

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

A media framework for the 21st century

Fields marked with * are mandatory.

Consultation on Directive 2010/13/EU on audiovisual media services (AVMSD) **A media framework for the 21st century**

Description

The Commission is consulting on the Directive 2010/13/EU on Audiovisual Media Services (AVMSD) first to check which parts of the Directive are currently fit for purpose as part of the Regulatory Fitness and Performance Programme (REFIT), and, second, to collect evidence and views on the future media services policy in the form of an impact assessment.

Targeted respondents

National regulators, broadcasters, producers, content providers telecom service providers, civil society organisations, academia and citizens

Duration

6 July 2015 - 30 September 2015

Comments received after the closing date will not be considered.

General information on respondents

* *I am responding as:*

- An individual in my personal capacity
- The representative of an organisation/company/institution

* Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

- Yes
- No

Please indicate your organisation's registration number in the Transparency Register.

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Please tick the box that applies to your organisation and sector.

- National administration
- National regulator
- Regional authority
- Public service broadcasters
- Non-governmental organisation
- Small or medium-sized business
- Micro-business
- Commercial broadcasters & thematic channels
- Pay TV aggregators
- Free and pay VOD operators
- IPTV, ISPs, cable operators including telcos
- European-level representative platform or association
- National representative association
- Research body/academia
- Press or other
- Other

My institution/organisation/business operates in:

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- Belgium
- Bulgaria
- Czech Republic
- Croatia
- Cyprus
- Denmark
- Estonia
- France
- Finland
- Germany
- Greece
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- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Spain
- Slovenia
- Slovakia
- Sweden
- United Kingdom
- Other

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

Orange

* Please enter your address, telephone and email

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

France

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- * **Do you agree to your contribution being published on the Commission's website?**

- Yes, I agree to my response being published under the name I indicate (name of your organisation/company/public authority or your name if your reply as an individual)
- No, I do not want my response to be published

Background and objectives

The Audiovisual Media Services Directive (AVMSD[1]) has paved the way towards a single European market for audiovisual media services. It has harmonised the audiovisual rules of the Member States and facilitated the provision of audiovisual media services across the EU on the basis of the country of origin principle. Since its adoption in 2007, the audiovisual media landscape has changed significantly due to media convergence[2]. The review of the AVMSD is featured in the Commission Work Programme for 2015, as part of the Regulatory Fitness and Performance Programme (REFIT). In its Communication on a Digital Single Market Strategy for Europe[3], the Commission announced that the AVMSD would be revised in 2016. Another REFIT exercise is being carried out, in parallel, in the field of telecoms with a view to come forward with proposals in 2016. Some of the issues treated in the current public consultation may have an impact on this parallel exercise and vice versa. In 2013, the Commission adopted a Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values"[4] inviting stakeholders to share their views on the changing media landscape and its implications for the AVMSD. On the basis of the outcome of this public consultation, the Commission has identified the following issues to be considered in the evaluation and review of the AVMSD:

1. Ensuring a level playing field for audiovisual media services;
2. Providing for an optimal level of consumer protection;
3. User protection and prohibition of hate speech and discrimination;
4. Promoting European audiovisual content;
5. Strengthening the single market;
6. Strengthening media freedom and pluralism, access to information and accessibility to content for people with disabilities.

You are asked to answer a number of questions revolving around these issues. Please reason your answers and possibly illustrate them with concrete examples and substantiate them with data. The policy options identified are not necessarily mutually exclusive, but may sometimes be combined. Please indicate your preferred policy options, if any, and feel free to provide any other comment that you deem useful.

Questions

1. Ensuring a level playing field

Services to which the AVMSD applies

The AVMSD regulates television broadcasts and on-demand services. It applies to programmes that are TV-like[5] and for which providers have editorial responsibility[6]. The AVMSD does not apply to content hosted by online video-sharing platforms and intermediaries.

These platforms and intermediaries are regulated primarily by the e-Commerce Directive[3], which exempts them from liability for the content they transmit, store or host, under certain conditions.

As a separate exercise, given the increasingly central role that online platforms and intermediaries (e.g. search engines, social media, e-commerce platforms, app stores, price comparison websites) play in the economy and society, the Commission Communication "A Digital Single Market Strategy for Europe" announces a comprehensive assessment of the role of platforms and of online intermediaries to be launched at the end of 2015.

Set of questions 1.1

Are the provisions on the services to which the Directive applies (television broadcasting and on-demand services) still relevant[8], effective[9] and fair[10]?

