

ERGA 2015 (12)

# ERGA report on material jurisdiction in a converged environment

---

18th December 2015

## CONTENTS

<b>Introduction</b>	Page 2
<b>Executive Summary</b>	Page 4
<b>Section 1 - The emergence of digital intermediaries and new forms of content provision and consumption in the audiovisual chain of distribution</b>	Page 12
<b>Section 2 - The public policy goals of the Audiovisual Media Services Directive</b>	Page 27
<b>Section 3 - The distinction between regulated audiovisual media services and other services containing audiovisual content</b>	Page 29
<b>Section 4 - Should different levels of regulation still be considered on EU or national level and if yes, which criteria should determine different levels of regulation?</b>	Page 40
<b>Section 5 - The consequences of the position of certain intermediaries in the online distribution chain</b>	Page 48
<b>Section 6 - The future roles and responsibilities of intermediaries in securing AVMS public policy goals</b>	Page 52
<b>Section 7 - The points of interaction between the AVMS framework and other regulatory frameworks, including the telecoms framework and the e-Commerce Directive</b>	Page 59

## Introduction

### 1. The purpose of this report

The European Regulators Group for Audiovisual media services (ERGA) was established in March 2014, through Commission Decision C(2014) 462 of 3<sup>rd</sup> February 2014 as advisory body to the Commission.<sup>1</sup> Its task is to advise and assist the Commission in its work to ensure a consistent implementation of the AVMS Directive in a converged media age.

This report presents ERGA's collective view on how the material jurisdiction of the Audiovisual Media Services Directive ("AVMSD") should evolve. This is part of a wider work stream assessing the evolution of the European regulatory framework in a converged media age, which includes:

- A report on **territorial jurisdiction in a converged environment** (to be issued in 2016)
- A report on **the protection of minors in a converged environment**.<sup>2</sup>

The AVMSD currently applies to editorially responsible providers based in EU Member States, which offer linear TV channels and video on demand services that are deemed to offer content comparable to broadcast TV programmes (i.e. "TV like") on the basis of a set of cumulative criteria, set out in recitals 21-28 and Article 1 (Definitions) of the AVMSD.

According to these, an audiovisual media service has the following characteristics:

- a) **A service** (as defined by art. 57 and 57 of the TFEU) (art. 1 (1)(a)(i))
- b) Under the **editorial responsibility** of the service provider (rec. 24-25, art 1.(1) (c))
- c) which is **mass media** (rec.21)
- d) and the **principal purpose** (rec. 22, art. 1 (1)(a)(i))
- e) is to **inform, entertain and educate** (rec. 22, art. 1 (1)(a)(i))
- f) through the provision of **audiovisual programmes** (rec 23-24)

On demand AVMS (art.1(g)) are "**TV –like**" (rec. 24, art. 1 (1)(b)).

Audiovisual media services are both economic and cultural goods, and play a fundamentally important role in informing a democratic society. In the past eight years since the Directive was laid before the European Parliament and European Council, we have observed significant changes in the market, with a wider variety of content services delivered to users over the internet. This has prompted questions as to whether the approach currently taken in the Directive needs to adapt in order to continue to provide a strong level of audience protection, and a measure of fair competition, in today's environment. In policy discussions about the material scope of the Directive, there are two distinct issues that tend to be raised:

- **Editorially responsible media service providers:** Does restricting regulation to "TV like" on demand content reflect the realities of the market today, and is it sufficient to secure audiovisual policy goals? The cumulative criteria for defining which services fall within scope are unavoidably subjective – could this difficulty be addressed by new criteria and/or guidance?

<sup>1</sup><http://ec.europa.eu/digital-agenda/en/news/commission-decision-establishing-european-regulators-group-audiovisual-media-services>

<sup>2</sup> ADD LINK FOR PUBLICATION

- **Platforms:** Should a new Directive go beyond the current focus on editorially responsible audiovisual media service providers and introduce a new set of rules for certain online platforms in order to secure certain public policy goals? There are separate questions about “audiovisual platforms” whose core business is to distribute audiovisual content, and other online platforms and intermediaries that distribute a much wider range of services.

The conclusions of this report are designed to inform the Commission’s work as it carries out its review of the AVMS Directive, and its wider review into the role of online platforms.

## 2. Methodology

This report has been prepared by a sub-group comprising representatives from the national regulatory authorities (“NRAs”) for audiovisual media in 21 ERGA member and observer countries.<sup>3</sup> The group was chaired by Ofcom (UK), with AGCOM<sup>4</sup> (Italy), the CSA<sup>5</sup> (France) and the DLM<sup>6</sup> (Germany) contributing to the drafting. To prepare evidence based reflections, the sub-group decided to frame the report around seven key themes:

1. **What changes have occurred in the audiovisual market?** What audiovisual content services are available in the market? How are consumers interacting with these services? Who are the key players in the online content distribution chain?
2. **What are the public policy goals of the AVMS Directive?** Do these goals remain relevant in a converged environment?
3. **Which content services should fall within the scope of the Directive?** In what way should the cumulative criteria the Directive introduced evolve in order to define these services?
4. **Which rules should apply to them?** On what basis should the rules be differentiated between the providers covered by the Directive?
5. **What questions might be raised by the position of certain intermediaries in the chain of distribution?** What are the possible opportunities and risks for competition, promotion of EU content, diversity of content, plurality of opinion and protection of audiences?
6. **Could certain intermediaries contribute to the fulfilment of audiovisual public policy goals in future?** What roles do they already play? What are the wider implications in this debate?
7. **What considerations does this raise in terms of the other frameworks that apply in the audiovisual value chain?** This includes the Electronic Communications Framework and e-Commerce Directive.

To prepare shared conclusions which reflect the opinions and experiences of all ERGA members, the sub-group circulated a questionnaire around national regulatory authorities and held several discussions on draft versions of the report.

<sup>3</sup> Belgium, Cyprus, France, Germany, Italy, Poland, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Norway, Romania, Slovenia, Spain, Sweden, UK

<sup>4</sup> Autorità per le Garanzie nelle Comunicazioni

<sup>5</sup> Conseil Supérieur de l’Audiovisuel

<sup>6</sup> Direktorenkoferenz der Landesmedienanstalten (DLM)

## Executive Summary

### 1. Changes in the audiovisual market

On the basis of data and analysis from the European Commission and from Member States we would highlight the following key trends:

- **The range of content available:** We note a proliferation of on demand and live streaming services delivered online, and the emergence of services offering content as part of a mix of services. Of particular relevance to this discussion are services which merge elements of linear and non-linear content services, blurring two traditionally distinct environments. We also observe the increasing importance of open sharing platforms, including video streaming sites and clip sales sites.
- **Changes in patterns of media consumption:** A rapid pace of innovation in the services available has been accompanied by a slower evolution in consumption habits. Levels of live TV viewing remain high, despite a modest decline in some Member States, and it remains the main consumption platform for the majority of Europeans. At the same time, consumption of online and on demand content has grown significantly, albeit from a low base. Viewing of online content, and use of devices other than the main TV set to view content, is higher among younger users.
- **Evolutions in the distribution chain:** A greater range of devices capable of delivering online content to the main TV screen are being brought to the market. Players are entering the content market from within the communications market and beyond, and an increasing number of actors are present at more than one stage of the value chain. More players are making use of the open internet to deliver services directly to consumers, often referred to as “OTT delivery”.
- **Complexity in defining the chain of distribution:** Defining the online value chain is an increasingly complex exercise due to the ever greater diversity of players involved, the different routes of content delivery available to providers. Nevertheless, it is possible to define a simplified model for the purposes of this discussion:



### 2. Audiovisual public policy goals

We define the public policy goals of the AVMS Directive on the basis of the Directive’s recitals and the European Commission’s website. These are:

- To guarantee conditions of fair competition without prejudice to the public interest role to be discharged by the audiovisual media services;
- To ensure freedom of information, diversity of opinion and media pluralism;
- To encourage the activity and development of European audiovisual production and distribution;

- To stimulate new sources of television production, especially the creation of small and medium sized enterprises;
- To protect viewers, in particular minors;
- To respect and promote the diversity of Europe's cultures;
- To encourage media service providers to make services accessible to people with a visual or hearing disability;
- To enhance public awareness and media literacy; and
- To ensure that events of major importance for society are not broadcast in such a way as to prevent a substantial proportion of the public from following such events;

There is consensus in ERGA that the changes in the market do not call the relevance of these goals into question. Some members of the group have underlined that some new goals may become important as the market evolves, in particular access, discoverability, prominence and integrity of audiovisual content services.

### **3. The types of services to be covered by a new Audiovisual Media Services Directive**

Rather than attempting to identify and rigidly define the types of content providers that should be covered under a new framework, we suggest that the Commission approach this issue using the cumulative criteria the Directive introduces to define these services.

The European Court has – on October 21, 2015 – handed down a judgement which clarifies some of these criteria. This comes at a time when the sub-group has already spent some 15 months discussing this subject, and the judgement has some relevance to Recommendations 1 and 2 of this report. However, given the request the Commission has made for ERGA to offer its expert opinion, this report provides ERGA's independent views on the subject of the different criteria in view of the forthcoming revision of the Directive.

#### ***Recommendation 1 – “TV-like”***

ERGA suggests that the Commission should revisit the definition of an audiovisual media service in a revised AVMSD and review the “TV-like” criterion in Article 1.b and recital 24. In reviewing it, the Commission should be mindful of the underlying goals of the Directive (e.g. the need for fair treatment of competing services, impact on society, democracy and culture, audience protection) and the principle of proportionality. The EU-Commission should consider whether, by working with ERGA, it can develop a set of guidelines that will help to provide greater clarity and a more consistent application of the definition.

**Background:** *The “TV-like” criterion is unavoidably subjective and there are several different national interpretations.*

#### **Recommendation 2 – “principal purpose of one service”:**

ERGA proposes that the Commission should review and clarify whether the Directive is compatible with the notion of “one service”; i.e. that one legal entity can offer or one website can contain several services, each with its own principal purpose.

**Background:** *When audiovisual content is presented to viewers as part of a multimedia service, regulators can face the challenge of first defining the service in question before they can evaluate whether the content is incidental to the service, or part of its principal purpose.*

### **Recommendation 3 – Editorial Responsibility:**

There is a broad consensus among ERGA Members that the concept of editorial responsibility should be clarified through guidelines in order to address interpretation issues that may arise from situations where more than one actor in the value chain appears to exercise a form of control. ERGA suggests that in future the European Commission could work with ERGA and the industry to develop guidance on the concept of editorial responsibility, in particular on the aspect of “effective control”, “relevant impact” and the organisation in a “catalogue”.

**Background:** *Of particular interest are cases where two or more actors in the value chain exercise some form of editorial decision in determining the range of the programmes offered in a service or how it is organised or presented. It is fundamentally important, for the purposes of efficient enforcement, that there is one clear locus of editorial responsibility.*

### **Recommendation 4 – audiovisual platforms/intermediaries:**

ERGA recommends the European Commission should consider – within its current comprehensive assessment on the role of online platforms – whether it is desirable, in a revised AVMSD, to introduce a specific set of rules for audiovisual platforms and intermediaries with relevant impact on media pluralism and diversity. The Commission should take account of what the relevant impact and economic assessments, and experience related to current legislative tools that exist at a European and national level, might suggest for extending the scope of the Directive in this way.

ERGA could consider further in-depth reflection on this topic, examining in particular the aspects of definitions, the potential effects on pluralism and diversity of the enhanced role of certain intermediaries, and how to weigh up any proposed new regulations with the need to preserve innovation online.

**Background:** *In the converged audiovisual environment, audiovisual platforms (e.g. cable, IPTV or OTT players offering own or third party commercial audiovisual content) or intermediaries such as search engines play an enhanced role in the value chain. These new players may directly influence or control the content offer and the choice of the consumer. The Commission will need to carefully consider the potential implications in terms of plurality, diversity and consumer protection and whether it would be appropriate to address these under the AVMSD and its specific goals.*

*The Commission will need to bear in mind the need for any new rules to be carefully designed and proportionately applied.*

#### 4. The rules that should apply to these services

The AVMS Directive currently differentiates rules on the basis of the means of delivery of content, with a lighter-touch regime in place for on-demand services. The Commission should not seek to take an overarching approach to graduating the rules that apply to providers that are covered under the Directive. Nor can it seek to uniformly apply a set of rules to all AVMS providers. In view of the different business and distribution models that each type of service provider has adopted, the Commission should look at each of the coordinated fields in the Directive individually, and assess:

- a) Whether, in view of the different transmission models it is possible to have replicated rules across the different services covered; and, if so
- b) Whether developments in the market justify a more coordinated approach.

The recommendations in this section should be read with the Directive's minimum harmonisation approach in mind. Member States have the freedom to go beyond what the Directive demands by way of a set of minimum standards should they choose to do so. It was also not the remit of this sub-group to review the merits of the wording of each specific rule of the Directive. Rather, it was asked to look at the coordinated fields in the AVMS, and examine whether a graduated or coordinated approach in these areas is justified. In taking this approach to these rules, we put forward the following recommendations:

##### **Recommendation 5 – Continuity**

There is a broad consensus among ERGA Members that some provisions in the current Directive that already set a common standard for all audiovisual media services have proven efficient. This applies to the rules on editorial and human dignity standards, co- and self-regulation and accessibility and the rules on common qualitative requirements for audiovisual commercial communication.

ERGA recommends that this coordinated approach should be maintained.

##### **Recommendation 6 – Modifications of the Directive**

For a number of other provisions, however, a majority of ERGA Members takes the view that a more coordinated approach in order to reflect the changes in consumer expectations and market dynamics brought about by convergence is necessary and recommend a modification of the Directive in respect of the following rules:

###### **a) Distinction between advertising and content:**

The Commission should consider establishing a common minimum standard for all audiovisual media services in the sense that advertising must be recognisable from editorial content.

###### **b) Integrity of the programme:**

ERGA recommends establishing a common basic rule for all audiovisual media services that sets out a principle at EU level that the insertion of advertising should respect the integrity of the programme.



**c) Protection of minors:**

As noted in the ERGA report on the protection of minors,<sup>7</sup> the level of protection provided should be more consistent across linear and non-linear content. Rather than using the means of delivery as the criterion for graduating regulation, a revised Directive could introduce level protections across linear and non-linear for the protection of minors, which would recognise both the different ways of controlling minors' access to audiovisual content and the harmfulness of content. The Commission should also consider introducing a requirement for all AVMS providers to restrict access to content that "might seriously impair" the development of minors.

**d) Right of reply:**

ERGA recommends that the existing rules on the right of reply, which only apply to linear broadcast services, should apply to all audiovisual media services.

**Recommendation 7 – Specific rules for linear media services**

There is a majority view among ERGA Members that the specific provisions on events of major importance to society cannot be replicated to all audiovisual media services but continue to be justified in the linear environment.

**Recommendation 8 – Further in depth-research**

On a number of topics there are a widespread range of views, and further in depth research is required. The Commission might consider conducting an assessment on the economic effects of applying uniform rules to the following topics.

**ERGA could consider further in-depth discussion on:****a) Advertising of specific products:**

A number of Member States have introduced stricter rules on advertising of specific products than those of the AVMSD. The different frameworks and their motives, and the impact of a more harmonised approach must be carefully examined.

**b) Quantitative advertising rules**

Further in-depth analysis should consider the effects on audiences and national advertising markets of amending or removing current provisions on minimum teleshopping windows duration, and hourly advertising limits, or if a daily limit would be more practical.

**c) European works:**

There is a need to examine whether the quota system is still the most efficient way to promote European works and independent producers or whether alternative concepts like obligations on prominence or production budgets should be considered. ERGA could also

<sup>7</sup> ADD LINK POST PUBLICATION

look into the different funding systems, the promotion of cross-border circulation of EU works and explore more efficient procedures for monitoring processes.

**d) Short news reports:**

ERGA recommends that the Commission should consider conducting an assessment of the economic effects of applying the existing rules on short news reports to the online environment before a further in depth discussion within the Group.

## 5. The implications of the position of certain intermediaries in the market

There are several actors that play an important role in the audiovisual distribution chain, and are able to exert an influence on the delivery of content. This includes video hosting sites, device manufacturers (through default screens), search engines and app stores. As the importance of these players in the wider audiovisual market grows, there are a number of different scenarios which present both opportunities and risks:

1. **Competition and choice:** If certain intermediaries become a more essential link in the chain between the content provider and end user, it could reduce the level of competition in the market, for example if the business model and navigation tools they develop lead to a reduced range of content providers being made available on their service. This could be amplified in the context of a “walled garden” or integrated “silo” model. On the other hand, a greater plurality of delivery routes between the content provider and consumer may lead to enhanced competition.
2. **The promotion of a diverse European content market:** An increase in the number of supply routes available to content producers could provide more opportunities for works that would traditionally have had limited commercial potential. At the same time, the discoverability of European content, or the diversity of the content available on services could be reduced if certain providers limit the availability of certain content or the criteria that content recommendations are based on. Content funding schemes could be rendered less effective as players that do not participate in the funding of original content capture a greater share of the value in the market.
3. **Big Data:** The use of data in recommendation tools provides players with important growth potential, and the ability to tailor content promotion to a user’s preferences could prove beneficial to viewers and content providers, facilitating access to and discovery of new and innovative types of content. At the same time, if tools focus too heavily on personal data and provide only a narrow set of recommendations, this could be to the detriment of content diversity.

Predicting market developments is an inherently uncertain exercise, and it will be important that policy makers monitor these developments closely.

## 6. The roles and responsibilities of intermediaries

The analysis above raises questions about the roles that certain intermediaries – including content hosts, ISPs and search providers – might play in securing AVMS policy goals. There is an important trade-off at the heart of this debate; though these intermediaries represent a potential “pinch point” for regulations to apply, obligations that are not carefully designed in

accordance with the specific role of these intermediaries could be impractical to enforce or pose wider risks for the operation of the open internet.

