

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

EUROCINEMA RESPONSE

Association of film and television producers

Transparency register number: 43245696854-79

SUMMARY

- Subject OTTs and platforms, particularly when they operate as distributors of online audiovisual media services, to the provisions of the AVMS Directive (notably Article 13) and ensure fair conditions of competition between traditional broadcasters and new operators.
- Revise the lax provisions of Article 13 (promotion and financing of online audiovisual works) in such a way as to create a level playing field at European level.
- Maintain the status quo on Articles 16 and 17 (quotas and investment obligations)
- Give Member States the right to regulate access to their territory for services of non-European origin without setting up an EU coordination scheme for these services.
- To counter forum shopping, which is in blatant contradiction with the European Union's principles, establish the possibility for the country of final destination to regulate the services targeting it primarily if not exclusively, even if these come under the jurisdiction of a European Union Member State, but exclusively for the objectives of promoting and financing creation (application of the country of destination principle).
- Commercial communications: Maintain the status quo for advertising on linear services but improve the protection scheme for non-linear services so as to prevent distortion in the advertising market. Protect the integrity of works with regard to advertising in electronic commerce.
- Do not plan an overhaul of the Electronic Commerce Directive but make the AVMS Directive directly operable when the services provided are audiovisual in nature. In this respect, there is a need to clarify how certain online services are covered by editorial responsibility and to include distributors of audiovisual media services within the scope of the AVMS Directive.

1. Guarantee conditions of fair competition

Services to which the AVMS Directive applies

SET OF QUESTIONS 1.1

Are the provisions on the services to which the Directive applies (television broadcasting and on-demand services) still relevant¹, effective² and fair³?

Relevant? YES – NO – NO OPINION

Effective? YES – NO – NO OPINION

Fair? YES – NO – NO OPINION

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

YES – NO (If yes, please explain below)

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)

Exposure and investment obligations (Articles 16 and 17) for linear services are based on their mass media nature and the role such obligations play in the development of European audiovisual creation is fundamental.

Recent studies demonstrate that linear media services continue to have a mass impact on the public, which justifies maintaining the level of obligations currently imposed on these services.

In parallel, on-demand audiovisual media services have the following characteristics:

- They have a mass impact on the public (in terms of access and consumption) and this results in considerable consequences on European creation (financing of creation, promotion of cultural diversity);
- The public in theory trusts the brands under which non-linear services are published: the corollary is that a principle of editorial responsibility should be imposed on them;
- Convergence leads to strong economic interaction between the different linear and non-linear markets.

¹ Relevance looks at the relationship between the needs and problems in society and the objectives of the intervention.

² Effectiveness analysis considers how successful EU action has been in achieving or progressing towards its objectives.

³ How fairly are the different effects distributed across the different stakeholders?

This justifies strengthening of the regulation of on-demand audiovisual media services, which should come as close as possible to the level of regulation of linear services.

The television environment constitutes a type of media for which the public demands a high level of regulation due to the importance of such media in maintaining democratic values (media pluralism, independence of national media regulators), societal values (consumer protection, protection of minors, protection of public health) and cultural values (promotion of cultural diversity and diversity of content).

We will develop possible ways and means below.

The coordination organised under the AVMS Directive has applied primarily to broadcast services as defined in point i) of Article 1, paragraph 1.

Article 1

1. For the purposes of this directive, the following definitions shall apply:

a) 'audiovisual media service' means:

i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union 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. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

The question of the regulation of on-demand audiovisual media services at European level has arisen more recently. An initial attempt to set up a European framework for online media services was undertaken with the revision of the Television without Frontiers (TVWF) Directive, renamed on that occasion the Audiovisual Media Services Directive⁴.

The environment has become more complex with the economic development of OTT (over-the-top⁵) platforms and services, some of which provide audiovisual content.