Relevant

- Yes
- No
- No opinion

Effective

- Yes
- No
- No opinion

Fair

- Yes
- No
- No opinion

Comments:

Concerning the proposed policy options, the scopes of the e-commerce directive and the AVMSD are clearly defined by their respective provisions. The increased convergence among services has not put at stake the relationship between the AVMSD and the e-commerce directive's provisions which do not imply any overlap or confusion. In particular, the rules on intermediaries liability provided for in the e-Commerce Directive still prove their effectiveness and do strike the right balance amongst the different interests at stake, also thanks to subsequent important interpretations from the European Courts. Therefore Orange believes that there is no need to change the scope of the AVMSD.

However, with regard to the distinction between services provided by different agents, Orange supports the European Commission's decision to investigate if there is room for the deregulation of audiovisual services particularly in the area of commercial services, to achieve a level playing field. For similar responsibilities, similar obligations should apply.

Are you aware of issues (e.g. related to consumer protection or competitive disadvantage) due to the fact that certain audiovisual services are not regulated by the AVMSD?

- Yes (if yes, please explain below)
- No

Preferred policy option:

- a) Maintaining the status quo
- b) Issuing European Commission's guidance clarifying the scope of the AVMSD. No other changes to Union law would be foreseen.
- c) Amending law(s) other than the AVMSD, notably the e-Commerce Directive. This option could be complemented by self and co-regulatory initiatives.
- d) Amending the AVMSD, namely by extending all or some of its provisions for instance to providers offering audiovisual content which does not qualify as "TV-like" or to providers hosting user-generated content.
- e) Other option (please describe)

Please explain your choice:

Copyright law as well as the freedom of expression and the freedom of the media set narrow boundaries regarding any lawful interference in the distribution of this content. Editorial responsibility should therefore remain the key requirement for liability, and hosting platforms and intermediaries should stay out of the scope of the AVMS to grant innovation in the provision of content offers.

However for similar responsibilities, similar obligations should apply. This is the case of the distribution of TV-like content on new means such as application stores, social networks or other platforms that do not necessarily provide tools for minors' protection for example. It also applies to some specific taxes or obligations, which create competitive disadvantages in the Directive application.

Some Member States, such as France, defined a specific "audiovisual distributor" category for AVMS providers who aggregate services in order to propose an offer to the final consumer, but do not bear a specific editorial responsibility. For instance, France issued specific rules aiming at audiovisual distributors, notably in terms of child protection, as well as specific taxes. It happens in Spain too: tax to finance state-owned broadcaster, or obligation to invest 5% of audiovisual incomes in European works apply to electronic communication operators, but not to other TV-like services. New players, such as over-the-top AVMS providers, application stores or social networks, while increasingly engaging in distributing TV-like contents on a large scale, are competing with traditional audiovisual distributors such as cable operators or ISPs, while sometimes eluding the provisions of national regulations and tax systems. There might be a need for clarifying the scope of the AVMS directive and preventing any distortion of competition, for instance by issuing guidelines to ensure that all AVMS providers engaging in competing activities are treated the same way.

Geographical scope of AVMSD

The AVMSD applies to operators established in the EU. Operators established outside the EU but targeting EU audiences with their audiovisual media services (via, for instance, terrestrial broadcasting satellite broadcasting the Internet or other means) do not fall under the scope of the Directive[11].

Set of questions 1.2

Are the provisions on the geographical scope of the Directive still relevant, effective and fair?

Relevant?

- Yes
- No
- No opinion

Effective

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

Orange shares the overall goal of re-establishing the attractiveness and competitiveness of the European creativity industry. The Commission should seize any occasion to re-balance the strength of the EU industry and to re-establish its competitiveness by decreasing the level of regulation imposed on audio-visual media services based in the EU.

Today, platforms established outside the EU who target the European market avoid European rules. As a first step, a geographical level playing field in the audio-visual media services' market should be established extending the scope of the AVMSD to cover every company targeting European markets, especially given the growing audio-visual activities of internet players in the provision of audio-visual media services.

Are you aware of issues (e.g. related to consumer protection problems or competitive disadvantage) caused by the current geographical scope of application of the AVMSD?

- Yes (if yes, please explain)
- No

If yes, please explain:

Please refer to our previous answer

Comments:

Preferred policy option:

- a) Maintaining the status quo
- b) Extending the scope of application of the Directive to providers of audiovisual media services established outside the EU that are targeting EU audiences. This could be done,
 for example, by requiring these providers to register or designate a representative in one Member State (for instance, the main target country). The rules of the Member State of registration or representation would apply.
- c) Extending the scope of application of the Directive to audiovisual media services established outside the EU that are targeting EU audiences and whose presence in the EU is significant in terms of market share/turnover. As for option b), this could be done,
 for example, by requiring these providers to register or designate a representative in one Member State (for instance, the main target country). The rules of the Member State of registration or representation would apply.
- d) Other option (please describe)

Please explain your choice:

Extending the scope of application of the AVMS Directive to providers of audio-visual media services established outside the EU that are targeting EU audiences would rebalance the market. To grant innovation, registration mechanisms should be triggered by significant market share.