However, this does not mean that there is not a role for intermediaries or platforms to play, and many already contribute towards the fulfilment of policy goals through a series of voluntary measures. Specific areas where intermediaries might contribute in future include:

1. **Protection of minors:** Policy makers will need to create an environment in which the relevant intermediaries have incentives to provide consumers with appropriate protection tools and clear information. The development of consistent tools - which are efficient, easy to use, affordable and work with well understood and common systems of categorisation and classification - should be encouraged.
2. **Access and discoverability:** The Commission should consider whether and how a future regulatory framework could enable the extension of interventions to secure access to and prominence of public interest content to certain platforms.
3. **Content Funding:** The regulatory framework should not prevent the extension of fiscal funding interventions to new actors.

More generally, we recommend that as a starting point the Commission should look to design any interventions in a similar fashion to ex-ante and ex-post interventions that apply to other intermediaries, placing an emphasis on the provision of clear definitions, reporting tools and routes of appeal.

When designing obligations, it appears crucial to take into consideration both the business models of these intermediaries and their potential impact on the market (and by extension public opinion) given the extent of their activity. Indiscriminate enforcement of the same rules across a range of different actors could undermine the open internet. At the same time, not imposing any rules on players that achieve a significant position in the market could in future result in imbalances in terms of both competition and diversity.

It would therefore be important to set out criteria to provide a clear basis for which providers would be included in the scope of any new obligations, and how obligations would be differentiated. This could include distinguishing between “audiovisual platforms”, for which the distribution of audiovisual content is the core business function, and other intermediaries that play a much wider role in the operation of the internet such as web search engines and ISPs. It could also include criteria related to scale, market impact and turnover.

## 7. The interaction between legislative frameworks

We observe a progressive blurring of the boundaries of three different legislative frameworks. Audiovisual content (regulated under the AVMS Directive) is delivered over a communications network (regulated under the Telecommunications Framework) and, in the case of content delivered online, the distribution chain involves digital intermediaries (regulated under the e-Commerce Directive).

There are a range of services in the audiovisual value chain where the extent to which they would meet the definition of a hosting provider under the e-Commerce Directive is not clear. These include online content stores social networks, blogs, and online EPGs. Some “hosts”

such as YouTube play a role that is more structured than technical hosting. However, this does not mean that they meet the definition of an editorially responsible provider under the AVMS Directive (even if the providers of channels on these services can).

Having considered the interaction between these frameworks, and the lessons that can be learned from them in considering a new system of regulation (as set out in recommendation 4), we consider that:

- The Commission should examine the exceptions that apply to the “internal market” clause under the e-Commerce Directive, and consider whether similar exceptions could be applied in an AV regulatory framework.
- A graduated system of obligations (e.g. on the basis of the extent to which the platform provider exercises an active or passive role) could be considered.
- Some models for taking “effective action” to remove or restrict access to illegal content, such as notice and takedown regimes, have generally proved effective. Others, such as deep packet inspection, have been considered too restrictive. Self and co-regulation could be an effective way to ensure consistent application of notice and take action measures, perhaps in the framework of common guidelines.

## Section 1

### The emergence of digital intermediaries and new forms of content provision and consumption in the audiovisual chain of distribution

This section discusses the evolution of the audiovisual media market since the AVMS Directive was adopted in 2010. In order to inform ERGA's analysis of whether the material scope of the Directive should change, we describe

1. The emergence of a wider and more diverse range of linear and on-demand services offered to audiences
2. The way that audiences are responding to these changes
3. The technological and business developments which support and enable these innovations
4. The way that the structure of the audiovisual production and distribution market has changed and the new roles played by intermediaries

It has drawn on a variety of existing sources including statistics and observations provided in the responses to a questionnaire circulated among ERGA Members in March 2015, and research published by the European Commission and the European Audiovisual Observatory. This will serve as background for the policy discussions that follow.

#### 1.1 In what ways has the range of content services that are available to consumers evolved?

This section explores the different types of online services that offer audiovisual content to consumers. These services include live streaming services, catch-up TV services, other video on demand (VOD) services and user generated content. Some of the most important developments observed in the past decade have been:

1. A proliferation in the number of linear and non-linear services that are available to audiences, and evolutions in the range of business and distribution models, including the offer of audiovisual content as a mix of services;
2. online content sharing platforms creating a market for user generated content and providing traditional players with new distribution channels.
3. the emergence of new forms of content brought about by lower costs of production and lower barriers to entry;

The ways in which consumers are interacting with these services, and the way their expectations of regulation have evolved as a result, are discussed in section 1.4

##### 1.1.1 Audiences are presented with an ever increasing variety of audiovisual media services with a wide range of business models

An ever increasing number of content providers are taking advantage of the opportunity to reliably deliver live and on-demand streaming content to the consumer.

**Video on demand services:** According to the MAVISE database, as of December 2014 there were 2,563 video on demand services established in the European Union, with a wide

range of business and distribution models.<sup>8</sup> Examples of models include free “catch up” services provided by several free to air broadcasters, subscription VOD (SVOD) services (Netflix, HBO Go, Canal Play and Wuaki TV), and transactional VOD services including download to own (DTO) and download to rent services (DTR). An increasing number of video on demand providers that are not associated with traditional broadcasters are producing and commissioning original content (Netflix, Amazon).

**Live streaming services:** In addition, an increasing number of live streaming services are being widely offered through websites or apps by traditional broadcasters, TV platform providers and players that operate independently from traditional actors. In Poland, there are currently 74 linear audiovisual services offered exclusively on the internet that are registered with the Radio and Television Council (KRRiT), with many more that cannot be qualified as audiovisual media services under the legislation available in the market.

**Mixed media services:** The clear delineation of services in the traditional TV environment is being challenged by the emergence of services offering audiovisual material as part of a mix of media. Examples of these services include:

- fan sites mixing ticket sales with match coverage and club news;
- cultural magazines, which use the online publishing format to integrate text, photography, long form and short form content, with no one form taking precedence;
- newspaper websites, which often contain audiovisual content in a catalogue or integrated into articles.

Several respondents to the sub-group’s questionnaire highlighted examples of “hybrid” services which mix elements of scheduled and on-demand content. Examples of such services include the BBC iPlayer, the NRK player and VGTV, which all offer viewers the ability to watch on demand catch-up content alongside live output. The linear and on-demand elements are often presented as a seamless integrated offering. Beyond the offerings provided by major broadcast brands, there are several “hybrid” VOD services which primarily allow access to a catalogue but also incorporate a live programme stream.

A range of digital television platforms, such as cable and even satellite operators also integrate their subscribers’ access to linear and on-demand content by allowing both to be accessed through a single Electronic Programme Guide. The fact that the different types of content that they offer is subject to different regulatory environments is not obvious to the consumer. The policy implications of these developments are discussed further in section 4.

### **1.1.2 Open online sharing platforms have facilitated rapid growth in the popularity of user generated content, and provided new distribution opportunities for traditional and non-traditional players**

Though their emergence is by no means a new development, many video hosting/sharing services, such as YouTube, DailyMotion and Vimeo, are very widely used. Although the majority of content on these services is uploaded by individuals, professional content is also being delivered on these platforms. For example, some traditional broadcasters also offer “channels” on these platforms, featuring short clips, and/or whole programmes. Some

---

<sup>8</sup> The Development of the Market for On-Demand Audiovisual Services, European Audiovisual Observatory, March 2015.

popular channels are able to participate in the advertising income generated by the platform. These platforms' role in the distribution chain is discussed further in section 1.6.

### **1.1.3 Lower production costs and lower barriers to entry have brought about evolution in the form of content online and offline**

Online video platforms and the general openness of the internet have made it easier to offer audiovisual content. In addition, low cost cameras and editing software have made production cheaper. Small producers and even individuals can produce AV material to a high standard, which has proved particularly attractive to younger users and niche users. Traditional TV providers are responding to viewers' new preferences, with services such as channels broadcasting live video gaming competitions, and adult content channels comprised of a continuous stream of 3-5 minute clips without end credits or titles.

## **1.2 How are viewers responding to the new AV environment, and the proliferation of AV services?**

The last decade has been characterised by a remarkable pace of innovation and change in the range of platforms, devices and services available for consuming audiovisual content, and the services offered on them. However, while choice has been revolutionised, consumption habits are evolving more slowly. The key trends that we observe include:

- Levels of linear TV viewing have remained relatively resilient, and it remains the main way of watching AV content. However, a gradual but clear decline in linear viewing can be observed in many Member States.
- Viewing of content on demand is growing rapidly, but from a low base; as is viewing of new types of online audiovisual content.
- The TV set remains the most popular device for viewing AV content, but that other devices (in particular smartphones and tablets) have grown in significance.
- Younger viewers exhibit higher levels of online content consumption and are more likely to view content on devices other than the main TV set.
- Viewers' expectations of protection across different platforms have begun to evolve to reflect changes in the market. Research suggests that consumers now expect more consistent standards to apply across live TV and TV catch-up services, in particular when the services are offered under the same brand.
- The potential remains for a more transformational shift to occur due to greater integration of traditional TV with on demand content offerings.

### **1.2.1 Linear TV has remained relatively resilient, but a slow decline is evident across many Member States**

Though linear TV viewing has remained broadly resilient, there has recently been a slight decline in several Member States. Ofcom's 2015 International Communications Market Report<sup>9</sup> suggests that there was a small decline in daily TV viewing across half of the

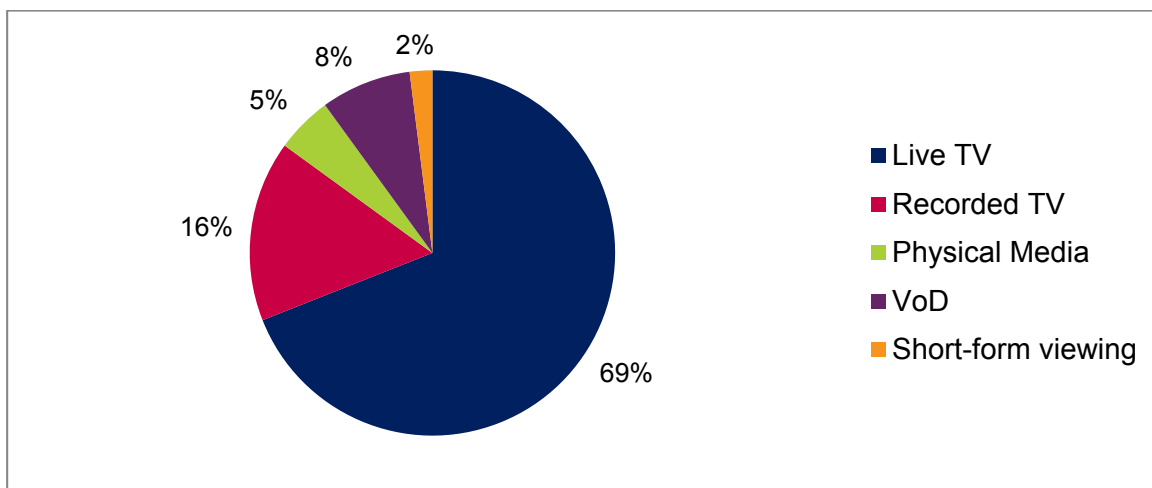
<sup>9</sup> Ofcom International Communications Market Report 2015 - [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/icmr15/icmr\\_3.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/icmr15/icmr_3.pdf)

European comparator countries in the study from 2013 to 2014.<sup>10</sup> This was the first year in which the research had shown a decline in linear viewing in the majority of European comparator countries. EurodataTV's One TV Year Report<sup>11</sup> also states that average daily TV viewing in 46 countries<sup>12</sup> declined from 3h56m to 3h54m between 2013 and 2014 (-1%). However, recent figures in other Member States demonstrate a small growth in live TV viewing. Viewers in the Netherlands watched an average of 200 minutes of television per day in 2013, the highest figure recorded since the records began.<sup>13</sup>

### 1.2.2 Online and on demand content consumption has grown, but linear TV remains the primary means of consumption for the majority of Europeans

As of June 2014, 25% of European internet users watched online video content every day.<sup>14</sup> However, the growth in online consumption has been from a comparatively low base, and linear TV viewing continues to dominate consumption. Figure 1.3, taken from Ofcom research, suggests that on average 69% of UK adults total viewing time is taken up by live TV. The second most popular viewing activity, recorded TV, accounted for 16% of viewing time. Added together, free and paid-on demand and streamed content accounted for 8%.<sup>15</sup>

**Figure 1.1: UK Adults (16+) viewing time across all devices**



Source: Digital Day 7-day Diary, Ofcom

<sup>10</sup> France, Germany, Italy, the Netherlands, Poland, Spain, Sweden, the UK

<sup>11</sup> EurodataTV, One TV Year Report 2014, <http://www.mediametrie.fr/eurodatatv/solutions/one-television-year-in-the-world.php?id=57>

<sup>12</sup> Austria, Northern Belgium, Southern Belgium, Bulgaria, English-speaking Canada, South Korea, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Lebanon, Malaysia, Netherlands, New-Zealand, Norway, Philippines, Poland, Portugal, Romania, Russia, Slovakia, South Africa, Spain, Sweden, French-speaking Switzerland, German-speaking Switzerland, Italian-speaking Switzerland, Taiwan, Thailand, Turkey, Ukraine, United Kingdom, USA, Venezuela, Vietnam. Different bases in each country.

<sup>13</sup> SKO Annual Report - [https://kijkonderzoek.nl/images/MSS/MSS\\_2014\\_rapportage\\_150302.pdf](https://kijkonderzoek.nl/images/MSS/MSS_2014_rapportage_150302.pdf)

<sup>14</sup> Statista: Percentage of internet users in selected countries that watch online video content every day - [http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=6355](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=6355)

<sup>15</sup> Source: Digital Day 2014, Ofcom - [http://stakeholders.ofcom.org.uk/binaries/research/cross-media/2014/Digital\\_Day\\_2014\\_Overview\\_of\\_Findings.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cross-media/2014/Digital_Day_2014_Overview_of_Findings.pdf)



A similar trend is suggested by recent figures from the Netherlands which show that 84% of viewing time is spent watching linear TV.<sup>16</sup> Though live viewing is gradually declining as more forms of online and on demand alternatives are brought to the market, these new forms of content are yet to cannibalise viewing to traditional TV channels. Research among UK internet users suggests that TV catch-up services are the most popular way to view TV programmes (“long-form content”) on demand, with 74% of users aged 16+ claiming to have “ever used” them. However, the research also suggests that around three quarters (72%) of internet users watch short-form content on platforms like YouTube.<sup>17</sup>

### 1.2.3 The consumption of on demand and online content and use of internet-connected devices to view content is higher among younger age groups

Audience demographic groups show different patterns of audiovisual media consumption. Children and young adults tend to consume higher than average amounts of online and on demand content and spend more time viewing content on devices other than the main TV set. Between 2013 and 2014, the global average live TV viewing decreased from 2h40m per day to 2h27m for young adults. The decline was 3 min for Dutch 20-34 year olds, 4 minutes for German 14-29 year olds, 6 minutes for Italian 15-24 year olds, 11 minutes for French 15-34 year olds, and 12 minutes for Danish 15-24 year olds and Spanish 15-25 year olds.<sup>18</sup> Norway has seen a significant decline in the amount of TV viewing by 16-24 year olds, which fell from 135 minutes in 2011 to 82 minutes in 2014, compared with a decline from 157 minutes to 132 during the same period for the general population.<sup>19</sup>

Among UK citizens aged 16-24, live TV accounts for only half of time spent on watching activities, with a fifth of viewing time (21%) spent on watching online content (8% short online video clips, on demand content 7%, downloaded/streamed content 6%).<sup>20</sup> This was more than double the average across all UK adults aged 16+. In France, almost 4 out of 5 internet users between 15 and 34 years old used catch-up services in 2014. Even though users aged 50 years and over demonstrated lower levels of usage, with 3 out of 5 using catch-up TV services, the increase in catch up viewing was far higher than it was for any other age group in the last five years. The proportion of users aged 50 and over using catch up services increased from 38.2% in 2012, to 60.7% in 2014.