Convergence, digitisation of content and access arrangements tend to increase conditions of competition between providers of new services and incumbent players (broadcasters). The difference of treatment between the two categories of players may result in serious distortions with respect to the promotion of **cultural diversity** and **media pluralism**. The provisions of the AVMS Directive in force at present are such as to stimulate media ecosystems at national or regional level. The success of the TVWF Directive, and subsequently of the AVMS Directive, is to have contributed to the organisation of national and regional audiovisual landscapes in keeping with the subsidiarity principle as well as the stabilisation of national broadcasting markets, notably in the context of the organisation of the public television-commercial television duopoly.

National or regional systems of promotion, creation and production of works create positive economic effects and contribute to European cultural diversity through the creation of varied

⁴Directive 2010/13/EU 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 ('Audiovisual Media Services' Directive)

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>

⁵ OTT (Over-the-top) i.e. Online content aggregators operating on the web global market as content service providers. These big operators (Google, Facebook, Netflix, Skype) do not own the infrastructure or bear any expenses to carry their content to the viewers.

works. These rules can co-exist with the core principles of the internal market and the free movement of services.

Consequently, on the basis of the principles developed in Articles 16 and 17 on linear services and in Article 13 (on non-linear services), the provisions of the AVMS Directive relating to the promotion, creation and production of European works should be extended to all **services, including platforms and OTTs delivering or providing professional audiovisual services**.

The emergence of a number of new operators, whose characteristics are poorly defined but which indeed act as audiovisual media service operators, therefore implies that various issues should be addressed:

- Their being subject to the AVMS Directive and its obligations;
- For the programme industries (film and television works), the inclusion of these platforms - often non-European in origin and with a substantial critical mass - in the financing of creation through reinvestment of a significant percentage of turnover is a vital policy objective;
- Rules on commercial communications must also be examined so as to ensure conditions of fair competition in access to the advertising market and to avoid weakening the competitive position of traditional media, because this would also likely create a negative impact on broadcasters' investment in programme industries.

This choice is of fundamental importance, especially since most platforms and OTTs are non-European in origin and therefore contribute only very relative added value to the European economy (corporate tax, job creation, respect for ethical standards). Their practices also increasingly give rise to reluctance on the part of public authorities.

As the Commission notes, a comprehensive assessment of platforms and online intermediaries should be launched at the end of 2015. Such an assessment is fundamental. It should in particular help identify:

- a) The operators that provide audiovisual content.
- b) Who are, or should be, automatically subject to the AVMS Directive (since de facto or de jure, they are characterised by the editorial responsibility that they apply or should apply).
- c) The jurisdiction under which these services fall, whether they are located in the European Union or outside it.
- d) The legal obligations that should apply to OTTs and platforms as well as other online services providing audiovisual services, notably in regard to financing and promoting audiovisual works.
- e) The operators acting as distributors of audiovisual services.

Another important question raised by the Commission concerns the possible revision and modification of the Electronic Commerce Directive.

Certain types of audiovisual services (for example, video content on newspaper websites) are at present either integrated into the Electronic Commerce Directive by certain Member States or into the AVMS Directive by others⁶.

⁶ See the European Commission's comments in the Executive Summary of contributions to the public consultation on the Green Paper 'Preparing for a Fully Converged Audiovisual World' p. 6 [Publication of the summaries of the Green Paper replies | Digital Agenda for Europe | European Commission](#)

Where an audiovisual content service is unequivocally identifiable as such, its inclusion in the scope of the AVMS Directive should be mandatory. Likewise, certain operators do not fall within the scope of the AVMS Directive. This includes distributors of audiovisual media services, in other words operators that organise a range of audiovisual services and offer the services to the public⁷. They should consequently be included and the AVMS Directive should be modified to this effect.

Conversely, the services identified as falling within the scope of the AVMS Directive must be removed from the scope of the Electronic Commerce Directive.

Options a) and b) do not seem sufficient to ensure compliance with the treaty obligations under the UNESCO Convention or to guarantee a fair framework for competition.

Geographical scope of the AVMS Directive

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**

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

YES – NO (If yes, please explain below)

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)

Operators established outside the European Union that provide audiovisual media services targeting EU audiences fall under the responsibility of the Member State of destination.