2. Providing for an optimal level of consumer protection

The AVMSD is based on a so-called "graduated regulatory approach". The AVMSD acknowledges that a core set of societal values should apply to all audiovisual media services, but sets out lighter regulatory requirements for on-demand services as compared to linear services. The reason is that for on-demand services the users have a more active, "lean-forward" approach and can decide on the content and the time of viewing.

In the area of commercial communications [12], the AVMSD sets out certain rules, which apply to all audiovisual media services and regulate, for example, the use of sponsorship and product placement. They also set limits to commercial communications for alcohol and tobacco.

It also lays down other rules that apply only to television broadcasting services and regulate advertising from a quantitative point of view. For example, they set a maximum of 12 minutes of advertising per hour on television, define how often TV films, cinematographic works and news programmes can be interrupted by advertisements and set the minimum duration of teleshopping windows.

Set of questions 2.1

Are the current rules on commercial communications still relevant, effective and fair?

Relevant?

- Yes
- No
- No opinion

Effective

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

Currently the regulatory regime for commercial communications differs between linear and non-linear services. Less stringent regime for on-demand services is still justified today by the difference in terms of choice and user control.

Are you aware of issues (e.g. related to consumer protection or competitive disadvantage) caused by the AVMSD's rules governing commercial communications?

- Yes (if yes, please explain)
- No

Preferred policy option:

- a) Maintaining the status quo
- b) Rendering the rules on commercial communications more flexible, notably those setting quantitative limits on advertising and on the number of interruptions.
- c) Tightening certain rules on advertising that aim to protect vulnerable viewers, notably the rules on alcohol advertising or advertising of products high in fat, salt and sugars.
- d) Other options (please describe)

Please explain your choice:

Today, the regulatory regime for commercial communications differs between linear and non-linear services. The introduction of a less stringent regime for on-demand services was justified at the time by the difference in terms of choice and user control and this justification remains valid today.

3. User protection and prohibition of hate speech and discrimination

General viewers' protection under the AVMSD

The AVMSD lays down a number of rules aimed at protecting viewers/users, minors, people with disabilities, prohibiting hate speech and discrimination.

Set of questions 3.1

Is the overall level of protection afforded by the AVMSD still relevant, effective and fair?

Relevant?

- Yes
- No
- No opinion

Effective?

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

Orange reckons that the current protection afforded by the AVMSD is relevant, effective and fair. Orange, as a trusted third-party, collaborates with national authorities and administration to fight against hate speech and discrimination, and to restrict the access of contents unsuitable for minors.

Are you aware of issues (e.g. related to consumer protection or competitive disadvantage) stemming from the AVMSD's rules?

- Yes (please explain)
- No

Comments:

Protection of minors

The system of graduated regulation applies also to the protection of minors: the less control a viewer has and the more harmful specific content is, the more restrictions apply. For television broadcasting services, programmes that “might seriously impair” the development of minors are prohibited (i.e., pornography or gratuitous violence), while those programmes which might simply be “harmful” to minors can only be transmitted when it is ensured that minors will not normally hear or see them. For on-demand services, programmes that “might seriously impair” the development of minors are allowed in on-demand services, but they may only be made available in such a way that minors will not normally hear or see them. There are no restrictions for programmes which might simply be “harmful”.

Set of questions 3.2

In relation to the protection of minors, is the distinction between broadcasting and on-demand content provision still relevant, effective and fair?

Relevant?

- Yes
- No
- No opinion

Effective?

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

For Orange, maintaining the distinction between broadcasting and on-demand content in relation to the protection of minors is still relevant because on-demand services imply a more active process to reach the offer contrary to linear services. Current rules on the protection of minors for on-demand services grant that minors cannot access content which “might seriously impair” their development.

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

- Yes
- No
- No opinion

Comments:

The rules of the AVMSD have been a first step to ensure a sufficient level of protection for minors, in particular, in a context of converging media world. The Directive has put in place safeguards to allow parents to manage their children's consumption of such content. In parallel, parental control tools are increasingly being made available on devices to allow parents to also restrict access to available audiovisual media services. Significant voluntary initiatives have already been taken by the industry with the support of the public institutions, including the European Commission e.g., the "ICT Coalition for children online" and the Better Internet for Kids initiative, under which Orange worked to ensure a continuing high level of protection when children access content online.