#### Figure 1.2: Catch-up TV annual penetration rate per age in France (%)

<sup>16</sup> Survey of Media Time Use (Media: Tijd) -

[http://www.mediatijd.nl/images/pdf/MediaTijd\\_Brochure\\_WEB.pdf](http://www.mediatijd.nl/images/pdf/MediaTijd_Brochure_WEB.pdf)

<sup>17</sup> Ofcom, Online Demand and Online Media Tracker, 2014 -

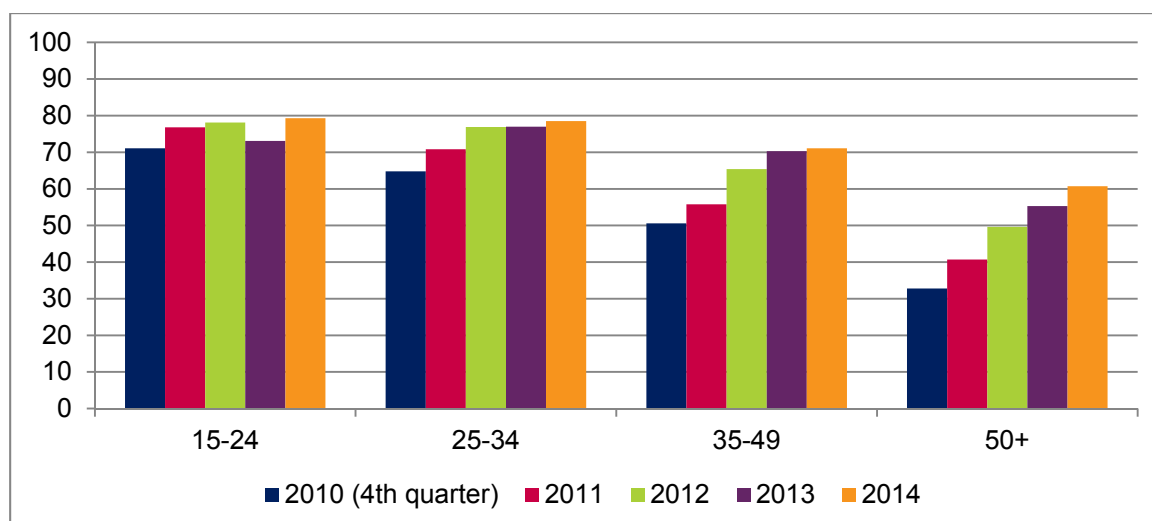
[http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015January/On-demand\\_and\\_online\\_media\\_use\\_and\\_attitudes\\_tracker\\_2014\\_Year\\_1\\_data\\_tables.pdf](http://stakeholders.ofcom.org.uk/binaries/research/statistics/2015January/On-demand_and_online_media_use_and_attitudes_tracker_2014_Year_1_data_tables.pdf)

<sup>18</sup> EurodataTV, One TV Year Report 2014, <http://www.mediametrie.fr/eurodatatv/solutions/one-television-year-in-the-world.php?id=57>

<sup>19</sup> Norwegian Media Barometer 2014 - [http://www.ssb.no/en/kultur-og-](http://www.ssb.no/en/kultur-og-fritid/statistikker/medie/aar/2014-03-25)

[fritid/statistikker/medie/aar/2014-03-25](http://www.ssb.no/en/kultur-og-fritid/statistikker/medie/aar/2014-03-25)

<sup>20</sup> Digital Day 2014, Ofcom



Source : Centre National du Cinéma et de l'Image Animée. *L'Économie de la télévision de rattrapage, 2014. Internet users aged 15 and over.*

#### 1.2.4 The television set remains the main viewing device for most Europeans, though the popularity of other devices is significant

For the majority of Europeans, the TV set remains the preferred device for viewing AV content. In Germany, 65.4 % of viewers aged 14 and over quote the TV set as their main device for TV and video consumption. Similarly, in France 81.3% of individuals watch live TV programs on a TV set every day, compared with only 1.6% on a computer, 0.7% on a smartphone and 0.6% on a tablet. The television set is also the main screen for viewing on demand programs. In France, 14.5% of individuals use their TV to watch on demand content every day, while 2.6% use laptop/desktops, 0.5% smartphones and 0.8% tablets.

**Figure 1.3: Daily use per screen in France in 2014 (%)**

	TV Set	Computer	Smartphone	Tablet
<b>Live</b>	81.3%	1.6%	0.7%	0.6%
<b>On demand</b>	14.5%	2.6%	0.5%	0.8%

Source : Médiamétrie, *Global TV 2014. October – December 2014. Individuals 15+.*

However, the use of other devices, in particular smartphones and tablets, to view content continues to grow. In Poland the number of people accessing audiovisual content on a smartphone increased to 48% in 2014, compared with 35% in 2013. The number of users seeking access to VOD services through tablets has risen in the same period of time from 1% to 29%.<sup>21</sup> In the Netherlands almost half of the population aged 13 and older (48%) claim to watch audiovisual material on smartphones and more than a third (36%) watch audiovisual material on tablets.<sup>22</sup>

Across Europe, among younger age groups are more likely to use of devices other than the TV set to consume audiovisual content. In Germany, research among the 14 –19 age group reveals that although the TV is the preferred device for video consumption only 36.6% name

<sup>21</sup> *Analiza rynku VOD w Polsce*, Pentagon New Media, Wrocław, 30.04.2014

<sup>22</sup> Moving Pictures, a study by GfK on behalf of SKO -

[https://kijkonderzoek.nl/images/Brochures/131114\\_SKO\\_BROCHURE\\_Moving\\_Pictures\\_2013.pdf](https://kijkonderzoek.nl/images/Brochures/131114_SKO_BROCHURE_Moving_Pictures_2013.pdf)

the TV set as their most used device, compared with 65.4% among all citizens aged 14+.<sup>23</sup> More than a third of Dutch viewers aged 13 to 19 years (36%) watch TV programmes via the laptop, with almost a quarter viewing content on tablets (24%) and smartphones (23%).<sup>24</sup>

### 1.2.5 Consumers' expectations of regulation have begun to evolve as well

Research published by Ofcom in December 2014 also found that the majority of participants thought that catch-up should be regulated to the same high standards as broadcast TV. The study found that while there is mixed understanding of regulation in the on-demand and online environment, perceived regulation is highest for "TV-like" online audiovisual services, and for devices used to access online content via a TV set. TV catch-up services have the highest proportion correctly identifying them as regulated (63% of users aware of them), while the perception that services are regulated is lower for more "non professional" content. Bearing in mind the mixed understanding in this area, the majority of online users claim to feel that current levels of regulation are about right (46%) or don't have an opinion (32%).<sup>25</sup>

Research conducted in France suggests that expectations may differ according to the content standards in question. In 2013, 74% of the French population considered regulation should apply on video content on the internet in order to protect young people against inappropriate content. However, fewer people (42%) considered regulation to be important to fight against racism, anti-Semitism and discrimination online.<sup>26</sup>

### 1.2.6 The potential for a greater shift towards online and on demand viewing remains

Though the evidence outlined above suggests a gradual evolution, rather than a revolution, in consumption habits, over a longer period there could be more potentially disruptive changes to viewing habits away from broadcasting. For example:

- New online entrants may begin to offer compelling content in greater volumes;
- Smart TVs will reach mass market penetration, user interfaces and recommendation tools may become enhanced and user friendly;
- More sophisticated on demand navigation tools may become more prevalent, enabling viewers to bypass traditional EPGs;

Though there is uncertainty, it is important that policy makers monitor these developments.

<sup>23</sup> Die Medienanstalten, Digitisation: All in flux – new forms and old patterns - [http://www.die-medienanstalten.de/fileadmin/Download/Publikationen/Digitalisierungsbericht/2014/Digitalisierungsbericht\\_2014\\_Englisch.pdf](http://www.die-medienanstalten.de/fileadmin/Download/Publikationen/Digitalisierungsbericht/2014/Digitalisierungsbericht_2014_Englisch.pdf)

<sup>24</sup> TNS NIPO, Media Standard Survey 2014 - [https://kijkonderzoek.nl/images/MSS/MSS\\_2014\\_rapportage\\_150302.pdf](https://kijkonderzoek.nl/images/MSS/MSS_2014_rapportage_150302.pdf)

<sup>25</sup> BDRC continental report for Ofcom, Attitudes to online and on demand content, 2014 Report., April 2015 - [http://stakeholders.ofcom.org.uk/binaries/internet/Attitudes\\_to\\_Online\\_and\\_On\\_Demand\\_Content\\_report\\_2014\\_report.pdf](http://stakeholders.ofcom.org.uk/binaries/internet/Attitudes_to_Online_and_On_Demand_Content_report_2014_report.pdf)

<sup>26</sup> CSA, Baromètre de perception de la qualité des programmes, Vague 2. <http://www.csa.fr/content/download/46682/487038/file/Barom%C3%A8tre%20de%20perception%20de%20la%20qualit%C3%A9%20des%20programmes.pdf>

### 1.3 The technological and business developments which have supported and enabled development in the audiovisual media market

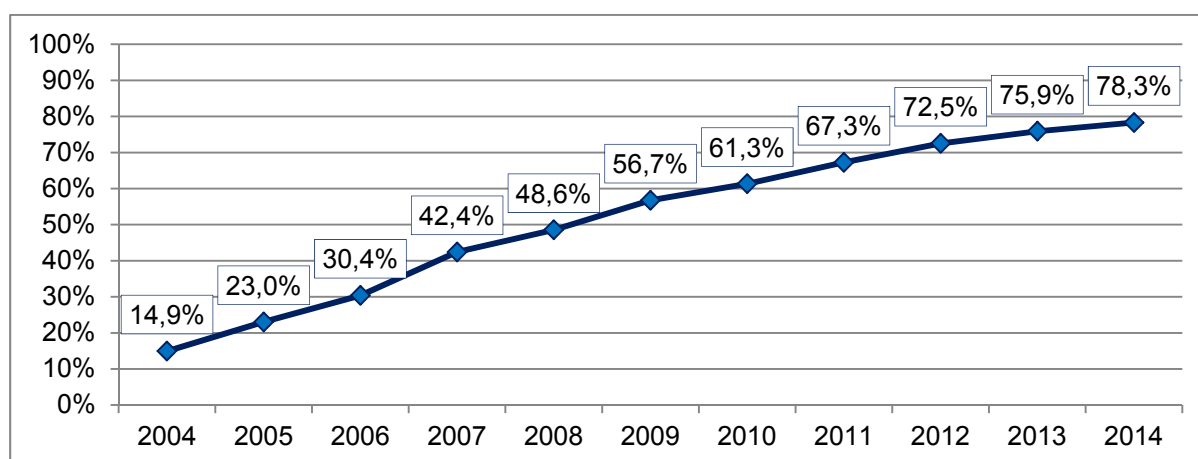
The key technology trends that have both contributed to changes in AV service provision between telecommunications and broadcasting include:

1. Expanding availability and take up of fixed and mobile internet services capable of delivering high quality audiovisual content to the consumer; and
2. The increased availability and take up of internet-connected devices on which AV content can be viewed;
3. Growing use of the internet as a delivery platform for AV content;
4. Service innovation from traditional players, and new entrants in the AV environment; and
5. The increased use of consumer data to shape and personalise AV services

#### 1.3.1 Continuing growth in the availability and take up of fixed and mobile broadband networks capable of delivering high quality AV to the consumer

Figures published by the European Commission as part of its 2015 Digital Agenda scoreboard suggest that basic broadband is available to all EU households when considering all major technologies (xDSL, Cable, FTTx, WiMax, HSPA, LTE and Satellite).<sup>27</sup> Eurostat data shows a six-fold increase of fixed broadband penetration from January 2004 to July 2014, when it stood at 78.3% of households (see figure 1.4).

**Figure 1.4 Broadband Penetration in the EU (as a percentage of households)**



Source: Eurostat – Community Survey on ICT usage by households and by individuals

We also observe increased availability and penetration of next generation access (NGA) services capable of delivering higher bandwidth content. European Commission data suggests that the coverage of NGA technologies (FTTx, VDSL and Docsis 3.0 cable) has more than doubled since 2010, and broadband services capable of delivering speeds greater than 30Mbps were available to 68% of EU households in 2015. Fast (<30Mbps) and

<sup>27</sup> Source: European Commission, Digital Agenda Scoreboard 2015 - Connectivity: Broadband market developments in the EU: <https://ec.europa.eu/digital-agenda/en/download-scoreboard-reports>

ultrafast (between 30 and 100Mbps) broadband penetration stood at 25.7%, following a significant annual increase of 32%. We anticipate that this growth will continue.<sup>28</sup>

European Commission data also show penetration of mobile broadband (meaning use of any device to access the internet away from the home or place of work) growing from 13% of the EU population in January 2009 to 67% in July 2014.<sup>29</sup> In 2014, 4G mobile broadband availability reached 79% in the EU, up from 27% in 2013.<sup>30</sup> This growth is facilitating more consumption of audiovisual content outside the home.

### **1.3.2 An ever increasing range of internet-connected devices are being brought to the market and quickly achieving mass market penetration**

The past decade has seen the emergence of an ever increasing range of devices that give consumers scope to access, create and share content across a range of services. The majority of internet-connected devices have continued to grow in penetration, which has both led to (and been partly caused by) increasing demand for content “on the go”.

The pace of innovation is unprecedented, and devices can reach mass market penetration very quickly. Figures from the European Audiovisual Observatory show the rapid growth in mobile device take up, with tablet ownership in the EU growing by 78.7% year-on-year from 2012 to 2013.<sup>31</sup> Mobile devices are likely to continue to increase in popularity. This is driven by the increased capabilities of networks, the increasing demand for services that provide content on-the-go, and the development of mobile devices with larger screens.

A particularly important trend is the emergence of “connected TV”, (not to be confused with IPTV) which describes a trend of integration of internet features into television sets (known as smart TVs) and set-top boxes, as well as technological convergence between computers and television sets and set-top boxes. The European Audiovisual Observatory’s 2014 yearbook suggests that smart TV sales grew by 42.3% year on year from 2012-13. Ofcom research suggests that a high proportion of smart TV owners in the EU 5 have connected their smart TVs to the internet and used the connection, ranging from 65% in France to 84% in Italy and the UK. The growth in penetration of smart TVs is expected to continue as smart functionality is increasingly built in to sets as standard.

### **1.3.3 A range of devices are delivering internet connectivity to the TV set**

Many devices capable of delivering internet-based content to the TV set have been introduced to the market, or have grown in popularity. Alongside Smart TVs with in-built connectivity discussed above, devices that enable consumers to access content delivered over the internet on the TV include:

<sup>28</sup> Source: European Commission Digital Agenda Scoreboard 2015, Digital Agenda Data Tool - <http://ec.europa.eu/digital-agenda/en/download-data>

<sup>29</sup> Source: Communications Committee – Broadband Access in the EU: Situation at 1 July 2014

<sup>30</sup> Source: European Commission, Digital Agenda Scoreboard 2015 - Connectivity: Broadband market developments in the EU: <https://ec.europa.eu/digital-agenda/en/download-scoreboard-reports>

<sup>31</sup> The European Audiovisual Observatory, 2014 Yearbook: Television, cinema, video and on-demand audiovisual services – the pan-European picture.

1. **Set top boxes:** Traditional TV platform providers have increasingly incorporated internet functionalities into their set top boxes, which deliver both linear content and non-linear content through the TV network and over the internet.
2. **Internet TV devices:** Several players have introduced external internet TV devices, which deliver content over the internet to the TV (Roku, Apple TV, Amazon Fire TV)
3. **Games consoles:** Consoles now include internet connectivity and allow access to varying amounts of audiovisual content as standard.
4. **Wireless streaming devices:** Devices such as Google's Chromecast, deliver content from a mobile device or PC/laptop to a TV screen using a Wi-Fi network.

#### 1.3.4 Growing use of the internet as a delivery platform for audiovisual content

The trends discussed above allow content providers new ways of reaching consumers, making use of the open internet. These services may be described as “Over The Top” or OTT – a term used to refer to any services delivered over the open internet; from search to VoD. The trends in connected devices described above have allowed the proliferation of audiovisual services which do not rely on traditional TV distribution technology, bespoke hardware or software; and do not need to reach agreements with platforms or access networks to offer their services to consumers.

#### 1.3.5 Audiovisual service innovation from across the communications sector and beyond

Audiovisual service providers are entering the market as start-ups and from a range of adjacent markets, including:

1. **Communications providers:** There have been multiple instances of communications providers moving into content markets as retailers or even producers. Widely reported examples include the Liberty Global – De Vijver merger in Belgium, and the entry of BT into the market for sports content in the UK. Content and communications services are increasingly sold in retail bundles, notably including internet and pay TV. Eurobarometer data from 2014 suggests that almost half of EU households purchase bundled communications services (46%), an eight point increase since 2009.<sup>32</sup>
2. **Broadcasters:** Existing audiovisual players are adding on-demand offerings alongside their linear services on traditional TV platforms; however, many are also launching their own online AV services and apps and bypassing platform operators, with examples including Sky's NOW TV in the UK.
3. **Technology players:** Some of the largest technology players, from diverse beginnings have entered a range of markets including AV services. Some now offer consumer devices and content portals. For example, Amazon, which entered the market as an online book retailer now operates an audiovisual content store (Amazon Instant Video), cloud services (Amazon Web Services) and consumer devices (Kindle e-readers and Fire tablets) among other services.

<sup>32</sup> [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_414\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_414_en.pdf)

An increasing number of providers (in particular communications providers and technology players) are present in multiple instances of the value chain. The potential implications of these business models are discussed further in section 5.

### 1.3.6 The increased availability and use of consumer data to shape and personalise AV services

User data is increasingly captured and used by service providers; the most widespread use is to deliver personalised content recommendations and/or targeted advertising; however, it may also form an input to decisions about content acquisitions or commissioning. While the use of data is most common among online service providers, traditional broadcasters are also looking to this opportunity. It may become an increasingly important influence on the way content is delivered and presented to consumers. The potential implications of this are discussed further in section 5.

## 1.4 How is the structure of the online audiovisual market different to that of the traditional audiovisual market?

The traditional media distribution chain comprised content production, content aggregation (commissioning or acquisition), and distribution via a single technology (over the air; via satellite or cable, or broadband networks) to a single type of viewing device.