⁷ Content distribution players include:

- Internet access providers when they distribute on-demand audiovisual media services;
- Managers of application shops that include on-demand audiovisual media services;
- Information society services when they offer audiovisual media services (for example, community platforms when they present an offering of audiovisual media services selected by them)

(see in this connection the response by France to the European Commission's consultation on the Green Paper 'Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values', point 5 - regulatory framework, 22.11.2013)

For satellite broadcasts, this has not led to any major malfunction (probably related to the fact that the transnational satellite market has never played an economic role in the primary content delivery market).

Platforms and OTTs are either under the jurisdiction of the US or of another non-EU country, or have opted - for some of the services they provide - to establish a base in Europe, i.e. the choice of the jurisdiction of a Member State (clarification of the jurisdiction must be an element of the study on platforms promised by the Commission in 2015 (see above)).

Our preference is maintenance of the status quo, namely Member States' right to control access to their territory for services having no jurisdiction in a European Union Member State.

Location of foreign operators⁸

The following are established in the United States:

- *Google's VoD services targeting European markets (United Kingdom, Germany, France and Spain) (Google Play movies), clearly operated by Google Inc.*
- *Google Play application shops, also operated by Google Inc.*
- *YouTube open platforms (operated by the Google subsidiary YouTube LLC)*
- *YouTube's paid VoD services (not widely known but that do indeed exist) exclusively in France, Germany and the United Kingdom:
<http://www.youtube.com/user/YouTubeMoviesFR>*
- *The MUBI services in English, French, German and Turkish operated by Bazaar Inc.*

Google's Irish subsidiary is used to register YouTube's advertising revenue as well as income from purchases on Google Play, but the legal notice for all services clearly states that they are provided by Google Inc. and YouTube LLC.

*What is less clear (because there is no statement to this effect visible on the sites) is the identification of the companies publishing the major studios' branded channels (Disney, Warner, Fox) on iTunes stores and American theme channels targeting Europe. According to certain professionals, the branded channels of the studios and networks found on iTunes stores targeting the United Kingdom, France and Germany are managed directly **from the United States**. The same may be true for the Walt Disney and Pixar branded channels available in most iTunes stores targeting Europe.*

Other American groups have chosen the Czech Republic as the country of establishment for their on-demand services (HBO and the Voyo service of Central European Media Enterprises, targeting Central and Eastern Europe).

It is also important to point out that the two principal VoD services available in SmartTV stores are established in Switzerland, a country that has not transposed Article 13 of the AVMS Directive: Acetrax (bought last spring by News Corp) and Viewster.

Another question: What companies manage the SmartTV stores (Samsung, LG, Philips, etc.)? It is important to draw the attention of legislators to this question because access will soon be played out in the control of these stores.

The on-demand audiovisual services targeting European countries offered by Apple (iTunes Store), Microsoft (XBoxLive and apparently most MSN portals) and Netflix are established in Luxembourg and therefore come under this country's jurisdiction (and under the AVMS Directive).

Concerning Apple's iTunes Stores, services for Africa, the Middle East and Asia (except for Japan) are provided by iTunes Sarl, a company incorporated under the laws of Luxembourg. There are apparently 77 iTunes Stores (including those serving China!!) established in Luxembourg. <http://www.apple.com/legal/itunes/ww/>

⁸ Extract from EUROKINEMA's response to the consultation on the Green Paper 'Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values' (29.08.2013)
http://www.eurocinema.eu/docs/Reponse_EUROKINEMA_LV-convergent_final_29.08.2013.pdf

The situation is less clear for Microsoft's MSN portals, but the '3 Terms of Use' refer regularly to the Luxembourg subsidiary and, in the absence of evidence to the contrary, are established in Luxembourg.

Sony's on-demand services, on the other hand, are established in the United Kingdom. Amazons' VoD services are established in the United Kingdom (for services for Britain and the Nordic countries) and in Germany (for services for Germany).

() Data was provided by the European Audiovisual Observatory. The interpretation is mine, however.*

2. Providing for an optimal level of consumer protection

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

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

YES – NO (If yes, please explain below)

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)

The current provisions of the AVMS Directive relating to linear services appear to be well balanced. Like the rest of the directive's provisions, they are the result of complex negotiations between the Member States.