However, the directive has not been implemented homogeneously between Member States. France and Spain have the strongest minor protection in Europe among European countries. As an example, in France, for on-demand services, distributors are required to put in place at least two separate areas: a first one where contents are suitable for families and a second one dedicated to contents not recommended or forbidden to minors (such as most violent contents and pornography). These kinds of programs must be locked by a password. And contents are rated for linear and on demand services with 4 signs to inform the public (10 years-old, 12 years-old, 16 years-old and 18 years-old). Those signs are available during the program, its trailer and any other form of communication.

The Commission should work on better harmonization in the field of child protection to streamline the digital single market.

What are the costs related to implementing such requirements?

Hardware and software development; content sourcing. These costs are increasing a lot due to the vast number of new devices which arrive on the market (iPad, smartphone, HDMI key, etc) where both linear and non-linear services are provided, demanding ad hoc developments and investments.

Comments:

The implementation of protection of minors' tools implies software and hardware costs. Other costs can include content sourcing and the preparation of the different signals to advise the audience. Moreover, TV broadcasters and online audio-visual services need to set regular meetings with experts to rate the contents before they are released and make sure that the rating is consistent between all the contents that are broadcasted or available online.

What are the benefits related to implementing such requirements?

Improve TV services offered by Orange

Comments:

Minors' protection tools are fully integrated in the Orange's offers to answer parents' concerns and demands. These tools are not only an obligation but also part of Orange's policy of supporting families to make the best use of the internet.

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

- Yes (please explain)
- No

Comments:

Preferred policy option:

a) *Maintaining the status quo*

b) *Complementing the current AVMSD provisions via self- and co-regulation* The status quo would be complemented with self-/co-regulatory measures and other actions (media literacy, awareness-raising).

c) *Introducing further harmonisation* This could include, for example, more harmonisation of technical requirements, coordination and certification of technical protection measures.

Other possibilities could be the coordination of labelling and classification systems or common definitions of key concepts such as minors, pornography, gratuitous violence, impairing and seriously impairing media content.

d) *Deleting the current distinction between the rules covering television broadcasting services and the rules covering on-demand audiovisual media services.* This means either imposing on on-demand services the same level of protection as on television broadcasting services (levelling-up), or imposing on television broadcasting services the same level of protection as on on-demand services (levelling down).

e) *Extending the scope of the AVMSD to other online content (for instance audiovisual user-generated content or audiovisual content in social media), including non-audiovisual content (for instance still images)* One option could be that these services would be subject to the same rules on protection of minors as on-demand audiovisual media services.

f) *Other option (please describe)*

Please explain your choice:

4. Promoting European audiovisual content

The AVMSD aims to promote European works and as such cultural diversity in the EU. For television broadcasting services, the EU Member States shall ensure, where applicable and by appropriate means, a share of EU works^[13] and independent productions^[14]. For on-demand services, the EU Member States can choose among various options to achieve the objective of promoting cultural diversity. These options include financial contributions to production and rights acquisition of European works or rules guaranteeing a share and/or prominence of European works. The EU Member States must also comply with reporting obligations on the actions pursued to promote European works, in the form of a detailed report to be provided every two years.

Set of questions 4

Are the AVMSD provisions still relevant, effective and fair for promoting cultural diversity and particularly European works?

Relevant?

- Yes
- No
- No opinion

Effective

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

The AVMSD has established a framework with minimum requirements and has given great freedom to Member States to put in place national schemes that go beyond these minimum requirements. As a consequence, provisions for promoting cultural diversity, and particularly European works, have been transposed in different ways across the Union, leading to a patchwork of 28 national regimes with very different standards. In particular, provisions covering financing and distribution of European works have not been implemented homogeneously by EU Member States. As an example, when France has imposed a minimum of 60% share of European works in the VoD services' catalogues (including a 40% share of French speaking content) and a substantial financial contribution to production, Luxembourg - where major international VoD services providers are established - has not set any quantified target. In Spain, obligation to finance European works up to 5% of audiovisual services incomes applies to electronic communication operators, but not to other TV-like services, creating different financial burden, discriminating and damaging effective competition in the European market. Moreover, in Spain some regional Government has passed a new tax on broadband lines (so applying only to ISPs) to finance audiovisual sector in the region which clearly overlaps financing obligations set by the Directive and the national law.

As a consequence of this regulatory asymmetry, the European Audiovisual Observatory (EAO) estimates that in the EU, over 52% of the VoD services available in one country are established in another Member State. Such forum shopping impacts the effectiveness of the provision for promoting cultural diversity, especially in the countries with the highest standards, and generates competition distortion.

In terms of European works, including non-national ones (i.e. those produced in another EU country), the catalogues offered by audiovisual media service providers contain:

- a) the right amount
- b) too much
- c) too little
- d) no opinion

Comments:

At EU level, it is hard to estimate if there is the right amount of European works in the catalogues offered by EU audiovisual services. As a matter of fact, rules on quotas of European works greatly differ according to the place where the service is based.