**Figure 1.5 - Traditional TV value chain**

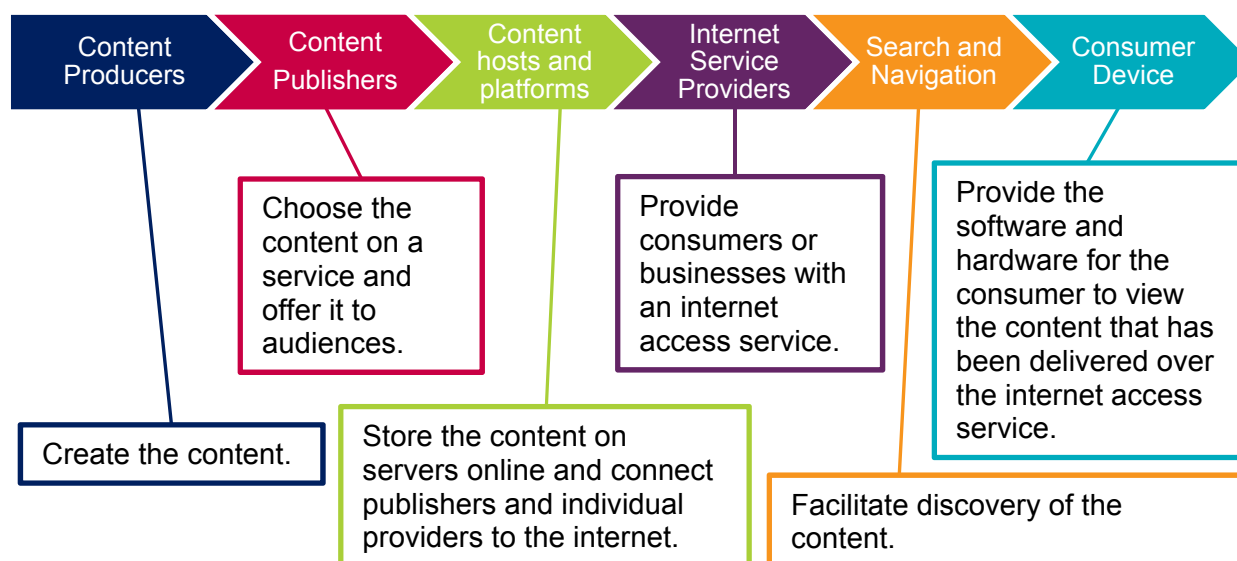


Convergence has made chains of distribution more complex. The range of actors conducting these “traditional” activities has diversified and the boundaries between different elements of the supply chain are blurring, for example:

- There has been consolidation, with players present in multiple instances of the value chain (producing and aggregating content, delivering to consumer devices across a multiple range of routes);
- Organisations that were traditionally playing separate roles are now competing to own the consumer relationship;
- There are an increasing variety of means by which players can aggregate content;
- Providers are able to directly interact with consumers over the open internet without requiring formal engagement with actors further along the chain;

For the purposes of informing a discussion about the material scope of the AVMS Directive, we set out a simplified model of online content distribution below. It is possible to group providers into six broad categories even if the nature of actors that fall within each category is diverse, and there are several players that operate in more than one segment. The model below does not capture certain actors that support the supply of content, such as payment providers or copyright collecting societies.

Figure 1.6 – Simplified online content distribution chain



#### 1.4.1 A more diverse set of actors are involved in content production, ranging from traditional producers to internet users

The number and variety of actors that commission, produce and own the original copyright to content available online has grown substantially in the past decade. This can include:

1. **“Traditional” producers:** Film producers, independent production houses, broadcasters.
2. **On demand producers:** An increasing number of OTT video on demand providers that are not associated with traditional broadcasters are producing and commissioning original content (Netflix, Amazon Instant Video).
3. **Individual artists and internet users:** As discussed in section 1.3.3 the emergence and increased popularity of open online platforms and social media has given individual users opportunities to make content available online.

#### 1.4.2 Content publishers describes actors that exercise prior choice over the content available on their service

Content publishers create or commission content and make it available online. The number and variety of actors that commission, produce and own the original copyright to content available online has grown substantially in the past decade. This can include:

1. **Linear and On demand service providers:** As discussed in section 1.3.1, a range of business and distribution models are prevalent among on demand providers that create and/or aggregate audiovisual content and deliver it to the consumer.
2. **Individual artists and internet users:** open online platforms and social media give individual users opportunities to make content available online by uploading it to sites including YouTube and DailyMotion.



Though there is significant variation in the business models the common characteristic that they share is that they create content or purchase content from one or more producers, and package it into a service which is offered to the viewer.

### 1.4.3 Hosting providers and platforms play an important role in storing and distributing content that is delivered over the internet

Content that can be found online must be hosted on a server connected to the internet. Producers and publishers use several means of storing and distributing content online:

1. **Using traditional “technical” hosting services:** using their own servers or servers offered by specialist providers to upload content so that it is available on the internet.
2. **Uploading it to “free” (advertising-funded) hosting platforms:** This can include dedicated online video sharing services (YouTube, Dailymotion, Vimeo, Vine). These platforms offer users a facility to upload audiovisual content to be distributed over the internet either through streaming or downloading via a website on the open internet or an app on a consumer device.
3. **Delivering content through TV platforms:** More and more TV platforms are driving internet connectivity to TV sets by integrating internet functionalities into their set top boxes, offering video on demand services and live streaming services including content that they own the rights to, and from trusted partners.
4. **Using internet TV platforms:** The last decade has also seen the entry into the market of online providers which operate independently of traditional TV platforms aggregating linear channels and making them available on the internet (Zattoo).

These services all provide facilities for third parties (whether it is individual users or trusted partners) to upload and store content on their service. However, the providers listed above operate different levels of control over the platform that they provide. For example:

- In the case of **video hosting providers**, although these platforms have developed their business models over time and carry out activities which affect the user experience, such as use of data to determine how content is presented to the user - suggesting their role is not merely passive - the content available on these platforms has been selected by third parties. The platform does not exercise prior control over the content that is uploaded to the service. This suggests their role is more similar to that of TV platform provider rather than an audiovisual media service provider with editorial responsibility.

As discussed in section 7 of this report, these providers of hosting services have special legal status as “hosts” under the e-Commerce Directive, and cannot be held liable for hosting illegal content unless they have been informed about that content.

- In the case of **TV platforms**, the platform provider plays a role in selecting the third party services that it carries, but does not have editorial control over the content transmitted through these third party services.

#### **1.4.4 Internet service providers (ISPs) play an essential role in enabling citizens and businesses to connect to the internet, but exercise no prior control over the content that is delivered over their networks**

The role of Internet Service Providers (ISPs) is to enable individuals, businesses and institutions to connect to the internet. The ISP owns a relationship with the customer with an agreement defining the technical characteristics of the connection (e.g. the internet speeds, the volume of data downloaded). However, ISPs do not exercise any control over the content that is delivered over their networks. Their role is to transmit data packets to the end user. ISPs qualify for “mere conduit” status under the e-Commerce Directive and cannot be held liable if their services are used to access illegal sites and services. The recently adopted Telecoms Single Market Regulation also constrains ISPs from controlling or restricting the content which may be accessed using the internet access service.

#### **1.4.5 Search and navigation tools are increasingly important in enabling users to discover content delivered over the internet, and are becoming an integral part of user interfaces**

In the linear TV space, the electronic programme guide (EPG) operated by the TV platform provider, and the numbers assigned to each channel are typically the primary navigation tools available to the consumer. In the online space, the picture is more complex. Navigation tools play an important role in facilitating internet users’ access to content online, including:

- 1. Web Search engines:** With ever more information becoming available on the internet, users are becoming more dependent on the facilities provided by search engines. The factors used by providers in their algorithms which determine search results vary greatly, but the range of data that is used continues to grow.
- 2. Recommendation Tools:** Actors involved at various points on the distribution chain are increasingly making use of tools which make use of both content metadata and user data to recommend content to users. A range of algorithms are used to determine how this content is presented, including contextual recommendations based on similarity to content that is being consumed, those based on popular or trending content and those based on the user’s behaviour.
- 3. TV Platform EPGs:** There is a growing tendency for TV platforms to provide EPGs which offer integrated access to live broadcast and VOD content. The way in which viewers access linear television services now involves many features that might previously have been considered unique to VOD services. Many platform providers offer information-rich EPGs to navigate linear content in a way that might appear to the consumer as a catalogue.
- 4. Social Media:** Social networking sites are an important route through which users discover content, whether it is “trending” content or material that has been uploaded or linked to by an individual user. Further, a number of players are making use of social media trends in order to determine how content is presented on their service (Netflix), or even to acquire “trending content” (Storyful).

#### **1.4.6 Consumer devices use either managed or open ecosystems to deliver content**

In the traditional broadcasting environment, the television set or set top box is the main device through which viewers can access audiovisual content distributed over TV signals. The growth of devices capable of delivering online audiovisual content to the consumer (1.5.2) and in particular to TV sets (1.5.3) has allowed new providers to enter the content distribution chain and compete for this relationship with the consumer.

The devices consist of the hardware and software that enable users to access content hosted online. They will interpret and present the content that arrives at the device in a form which is accessible by the consumer. They may use general internet browsers to enable the user to access content via web pages on the open internet, or bespoke applications providing access to a single service. These devices fall into two broad categories:

- 1. Managed, or “walled garden” environments:** This encompasses integrated device-platforms (e.g. Smart TVs, smartphones, games consoles, tablets, set top boxes). The device and operating system/user interface are provided solely as a package. In some instances the internet-based content will be delivered through a system managed solely by the platform provider and typically only content from “trusted” partners will appear (e.g. set top boxes by TV platform providers). For app-based systems, if third parties are able to develop apps/software for the operating system, the platform requires that any apps developed by third parties are developed to proprietary standards (Apple iOS).
- 2. Open environments:** This includes open platforms which enable third parties to develop software and applications which work across multiple devices with relatively little differentiation required (Android).

The operating systems used by devices are currently diverging and it is difficult to predict whether either model will become more prevalent in the industry. Nevertheless, if operating systems and software requirements continue to diverge, the need to develop multiple versions of a service to be compliant with multiple operating systems could increase costs for content providers.

## Section 2

# The public policy goals of the Audiovisual Media Services Directive

## 2.1 Introduction

Audiovisual content and services have historically been the focus of a number of specific public policy interventions. These measures have been taken because of the important impact that audiovisual content has on culture and the functioning of a democratic society.

In assessing the appropriateness of the scope of the AVMSD in today's context, it is important to remind ourselves of the goals it sets out to achieve. The review of the Directive, and the changes in the market that have occurred since it was adopted, provide us with an opportunity to assess the relevance of these aims. Below we summarise the broad purposes of the Directive, and the spread of views among regulators about the appropriateness of these purposes. This provides context for the rest of the report, which examines the extent to which these goals are being effectively delivered by the Directive's material scope.

## 2.2 The public policy goals of the AVMS Directive

It is important to remind ourselves of the AVMSD's intended purposes. We define the broad aims of the Directive based on its recitals and stated on the European Commission's website.<sup>33</sup> They are:

- To guaranteeing conditions of fair competition without prejudice to the public interest role to be discharged by the audiovisual media services;
- To ensure freedom of information, diversity of opinion and media pluralism;
- To encourage the activity and development of European audiovisual production and distribution;
- To stimulate new sources of television production, especially the creation of small and medium sized enterprises;
- To protect viewers, in particular minors;
- To respect and promote the diversity of Europe's cultures;
- To encourage media service providers to make services accessible to people with a visual or hearing disability;
- To enhance public awareness and media literacy; and
- To ensure that events of major importance for society are not broadcast in a way that deprives a substantial proportion of the public of the possibility of following them.

The table at **Annex 1** sets the provisions in the Directive which are designed to fulfil these goals, and whether they apply across all AVMS, or only to linear or non-linear services.

## 2.3 Do these policy goals remain relevant?

The results of the sub-group's questionnaire show that there is broad consensus that the goals listed above remain relevant, even if the mechanisms through which they are achieved may have to evolve. Though as we have observed in section 1 there have been some

<sup>33</sup> <http://ec.europa.eu/digital-agenda/en/audiovisual-media-services-directive-avmsd> and [http://ec.europa.eu/archives/information\\_society/avpolicy/reg/tvwf/index\\_en.htm](http://ec.europa.eu/archives/information_society/avpolicy/reg/tvwf/index_en.htm)

significant changes in the market for audiovisual content, these changes do not call the legitimacy of any of the current goals of the AVMS Directive into question.

In responding to the questionnaire, **fair access (5), findability (6), prominence (3) and integrity (1)** of audiovisual content services which fulfil certain public interest characteristics, were put forward for consideration as new goals in some responses. Those NRAs that suggested these new goals highlighted the fact that discoverability is likely to become increasingly important in view of the potential influence that the content that is proposed at the consumer's first point of access has over their choice of content.

In sections 3 and 6, we set out some further considerations as to how the Commission could proceed in order to secure prominence of public interest content as the market evolves. It should give careful consideration to how the AVMS Directive interacts with other relevant frameworks (in particular the Electronic Communications Framework) and in particular to which framework is most suitable for delivering this policy goal.

#### **2.4 Are these goals being effectively delivered by the Directive's current material scope?**

A majority of respondents to the sub-group's questionnaire (16/24) considered that the goals of the Directive have for the most part been achieved by its current material jurisdiction. However, there are some concerns in specific areas where the goals may not be being fully fulfilled or where they may be challenged in the near future. These included:

- **Fair Competition:** as outlined in section 5, with increasing convergence, there may be increased imbalances between players that are included in the Directive's scope and those which are excluded.
- **Promotion of European content creation:** The Directive may not fully achieve the goal to support European content creation. As new intermediaries that fall outside the scope of current requirements play a greater role in distribution of AV content, it may lessen the effectiveness (e.g. for requirements around prominence of public interest content). In particular, in some Member States players within the scope of the Directive are required to make financial contributions towards content creation, while players that are present in the market but outside the scope of the Directive do not.
- **Cultural Diversity:** As outlined further in section 5, guaranteeing cultural diversity in the light of new business and distribution models could become increasingly challenging. The development of algorithm-based recommendation tools, and "walled garden" ecosystems present on some consumer devices, could represent a risk for diversity, though there is uncertainty about how the market will evolve and these developments could equally provide new distribution routes for content providers;
- **Protection of Minors:** Statutory regulations on editorially responsible providers alone is not sufficient in itself to guarantee effective protection of minors without considering the role that other actors play, in particular the growing importance that technical protection tools provided by certain intermediaries.

## Section 3

### The distinction between regulated audiovisual media services and other services containing audiovisual content

#### 3.1 Problem description and structure

The changes described under Section 1 have facilitated the emergence of a variety of new and innovative services containing audiovisual content (as well as new intermediaries in the on-demand chain of distribution). In particular, regulators note the growth of:

- **“mixed media” services** which often combine elements of live streaming and/or on demand material with other content like archive of photographs or text offerings,
- **“hybrid” services** which (often seamlessly) blend elements of linear and non-linear content distribution.
- **open online sharing platforms** combining short form and user generated content and/or traditional broadcast services or
- delivery of content **“over the top” (OTT)** .

These changes make it more challenging in day to day regulatory practice to determine if these new or hybrid services fall within the scope of the Directive. This leads us to consider whether the scope of the AVMS Directive as it is today is still appropriate in terms of the services that it covers, and the definitions it provides to quantify those services.

Instead of trying to identify categories of innovative services that in future should or should not be covered by the Directive, ERGA proposes to look at the cumulative criteria that are currently provided by the Directive for determining whether a service constitutes a regulated on-demand audiovisual media service. Based on the replies to a questionnaire circulated among ERGA Members and existing regulatory practice and case law, we evaluate the following “critical” criteria in order to see whether they are still appropriate or should be clarified (by legislation or common guidelines/best practices) or modified:

- a) the provision of a “TV-like programme”
- b) the “principal purpose” of the “service”
- c) the definition of a media service provider and their editorial responsibility

In exploring whether these criteria should be modified, account is taken of the following considerations:

1. Any extension of the scope of the Directive needs to be in line with the (*current and future*) goals of audiovisual media regulation. In particular, it is assumed that the imposition of specific rules may only be justified when the social benefit of regulation outweighs the economic cost to the provider. In particular, it may only be justified for those audiovisual services that are important for society, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism - education and culture (Rec. 5 AVMSD) and if a more level playing field is achieved. The discussion on the extension of the scope of the AVMSD has to take into account whether any “new” services to be covered are already subject to other regulatory

frameworks (e.g. the e- Commerce Directive) and the interaction between these frameworks (see section 7).

2. The abstract criteria provided by the AVMSD to define an audiovisual media service and which have to be fulfilled cumulatively give a large room of discretion to regulators and implementation varies among Member States. To a certain extent this discretion is necessary to respect the different social and regulatory environments. However, with increasing cross-border provision of audiovisual media services, a more common approach becomes important. Several national regulators have expressed a need for further clarification of the relevant criteria and a more common approach to determining scope.
3. Regulatory competences for on-demand audiovisual media services also differ within the European Union. In some Member States, regulators do not have an overall competence to deal with these issues, whereas regulators in other Member States have developed a detailed practice and sometimes guidelines on how to interpret the different criteria. Also, in some Member States, on-demand audiovisual media services are subject to a requirement to notify and pay a fee.

## 3.2 The provision of a “TV-like” programme

### 3.2.1. The definition of the criterion “TV-like” programme in the AVMSD

According to Art.1 par. 1 b) AVMSD, “*programme*” means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama;

Only programme services “*the form and content of which are comparable to the form and content of television broadcasting*” shall be subject to the AVMSD. The intention of the European legislator is to cover only on-demand and broadcast television audiovisual media services which are “television-like”, i.e.

*“that they compete for the same audiences as television broadcasts and the nature and the means of access to the service would lead the user to reasonably expect regulatory protection within the scope of the Directive”* (Recital 24).

The AVMSD allows for “TV-like” to be interpreted in a dynamic way to take into account developments in television broadcasting.

### 3.2.2. Regulatory practice and case law

In order to determine whether a new service constitutes a “TV-like programme”, some regulators have published decisions or guidance which set out factors they take into consideration when determining whether the offerings are comparable to TV programmes. Also, the European Court has recently ruled on the interpretation of a “TV-like programme”, determining that a subdomain of the Tiroler Zeitung Online website, which contained short

videos consisting of local news bulletins, sports and entertainment clips, should be classified as an audiovisual media service.<sup>34</sup>

### ***Published Regulatory Decisions***

Through a number of published decisions, Ofcom (UK) has identified a number of characteristics which are considered when assessing whether a programme (linear or on demand) is TV-like.<sup>35</sup> These include the duration of the programme, the narrative structure, the production techniques and quality, whether the content has titles and credits. The main reference point for comparison is linear television programmes.

