission Green Paper
Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values
SAA, FERA, FSE Joint Contribution
21 August 2013

The Society of Audiovisual Authors (SAA) is the association of European collective management organisations representing audiovisual authors’ rights. Its 25 member societies in 18 European countries manage the authors’ rights of over 120,000 European film and television screenwriters and directors.

FERA (Federation of European Film Directors) is an international organisation that represents 39 directors’ associations and approximately 20,000 film and television directors from 29 countries, speaking in the European arena for their economic, cultural and creative rights.

The Federation of Screenwriters in Europe (FSE) is the voice in Europe for more than 6,000 professional screenwriters working mainly in the film and television industry. It is a federation of currently 25 associations, guilds and unions of screenwriters in 19 countries.

FERA, FSE and SAA welcome the publication of the Green Paper on Preparing for a fully converged audiovisual world: Growth, Creation and Values and the consultation process it opened. Digital technology and the internet continue to rapidly change the way in which audiovisual works are produced, marketed and distributed to the audience, under the pressure of consumers increasingly expecting to be able to watch anything, anywhere, anytime, and on any device.

We would, however, also like to take this opportunity to express our regret that the European Commission has not followed up on its Green Paper on the Online Distribution of Audiovisual Works and that this current consultation fails to address any authors’ rights or copyright issues. While this consultation is welcome, there is a need, alongside the current Licences for Europe stakeholder dialogue, for the Commission to continue its dedicated work on audiovisual issues. The issue of the remuneration of audiovisual authors, which was clearly raised in the aforementioned Green Paper on the Online Distribution of Audiovisual Works, must not be allowed to slip off the European Commission’s list of action areas and we hope to be able to look forward to future announcements in this area.

One notable omission in the questions of the Green Paper on Preparing for a fully converged audiovisual world: Growth, Creation and Values is the value of defending Europe’s cultural diversity, which is only briefly mentioned at a couple of points in the document.
The audiovisual sector is one of most prominent examples of Europe's cultural diversity, and proof of how cultural diversity and business can go hand in hand with the help of sophisticated cultural policies. For this to continue to be the case as the European single digital market develops, there needs to be an adapted legal framework that will help preserve and develop the visibility of high quality European works and support the promotion of EU production and distribution. This support must come through mechanisms that help guarantee financing of works and respect the works and the authors’ rights therein. Active promotion is necessary in a converged world of near unlimited choice to ensure the real visibility and accessibility of European works.

While not mentioned in the Green Paper, converged fiscal policy should also be considered through harmonised reduced VAT rates on all cultural products irrespective of their access method (e.g. cinema tickets vs. Blu Rays vs. downloads).

The independence of Europe's media needs to be preserved and a future for European players guaranteed. This will guarantee media pluralism but it is also important for authors who do not want to cater for global players only.

SAA, FERA and FSE fully believe that converged media represents an opportunity for European screenwriters and directors as beyond the technical issues it raises, it reinforces the structural trend that professional content is king. Traditional media and new services, whether hardware driven or Over-The-Top (OTT) services, rely on professional content to develop any long term sustainable activity. The creativity and experience of European screenwriters and directors to tell stories in moving images is recognised worldwide. New services and converged media can help them reach new audiences and redefine their remuneration flows thanks to the increased accuracy of exploitation data. However, for remuneration to flow, Europe's authors must be able to work and that means ensuring the continued development of European production and distribution in a converged world if we want to avoid a brain drain of European talent.

**GROWTH AND INNOVATION**

**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?

Firstly we have to respectfully disagree with the assertions made by the Green Paper with regards to this question. US companies in Europe do not operate in a borderless market enabling them to raise sizeable budgets and take advantage of economies of scale nor do they offer audiovisual content online without territorial access restrictions (page 5).

Making this comparison between US and EU companies is like comparing apples and oranges, for the following reasons:

1. US production companies have established a successful presence in most if not all EU member states and beyond. This does not mean they have a borderless European market, but rather a long established national presence, competing on each local market. New services arriving in Europe have, without exception, opened up territory by territory, expanding and setting up a local presence in each territory over time (e.g. Netflix (apparently caught out using fan subtitles in
2. Any economy of scale is back home in the US where they do have a borderless monolingual market nationwide. Taking into account the size of the US market, the companies which have developed their activities and presence in the US market have the size, capitalisation and investment capacity to develop in any other territory, including in the European ones. This scale effect is of course added by their global presence. New market entrants benefit from this US home-market scale to generate a buzz around their product/service before launching in other territories.

3. US companies enjoy a well established market demand for their products that have in fact become universal in their appeal.