At over 12 minutes of advertising per hour, one wonders whether programmes transmitted for 'free' (although financed by fees or advertising), and in particular cinema and audiovisual production, would remain attractive. The status quo on the existing provisions seems to be a viable option.

On the other hand, the matter of imposing a graduated - in other words lighter - scheme on non-linear services is highly debatable.

The distinction between linear and non-linear services is not justified with respect to commercial communication. The concept of 'degree of control' that the user may exercise remains relatively hypothetical for non-linear services and certainly cannot systematically justify a form of easing of the rules for these services.

While it is clear that the choice of the non-linear programme is the user's decision, once that choice is made the consumer ends up in a viewing situation similar to that of a linear services and

is consequently entitled to demand a level of protection equivalent to that existing in linear services (in regard to public health, for example).

Authors, directors and producers of European works are also entitled to obtain protection from the public authorities with respect to the treatment that can be applied to their works in the context of an online transmission (possible mutilation, segmentation, additions to or transformation of the work). This ethical aspect must necessarily be taken into consideration with respect to the integrity of works and freedom of creation.

The other aspect that must be taken into account is the fair apportionment of advertising resources. In the past, this was the purpose of the organisation of the public channels-commercial channels duopoly.

Commercial communications continue to constitute a significant and vital resource for linear services (commercial TV and in many cases public channels) and for the growth of non-linear services⁹. The imposition of fewer constraints on non-linear services in rules on commercial communications, on the pretext that the consumer enjoys freedom of choice, is a very debatable concept since the economic and competitive balance between linear and non-linear services risks being affected. An adjustment to the rules should be made on this point.

4. Promoting European audiovisual content

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

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

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

YES – NO – NO OPINION

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

YES – NO (If yes, please explain below)

⁹ Over the longer term, they will come to rely on a mixed financing system (advertising revenues and subscription or one-off payment).

¹⁰ In 2014, online advertising totalled 24 billion euro and television advertising 28 billion euro.

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

Benefits: **(see response below)**

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

Costs:

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 Productions¹¹ (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)*

Our association proposes to examine the question of the promotion of audiovisual works taking into account the specific characteristics of linear audiovisual services and non-linear audiovisual services.

▪ **Linear audiovisual services**

The provisions on linear audiovisual services are those relating to Articles 16 and 17 of the AVMS Directive.

Article 16.1 - Majority proportion of transmission time for broadcasts of European works
'Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping.'

Article 17 – 10% of transmission time or alternately at least 10% of their programming budget reserved for European works created by independent producers.
'Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or

¹¹ Works transmitted within 5 years of their production.

alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters.'

In the reports evaluating implementation of the AVMS Directive with respect to the provisions of Articles 16 and 17, the European Commission concludes that implementation of these provisions is satisfactory (see on this subject the Commission's appraisal report on the basis of data provided by the Member States)¹²

In addition, implementation of these provisions is qualified by the 'where practicable' limitation and by the fact that Article 4 is taken into account, offering flexibility to Member States and in terms of the services subject to implementation of these obligations.

Article 4

'1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union laws.'

It is consequently by no means desirable to abolish or revise these provisions, and even less so to call them into question.

Our association firmly supports the **status quo on Articles 16 and 17 of the AVMS Directive**.

Article 13 of the AVMS Directive focuses on the promotion of audiovisual works in non-linear audiovisual services (video-on-demand services).

Article 13

'1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, 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 offered by the on-demand audiovisual media service.

2. Member States shall report to the Commission no later than 19 December 2011 and every 4 years thereafter on the implementation of paragraph 1.

3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.'

This article establishes that media service providers shall promote the production of and access to European cinematographic works.

Member States may choose from among three different tools for the promotion of European audiovisual works:

- 1) Financial contribution to the production and rights acquisition of such works;
- 2) Quantitative promotion, i.e. a significant share in catalogues reserved to European works;
- 3) Qualitative promotion, i.e. the promotion of European works in catalogues.

For now, these three options are interchangeable.