The practice established by Ofcom is part of the guidelines which ATVOD, the UK co-regulator, has published for stakeholders who have to notify their Video On Demand (VOD) services. The “Guidance on who needs to notify”<sup>36</sup> sets out the factors and criteria ATVOD applies when determining whether a service falls within the definition of an on-demand programme service. Again, in its assessment of what is ‘TV-like’, ATVOD compares video content with broadcast television programming of the same or equivalent genre.<sup>37</sup> This approach means that services that provide audiovisual material which is not comparable to a traditional broadcast television tend to fall outside the regulatory regime.

The Belgian CSA has also published recommendations which give guidance to stakeholders on which VOD services have to be notified under the specific media regulation.<sup>38</sup> The CSA applies a broad concept of what is a “programme” and does not consider the “tv-like” character of a programme as a stand-alone, additional criteria intended to restrict the scope of media regulation. The CSA therefore considers short-form programs and local, institutional, cultural, social services distributed via a catalogue as programmes to be notified as on-demand audiovisual media services.

### ***Case C-347/14 – New Media Online***

In examining whether the distinct video section of a newspaper website (Tiroler Tageszeitung Online, operated by New Media online GmbH) with a catalogue of around 300 videos can be considered a “TV-like programme”, the Austrian Regulator focused not on the length but on the content of the videos, available in a discrete video section of the newspaper website, and concluded that the audiovisual reports on local events and activities, sport reports, film trailers or instructions or actual news events compared to the content of a broadcast and addressed the same audience as television broadcast.<sup>39</sup>

<sup>34</sup> Opinion of Advocate General Szpunar of 1 July 2015, Case 347/14 – New Media online GmbH, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165435&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=615968>

<sup>35</sup> Ofcom scope determinations: <http://stakeholders.ofcom.org.uk/enforcement/on-demand-standards/scope-appeals/>

<sup>36</sup> [http://www.atvod.co.uk/uploads/files/Guidance\\_on\\_who\\_needs\\_to\\_notify\\_Ed\\_4.0\\_Feb\\_2014.pdf](http://www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed_4.0_Feb_2014.pdf)

<sup>37</sup> Section 3.9 of the Guidance note lists the factors which ATVOD takes into account.

<sup>38</sup> „Recommandation relative au périmètre de la régulation des SMA « , <http://csa.be/breves/652>

<sup>39</sup> Kommunikationsbehörde Austria, Bescheid KOA 1.95 0/12-048: [https://www.rtr.at/en/m/KOA195012048/29200\\_KOA\\_1.950-12-048.pdf](https://www.rtr.at/en/m/KOA195012048/29200_KOA_1.950-12-048.pdf)



In its judgement of 21 October 2015, the European Court of Justice has in principle confirmed the approach taken by the Austrian Regulator<sup>40</sup> in the context of a Preliminary ruling submitted by the Austrian Verwaltungsgerichtshof in the case C-347/14 – New Media Online.<sup>41</sup> The Court ruled that the concept of a programme covers the provision of short form videos – under the subdomain of a newspaper website - consisting of local news bulletins, sports and entertainment clips. In particular:

1. The Court recalls that according to the Directive, a “programme” is a set of images that form an individual item within a schedule of catalogue. The question whether a programme compares in form and content to television broadcasting therefore relates to the single video clip and not to the complete compilation of videos.
2. The Court states that the concept of a “programme” under Art. 1 (1) (b) of the Directive does not contain any requirement relating to the length of a set of images.
3. In order to qualify as a “TV-like” programme, in particular three criteria must be fulfilled the videos must be aimed at a mass audience, they are likely to have a clear impact on society and the manner in which the user selects the videos is similar to “classical” VoD content.
4. The Court states that the purpose of the Directive is to subject actors who compete for the same audience to the same rules in order to avoid unfair competition. Videos that are produced by local radio broadcasters and available on their website or videos on cultural or sporting events or recreational reports can be considered to compete with music channels, sports channels and entertainment programmes.

The Judgement of the Court provides valuable clarification on the concept of a “tv-like” programme falling within the scope of the Directive. In particular, to decide whether a programme is comparable in form and content to television broadcasting, the object of comparison is the video clip and not the overall presentation in a catalogue. It can also be concluded from the considerations of the Court that the tv-like criteria does not require “one to one comparability” to traditional broadcast content.

### **3.3.3. Clarification or modification of the criterion “TV-like” programme?**

The TV-like criterion is unavoidably subjective and there are different national interpretations. It is fundamentally important that regulators, viewers and service providers understand where the boundaries of the regulatory framework fall, and the need for clarity is a common concern among ERGA members. The definition the AVMS Directive works with needs to keep pace with market developments. The requirement to compare programming to a theoretical linear counterpart is becoming difficult to achieve, particularly in genres, such as children’s and adult content, where online on demand is starting to replace broadcast provision. Ofcom’s 2015 Children and Parents Media Use and Attitudes research indicates that in households where both are available, 12-15 year olds are more likely to say they

<sup>40</sup> Judgement of the European Court of 21 October 2015, Case 347/14, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=170123&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=475262>

<sup>41</sup> Opinion of Advocate General Szpunar of 1 July 2015, Case 347/14 – New Media online GmbH , RN. 21,29,43, 48; - see FN.1

prefer to watch YouTube videos in preference to TV programmes.<sup>42</sup> In the absence of any direct comparison, the assessment of TV like inevitably requires subjective formulations of what might be the characteristics of any linear equivalent.

In terms of modifying the criteria, there is a trade-off:

- a) On the one hand, whether the current wording of the criterion is “future proof” may be challenged by market developments. For example, the increasing production and consumption of high quality short form content – in particular by the younger generation - which appears on platforms like YouTube<sup>43</sup> or is tailored for consumption on mobile devices.<sup>44</sup> This suggests that VOD producers not only compete against traditional broadcasters, but that they may also compete increasingly with providers of high quality short form content - using established brands for new forms of presentation - adapted to the multimedia environment. The standards areas that the AVMS Directive has as part of its ambitions, in particular the protection of minors may be put under strain if it becomes increasingly difficult to find linear broadcast content that can be compared to a broad swathe of mainstream video on demand programming.
- b) On the other, the criterion represents an “anchor”, with the intent to limit regulation to services on which the viewer might legitimately expect regulation, and where it is proportionate for regulation to apply due to the impact that services have on society, democracy and culture. In reviewing the definition, it is important that the Commission bears these two objectives in mind.

A new definition may not solve the interpretation issues, so it will be important to take steps (such as the provision of clear guidance) in order to ensure that the boundaries of the regulatory framework are well understood and consistently applied.

### ***Recommendation 1 – “TV-like”***

ERGA suggests that the Commission should revisit the definition of an audiovisual media service in a revised AVMSD and review the “TV-like” criterion in Article 1.b and recital 24. In reviewing it, the Commission should be mindful of the underlying goals of the Directive (e.g. the need for fair treatment of competing services, impact on society, democracy and culture, audience protection) and the principle of proportionality. The EU-Commission should consider whether, by working with ERGA, it can develop a set of guidelines that will help to provide greater clarity and a more consistent application of the definition.

## **3.3 The principal purpose of a service**

### **3.3.1 The definition of the “principal purpose of a service” in the AVMS-D**

Recital 22 of the AVMS-D states:

<sup>42</sup> Ofcom, Children and Parents Media Use and Attitudes Report 2015 - [http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/children-parents-nov-15/childrens\\_parents\\_nov2015.pdf](http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/children-parents-nov-15/childrens_parents_nov2015.pdf)

<sup>43</sup> See Ofcom Decisions BBC Top Gear; BBC Food, Fn.

<sup>44</sup> In the UK, Channel 4 has very recently launched a short form mobile service available to customers on the O2 phone network

*“For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. ...*

Recital 28 of the Directive further clarifies that:

*“The scope of this Directive should not cover electronic versions of newspapers and magazines”.*

### **3.3.2 Regulatory practice and case law**

Where audiovisual material is offered in the context of a multimedia service - examples include online newspapers with video sections, gambling websites with links to articles and sport broadcasts, radio websites offering sections with music videos, sports clubs that illustrate match reports with video recordings and interviews – regulators face the challenge first to define the service at stake before they evaluate whether the audiovisual content or incidental to this service or rather constitutes its principal purpose.

Although the regulatory approach is distinct in detail, there is a widespread regulatory practice among those ERGA members who have dealt with these questions – mostly in the context of newspaper or radio websites – that a website can contain several “services”, each with its own principal purpose. Separate services have for example been identified in cases where the different sections of the website were largely independent of each other and an overarching, unifying purpose of the site was missing. For some regulators, a video section that can be viewed independently from the rest of the website and consists of a catalogue of programmes in itself is generally considered to be a service in its own right.<sup>45</sup> In these cases the principal purpose of the service is usually straightforward to identify because the main aim of the video section obviously is to provide audiovisual content and thus fulfils the criterion “principal purpose of the service”.

#### ***Regulatory Practice***

In the event that the audiovisual material provided on the website cannot be considered to comprise a service in its own right, the question is whether it is ancillary to the provision of another service or whether it constitutes the principal purpose of the overall service. Again practice differs among regulators.

In its published decisions,<sup>46</sup> Ofcom has identified features it considers to be characteristics of a service where providing audiovisual material is more likely to be the principal purpose and,

<sup>45</sup> BE CSA, France, Hungary, Sweden, Norway ; BE VRM – case 60 second news; (*other??*)

<sup>46</sup> Ofcom scope appeals: <http://stakeholders.ofcom.org.uk/enforcement/on-demand-standards/scope-appeals/>

by contrast, characteristics of a service in which the provision of audiovisual material is more likely to be merely ancillary. These features relate to the “homepage” through which the audiovisual material is accessed; the cataloguing and accessing of the material; the duration, completeness and independence of the material; the access links between the relevant audiovisual material and other content; the content links between the relevant audiovisual material and other content; the balance and nature of the audiovisual and other material; and whether, on an overall assessment, the audiovisual material could be said to be integrated into, and ancillary to, another service. The French CSA relies on a more quantitative approach based on the presentation and shape of the service e.g. the number of programmes and/or the number of sections devoted to audiovisual.

### **Case C-347/14 – New Media Online**

In the New Media Online Case, the European Court interprets Recital 28 in the light of the goals of the Directive, which are to protect consumers and to achieve a level playing field in the audiovisual media services market. The Court concludes that offerings of electronic newspaper or magazine are not to be excluded per se from the scope of the Directive on the sole basis that the service is operated by a publishing company from the printed press.

The assessment of the principal purpose of the service requires – according to the Court – an examination whether the service offered in the video subdomain is independent in form and content from the written press articles of the online newspaper website. **Only if the service appears to be indissociably complementary to the journalistic activity of the publisher, in particular as a result of the links between the audiovisual offer and the offer in text form, it will not be covered by the Directive.**

The Court confirms that a multimedia website - and in consequence a legal entity - may offer “several” services. This confirms existing regulatory practice in some Member States .

The relevant criteria to establish whether the provision of audiovisual media content on a multimedia offering constitutes a separate service are the links (in form and content) that exist between the overall offer (text, music and/or print) and the audiovisual part which have to be examined on a case by case basis. This means that hybrid services mixing videos with photographs, text or music offerings may fall under the scope of the Directive even if the audiovisual content does not constitute a standalone offer or is presented in a discrete part of the website under a subdomain. The Court considers that the content links between the audiovisual material and the other content constitute a main criterion for determining whether the audiovisual part is indissociably complementary to the main purpose of the website.

### **3.3.3 Clarification or modification of the criteria “principal purpose of a service”?**

It is necessary to consider whether the “digitisation” of the media environment, where multimedia or “hybrid” online services are a common feature, requires a new approach to determining which on-demand services that contain audiovisual content should qualify for specific regulation. In addressing this issue care must be taken not to extend the scope of the Directive excessively, in such a way which would place too heavy an administrative burden on providers and raise issues in terms of efficient implementation.

The goals of the Directive should be the reference point for the boundary between more and less regulated audiovisual media services. In principle, services that fully or partly compete for the same audience or in the same advertising markets should be subject to the same rules. At the same time, regulation may only be justified for audiovisual content services that have a sufficiently important impact on society, democracy, education and culture.

In this perspective the way in which a service is presented and how it is perceived by the audience are fundamentally important. We note above that the emergence of “mixed media” services challenges the clarity of the “principle purpose of one service” criterion. In order to ensure that a future framework is well understood by viewers, the industry and regulators, it is important that the Commission takes steps to address this ambiguity.

**Recommendation 2 – “principle purpose of one service”:**

ERGA proposes that the Commission should review and clarify whether the Directive is compatible with the notion of “one service”; i.e. that one legal entity can offer or one website can contain several services, each with its own principal purpose.

### **3.4 The editorial responsibility of the audiovisual media service provider**

#### **3.4.1 The definition of the audiovisual media service provider and editorial responsibility in the AVMS-D**

Only providers who are editorially responsible for the selection and organisation of the audiovisual content media services qualify as audiovisual media service providers for the purposes of the Directive.<sup>47</sup> This excludes natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties (Recital 26 AVMSD). According to Art.1 para. 1 d) of the AVMSD, “editorial responsibility” means:

*“... the exercise of effective control both over the selection of the programmes and over their organization either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content of the services provided.”*

Editorial responsibility constitutes one of several establishment criteria to determine the jurisdiction under which an audiovisual media service provider is held responsible (Art. 2 para. 3 AVMSD) which are considered in the ERGA report on territorial jurisdiction.

#### **3.4.2 Regulatory practice and case law**

The wording of the Directive suggests that the criterion of editorial responsibility was intended to distinguish providers of content from persons supplying merely a transmission or hosting service, such as ISP or providers of hosting platforms for user generated content. However, there are several instances in which these clear cut distinctions between transmission and content provision are increasingly blurred in a converged environment.

<sup>47</sup> Art. 1 para 1 d) AVMSD

Regulators increasingly encounter cases where two or more persons have a role in determining the range of programmes offered in a service and their organisation within that range. Examples include:

- platform operators that determine the design, branding and look of a catalogue whereas the content provider decides on the amount and type of programmes they makes available on the platform;<sup>48</sup>
- hosting providers that offer whole “branded channels” of professional content on their video sharing platforms;<sup>49</sup>
- on-demand content aggregators that provide access to content from a variety of different sources but use techniques to facilitate the location of the content via search algorithms, an EPG or alphabetical or genre indexing; or
- TV device manufacturers who decide on the organisation of programmes to appear on the opening screen of smart TVs.

In these cases the “intermediary” assumes a role in modifying the service and may also act as a gatekeeper who may influence or even control the content offered to the consumer.

In cases where several actors share responsibility for the selection and organisation of the programmes, media regulators generally define which of the players assumes the effective control or retains de facto the “final say” over the choice and organisation of the programmes in a service. In determining which party has effective control some regulators refer to contractual agreements as a starting point.<sup>50</sup> If the parties have settled the ambiguity as to which party should be considered to exercise editorial responsibility in their contracts this is considered - in the absence of strong and compelling evidence to the contrary – a valid indicator for where the editorial responsibility lies.<sup>51</sup> Some regulators consider that “presentational” techniques such as algorithms used to facilitate the discovery of content do not fulfil – on their own - the requirements to establish editorial responsibility.<sup>52</sup>

There is limited case law to date which deals with how to determine editorial responsibility in cases of shared editorial contribution by several actors in the audiovisual media value chain.

### 3.4.3 Clarification or modification of the criteria “editorial responsibility” ?

The concept of editorial responsibility is essential for identifying the audiovisual media service provider who in turn is responsible to respect the specific requirements of the Directive. As recital 25 of the AVMSD already suggests there may be a need to further clarify the concept of “effective control” in cases where more than one person has some editorial control in the offering an audiovisual on demand media service.

<sup>48</sup> Ofcom decision BSKyB- Appeal at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/bskyb-appeal.pdf>

<sup>49</sup> EX „Most popular videos on Youtube Belgium“ at: .....

<sup>50</sup> Ofcom Decision Nickelodeon and others at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/nickelodeon.pdf>; Austria mobile operators offering linear loops of av content *reference????*

<sup>51</sup> Ofcom Decision Nickelodeon and others at:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/nickelodeon.pdf>; Ofcom BSKyB Appeal at:

<sup>52</sup> ATVOD , Guidance on who needs to notify, Section 4.6 d); Norway *any reference available?*

It is fundamentally important that a future regulatory framework avoids a situation where more than one actor can be considered to have editorial responsibility over a service and be held to account for complying with AVMS rules. There is a broad consensus among ERGA Members that the concept of editorial responsibility should be clarified through guidelines in order to address interpretation issues that may arise from situations where more than one actor in the value chain appears to exercise a form of control.

**Recommendation 3 – Editorial Responsibility:**

ERGA suggests that in future the European Commission should work with ERGA and the industry to develop guidance on the concept of editorial responsibility, in particular on the aspect of “effective control”, “relevant impact” and the organisation in a “catalogue”.

### 3.5 The role of audiovisual platforms

#### 3.5.1 – The policy debate

Taking into account the increased influence that intermediaries or distributors may exercise through their enhanced role in the value chain, the Commission should consider whether it would be appropriate to bring certain intermediaries and platform providers within the scope of the AVMS Directive.

A number of media regulators in their replies to the ERGA questionnaire, highlighted that several intermediaries in the audiovisual value chain such as hosting platforms or device manufacturers come in between the user and the content provider and may – in cases of significant market presence – become gatekeepers that influence or even control the content offered to the consumer. There are concerns among several members about the effects that this could have on content diversity, pluralism, content funding and audience protection. Others highlighted the need to gather further evidence on whether these effects could materialise, and whether any enduring bottlenecks are likely to emerge in the near future.