4. This dominant market position is consolidated by their massive marketing spend, which makes any European effort pale in comparison.

5. While seeking pre-financing partners is becoming the norm, also for many US productions, they have traditionally relied on a different funding model where a studio or a cable company will fully finance the production. Those instances allow them more freedom to be flexible in terms of release strategies - provided it makes business sense.

6. The TV markets are fundamentally different. The US has a tradition of private cable television (that fully finance a lot of the leading quality TV shows that are very successful in Europe) that run alongside free to air, (excessively) advertising supported, services. Europe, however, has a network of public service broadcasters, alongside pay TV operators, who have long been supporters of Europe’s cultural diversity through their investments in local productions targeted at local audiences. Given each country’s limited scale, national broadcasters can only commission or partially fund a limited amount of independent productions and only produce a limited amount in-house which is a comparative disadvantage for EU companies. It would be interesting to see a comparison of average pay-TV subscriptions for each continent.

It is wishful thinking that the same preconditions could be established for EU companies.

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 Green Paper rightly points out that premium content (major sport events and successful recently released films, so-called blockbusters) generates a high demand and significant revenues in the audiovisual sector (page 6).

The Green Paper further acknowledges that exclusive deals between platform operators and content providers have formed the basis for content producers to amortise their investments (page 6) and also for market players to differentiate their offers.

Film release strategies at global level are very different for a US blockbuster and a European film. While for US blockbusters it is usually part of an initial marketing plan which devotes at
least the same amount of money to promotion as to production, for European Films it is more an issue of pre-sales of different territories before the film is made (at film markets and film festivals for example) and of further opportunities if the film is doing well in its home country. Therefore, it usually takes more time for a European film to reach its full potential audience at global level than for a US blockbuster. In this context, the pressure to accelerate film releases and exploit them before they are illegally available online is more detrimental to European films as it limits the sometimes slow emergence of “word of mouth” or “buzz” that is essential for niche films which do not have the marketing capacities of US blockbusters.

Release windows on different media (theatrical release, DVD and Blu Ray, VOD, pay-TV, free-TV, etc.) are an integral part of the business model of the audiovisual sector and like most decisions related to the exploitation of a film (or any audiovisual work), the periods are decided at national level. In most European countries, there are professional agreements with rights holders or commercial agreements tailored to each particular film to maximize its exploitation, its visibility for the audience and the revenues generated by each form of exploitation.

The current release windows are usually related to obligations towards financing partners of the film. State aid rules allow for only 50% public funding, which means that the producer must find the remaining 50%. This consists to a large degree of pre-sales, which is simply “borrowing” from the future earnings of the film in the various distribution channels, primarily cinema distribution (minimum guarantees) and broadcasting fees.

Today these financing partners naturally demand to have exclusive windows in return for advance payments, and if online players do not have the same funding obligations, but stand to earn money at the expense of the financing partners, this jeopardizes the entire ecosystem.

We support flexibility in release windows so long as the question of how film production and distribution will be funded is simultaneously addressed. It is also important to acknowledge that a film’s market value is intimately linked to its initial theatrical release and crucial to maximising its performance in subsequent distribution channels.

While the Green Paper notes that increased content offer in terms of quantity and diversity is changing the entertainment landscape (page 6), we would like to reiterate that it is professional quality content that mainly drives the real growth in both the offline and online market.

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

There are two aspects to any potential regulatory action on access to platforms. Equally, there are now hardware driven and Over-The-Top (OTT) platforms which may need to be considered differently.

First of all, competition law should be satisfactorily implemented to ensure that vertically integrated companies are not able to abuse their dominant position and limit access of other services or content providers to platforms.

Secondly, it may be deemed necessary, in the interests of media pluralism and the promotion of cultural diversity, to implement ‘must-carry’ legislation to ensure that general interest broadcasters are not shut out of new hardware and application driven platforms.
At this stage or in the foreseeable future it would not be appropriate to regulate access to OTT platforms. These platforms will need to find their place in the value chain and compete for premium content. It is interesting to see some starting to invest in original creations as a way of securing premium content, and subsequently operating within the traditional industry framework through licensing (e.g. Netflix with House of Cards, subsequently licensed to Canal+).

The current practice, however, is that online platforms mostly acquire non-exclusive licenses, but there is a need to rethink the role of VOD services/online platforms at different stages in the value chain.

The contracting parties have the freedom to enter into arrangements that are underpinned by a sustainable economic model.