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

- Yes
- No
- No opinion

Comments:

Have you come across or are you aware of issues caused by the AVMSD's rules related to the promotion of EU works?

- Yes (please explain)
- No

Yes - explain

The combination of the lack of harmonisation between Member States on promotion of works and the country of origin principle incentivises the most opportunistic players to establish in Member States where rules on audiovisual media services are the most liberal, opening the door to forum shopping and distortion of competition in the EU market.

This impacts the efficiency of the promotion of works provisions as these companies tend to establish in the less demanding Member States, and escape from the high standards imposed by the country of destination of their service.

A greater harmonisation in terms of quotas and financing obligation could help to reach a balanced share of European works all across Europe and would help fitting customers' demands.

Comments:

What are the benefits of the AVMSD's requirements on the promotion of European works? You may wish to refer to qualitative and/or quantitative benefits (e.g. more visibility or monetary gains).

The promotion of European works grants to the EU cinematographic and audiovisual industry a reliable market share, but do not provide any substantial benefit to AVMS provider.

Comments:

As an audiovisual media service provider, what costs have you incurred due to the AVMSD's requirements on the promotion of European works, including those costs stemming from reporting obligations? Can you estimate the changes in the costs you incurred before and after the entry into force of the AVMSD requirements on the promotion of European works?

In Europe the current situation is very uneven. Several countries transposed the directive ad minimum, leaving the national regulatory bodies the choice to set the level of contribution to the production of audiovisual and cinematographic works, as well as the part of European works in the services provided. Other countries such as Spain and Italy set stricter and precise rules on the financing and the promotion of European works, which creates a discriminating environment (obligations not applied to TV-like services), administrative burden and that leads to administrative penalties when not observed. For instance, both Italy and Spain require a quota of national languages works besides the European quota of works for on-demand services.

The transposition of the AVMSD for on-demand services in France is directly inspired from the rules applied to TV services. Thus, French services are submitted to both quotas on the exposition of European works and French-speaking works, applied separately to audiovisual and cinematographic works. These rules of exposure are furthermore broadened by mandatory funding, applied as well on audiovisual and cinematographic works. An on-demand service proposing an offer with audiovisual and cinematographic works is therefore submitted to 8 different kinds of quotas.

Concerning funding, Orange considers that applying the same mandatory funding provisions, as those applied to television services, to video-on-demand services also creates a problem of consistency, as on-demand services thus bear a double obligation. As a result fundings are calculated as a percentage of the VOD service global turnover, and on the basis of each individual program purchase, for which the service provider must contractually pay back a fixed part of the public price. In Spain funding obligation is calculated as a percentage of the total amount of audiovisual incomes (not only VoD incomes), even if there is no editorial responsibility for the rest of services.

Should the quota system remain, Orange advocates for a single quota for both cinematographic and audiovisual works. This single quota would grant the promotion and the financing of European works helping the diffusion of European works across Europe, not only cinematographic works, but other audiovisual works that are not channeled through traditional cinemas, but digital channels too (in Spain the work is required to be exhibited firstly in a traditional cinema, otherwise it cannot be counted as funding obligation required).

Comments:

Preferred policy option:

- a) Maintaining the status quo
 - b) Repealing AVMSD obligations for broadcast and/or for on-demand services regarding the promotion of European works. This would entail the removal of EU-level harmonisation on the promotion of European works, which would then be subject to national rules only.
 - c) Introducing more flexibility for the providers' in their choice or implementation of the measures on the promotion of European works. This could imply, for example, leaving more choice both to TV broadcasters and video-on-demand providers as to the method of promoting European works.
 - d) Reinforcing the existing rules. For television broadcasting services this could be done, for example, by introducing additional quotas for non-national European works and/or for European quality programming (e.g. for fiction films, documentaries and TV series) or for co-productions; or by setting a clear percentage to be reserved to Recent Independent Productions [15] (instead of "an adequate proportion"). For on-demand services, further harmonisation could be envisaged: by introducing one compulsory method (among e.g. the use of prominence tools, an obligatory share of European works in the catalogue or a financial contribution – as an investment obligation or as a levy) or a combination of these methods.
- e) Other options (please describe)

Please explain your choice:

Taking into account the current scenario and current trends, Orange believes that the Commission should provide more flexibility to providers on the promotion of European works and should look for other ways to promote European content industry. These should be based more on industry initiatives and on competition dynamics. Audiovisual media providers will be willing to promote those European works from which they obtain fair and sustainable returns also in terms of product differentiation. At the same time, this will have a positive impact on content creators, that would be interested in receiving support and so they would strive to create high quality European content.