The review of the AVMS Directive, and the Commission’s in depth enquiry into the role of online platforms, represent an important juncture in the evolution of Europe’s regulatory framework. It will be essential, as part of these exercises, for the Commission to carefully consider what the evidence it gathers suggests about the role that certain platforms and intermediaries might play in addressing any concerns that may arise.

In considering any new rules to impose on platforms, the Commission will need to bear in mind the risks that arise. It would be undesirable to introduce a new system of intermediary or platform regulation which is not based on clear definitions, and where rules do not appropriately reflect the role that specific actors play in the value chain. There would be a need to clearly define which new sets of actors which are subject to regulation, and any new rules would to be carefully designed.

#### 3.5.2 – Guiding Principles

If the Commission does bring new actors within the scope of AVMSD, then it would perhaps be more appropriate to distinguish between audiovisual media service providers as defined in the current framework, on the one hand, and introduce new provisions for platforms on

the other. A modification of the “editorial responsibility” concept to cover the activities of such actors may lead to further ambiguity in determining the locus of editorial responsibility.

The degree to which audiovisual policy obligations should apply, and the specific rules that could apply, should depend on the specific nature of a platform or intermediary. It could depend on whether a platform is operating as an “audiovisual platform” which purely acts as a platform for audiovisual content (such as a TV platform), or as a platform for a much wider range of content and services (such as a general web search engine). Other relevant factors in differentiating obligations could include the turnover, and the degree to which the platform provider plays an active or passive role in distributing services through its platform.

Such a two tier approach could ensure the continued effectiveness of specific media rules of the Directive which apply to providers who are editorially responsible for the broadcast and broadcast-like online content that they offer. On the other hand, a new and separate basic set of rules would perhaps be more effective and proportionate in reflecting the specific role that certain platforms play, and addressing any specific concerns around the fulfilment of the specific goals of the Directive (plurality, freedom of information and consumer protection) that may arise from convergence and the growth of new players. This is discussed further in section 6 of this report.

#### **Recommendation 4 – audiovisual platforms/intermediaries**

ERGA recommends the European Commission should consider – within its current comprehensive assessment on the role of online platforms – whether it is desirable, in a revised AVMS Directive, to introduce a specific set of rules for audiovisual platforms and intermediaries with relevant impact on media pluralism and diversity. The Commission should take account of what the relevant impact and economic assessments might suggest for extending the scope of the Directive in this way.

ERGA could consider further in-depth reflection on this topic, examining in particular the aspects of definitions, the potential effects on pluralism and diversity of the enhanced role of certain intermediaries, and how to weigh this up with the need to preserve innovation online.



## Section 4

# Should different levels of regulation still be considered on EU or national level and if yes, which criteria should determine different levels of regulation?

## 4.1 Introduction

### 4.1.1. – What is the issue at stake?

On the basis of the suggestions outlined in Section 3 this section examines whether:

- different levels of regulation for linear and on demand services should still be considered;
- what the relevant criteria to determine a graduated approach should be; and
- on which level - EU or national - they should be regulated.

The AVMSD establishes a tier of coordinated rules that apply to all providers of audiovisual media services. The Directive distinguishes between linear (television broadcasts) and non-linear (on-demand) services and foresees stricter rules for providers of television broadcast services. The criterion which determines whether an audiovisual media service qualifies for stricter or lighter regulation is the way in which it is distributed. The main rationale for this graduated regulation is the degree of user control over the services (active “lean forward” or passive “lean backward” consumption) and the (less important) impact they have on society (Recital 58). This justifies imposing lighter regulation on on-demand audiovisual media services which are only required to comply with the basic rules provided for in the Directive.

However, in a convergent environment, this logic might be questioned. The increase of “hybrid” services and the distribution of the same or similar content over different devices as described under section 1, calls us to consider whether delivery of the service might be the only appropriate criterion to justify graduated regulation. Arguments in favour of a review of the delivery criterion mainly include the following points:

- From a consumer perspective, the distinction between linear and non-linear offers is blurring either because the same content is offered on different platforms (linear TV on mobiles and tablets – VoD on TV screen) or because different types of media service (print/VoD/ streaming) are accessible via the same interface.
- As a consequence the assumption of more or less control of the consumer in the linear respectively the on-demand world may be called into question.
- The increase in offers and consumption of VoD services<sup>53</sup> heightens the impact of on-demand AV media services on society, thus challenging the assumption under Recital 58 of the AVMSD

<sup>53</sup> Regarding the increased consumption of VoD services, see e.g. DLM's Digitisation Reports 2014 and 2015 Chapter on “Current status of digitisation in German (TV) households”, available under [http://www.die-medienanstalten.de/fileadmin/Download/Publikationen/Digitalisierungsbericht/2015/Digitisation\\_2015\\_english.pdf](http://www.die-medienanstalten.de/fileadmin/Download/Publikationen/Digitalisierungsbericht/2015/Digitisation_2015_english.pdf)

- The growing importance of audiovisual on-demand media services increases competition between the different audiovisual media service providers and enhances the need to provide a level playing field.

On the other hand, studies show that television broadcasting is and will in the foreseeable future continue to be the major information source for the majority of viewers and users may expect more protection in the linear broadcasting environment. Some regulatory authorities argue that consumers still have strong expectations of a higher level of regulation for linear audiovisual media services.

Furthermore, a number of rules of the current Directive may not be straightforward to apply to on demand audiovisual media services, e.g. the quantitative requirements for TV advertising or the requirements in the context of events of major importance to society. This suggests a need to maintain some distinction in regulation between linear and non-linear services. Last but not least, it should be considered that some regulatory authorities have no or only limited statutory powers in respect to non-linear services (and some have therefore not been in a position to comment on the necessity to maintain or not the distinction between linear and not linear services).

#### 4.1.2 – Our approach to this question

Rather than answering the question in an overarching fashion, **ERGA suggests each of the coordinated areas of the AVMSD** (editorial and human dignity standards, qualitative advertising rules, quantitative advertising rules, protection of minors, right of reply, promotion of EU works, events of major importance to society, short news reports) **should be reviewed**. The review should examine on the basis of the delivery criterion **whether different standards of regulation are still justified**. A table detailing the current common and different rules for linear and non-linear services is available at **Annex 2**.

In the sub-group's discussions we have identified:

- **Continuity:** Provisions that already apply across all AVMS, which have proved efficient and so a coordinated approach should be maintained;
- **Modifications:** Provisions where a more coordinated approach may be justified in order to reflect changes in delivery and consumption of audiovisual media;
- **Specific rules for linear services:** Rules which should continue to apply only to linear services; and
- **Further analysis:** A number of the rules require further careful assessment of the impact on both the dynamics of the market and viewers in the different Member States.

We set out the rules which we consider to fall within each category below. This section should be read with its minimum harmonisation approach in mind. Member States have the freedom to go beyond what the Directive demands by way of a set of minimum standards should it choose to do so. Our advice should be viewed with this point in mind. It was also not within the remit of this sub-group to suggest amendments to the specific wording of each rule. As such we approach each issue purely from the standpoint of whether it makes sense to have a rule that only applies to linear, or whether a rule should apply across all AVMS

## 4.2 Continuity

### 4.2.1 – Co- and self-regulation, obligation to inform, prohibition of incitement to hatred and accessibility

To date, the same rules already apply to linear and on linear audiovisual media services in respect to the principle of self- and co-regulation, to the obligation to inform, the prohibition of incitement to hatred and the obligation to promote accessibility to people with visual or hearing disabilities (Art. 4(7) – 8 AVMSD). Taking a coordinated approach in this area remains efficient, and there should still be rules which apply to all audiovisual media services in the following areas.

#### 4.3.1. Common qualitative rules for advertising

Common rules for all audiovisual media services already apply to a number of qualitative requirements in advertising. These include the prohibition of surreptitious advertising, subliminal techniques, discrimination, tobacco advertising or advertising of alcoholic beverages directed to minors, advertising of medicine available only on prescription or advertising that causes prejudice to health and environment or physical or moral detriment to minors. Also audiovisual commercial communication must be recognizable and respect of human dignity and common rules apply to sponsoring and product placement. Codes of conduct regarding “unhealthy” food are to be established (Art. 9 AVMSD).

It has proven efficient to apply rules in these areas to all audiovisual media services, and, setting aside any issues that may have arisen from the specific wording of the rules themselves, the coordinated application has raised no major concerns in past regulatory practice which would justify a revision.

#### **Recommendation 5 – Continuity**

There is a broad consensus among ERGA Members that some provisions in the current Directive that already set a common standard for all audiovisual media services have been proven efficient. This applies the rules on editorial and human dignity standards, co- and self-regulation and accessibility and the rules on common qualitative requirements for audiovisual commercial communication. ERGA recommends that this coordinated approach should be maintained.

## 4.3 Modifications of the Directive

For a number of other provisions, however, a majority of ERGA Members takes the view that a more coordinated approach is necessary in order to reflect the changes in consumer consumption and market dynamics brought about by convergence and recommends a modification of the Directive in respect of the following rules.

### 4.3.1 Specific qualitative advertising requirements for linear services

#### a) Distinction between advertising and content – Art. 19 (1)

TV advertising must not only be recognisable but also be distinguishable from editorial content. The provision aims to ensure the authenticity and credibility of audiovisual content

by requiring broadcasters to clearly communicate to the consumer when television advertising is being broadcast.

In principle, it is important that the distinction between editorial content and advertising is clear to the consumer. In a converging environment where the user may not easily recognise or may even not be interested in the means of delivery of the content they watch, and in the context of growing consumption of on-demand content, a common approach to ensure transparency may seem reasonable. A basic standard at the EU-level would allow flexibility for Member States to adjust interventions in line the developments and changes in their markets and existing differences in cultural policies.

**Recommendation 6.a) Distinction between advertising and content:**

The Commission should consider establishing a common minimum standard for all audiovisual media services in the sense that advertising must be recognisable from editorial content.

**b) Integrity of the programme**

A number of restrictive provisions on the possibility to insert advertising during TV programmes aim to protect the integrity of the audiovisual programme (Article 20 AVMSD) – From a media policy perspective and taking into account that audiovisual media services are both economic and cultural goods, it is a concern to ensure the integrity of audiovisual media content. A basic principle to respect integrity when inserting advertising could be a useful regulatory requirement in an environment where the means of delivery is becoming less and less recognisable and where new business models of short form content may require a more flexible rule. It could also give Member States the flexibility to adapt interventions to balance the different national market conditions and the need to maintain an adequate level of protection for consumers. A common regulatory level would also create a more level playing field for companies providing audiovisual media content.

**Recommendation 6.b) Integrity of the Programme:**

ERGA recommends establishing a common basic rule for all audiovisual media services at EU level that sets out a principle that the insertion of advertising should respect the integrity of the programme.

**4.3.2 – Protection of Minors**

The AVMS imposes distinct obligations for broadcast and on-demand services: content which is “might *seriously* impair the...development of minors” cannot be broadcast but can be offered on-demand when access controls are in place (“to ensure that minors will not normally hear or see...”). Content which is “likely to impair...” can only be shown on broadcast services when access controls are in place, but can be shown unrestricted on demand services.

Several developments have cast doubts on the efficacy of these differences in standards. Non-linear audiovisual media services are widely consumed across the EU and there are

reasons to assume<sup>54</sup> that their consumption will increase further in future. “Hybrid platforms” are increasingly mixing live and VoD offers, often under one brand.

There are indications that consumer expectations are evolving with the changing digital environment. Ofcom research suggests that audiences have broadly similar regulatory expectations of linear TV services and their catch-up services, and many had similar expectations for video-on-demand services. For the majority of participants, brand perceptions extended beyond broadcast TV, meaning people expected brands to retain the same quality standards regardless of method of delivery or point of access.<sup>55</sup>

With growing changes in consumption patterns and consumer expectations, it is becoming increasingly difficult to justify different regulatory treatment for linear and non-linear media services in the field of protection of minors.

#### **Recommendation 6.c) Protection of minors:**

As noted in the ERGA report on the protection of minors[1], the level of protection provided should be more consistent across linear and non-linear content. Rather than using the means of delivery as the criterion for graduating regulation, a revised Directive could introduce level protections across linear and non-linear for the protection of minors, which would recognise both the different ways of controlling minors’ access to audiovisual content and the harmfulness of content. The Commission should also consider introducing a requirement for all AVMS providers to restrict access to content that “might seriously impair” the development of minors.

#### **4.3.3 Right of reply**

The provision regarding the right of reply also only applies to television broadcasting, i.e. to linear services. Art. 28 provides for a right of reply of any natural or legal person whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts. According to recital 103 AVMSD, the right of reply is an appropriate legal remedy for television broadcasting and **could also be applied in the online environment**. There is a broad consensus among ERGA Members to the right of reply should apply to all audiovisual media services in a convergent environment.

#### **Recommendation 6.d) Right of reply:**

ERGA recommends that the existing rules on the right of reply, which only apply to linear broadcast services, apply to all audiovisual media services.

### **4.4 Specific Rules for Linear Media Services**

#### **4.4.1 Events of major importance to society**

<sup>54</sup> European Audiovisual Observatory: “The development of the European market for on-demand audiovisual services”, March 2015, page 23

<sup>55</sup> Kantar Media report for Ofcom. December 2014. Protecting audiences in an online world. [http://stakeholders.ofcom.org.uk/binaries/research/tv-research/protecting-audience-online/Protecting\\_audiences\\_report.pdf](http://stakeholders.ofcom.org.uk/binaries/research/tv-research/protecting-audience-online/Protecting_audiences_report.pdf)

There are currently no common rules on major events that apply to all audiovisual media services. Art.14 AVMSD, which provides for free access to the transmission of events of major importance for society (specified by each member state in a list of designated events), applies to television broadcasting, i.e. only to linear services. There is a broad consensus among ERGA Members that although audiovisual media services should in general be subject to common rules, that the provision on the free to air transmission of specific events of major importance to society is still only justified for the linear environment.

#### **Recommendation 7 – Specific rules for linear media services**

There is a majority view among ERGA Members that the specific provisions *on* events of major importance to society cannot be replicated to all audiovisual media services but continue to be justified in the linear environment. ERGA therefore recommends maintaining the status quo.

### **4.5 Further in depth research**

Modifications of the following rules have the potential to impact different Member States in different ways depending on the economic and cultural conditions in their national markets. In view of the complexities and sensitivities that arise, the Commission might consider conducting an assessment on the economic effects of applying uniform rules to the following topics:

#### a) Specific rules on advertising for alcoholic beverages and medical products

The Directive provides more detailed rules on teleshopping and television advertising for medicinal products or treatment and alcoholic products. Many Member States already have introduced stricter rules than those of the AVMSD, so it is necessary to further understand the situation and the underlying cultural motives, and to analyse the different frameworks, before determining whether a more harmonised approach would be justified.<sup>56</sup>

#### b) Quantitative advertising rules for television advertising and teleshopping

Different views prevail among ERGA Members as to whether the current provisions on minimum teleshopping windows duration and hourly advertising are still appropriate in a converging environment or if a daily limit would be more practical leaving thus the content provider to better adjust the programme.

The obligation to limit television and teleshopping advertising to a maximum of 20% within a given clock hour can by its very nature not be uniformly applied across linear and non-linear media services. It may be argued that advertising minutage is no longer efficient and justified in a convergent environment where the same broadcast content can be viewed as catch up TV or on a VOD platform prior to its broadcast.

On the other hand, with TV still being the main medium for the consumption of audiovisual content, a number of Member States may also legitimately seek to maintain a higher level of

<sup>56</sup> The Commission's Evaluation Report and the study it has commissioned on the exposure of minors to alcohol advertising on linear and non-linear audiovisual media services and other online services (once finalized) give further reference. In the UK e.g., VOD services are already covered by a code of advertising practice that applies to non-broadcast advertising. This contains detailed qualitative rules in relation to these products.

audience protection in the broadcasting environment. However, it might be argued that even without the 20% rule, there is always a limit to the amount of advertisements that the content provider can insert in between programmes, with broadcasters having incentives to ensure that the volume of advertising broadcast remains in line with viewer expectations of acceptable limits.

In assessing whether to continue with hourly limits, it will be important for the Commission to gather evidence of the effects of an EU-wide relaxation or deletion of the rules on the advertising market and on audience protection and expectations in each Member State.

### c) Promotion of European Works

There are currently no common rules that apply to *all* audiovisual media services, but different provisions for linear and non-linear services:

- **Linear services:** Art. 16 AVMSD stipulates that member states shall ensure, where practicable and by appropriate means, that broadcasters reserve a majority proportion of their transmission time for European works (excluding the time allotted to news, sport events, games, advertising, teletext services and teleshopping). Art. 17 AVMSD stipulates that broadcasters reserve 10% of their transmission time or at least 10% of their programming budget for European works created by independent producers. Art. 18 AVMSD provides for an exemption for local broadcasters.
- **Non-linear services:** Art. 13 AVMSD stipulates that on-demand audiovisual media service providers promote, where practicable and by appropriate means, the production of and the access to European works. Such promotion could relate to the **financial contribution** made by such services to the production and rights acquisition of European works or **to the share and/or prominence** of European works in the catalogue of programmes

The question of the best way to continue to secure the promotion of the EU content industry is fundamentally important and is wider than reviewing whether or not there should be common quotas for all audiovisual media services. In principle, the production and distribution of European programs only partly depends on the imposition of quotas. Any reviews in this area should be considered in the context of wider initiatives, such as obligations relating to foster prominence or the spending of a certain amount of the production budget for European works, and carefully considered in line with the different programme funding arrangements that are in place in different Member States.