FINANCING MODELS

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

Yes. We believe in the principle that all media or platforms, offline and online, that benefit from audiovisual works should contribute to the funding and distribution costs of new production. This is recognised in the AVMS Directive. The artistic merit, technical quality and diversity of the films and television programmes we make in Europe are the pre-conditional criteria for growth, and any revised legislation must have the aim of encouraging and sustaining a healthy European audiovisual sector that will in turn continue to guarantee Europe’s cultural diversity.

The presence and visibility of European works on all online platforms is an essential part of the AVMS Directive, in particular Article 13 regarding the production of and access to European works, and should be strictly and carefully implemented by all Member States, which is regrettably not yet the case. Especially publicly funded online catalogues and services must be required to include a significant proportion of European works, and present them prominently. In a converged world of access to an ever larger array of audiovisual works, it is essential that ‘discoverability’ of European works is guaranteed.

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?

Release windows will inevitably change as online use generates more economic value, though it is important to recognize the superior importance of offline partners to the return of investment so far. VOD’s current turnover is currently very small, and it would be unfair to allow the new audiovisual media services to profit from European audiovisual works without investing a fair share of their turnover in the production and release of new works. Some have started to do so, but it would seem early to call this a trend. It is however already clear that the revenues generated by online platforms for each single title is only ever going to be a fraction of what the same revenues have traditionally been for DVD releases. This is a dramatic loss of value that will greatly affect each film’s ability to secure initial funding to get made, and to be profitable.

We strongly believe, as provided for in Article 13 of the AVMS directive, that financial
contributions from online services should consist of the obligation to invest a share of the turnover of the service concerned in the production and rights acquisition of European works (the investment rate could increase according to the turnover) and/or by contributing to national film and audiovisual production funds. The implementation of this so far has been insufficient.

We would like to underline that the investment and financing of European production is complementary to the remuneration of authors and should not be perceived as limiting the involvement of new distributors and services in the remuneration of authors. Audiovisual authors should be remunerated for every exploitation of their work.

**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?

We understand that the current variety of standards means that producers have to supply films in a variety of different formats to cover all of the different media including among different VOD platforms (e.g. the requested formats for iTunes, Universciné, and a cable VOD supplier in Belgium are all different). We have an example of a broadcaster in one Member State which supports 60 different technology platforms for its catch up TV service. While we are not opposed to competition between standards per se (and this is certainly nothing new – BluRay vs HD, VHS vs Betamax), we would note that in an already fragmented European audiovisual production and distribution market, extra costs such as producing significant numbers of different formats (and the examples above concern one country only) can only have a detrimental effect on the circulation of works.

More generally, it is important that consumers have access to interoperable systems that do not lock consumers into a single operator or group of operators but instead enable them to access the full range of services and works available. This will also help guarantee access to Europe’s cultural diversity.

**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?

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?

9. What specific research needs with regard to spectrum have to be addressed to facilitate such development?

Our organisations are technology agnostic regarding the way that Europe’s audiovisual works are brought to their audience. However, with the arrival of 4k definition televisions [source] which can truly bring the creators’ vision to the home viewer, the integrity of the work needs to be guaranteed. The technical delivery system must be able to deliver without a loss of quality or damaging the user experience. Current network resources are not sufficient to guarantee quality viewing at current resolutions (HD) across the EU (often limited to cities).
Films pixelising due to insufficient bandwidth or frequently buffering does not respect the authors creative vision or provide a satisfactory user experience.

In this regard there may also be an impact on net neutrality / traffic management. Europe needs to ensure that access to European content is not sacrificed due to international vertically integrated companies dictating which content can reach European consumers to which degree of quality (either on the basis of prioritising their own subsidiaries’ services or content or on the basis of commercial deals). There are already examples of throttling (see the SFR-YouTube case in France) and there are already questions in the US as to whether some cable operators are prioritising their own video content over other suppliers [source].

VALUES

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?

The inclusion of non-linear services in the AVMS Directive in 2007 was based on the need for a lighter regulation for these services than for traditional audiovisual services to facilitate their take-up. It is legitimate, after a certain period of time of implementation, to ask whether this lighter regulation for non-linear services is still needed. This can be done by looking at the development of those services and whether their development has resulted (or not) in market distortions to the detriment of traditional services.

A second question relates to the limited scope of the extension of the AVMS Directive to on-demand services only in the online environment. Is this limitation to on-demand services not too narrow and does it leave out important online services which make available audiovisual works to the audience?

Impact assessments should be conducted on both issues to identify possible market distortions. Without wanting to predict the conclusions of such impact assessments, it would seem obvious to us that in the case of any distortion, the principles of Articles 13, 16 and 17 should be maintained and constitute the minimum basis for any audiovisual media service. There should certainly be no lowering of AVMS Directive standards. We would welcome more pressure on Member States as to how they implement the Directive (and article 13 in particular) and more strict application of the articles 13, 16 and 17 to online players.