Moreover, more harmonization should be guaranteed amongst European Member States. To achieve a true digital single market, balanced rules about the promotion of European works across the different Member States could be an opportunity to ensure both audiovisual diversity and balance between European countries.

5. Strengthening the single market

Under the AVMSD, audiovisual media companies can provide their services in the EU by complying only with the rules within the Member States under whose jurisdiction they fall. The AVMSD lays down criteria to identify which Member State has jurisdiction over a provider. These criteria include where the central administration is located and where management decisions are taken on programming or selection of content. Further criteria include the location of the workforce and any satellite uplink, and the use of a country's satellite capacity. The AVMSD foresees the possibility to derogate from this approach in cases of incitement to hatred, protection of minors or where broadcasters try to circumvent stricter rules in specific Member States. In these cases the Member States have to follow specific cooperation procedures.

Set of questions 5

Is the current approach still relevant, effective and fair?

Relevant?

- Yes
- No
- No opinion

Effective?

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

Today, the Country of Origin is the core principle of the directive and has been introduced to foster the achievement of the single market for audiovisual media services. Audiovisual media companies can provide their services in the EU by complying only with the rules within the Member States under whose jurisdiction they fall. However, combined with the lack of harmonization, the country of origin principle has missed the achievement of the single market and has incentivized some non-EU-based companies to establish in Member States where rules on media services are the most liberal, leaving the room to forum shopping and competition distortion on the EU market. Furthermore, criteria such as satellite uplink or the use of a country's satellite capacity do not seem to be suited anymore to the situation of audiovisual and media markets, as many services (especially on-demand services) do not use these transmission technologies and are rather distributed through land-based networks.

Harmonization is key to achieve the single market and ensure equity amongst players of the market and should be privileged to fill the gap created by the country of origin principle. Orange supports the objective to achieve the single market for media services so that consumers and media service providers can fully benefit of the free flow of services in the European Union. However, regulatory and tax equity are key and should not be undermined by the regulatory framework.

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

- Yes (please describe)
- No

If yes describe and explain their magnitude

Please refer to our previous answers to questions 4 and 5.1

Comments

If you are a broadcaster or an on-demand service provider, can you give an estimate of the costs or benefits related to the implementation of the corresponding rules?

- Yes
- No

Estimate of costs:

Estimate of benefits:

The lack of level playing field has a considerable impact on the on-demand services market.

Comments:

Preferred policy option:

- a) Maintaining the status quo
- b) Strengthening existing cooperation practices
- c) Revising the rules on cooperation and derogation mechanisms, for example by means of provisions aimed at enhancing their effective functioning
- d) Simplifying the criteria to determine the jurisdiction to which a provider is subject, for example by focusing on where the editorial decisions on an audiovisual media service are taken.
- e) Moving to a different approach whereby providers would have to comply with some of the rules (for example on promotion of European works) of the countries where they deliver their services.
- f) Other options (please describe)

f) other option: please describe

Considering the forum shopping phenomenon and the lack of level playing field described previously, harmonization is the only way, in our view, to strengthen effectively the single market. Where harmonisation cannot be sufficiently achieved, the application of the country of destination principle to some provisions (e.g. on the promotion of European content) should be considered.

Please explain your choice:

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

Independence of regulators

Free and pluralistic media are among the EU's most essential democratic values. It is important to consider the role that independent audiovisual regulatory bodies can play in safeguarding those values within the scope of the AVMSD. Article 30 AVMSD states that independent audiovisual regulatory authorities should cooperate with each other and the Commission. The AVMSD does not directly lay down an obligation to ensure the independence of regulatory bodies, nor to create an independent regulatory body, if such a body does not already exist.

Set of questions 6.1

Are the provisions of the AVMSD on the independence of audiovisual regulators relevant, effective and fair?

Relevant?

- Yes
- No
- No opinion

Effective?

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

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

- Yes (please explain)
- No

Comments:

Preferred policy option:

- a) Maintaining the status quo
- b) Laying down in the AVMSD a mandate for the independence of regulatory authorities,
- for example by introducing an explicit requirement for the Member States to guarantee the independence of national regulatory bodies and ensure that they exercise their powers impartially and transparently.
- c) Laying down minimum mandatory requirements for regulatory authorities, for example detailed features that national regulatory bodies would need to have in order to ensure their independence. Such features could relate to transparent decision-making processes;
- accountability to relevant stakeholders; open and transparent procedures for the nomination, appointment and removal of Board Members; knowledge and expertise of human resources; financial, operational and decision making autonomy; effective enforcement powers, etc.
- d) Other options (please describe)

Please explain your choice

In our view, independence of regulatory authorities is key to ensure the freedom of expression and information, underwritten by the article 11 from the Charter Of Fundamental Rights Of The European Union and the freedom of media, according to article 10 of the Treaty on the Functioning of the European Union.