Another major concern in the convergent environment is to ensure that all major players contribute to the promotion of audiovisual productions where practicable and by appropriate means. There are different options in regard to funding systems and inclusion of all players with a reasonable presence in national markets to contribute to the production of content.

Further concerns relate to monitoring compliance with the quota obligations and further reflections seem necessary on means of reducing burdensome administrative procedures.

### d) Short News Reports

The provisions regarding short news reports only apply to television broadcasting. Art. 15 AVMSD provides for the broadcasters' general right to access events of high interest to the public which are transmitted on an exclusive basis for the purpose of short news reports. According to Art.15 (5) AVMSD, short extracts may be used in on-demand services only if the same programme is offered on a deterred basis by same AVMS-provider.

A relevant number of ERGA Members have doubts as to whether this rule could or should be replicable for all audiovisual media services, as the result of which *all* audiovisual media services would benefit from the right to short news reports. It is felt that a further assessment of the economic effects is needed before a well-founded conclusion can be reached.

### **Recommendation 8 – Further in depth-research**

**ERGA could consider further in-depth discussion on:**

#### **a) Advertising of specific products:**

A number of Member States have introduced stricter rules on advertising of specific products than those of the AVMSD. ERGA will further explore the different frameworks and their motives and analyse the impact of a more harmonised approach.

#### **b) Quantitative advertising rules**

The discussion will in particular focus on whether the current provisions on minimum teleshopping windows duration and hourly advertising are still appropriate or if a daily limit would be more practical leaving thus the content provider to better adjust the programme.

#### **c) European works:**

The Group or a newly created subgroup shall in particular examine whether the quota system is still the most efficient way to promote European works and independent producers or whether alternative concepts like obligations on prominence or production budget should be considered, but also look into the different funding systems, the promotion of cross-border circulation of EU works and explore more efficient procedures for the monitoring process.

#### **d) Short news reports:**

ERGA recommends that the Commission should consider conducting a previous assessment of the economic effects of applying the existing rules on short news reports to the online environment before a further in depth discussion within the group.



## Section 5

# The consequences of the position of certain intermediaries in the online distribution chain

## 5.1 A new context

The audiovisual industry has become truly digital, and is a central part of the wider digital economy. This convergence brings about important changes which could be beneficial if certain circumstances are met. The evolutions in the market today shape the uses and values of tomorrow, and policy makers have to anticipate and accompany these changes in a way which would not be detrimental to innovation and exposure to new content.

More than before, audiovisual content proves to be one of the key (if not the main) driving forces behind evolutions in internet usage. For many internet players, it also represents the heart of their business model as professional content is becoming easier to create and more widely available, enabling a 'virtuous circle' of content creation and audience growth. This is reinforced by the development of connected devices (TVs, tablets and smartphones). Some players for whom content, in particular audiovisual content, represents a cornerstone of their business model, have enjoyed particularly rapid growth on a global scale. The global success of some SVOD providers confirms the central role that audiovisual content can play in enabling growth in the online market (as well as showing the importance of tools for content promotion and consumption).

The rapid growth that certain providers have enjoyed has enabled them to quickly diversify their portfolios and build vertically structured services, where they are present at multiple stages of the chain of content distribution. These services have been widely adopted by consumers. These silo-models generate potential risks in areas as diverse as financing of content creation, the balance of competition, access to content, findability, cultural diversity, protection of vulnerable audiences and data privacy.

In this section, we explore the role that various intermediaries play in the audiovisual content space. We set out a number of different scenarios which present both opportunities and risks that may emerge if and when the significance of the role played by certain intermediaries grows. In particular, we carefully consider:

- Professional video hosting providers;
- Connected device manufacturers;
- Applications stores; and
- Search and recommendation engines.

## 5.2 Possible impacts on competition

The pace of innovation in the online space, the range of providers in the market, and the low barriers to switching at many instances of the chain (i.e. general web search engines, web

browsers, which are offered free of charge to the user) make it questionable that enduring bottlenecks currently exist.

In terms of how the market may evolve in future, on the one hand, the proliferation of content providers in the market, and of navigation routes that content providers have to reach viewers may increase the level of competition and the level of choice available to the user. This could also provide new opportunities for providers that may not previously have enjoyed commercial success in the linear space.

However, there are also a number of developments that could have an adverse effect on the level of competition in the audiovisual market. We consider that there are two main sources of potential risks:

1. **Pressure as a result of regulatory imbalances:** Several regulators (12) estimated in their responses to the sub-group's questionnaire that the comparative lack of constraints on operators that do not fall within the scope of the AVMS Directive (in particular digital intermediaries) can offer them significant competitive advantages compared to regulated audiovisual media service providers. These occur in specific areas such as content acquisition, attracting viewers or the advertising market. The pressure from these players is heightened as a result of the global scale and relative financial power that they enjoy.
2. **Gatekeeper positions:** Certain players could capitalise on a strong position in their specific market. They could become essential to users and represent a vital link in the distribution chain for content providers interacting with them (from both a technical and economic position). This may in turn have an impact on content diversity, reducing users' choice, and raising questions in terms of pluralism of expression of ideas and opinions and cultural diversity. The risk would be greater in an integrated *silo* model, in which the same provider is likely to offer audiovisual content through a VOD service, and manage an operating system and app store.

Nevertheless, predicting how the competitive dynamics of such a fast moving market may evolve is an inherently uncertain exercise, and it is important that the Commission pays close attention to the evolutions in the audiovisual value chain.

### 5.3 Potential impacts on cultural diversity, works' exposure and financing

Several ERGA members have stressed that the role that certain intermediaries play regarding access to content could be an important source of opportunities and risks. This specific gatekeepers position between user and content, may impact cultural diversity and content findability through the use of tools to guide the user to access content, either through personal recommendation or even further upstream by proposing by default home screens of connected devices (smart TVs and set top boxes, smartphones, tablets etc.).

Players at different instances of the distribution chain have the ability to influence the choice of content that is available to the end user:

- **Professional video hosting providers** that play a more structured role in handling content than traditional technical hosts, and can use algorithms that take account of a range of content metadata and user data promote certain content through cross-linking, in search results or on home pages;
- **Connected device manufacturers**, which decide what services will be pre-installed or can be downloaded on their devices and can influence the user's first point of access to audiovisual content through default screens;
- **App stores** that can promote particular services over others by cleverly organising layouts or choose not to carry certain services (particularly their competitors');
- **Search engines** that determine in what order the various services they propose (legal or illegal) appear.

A plurality of players can significantly influence access to content by customising and making recommendations, and there is uncertainty in terms of how the usage of these services will evolve. A greater diversity of navigation routes available to the viewer, and the use of recommendation tools, may broaden the users' exposure to content. On the other hand, the use of these tools (with limited transparency on the criteria used) could narrow the range of content that users are exposed to, which could be detrimental to serendipitous content discovery and content diversity.

Operators' strategies may also significantly influence content consumption, since these players can choose to only contract with a small number of providers or promote suggest their own content over content offered by other providers. This strategy may be based on their popularity and economic position and the bargaining power that they draw from this. If certain intermediaries were to achieve a bottleneck position in the online content market and pursue such strategies then it would have wider implications for the availability and discoverability of content.

Valuing works must remain central. At first sight, content creators and producers can benefit from a supply diversification that brings new distribution opportunities for works that would traditionally have had limited commercial potential. However, this process is accompanied by a change in consumption patterns that could potentially threaten works' development. Traditional audience fragmentation, and reduced spend on content could reduce the diversity and quality of content in the market through its virtuous effects on content investment. Other factors which could have an impact are split by type of offers or thematic content, widespread cancellable subscriptions, competition with formats allowing non-linear and unlimited use. At the same time, these new opportunities for content providers could result in increased consumer spend in content, thus having a positive virtuous effect on levels of content creation and investment.

It is important to reflect on the funding of content creation, as well as the idea that a player drawing income from exploiting and displaying content should contribute to its creation. As the role of certain intermediaries, platforms and larger ecosystems (such as companies manufacturing terminals and providing services) becomes more central they capture an increasingly significant share of the value from audiovisual content. As these providers fall outside interventions to secure content funding, these interventions, and their virtuous effects on content diversity and quality would be weakened.

## 5.4 Focus on "Big data"

It is important to reflect on the possible consequences of digital intermediaries' development on diversity, in particular on the effects of "Big data" on the audiovisual sector.

Increased non-linear consumption and data are part of the same movement; the shift from a model in which broadcasters handle editorial decisions to one in which offers are more specifically tailored to viewers' and listeners' preferences. This transformation renews the role of audiovisual media service providers as well as the terms of prescription. The use of data to tailor content offerings could increase the level of diversity in the market, and provides opportunities for the producers creative works that would have had limited commercial potential in the traditional TV space. However, the use of "Big Data", the prevailing of wider customised recommendation mechanisms and the opacity of this process, raise questions regarding the promotion of European audiovisual production, diversity of programming and pluralism of opinions. Excessive offer customisation may entail negative effects, enclosing the viewer in his own taste, to the detriment of curiosity and serendipitous discovery.

While acknowledging the usefulness of algorithms that underlie customised recommendation systems, their use induces three risks:

1. providing to the user excessive and unwanted customized data;
2. abusive trust in their results; and
3. privacy issues resulting from exploiting personal data.

However, this innovation should not be negatively considered. It should instead be promoted as a catalyst supporting greater cultural diversity, as long as minimum precautions are taken regarding the risks brought about by systematic or excessive personal recommendations. These new tools should not reduce the variety of content being proposed to the consumer.

## 5.5 Focus on Privacy

Users' data is at the heart of innovation in the audiovisual content space and the wider digital ecosystem. Consumers will directly benefit from services, including customisation or recommendations drawn up on the basis of data, provided that the capacity for free choice based on a wider set of parameters is retained. However, specific attention should be paid to their exploitation by a range platforms, intermediaries but also broadcasters, and OTT providers, who are increasingly reliant on their ability to generate value from the information collected from their users.

## 5.6 Conclusion

A significant number of regulators (10) underlined the importance of closely monitoring the market and new intermediaries in order to confront any of these risks to the effective functioning of the market if they materialise. In the following section, we go on to consider the obligations that intermediaries could, in the future, be required to fulfil if any of these risks materialise (see sections 6.4.1 – 6.4.3).

## Section 6

# The future roles and responsibilities of intermediaries in securing AVMS public policy goals

## 6.1 Introduction

In section 3 we recommend that the Commission should consider what role certain intermediaries and online platforms should play in delivering audiovisual policy goals. As we note in section 3, the review of the Audiovisual Media Services Directive and the European Commission's in depth enquiry into the role of online platforms provide us with an important opportunity to reflect upon this debate.

In section 2 of this report, we note that the policy goals associated with the AVMS Directive remain fundamentally important and that the changes in the market do not call their relevance into question. As noted in section 1 an ever more diverse range of actors are involved in the supply of audiovisual content. Section 5 notes that several intermediaries, in particular video hosting platforms and search providers, play an increasingly significant role in the supply of audiovisual content and are having an ever greater impact on the competitive dynamics of the market. This raises legitimate questions about the role that they might play in securing a range of audiovisual policy goals.

The intermediaries that are particularly relevant to audiovisual policy discussions are actors which connect consumers and audiovisual media service providers online, but do not themselves exercise prior control over the bulk of the content offered. In debates about the role of these intermediaries in securing goals specific to the audiovisual sector, it is important to note that a range of different organisations, with different business models are implicated in this debate. This includes platforms such as TV platforms and video sharing sites that operate primarily to distribute audiovisual content, which we refer to here as "audiovisual platforms", and a range of other intermediaries such as general web search engines and ISPs that facilitate the distribution of a much wider range of content and services.

In this section we build upon the recommendation made in section 3 of this report in respect of audiovisual platforms, and consider further the specific roles that certain intermediaries might play. We analyse the trade-off and risks that are posed in this debate below. However, we also note that intermediaries can and already do take various voluntary measures to fulfil policy goals, and are able to deploy these measures without coming into conflict with the limited liability framework that the e-Commerce Directive provides.

## 6.2 The trade-off

Section 7 discusses the safe harbours that the e-Commerce Directive provides for ISPs and hosts, and the range of actors in the audiovisual value chain that meet the definitions under the Directive and in national legislation. The policy debate in relation to the role of intermediaries raises an important and delicate trade-off:

- On one hand, sections 1 and 5 of this report show that several platforms and intermediaries already play a significant role in the distribution of audiovisual content

online. Furthermore, they could represent an important bottleneck on which certain measures, for example to secure the protection of minors or the availability and prominence of public interest content, could apply.

- On the other, the operation of the internet – and the low barriers to entry and diversity of services available - depends substantially on the activities of intermediaries. Obligations which are not carefully designed would raise a significant risk of unintended consequences for innovation and the free flow of information online. For instance, it would be undesirable to introduce obligations which would incentivise intermediaries that do not currently choose the content that is available on their service to become intermediators, making an active choice over which services can and cannot be accessed. In addition, it would also be disproportionate to apply obligations without distinction, not reflecting the extent of certain intermediaries activity on the audiovisual market.

Online intermediaries such as content hosts, search engines and ISPs, exert no prior control over the vast majority of the content that is hosted on transmitted on their service. Making these providers editorially responsible for content provided by third parties would incentivise them to review all content that they distribute, and would require them to profoundly change their business model.

This is not to say, however, that intermediaries cannot play a role. Rather, that any obligations introduced on intermediaries should carefully reflect the nature of their role in aggregating and distributing content, and be proportionate, based on the impact that they have on the market (and, by extension, their potential impact on public opinion) and enforceable. As we note below, intermediaries can take steps to further policy goals, and many of them already do both as a result of obligations under legislative frameworks and on a voluntary basis.

### **6.3 The voluntary measures that intermediaries are undertaking to fulfil policy goals**

In section 7 we discuss the safe harbours that ISPs and content hosts receive under the e-Commerce Directive. This reflects the fact that they do not exercise prior control over the majority of the content that is carried on their services. However, these liability protections do not prevent intermediaries playing a role in the fulfilment of policy goals, and many already do in certain areas. Section 7 notes that regulatory obligations already apply to certain intermediaries in the audiovisual value chain under EU legislative frameworks, such as “notice and takedown” obligations for hosts under the e-Commerce Directive.

In addition to these existing regulatory obligations, a range of technical tools are being deployed on a voluntary basis in order to fulfil a wide range of goals. These include both:

- Measures to protect users (in particular children) from potentially harmful material; and
- Measures to remove or restrict access to illegal material.

We discuss these in more detail below. The examples are non-exhaustive, and only include measures introduced by intermediaries that do not fall within the scope of the Directive.

### 6.3.1 Voluntary measures to protect users from harmful material

In this sub-group's discussions, NRAs have highlighted a range of steps taken by intermediaries which are primarily aimed at protecting children from harmful content online. Intermediaries have incentives to contribute to the protection of their users, in particular children, from harmful content. As such there are a wide range of technical tools that online intermediaries use in order to block or restrict access to harmful material on an ex-post basis. These include (but are not limited to):

- **Parental filters - ISPs:** Fixed and mobile ISPs typically offer their users the option to install parental filters in order to protect children from content that may be harmful to their development.

In 2013, the UK's four major fixed line ISPs (BT, Sky, TalkTalk and Virgin Media) agreed to offer all new customers family-friendly network-level filtering by the end of that year. The ISPs have also rolled out the offer to existing customers, with a view to completing this process by the end of 2014. The filters allow a consumer to manage access in their home to a range of internet services that may include content, conduct or contact risks for minors. The filters apply to "all devices in the home that connect to the internet connection", including WiFi connected desktops, laptops, tablets, smart phones, connected televisions and games consoles.

In Slovenia, the largest mobile operators and ISPs have signed a voluntary code of conduct which introduces classification requirements that providers must comply with in order to ensure the protection of children using their services.

- **Safe search facilities – search engines:** Search engines offer a number of "safe search" facilities and content detection tools to filter results that contain content that is potentially harmful to children. In Germany, the Selbstkontrolle Suchmaschinen (an organisation created in 2005 by German search providers) in collaboration with the Federal Department for Media Harmful to young people (BPjM) has developed a technical procedure whereby URLs which have been placed on the BPjM index of material that is harmful to young people will not be displayed in search results.
- **Access controls – content hosts:** Major online video sharing websites (YouTube, DailyMotion) and social networks have generally introduced community standards. These are often reflected in their terms of service, acceptable use policies, online safety information centres and/or community guidelines. The standards and protections may vary by brand, type of content delivered (e.g. professional and/or user generated) type of service, or age group that the product is addressed to. They primarily rely on tools which enable users to report content to the platform which, depending on the severity of the breach of its standards, may place it behind an access control system or remove it. Providers often also offer tools and information within their products to enable users to report and learn about what they can do to protect themselves or others using the same service.
- **Rating tools:** A self-rating tool developed by NICAM and the British Board of Film Classification (BBFC) "You Rate It" is currently being tested on the Italian user

generated content platform “16 mm”. It enables users that upload content to classify based on a system which assesses how harmful the content is.

We also note a range of networks at a European and national level which enable the industry to share best practice in relation to protecting users (in particular minors) online. EU-level examples include the *Safer Internet Programme*, and a series of partner initiatives, such as the *CEO coalition to make the Internet a better place for kids*, with many more networks present in individual Member States.

### 6.3.2 Measures to combat the distribution of illegal material

Intermediaries also take a range of steps to combat illegal material on a voluntary basis, often in collaboration with law enforcement authorities and NGOs. There are several ongoing initiatives, including those which relate to the following types of content:

- **Child abuse material:** Intermediaries generally take steps to prevent the distribution of child sexual abuse material. This includes blocking websites by ISPs, the removal of content and termination of accounts by hosting providers, the removal of results by search engines, and the removal of payment facilities by payment providers. A collaborative network of 51 hotlines in 45 countries (INHOPE) has been established in order to provide a one-stop shop for reporting illegal content, and to exchange expertise and reports among its members.
- **Copyright infringement:** As noted in section 7, several EU based rights holders take advantage of the notice and takedown framework provided for by the US Digital Millennium Copyright Act (DMCA) and the e-Commerce Directive to request that intermediaries (in particular search providers) remove content or links to content that infringes copyright.