We noted with interest Commissioner De Gucht’s statement in June regarding the Transatlantic Trade and Investment Partnership (TTIP) - “What is really at stake in these negotiations on audiovisual is the so-called digital evolution or revolution in those media,” “There is no European legislation on this at this moment in time, [while] there is legislation on online and video-on-demand.” [Source]. It is not entirely clear what Commissioner De Gucht means with this statement. After years of political and financial investment in Europe’s cultural diversity through, among others, its audiovisual policy, there should be no attempts to undermine any gaps in European audiovisual policy during trade negotiations. We are pleased to note here that audiovisual has been formally excluded from the negotiation mandate of the TTIP.
An important market distortion caused by the regulatory differentiation between linear and non-linear services relates to the different VAT rates for the delivery of audiovisual works to the audience depending on the media. While cinema tickets and broadcasting services can benefit from a reduced VAT rate, online delivery is not eligible for such a reduced rate according to European legislation. The absence of a harmonised reduced VAT rate on audiovisual works, irrespective of their access method, is detrimental to the take off of European VOD services.

11. Is there a need to adapt the definition of AVMS providers and / or the scope of the AVMS Directive, 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?

SAA, FERA and FSE believe that it is too early to consider a revision of the AVMS Directive as we do not have the full results of its implementation. In addition to this, the current penetration levels of used connected devices means that no immediate action is necessary.

However, there are clearly services, such as YouTube or Dailymotion, that in an increasingly converged world are used by consumers in a manner increasingly resembling that of a video on demand service. YouTube has now launched paid subscriptions for certain channels in the USA, playlist functions enable ‘lean back’ linear viewing, and more and more traditional media companies are investing in YouTube ‘networks’ (e.g. Disney buying Awesomeness TV through its Dreamworks subsidiary). Third party websites that editorialise licensed YouTube content (whether through embedding or through linking) may also need to be considered. Even the vocabulary of ‘channels’ and ‘networks’ suggests a clear link to more traditional services that are subject to the AVMS Directive.

While the key question of ‘editorialisation’ remains, we believe that the changes mentioned above represent part of a steady shift of these services towards a level of editorialisation and reliance on professional content organised in channels that will also see them (or at least distinct parts of their service) shift from being outside of the AVMS Directive to inside it. In the absence of recognition of this shift from national authorities or regulators, then action may well be required to ensure that AVMSD requirements such as the promotion and/or financing of European works are enforced. The recognition of such a shift would also have an impact on the application of certain elements of the e-commerce Directive to these services, notably regarding respect of authors’ rights.

12. 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?

The country of origin principle can only apply when equal or harmonised conditions and rules exist in the different Member States so as to avoid market distortions. In the AVMSD, the country of origin principle goes hand in hand with a set of minimum common rules covering aspects like advertising, protection of minors and promotion of European audiovisual works. This is also the case for the E-Commerce Directive which approximates national provisions on information society services relating to the establishment of service providers, commercial communication, electronic contracts, liability of intermediaries, etc. so that the country of origin principle can apply. Better or stricter implementation of these rules or more common rules make the country of origin principle legitimate and applicable. On the contrary, the absence of harmonisation associated with the country of origin principle can only create market distortions.
Modern digital distribution and the arrival of cloud computing, which renders the country of origin of the transmission irrelevant, have undermined the Satellite provisions of the 1993 Satellite and Cable Directive as a template for Europe wide digital rights clearance. It has also proved problematic as certain broadcasters circumvent national regulations by transmitting from another country (i.e. TV3 avoids advertising regulations in the Nordic countries by being based in the UK).

In this context, we strongly back the retention of the territoriality principle for the copyright licensing of all forms of communication to the public of audiovisual works, including retransmission and simultaneous transmission (cable provisions of the 1993 Satellite and Cable Directive) and the payments to authors that it ensures.

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?

The AVMS Directive and the E-Commerce Directive have clearly different objectives. The fact that there are services that can be subject to both Directives is in no way problematic.

As mentioned above (see question 11), we believe there is a steady shift in a number of services that currently fall outside of the AVMS Directive that will ultimately lead them to be subject to the Directive. We believe that this same shift will also see parts of the e-commerce Directive, notably those parts concerning respect of authors’ rights apply to these services (or parts thereof). In the absence of recognition of this shift from national authorities or regulators, then action may well be required to ensure that the relevant parts of the e-commerce Directive can be enforced.