¹² First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010. Promotion of European works in EU scheduled and on-demand audiovisual media services COM(2012) 522 final <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0522&from=EN>

In its first report¹³ on the application of these provisions, the Commission interprets the provisions of Article 13 as follows:

'Article 13 does not impose any specific tool to promote European works. It provides examples of means to carry out such promotion: financial contribution to the production and rights acquisition of European works, a share and/or the prominence of European works in the catalogues offered to the public. Article 13 AVMSD has been implemented by Member States in a highly diverse way, going from very extensive and detailed measures to a mere reference to the general obligation to promote European works.'

The first report on the application of the provisions of Article 13 on the promotion of audiovisual works in on-demand audiovisual services is extremely laconic (and probably reflects the lack of information obtained in this area from Member States).

However, it may be established here that very few Member States have made the choice of combining the three options (financing + quantitative promotion + qualitative promotion). It even seems that certain Member States support only the option of qualitative promotion, in other words the optimisation of European works in catalogues, and disregard the aspects of the share of works in catalogues and the financing of production or rights acquisition of European works by providers of the service.

This first report points out that certain States rely mainly on giving prominence to European works in catalogues, an option aiming to optimise access to European works in a qualitative manner.

Several Member States have imposed obligations on video-on-demand service providers to finance the production or acquisition of European works.

Several Member States combine this option with that of quantitative promotion (important share of European works in catalogues).

Apparently, France alone combines the three options. The nature of the financial obligations also varies considerably. The average obligation on VoD service providers is 2% of their annual turnover (France requires 26% of annual turnover).

In their responses, several regulators explain that financial contributions are the most effective option because they constitute a direct way of ensuring the production of European works. This creates a virtuous circle through the reinvestment of a portion of the income from the exploitation of European works in the production of new works, which seems extremely favourable to cultural diversity at national and European level alike.

Our association takes the view that a more thorough examination of the implementation of Article 13 should be considered so as to fine-tune the existing arrangements, which are decidedly too lax.

One possibility would be to get Member States to agree to combine the implementation of two options, either the financial contribution and qualitative promotion (prominence of European works), or the financial contribution and quantitative promotion (a majority of European works in catalogues), while continuing, for the Member States so inclined, to benefit from the provisions of Article 4 (implementation of more detailed or stricter rules), so as to enable them to combine the three options.

¹³ [Promotion of European works in practice | Digital Agenda for Europe | European Commission](#) - July 2014

The three options should also be defined in much greater detail in order to create a level playing field offering conditions of fair competition and ensure appropriate means of promotion of cultural diversity of European content.

In this regard, the share of financing of rights acquisition of European audiovisual works should be at least **10%** of annual turnover.

Growth of the video-on-demand market, and the fact that it has to a large extent replaced sales of video on a physical medium without really compensating for the losses caused by the decline of these sales, necessitates greater financing of European works by video-on-demand operators.

Likewise, the options with respect to qualitative or quantitative promotion should be defined in greater detail. On qualitative promotion, we suggest a look at the Canadian example aiming to give the Canadian public an incentive to consume national services by organising electronic programme guides (EPGs) in such a way that they facilitate access to these services (provisions on optimisation of services).

5. *Strengthening the single market*

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**

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

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

COMMENTS

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

YES – NO

Estimate of costs:

Estimate of benefits:

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)*

Imposition of the country of origin principle has been extremely beneficial to broadcast services. Once authorised by the country of establishment, such services may transmit throughout the European single market.

This rule did not create problems for public broadcasting services, since they are established in the country where they primarily provide services (and from which they draw resources - levies or advertising revenues).

The issue became more complicated with the development of commercial broadcasting. Certain TV groups have attempted to benefit from freedom of establishment as a way of circumventing the obligations imposed by the country of destination (notably on the protection of minors, advertising rules and contributions to the financing of European works).

The emergence of platforms and OTTs undeniably brings back to the fore the questions of the country of origin principle and freedom of establishment.

Without fundamentally questioning the country of origin principle or freedom of establishment (the latter is enshrined in the Treaty as a fundamental freedom), the Commission and Council should prohibit **fraud** between Member States.