We also note the development of content detection tools that allow for the automated detection of infringing content. YouTube operates a “Content ID” system which enables copyright owners to identify infringing content on YouTube and to request that it is removed or that any advertising revenues are diverted to the copyright owner. The system makes use of an automated system which analyses videos and verifies them against a database of copyrighted content. Google has also modified its web search algorithm in order delist services based on how many copyright removal requests they have received.

## 6.4 What role can intermediaries play in the delivery of audiovisual public policy goals?

As we note above, imposing regulations on intermediaries that would require or incentivise them to exert prior control over content would have a profound impact on the operation of the internet, and the freedom of individuals and businesses to participate in the creation and distribution of content.



However, this does not mean that there is not a role for intermediaries. Instead, it shows the importance of ensuring that any obligations are carefully adapted to fit with their business models.

#### **6.4.1 – The need for clear definitions and carefully adapted rules**

We welcome the European Commission's desire to consider what roles platforms such as internet content hosts might play in delivering the public policy objectives of the AVMS Directive. The goals addressed under the Directive are fundamentally important in view of the fact that audiovisual media is a cultural good, as well as an economic one. We note above the risks associated with designing policy interventions that apply to intermediaries, and the fact that as a result they should be subject to a separate set of obligations to those which apply to audiovisual media service providers, with due consideration to the specific role they play in aggregating or distributing audiovisual media services.

Below we set out some specific policy areas where obligations could apply, and some general principles that should guide the Commission in its consideration of the role of intermediaries and platforms.

In designing any new obligations, the Commission should be wary of the need for a cautious approach and the need to clearly define the actors subject to any new sector-specific rules. The degree to which audiovisual policy obligations should apply, and the specific rules that could apply, should depend on the specific nature of a platform or intermediary. It could depend on whether a platform is operating as an "audiovisual platform" which purely acts as a platform for audiovisual content (such as a TV platform), or as a platform for a much wider range of content and services (such as a general web search engine). Other relevant factors in differentiating obligations could include the turnover, and the degree to which the platform provider plays an active or passive role in distributing services.

It will be important to bear these distinctions in mind and to ensure that any specific obligations that apply to audiovisual platforms do not operate in tension with other legal frameworks, and carefully consider which regulatory mechanism is the most appropriate for completing the regulatory objectives taking into account both the AVMS and the e-Commerce Directives.

#### **6.4.2. Specific areas for consideration**

The Commission should give particularly careful consideration to how certain intermediaries can contribute to the protection of users from harmful material, and furthering cultural policy objectives. In the discussions held in this working group, we have identified the following as areas where the roles that intermediaries might play require a particular focus:

- **Protection of minors:** As noted in the paper of the ERGA sub-group on the protection of minors, in order to ensure the effective protection of children, especially online, it will be important to complement regulation of editorially responsible AVMS providers with a range of other measures to ensure the provision of protection tools and clear information for parents and children.

**Conclusion:** Policy makers will need to create an environment in which the relevant intermediaries have incentives to provide consumers with appropriate protection tools and clear information. The development of consistent tools - which are efficient, easy to use, affordable and work with well understood and common systems of categorisation and classification - should be encouraged.

- **Access to and discoverability of content:** Measures to secure access to and discoverability of public interest content are important tools to promote European and national content in the traditional TV space. We note above that the proliferation of ways in which users can access content online may reduce the effectiveness of current measures. As the market evolves, it will be particularly important to consider how measures to ensure universal access and discoverability of public interest content should be adapted.

**Conclusion:** In order to ensure fair competition in future, the Commission should consider whether and how access and prominence requirements could be extended to new platforms, in particular “audiovisual platforms” such as video sharing sites. The flexibility that the Electronic Communications Framework currently offers Member States in adapting the measures that apply to the providers of telecommunications networks and services should be maintained in any new obligations. Public interest content differs in each Member State, and it is important to continue to allow Member States to determine the specific services that should benefit from such obligations.

- **Content creation funding:** Several Member States across the EU fund content through the introduction of levies on broadcasters, VOD providers and distributors in the traditional TV value chain. The effectiveness of these measures could be reduced as actors in the online supply chain, which are not subject to them, capture a greater share of the value in the market.

**Conclusion:** The Commission should seek to ensure that the EU framework does not constrain Member States from extending levy based funding schemes to actors in the online value chain. It will need to give careful consideration to how any such measures interact with international frameworks dealing with taxation of multinational companies.

#### 6.4.3 General principles that should be observed in designing any new rules

As a general principle, any new obligations on actors (such as content hosts, ISPs and search engines) that do not choose the content distributed through their services based on its editorial characteristics should broadly be designed using those obligations that currently apply to other intermediaries (for example in notice and take-down frameworks and prominence and access regimes) as a starting point. For some, the lack of editorial control means that an emphasis may be placed on ex-post interventions. Others have highlighted ex-ante measures (e.g. around discoverability) may also be worth considering in certain circumstances, depending on the specific nature and significance role that the intermediary plays in the market.

It is already the case that the operation of the AVMSD may involve service providers who are not editorially responsible. For example, in order to be able to enforce AVMSD, the content regulatory authority may need to instruct intermediaries such as satellite operators or the providers of uplink services to withdraw service from a specific broadcaster. The Commission should consider whether intermediaries in the online supply chain could play a similar role.

Given that any framework involving intermediaries would rely heavily on reports from third parties, procedures for handling complaints should be transparent and demonstrably effective, based on the provision of clear reporting tools. In cases where content can be removed or access to content can be restricted by an intermediary, there must also be a clear route of appeal for the content provider.

As noted above, rules should adequately reflect the specific role that a provider plays in distributing content, and might be more relevant if operators are seen to be playing a significant role in content distribution. As noted above, consideration of any such obligations should take careful account of the impact that it would have on the internet ecosystem as it is today, and the way in which individual EU citizens are able to engage with it by participating in the creation and distribution of content.

## Section 7

### The points of interaction between the AVMS framework and other regulatory frameworks, including the telecoms framework and the e-Commerce Directive

One of the most relevant aspects of convergence is the progressive blurring of the boundaries of the three different frameworks relevant to the online distribution of audiovisual content.

Audiovisual content, whether it be linear or non-linear (regulated under the AVMS Directive) is delivered over a communications network (regulated under the Telecommunications Framework) and, in the case of content delivered online, the distribution chain involves digital intermediaries (regulated under the e-Commerce Directive). There are similarities between the information society service providers as defined in the e-Commerce Directive and other intermediary figures in the traditional broadcasting space. For instance, the regime of responsibility set out in the e-Commerce Directive comprises *ex post* obligations similar to those which apply to other intermediaries in the linear AVMS environment.

As a first step it is necessary to identify some specific key elements of each framework:

- **The AVMS Directive:** imposes public policy obligations on editorially responsible providers of audiovisual media services. It defines linear and non-linear on demand AVMS, AVMS providers and what constitutes editorial responsibility for an AVMS.
- **The e-Commerce Directive:** defines two main types of intermediary (hosts and mere conduits) for which it sets out a limited liability framework. It also defines information society services, and information society service providers.
- **The Electronic Communications Framework:** defines electronic communications networks (ECNs) and electronic communications services (ECSs). It also introduces a range of obligations, for example in relation to the management of radio frequencies and numbering and addressing. It also includes “must carry” rules which require network providers to transmit specific television or radio services.

Although each framework was designed to be separate and independent, having its own goals and objectives, technological evolution has led to new ways of consuming content which have reduced the extent to which the frameworks operate independently of each other. Technological development is creating new business opportunities while promoting synergies between different players and fields, while linear and non-linear services are converging, in such a way to make hard to draw a line between the two activities.

#### 7.1 The definitions under the Electronic Communications framework apply in the audiovisual value chain.

The e-Commerce Directive relates in to the following areas: newspapers, databases, financial services, professional services (lawyers, doctors, accountants, estate agents), recreational services, direct marketing and advertising and Internet access services. The main definitions that are relevant in the AV value chain are:

- **information society services:** any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services;
- **lender:** any natural or legal person providing an information society service;
- **provider established:** a service provider who effectively pursues an economic activity using an indefinitely stable installation. The presence and use of technical means and technologies required to provide the service does not constitute an establishment of the provider;
- **recipient of services:** means the natural or legal person who, for professional ends or otherwise, uses an information society service, even for seeking information or making it accessible information;
- **commercial communications:** all forms of communication, except in special cases described in the Directive, intended, directly or indirectly, to promote goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.

## 7.2 The extent to which there is a common understanding around the e-Commerce definitions (in particular «hosts») in the context of certain players in the audio-visual value chain

In responding to the sub-group's questionnaire, many NRAs referred to online platforms hosting user generated audiovisual content, (such as Youtube or Dailymotion). These providers do not fulfil the criteria prescribed by the AVMSD in order to be defined as AVMS providers, due to the lack of editorial responsibility.

YouTube's model has more similarities to that of a TV platform operator than it does with an editorial AVMS. Some YouTube channels may be considered as VOD services, with the editorially responsible subject being not the hosting provider but the provider running the channel itself. A number of members of the sub-group have drawn attention to the importance of the provision of protection tools on websites hosting UGC to address risks around minors being exposed to harmful content, as these providers cannot review the characteristics of the content that is carried on their service.

More generally, online platform providers, such as video hosting providers, operate differently from traditional platform providers. Video hosting providers are not providing capacity on a finite network asset in the way that a traditional operator would be, and generally operate as open platforms for users to publish content.

These platforms are generally considered to be "hosts" for the purposes of the e-Commerce Directive, but they do demonstrate (if not an editorial responsibility) an activity that is more structured than pure technical hosting, in that they conduct several activities that modify the end-user experience. These include the use of algorithms to determine how content is presented to the user, marketing activities, and influencing audience flow through crosslinking.

Member States have in general carried out a direct transposition of the definition of activities in Articles 12 to 14 of the e-Commerce Directive, but divergent national case law has

emerged particularly in regard to the application of liability exemptions to (I) "new services" (II) location tool services and (III) hyperlinking services.

Where specific exemptions from liability for search engine services and hyperlinking services have not been explicitly included in national legislation, these services have either been classified as mere conduit services, caching services or hosting services, or courts have excluded them from the scope of any exemption.

Similarly, there is divergent national case law on video-sharing sites:

- a. **France:** French case law recently confirmed that video-sharing sites can benefit from the liability exemption for hosting activities, for instance in the *Magdane vs. Dailymotion* case.<sup>89</sup> The fact that DailyMotion received advertising revenues was irrelevant in determining whether it was a hosting service provider or not. The fact that DailyMotion put in place a specific architecture allowing it to format and to encode certain content should not lead to the conclusion that it is not a hosting service provider. According to the court, these technical operations would, on the contrary, be part of the essence of the hosting activity and would not at all be equivalent to the selection of content;
- b. **Germany:** In Germany, however, the Hamburg Court held (in *Peterson v Google Inc and others*) that a video sharing site for videos uploaded by third parties cannot benefit from a liability exemption when it presents the uploaded content as its own content. The court ruled that YouTube could not benefit from a liability exemption for hosting providers as, for the following reasons, it would have adopted uploaded third party content as its own:
  - i. YouTube provides a specific layout of the website and YouTube's logo is shown in rather big letters above the playing video;
  - ii. YouTube provides links to related videos;
  - iii. YouTube displays commercial video clips and not only content that expresses a personal opinion.
  - iv. Because of the arrangement of the website the average user cannot tell at first sight that the videos were uploaded by the user and not by YouTube;
  - v. The homepage of YouTube suggests that YouTube exercises editorial control as it suggests certain videos;
  - vi. YouTube actively connects advertisements to uploaded videos;
  - vii. YouTube's Terms and Conditions indicate that YouTube can use the content uploaded on its site as its own content.
- c. **Italy:** In Italy the Civil Court of Rome (*RTI and others vs. YouTube and others*) also considered that a video-sharing site could not benefit from a liability exemption. The court stated that YouTube was not to be regarded as a hosting provider but as a "digital broadcaster" and was consequently considered fully responsible for the published content. YouTube would play an active role and would not limit its activities to providing server space for users to independently upload and organize content.

A few crucial issues regarding the compatibility of the AVMSD and the ECD regimes have emerged. Several members of the group have also highlighted stores of audiovisual content (iTunes, Google Play and similar) and music platforms, where it is less clear whether they would fall within the definition of a content "host", even if they do not fall under the scope of

the AVMSD. These providers are also exercising an activity which is far more well-structured and articulate than simply offering content and services created by third parties.

Another aspect to highlight is the position of subjects such as search engines, social networks, blogs, and EPGs. These actors are definitely not covered by editorial responsibility deriving from the AVMSD. It is also unclear if they are subdued to the e-Commerce regime, and there are different national interpretations across the EU. Nonetheless they are having an increasing impact on content consumption.

### **7.3 Rules from the Electronic Communications Framework and limited liability frameworks which apply in the audio-visual value chain**

#### **7.3.1 The identification of the appropriate regulatory regime**

It could be argued that the AVMS Directive and the e-Commerce Directive do not provide sufficient clarity across the full range of players that currently operate in the market. NRAs' recent experiences identify two strongly connected key issues: the identification of the appropriate regulatory regime and the definition of the territorial jurisdiction under which the services are falling.

The responses to the European Commission's Green Paper on Audiovisual Convergence suggest a common concern among many NRAs in relation to asymmetric regulatory treatment of services that have a competitive impact on the market but are subject to different frameworks.

Many services operating in competition with EU AVMS providers are established outside the EU, but nonetheless targeting EU countries. The AVMS Directive only applies to providers under EU jurisdiction and is underpinned by the country of origin principle. The AVMS rules do not apply to providers delivering content online from outside of the EU Member States, but targeting the EU. However, there are provisions for linear services operated from outside the EU, but making use of using EU technical facilities such as satellites or uplink services.

The e-Commerce Directive also sets out a framework for establishing territorial jurisdiction. Under the country of origin or "internal market" clause, an operator is deemed to be established in the country where it actually pursues an economic activity through a fixed establishment. The e-Commerce Directive provides for exceptions to this principle, and it may be useful to examine these exceptions in more depth, in particular looking at extent to which similar exceptions could be applied in a future audiovisual regulatory framework.

Defining the jurisdiction of some internet services can also be challenging, because the transnational nature of the service can raise issues in terms of identifying the place of establishment or the countries that are being targeted. When services being intended for a plurality of different countries it can be difficult to reconcile with the concept of "a stable location" (for the purposes of the provider established definition under ECD). We note that a separate sub-group is considering the subject of territorial jurisdiction.

#### **7.3.2 – Ex-post responsibilities under other legislative frameworks**

As we note in sections 3 and 6, though it is legitimate to discuss whether certain intermediaries may play a role in fulfilling AVMS goals, AVMS rules designed for editorially responsible providers may not correctly address the issues at stake and not effectively guarantee the most relevant goals of the AVMS system. In this light, we note that a separate set of rules would be more adequate.

Measures to consider include the possibility of a graduated system of obligations new intermediaries (e.g. depending on the extent of their role in handling the content supplied on their service) and improving the technologically neutral approach from the electronic communications framework.

New obligations could be designed on the basis of existing interventions that apply under separate frameworks. For instance, we may take into consideration ex-post “notice and take-action” schemes that operate under other frameworks:

#### **A) Satellite and uplink providers:**

In extreme cases, service providers in the linear space who are not editorially responsible, such as satellite operators or the providers of uplink services may, on the basis of notifications by the NRA to withdraw service from a broadcaster having repeatedly and infringed the AVMSD rules. Satellite providers can encounter difficulties in establishing direct contact with content providers in such cases, and also technical difficulties in removing one service if it is transmitted as part of a grouping of services.

#### **B) DMCA – “notice and takedown”:**

Another noteworthy aspect around search engines, is that they are not specifically included in the transposition of the ECD, though they are in some Member States’ transpositions. However, in many cases, copyright owners take advantage of the intermediary status and partial liability framework which applies to these providers under the US Digital Millennium Copyright Act (DMCA). This allows copyright owners to request search providers remove links to infringing content – similar to the notice and takedown framework with which EU hosting providers comply.

#### **C) E-Commerce Directive – “expeditious action”:**

The ECD sets out a principle correspondent to the US DMCA “safe harbour”: Internet intermediary service providers should not be held liable for the content that they transmit, store or host, as long as they act in a strictly passive manner.

The specific limits on what intermediaries can do with the content that they transmit, store or host before losing the possibility to benefit from the limitations of liability set out in the e-Commerce Directive are not always straightforward to interpret. At the same time, when intermediaries providing hosting services become aware of illegal content (terrorism, child pornography, fraud, copyright infringement) they are required to expeditiously take effective action to remove it or to disable access to it.



As for the extent of this “effective action” many different models for ISP to cooperate have been identified: “notice and takedown”; “notice and notice”; “notice and disconnection” or graduated response; and “filtering”, which involves either (i) requiring ISPs to block access to websites implicated in the infringement, or (ii) examining internet traffic in transit to subscribers of the ISP to see if it is infringing content (monitoring or “deep packet inspection”) which may then lead to certain traffic (or certain sites) being filtered or blocked.

Some of these models have proved to be effective. For example, “notice and take-down” is widely used at a global level, particularly in cases of copyright infringement (though critics have warned of the risk of placing a burden on intermediaries to judge content if infringement is not obvious). Others have been considered too invasive and dangerous for the freedom of the internet, with deep packet inspection being deemed by the European courts as too restrictive.