Both Directives should be subject to frequent evaluations to ensure that evolutions in technology or commercial practices do not prevent their policy objectives being achieved. While hypothetical, if the arrival of smart TVs ultimately leads to a move away from channel based access to application based access, then the policy objectives of financing and providing visibility to European works, among many others, still need to be guaranteed.

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

Media literacy and the ability for consumers to be able to understand and analyse the media in a converged world is clearly important and something that SAA, FERA and FSE supports.

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?

Filtering mechanisms may be acceptable if the choice is pre-defined by the consumer or as part of legitimate policy objective by a Member State.

Commercial or profile based filtering, however, must not be allowed to limit consumers’ access to a broad array of content and opinions and indeed intervention may be deemed necessary to prevent such filtering. The question may also need asking – how do you guarantee the prominence in algorithm based search results and recommendations? A VOD
operator should not be able to avoid its AVMS Directive obligations regarding visibility of European works on the basis that it uses algorithm based recommendations [source, or Eli Pariser’s Ted talk on “the Filter Bubble”].

This section of the text focuses on the filtering of licensed content. Filtering mechanisms may however be useful in a converged world to counter the commercial exploitation of unlicensed copyright protected works. Currently a simple search in YouTube for ‘full film’ brings up a list of protected works available in their entirety. In a converged environment where the access to content is available seamlessly on a household’s main screen via the web, filtering of unlicensed commercially operating domains could be useful.

It is interesting to note Google’s cooperation with rightsholders in this area to remove certain terms (a sort of filtering) from its autocomplete function. The UK has also recently seen the courts implement filtering on certain domains that are judged to provide access to unlicensed content.

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’?

As mentioned in the response to question 13, evolutions in technology or commercial practices should not prevent EU policy objectives from being achieved. The challenges created by opening a household’s main screen to the seemingly boundless content of the internet will undoubtedly provide challenges for national regulators and authorities. It will also likely see the arrival of new ‘editors’ trying to provide consumers with ways of accessing the information most relevant to them. The importance of prominence of European media (and in turn European works) may well become more and more important in a world where ‘editors’ operate on a commercial basis or as part of vertically integrated companies that could prioritise their own content. The means of ensuring this will undoubtedly become more complicated (e.g. could you/would you/should you oblige a search engine to prioritise European results for a query, how will the landing page of connected TVs be decided?).

There should be a must carry requirement for broadcasters and services deemed as guaranteeing ‘general interest content’. Member States may also want to be able to extend must carry requirements from network operators to hardware manufacturers.

The independence of the EU’s media must be preserved and the continued presence of EU players ensured as this will help guarantee the future of Europe’s cultural diversity. It is important for authors to not just cater for global players but to be able to cater for their local markets.

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?

The current rules regarding commercial communications are in many ways satisfactory.
SAA, FERA and FSE feel that there must continue to be a clear distinction between creative works and any advertising in a converged media environment. The rules for linear media have been built over a number of years and are appropriate. We would not want to see a reduction in the regulations regarding commercial communications in order to align them with the (weaker) requirements for non-linear services.

Advertising on online services is on the surge and new techniques are developing, with some of them questioning the AVMSD principles. We are already seeing advertising being inserted automatically into user generated video sites (both at the beginning and midway through videos) and overlays appearing. Sometimes the advertising length is disproportionate compared to the duration of the viewed content. These are clearly not in line with the objectives of the AVMS Directive and may need to be considered further as penetration of connected devices increases.

The issue of advertising supplied through second or third screens may also need to be considered in future. If these adverts are linked to linear services will they count towards the 20% per hour of the AVMS Directive? It may even be questionable as to whether advertising on second or third screens affects the integrity of a creative work being viewed on the main screen.

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

It would be a shame for the European Commission to use technological progress to take a backward step on advertising regulations that have been developed over many years. If the Commission feels that action is necessary then it may wish to consider further consultation or a stakeholder dialogue to establish what future regulatory initiatives are necessary.

Furthermore, advertising in the form of product placement should not be allowed to have any impact on the creative process of the authors of a work.

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

We would first of all like to underline that commercial overlays may infringe the moral rights of the authors of an audiovisual work and certainly fail to maintain the integrity of the work.

Commercial overlays or other novel on-screen techniques should only be approved by those who have licensed the works and have a contractual relationship with (and hence a financial stake in) the creative chain. Commercial overlays added by simple hosting services or hardware providers on the basis of their ability to monitor the viewer’s interests and what they are watching are not acceptable. These hosting services and hardware manufacturers should also not be able to take advantage of the success or popularity of a creative work through overlay advertising without the authorisation (and payment) of the licensed rightholder.

We do not have any comment on questions 20 to 25 on protection of minors and on questions 26 and 27 on accessibility for persons with disabilities.

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