Benefiting from freedom of establishment in one Member State in order to provide a service to another EU state, with the obvious intent to circumvent the stricter specific obligations implemented by the latter, should not be tolerated since the relevant target market is that of the country of destination (and not that of the country of origin that issued the operating licence).

This question takes on heightened significance with the development of platforms and online services, some of which benefit from an establishment of convenience meant to provide them with a tax haven and more particularly, in the case of production financing, with a 'levy haven'¹⁴. According to the European Audiovisual Observatory, more than 50% of video-on-demand services available in a Member State appear to be established in another Member State.

Freedom of establishment is one thing, but fraud is quite another. It is regrettable that fraud can be organised and tolerated, notably by the Council.

For the online market, as stated above, a country like France has set very ambitious standards in regulating its video-on-demand (VoD) market (financing of European audiovisual works in the amount of 27% of annual turnover, obligation of a significant share of European works in catalogues and obligation to promote content in catalogues).

Such obligations, as legitimate as they may be in the light of the preponderance of the online economy (to the detriment of the market for video on a physical medium) and easier access for the consumer, are already creating, and will do so even more in the future, the temptation for operators, in particular non-European operators, to circumvent French legislation by invoking an establishment of convenience giving them a tax exemption in another Member State as well as an exemption from obligations for the promotion of European works.

As proposed above, establishment of a single level playing field must be considered on the question of the promotion and financing of online distribution of European works. However, this level playing field will not be sufficient in itself to close the gap between low-standard and high-standard countries with respect to the promotion of online audiovisual services.

Until 'fraud' resulting from deficient enforcement of freedom of establishment and free movement becomes a subject of concern for the Council (as well as the inevitable deterioration of freedom

¹⁴ Term used by the German authorities in their comments on 'European AV Policy in the Digital Era', dated 11 July 2014, page 2.

of establishment and free movement and increasingly recurrent opposition to implementation of these principles) and is seriously sanctioned, **other ways and means** will have to be considered to ensure strict compliance with national laws establishing, in particular, high standards for the promotion of audiovisual works.

This would imply giving **the country of destination the possibility to apply its legislation** on the promotion of European works provided that the service in question targets this country exclusively or primarily (even if it is legally established in another Member State).

In this context, any content provider that markets its services to a country other than the host country in the European Union should be subject to the destination country's contribution scheme on the basis of the turnover generated on this market. This should consequently apply to all services that develop a direct marketing activity with consumers in the Member State concerned on whose market they draw revenue (essentially from advertising or from subscriptions, leasing fees or one-off payment).

This presupposes that the content provider:

- 1° has a permanent establishment in a Member State so that it is subject to all rules allowing it to benefit from the principle of free movement in the internal market; André Lange states in this connection that many services fail to identify themselves¹⁵.
- 2° declares its activity in all the Member States where it **markets** its offering (including the sale of advertising space, call TV revenues, etc.)
- 3° keeps its accounts to show turnover obtained in each Member State.

The provider should have a permanent establishment in a European Union host state and should be subject to all the rules of this state (**except rules on contributions to production**) as well as several virtual permanent establishments (corresponding to its exercise of an economic activity in a state), which would require it to comply with the **contribution rules of each state in which it is virtually established**.

This form of **very partial derogation**, for reasons of **general interest**, from the country of origin principle should apply to both **publishers of services** (linear and non-linear) and to **distributors of audiovisual media services**.

This would require the introduction in the AVMS Directive of a reference to a **virtual permanent establishment** (marketing criteria) to ensure that operators covered by this provision are subject to the provisions of the **revised Article 13 of the AVMS Directive**¹⁶ and to the national provisions of the country of destination on the promotion and financing of programme industries.

¹⁵ Contribution on the public consultation on Directive 2010/13/EU on audiovisual media services (AVMSD) - By Dr. André Lange, independent expert andre.lange.medart@gmail.com
10 September 2015. <http://alfa.blog.lemonde.fr/files/2015/09/ANDRE-LANGE-CONTRIBUTION-ON-THE-PUBLIC-CONSULTATION-ON-DIRECTIVE-SMA-final-10092015.pdf>

¹⁶ It should be noted that, from 2015, VAT is subject to regulation in the country of destination