This is already the case for France where the quasi non-governmental organisation for audiovisual regulation is independent from the executive power. We believe that this type of organisation is key for audio-visual regulation at national level.

Including the minimal requirement of an independent body to regulate audio-visual issues would be a good way to make sure that these freedoms are respected. In most countries, carrying out such independent authorities would not cause problems.

Must Carry/Findability

In the context of the regulatory framework applicable to the telecoms operators, under the Universal Service Directive[16], Member States can in certain circumstances oblige providers of electronic communications networks to transmit specific TV and radio channels ("must-carry" rules). Under the Access Directive[17], Member States can also set rules on the inclusion of radio and TV services in electronic programme guides (EPGs)[18] and on presentational aspects of EPGs such as the channel listing. Most recent market and technological developments (new distribution channels, the proliferation of audiovisual content, etc.) have highlighted the need to reflect on the validity of the must-carry rules and on whether updated rules would be required to facilitate or ensure access to public interest content (to be defined at Member State level), for instance by giving this content a certain prominence (i.e. ensuring findability/discoverability).

Set of questions 6.2

Is the current regulatory framework effective in providing access to certain 'public interest' content effective?

- Yes
- No
- No opinion

Comments:

Orange believes that there is no need to expand the scope of existing access regulation. Convergence will lead to a richer offer of services: traditional broadcasters may start providing linear or non-linear TV services over the Internet (as if they were OTTs), OTT players will also start providing linear or non-linear TV services, and traditional distributors may re-distribute their signals on a broadband circuit in addition to a TV circuit. In this context, increasing access obligations seems over-conservative especially at a point in time where most stakeholders recognize that the traditional telecom package should be reduced rather than extended.

Regulators should limit their activity to the creation of a level playing field subjecting all services, including distributors, to the same regulatory obligations. Must-carry rules should not be extended to additional infrastructure/platforms, and the extension of related obligations to other forms of media services than specific linear audio-visual media services is not regarded as necessary. In particular, scarcity considerations cannot be applied to those platforms that are relevant in the case of access to on-demand services, particularly not when there are different infrastructures among which the user can choose. Besides, guidelines setting criteria in order to identify public interest services could be useful in the prospect of harmonisation between member states.

If you are a consumer, have you faced any problems in accessing, finding and enjoying TV and radio channels?

- Yes (please explain)
- No

Comments:

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

- Yes
 No

Comments:

Preferred policy option:

- a) Maintaining the status quo, i.e. keeping in place the current EU rules on must carry/
 EPG related provisions (i.e. no extension of the right of EU Member States to cover services other than broadcast).
- b) Removing 'must carry' /EPG related obligations at national level/at EU level.
- c) Extending existing "must-carry" rules to on-demand services/and or further services currently not covered by the AVMSD.
- d) Amending the AVMSD to include rules related to the "discoverability" of public interest
 content (for instance rules relating to the prominence of "public interest" content on distribution platforms for on-demand audiovisual media services).
- e) Addressing potential issues only in the context of the comprehensive assessment
 related to the role of online platforms and intermediaries to be launched at the end of 2015 as announced in the Digital Single Market Strategy for Europe.
- f) Other options (please describe).

Please explain your choice:

Please refer to our previous answer.

Accessibility for people with disabilities

The AVMSD sets out that the Member States need to show that they encourage audiovisual media service providers under their jurisdiction to gradually provide for accessibility services for hearing and visually-impaired viewers.

Set of questions 6.3

Is the AVMSD effective in providing fair access of audiovisual content to people with a visual or hearing disability effective?

- Yes
 No
 No opinion

Comments:

The AVMSD has been a first step in the provision of fair access to audiovisual content to people with a visual or hearing disability. As an illustration, in France, accessibility is favoured with subtitles for the deaf and audio description for the blind on the on-demand platforms. Linear services are instead subjected to obligations.

In addition, due to the broad adoption of internet services, Orange considers investments in innovative services as fundamental for people with disabilities. This category is increasingly able to benefit from the wide range of audiovisual media services. Therefore, Orange is already taking a number of initiatives (often in collaboration with Public Administrations and associations of disabled people) with the aim of meeting their needs with terminals, products and services adapted to their specific requirements, in the same way as they do with all other customer segments. These initiatives are proving favourable for all parties: disabled people are obtaining services that facilitate their integration in the Information Society and companies in the industry are stimulating their innovation skills.

In addition, accessibility is a public interest issue. Public funding is key to promote innovation in this area.

Have you ever experienced problems regarding the accessibility of audiovisual media services for people with a visual or hearing disability?

- Yes (please describe)
 No

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

- Yes
 No

If yes: cost:

Contracts and laboratory costs

Comments:

As a distributor we bear the costs of integrating subtitles to the delivered programs. In addition, we also bear the costs of the hardware development needed to implement subtitles and audio description at their best quality.

Preferred policy option:

- a) *Maintaining the status quo*
- b) *Strengthening EU-level harmonisation of these rules.* Instead of encouraging it, the EU Member States would be obliged to ensure gradual accessibility of audiovisual works for people with visual and hearing impairments. This obligation could be implemented by the EU Member States through legislation or co-regulation.
- c) *Introducing self and co-regulatory measures*
- This could include measures related to subtitling or sign language and audio-description.
- d) *Other option (please describe).*

Please explain your choice

In our view, strengthening EU-level harmonisation of accessibility rules is the best option. Accessibility rules should provide the same level of protection to consumers no matter the Member State where the service provider is established.

Events of major importance for society

The AVMSD authorises the Member States to prohibit the exclusive broadcasting of events which they deem to be of major importance for society, where such broadcasts would deprive a substantial proportion of the public of the possibility of following those events on free-to-air television. The AVMSD mentions the football World Cup and the European football championship as examples of such events. When a Member State notifies a list of events of major importance, the Commission needs to assess the list's compatibility with EU law. If considered compatible, a list will benefit from 'mutual recognition'.

Set of questions 6.4

Are the provisions of the AVMSD on events of major importance for society relevant, effective and fair?

Relevant?

- Yes
- No
- No opinion

Effective?

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

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

- Yes (please explain)
- No

Comments:

Preferred policy option:

- a) Maintaining the status quo
- b) Other options (please describe).

Please explain your choice

Programs offered by Orange both on linear and on-demand services do not imply events of major importance. Thus, Orange's experience is not relevant for this question.

Set of questions 6.5

Are the provisions of the AVMSD on short news reports relevant, effective and fair?

Relevant?

- Yes
- No
- No opinion

Effective?

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

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

- Yes
- No

Comments:

Preferred policy option:

- a) Maintaining the status quo
- b) Other options (please describe).

Please explain your choice

Right of reply

The AVMSD lays down that any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies.

Set of questions 6.6

Are the provisions of the AVMSD on the right of reply relevant, effective and fair?

Relevant?

- Yes
- No
- No opinion

Effective?

- Yes
- No
- No opinion

Fair?

- Yes
- No
- No opinion

Comments:

Have you ever experienced problems regarding the right of reply in television broadcasting services?

- Yes (please explain)
- No

Preferred policy option:

- a) Maintaining the status quo
- b) Other options (please describe).

Conclusions and next steps

This public consultation will be closed on 30 September 2015

On the basis of the responses, the Commission will complete the Regulatory Fitness and Performance (REFIT) evaluation of the AVMSD and inform the Impact Assessment process on the policy options for the future of AVMSD.

Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) here:

Footnotes

[1] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. Hereinafter, "the AVMSD" or "the Directive".

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

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, a Digital Single Market Strategy for Europe, COM (2015) 192 final, 6 May 2015.

[4] Hereinafter, "The Green Paper" (<https://ec.europa.eu/digital-agenda/node/51287#green-paper---preparing-for-a-fully-converged-audio>)

[5] Recital 24 of the AVMSD: "It is characteristic of on-demand audiovisual media services that they are 'television-like', i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of 'programme' should be interpreted in a dynamic way taking into account developments in television broadcasting."

[6] Article 1(1)(a) of the AVMSD. The Audiovisual Media Services Directive applies only to services that qualify as audiovisual media services as defined in Article 1(1)(a). An audiovisual media service is "a service [...] which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC". This definition covers primarily television broadcasts and on-demand audiovisual media services.

[7] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

[8] Relevance looks at the relationship between the needs and problems in society and the objectives of the intervention.

[9] Effectiveness analysis considers how successful EU action has been in achieving or progressing towards its objectives.

[10] How fairly are the different effects distributed across the different stakeholders?

[11] Article 2(1) AVMSD – "Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State." (emphasis added)

[12] "Audiovisual commercial communication" is a broader concept than advertising and it refers to images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement. See Article 1(1)(h) AVMSD.

[13] For European works: a majority proportion of broadcasters' transmission time.

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

[15] Works transmitted within 5 years of their production

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

[17] Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as amended by Directive 2009/140/EC

[18] Electronic programme guides (EPGs) are menu-based systems that provide users of television, radio and other media applications with continuously updated menus displaying broadcast programming or scheduling information for current and upcoming programming.

Useful links

AVMSD (<https://ec.europa.eu/digital-agenda/en/audiovisual-media-services-directive-avmsd>)

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