

UK Government response to the European Commission consultation on the review of the Audiovisual Media Services Directive (AVMSD)



Introduction

The UK Government welcomes the opportunity to respond to the Commission's consultation on Directive 2010/13/EU on audiovisual media services (AVMSD) "A media framework for the 21st century". We generally regard the regulation of the European audiovisual market through AVMSD as a success story. However, this broadcasting-focused framework is being challenged by convergence and the evolution of new players. We suggest that any review of the AVMSD must be undertaken with a view to:

- Maintaining a stable regulatory framework for investment and competition in an increasingly converging audiovisual market through the regulatory certainty provided by preservation of the country of origin principle;
- Supporting the growth of European creative industries;
- Supporting consumer choice and protecting consumers adequately and giving them the right tools and frameworks to be able to safely navigate audiovisual and media content and services.

The Digital Single Market and the Country of Origin Principle

The Digital Single Market is a key priority for the UK. It offers huge potential for driving jobs and growth, and has a key role to play in safeguarding Europe's future competitiveness. The primary purpose of the Audiovisual Media Services Directive is to ensure the effective operation of the internal market for television broadcasting services by ensuring the free movement of broadcasting services throughout the EU. The country of origin principle (COO) is a fundamental and critical precondition for the generation of a Digital Single Market in content; it is the core of the directive and must not be lost or eroded.

COO has simplified regulatory burdens on distributors and therefore made it possible for more people across Europe to experience the best of European digital culture. It also has the flexibility to support future developments in cross-border provision. For example, the UK Government supports the Commission's recent Digital Single Market Communication proposing copyright reforms to enable portability of digital content that consumers are entitled to access when they travel in the EU. The existing country-of-origin framework of the AVMSD supports the provision of portable services in terms of providing regulatory certainty, alongside targeted copyright changes, which may also require safeguards to ensure provisions are not abused. By contrast, the alternative – the Country of Destination principle – leads to regulatory insecurity and financial burdens for the industry.

The breadth of the Digital Single Market strategy raises a number of overlapping issues. For example, in protecting consumers, a role for ISPs could be created by augmenting the scope of AVMSD or through clarifying the e-Commerce Directive; or the discoverability of content which is considered in a number of directives including

AVMSD and the Access Directive. Additionally, the telecommunication framework review will look at end user rights and the quality of experience for users of electronic communication services and networks. The Commission needs to be clear on what they are regulating and why, to prevent any confusion of content services with electronic communications services – a distinction that still is valid. However, it is important the regulation nevertheless is consistent.

Links with Other Consultations

There are a number of ongoing or soon to be launched consultations that are also relevant to the questions considered in this consultation and it is important that issues are considered in an integrated manner. Notably, the Commission is also consulting on the review of the Satellite and Cable Directive, with a later closing date. This Directive sets out the copyright and licensing framework that has allowed satellite broadcasts to be available across borders without infringing copyright. The Commission should consider the results of the two consultations in parallel to ensure that the framework continues to support consumer choice and provides strong incentives to invest in the production of content.

The role of platforms should be carefully considered (e.g. pay-TV platforms or content host platforms or search platforms). Assessment of all regulation should be based on the principles of better regulation, and evidence-based policy making.

Creating a level playing field may be better achieved by reducing or removing regulation on existing players rather than by extending the scope of AVMSD. Platforms must, however, respect national legal frameworks and assist law enforcement authorities. Platforms must act in a socially responsible manner and be reasonable and timely in their cooperation with law enforcement authorities and in the removal of illegal and copyright-infringing material, without harming freedom of expression.

Radio

We feel that the DSM strategy ignores the continuing importance of supporting a digital future for radio. The UK wants to ensure it remains a distinctive and vibrant medium for citizens and consumers. Whilst it is appropriate that responsibility for the regulation of radio services remain within the competence of national Governments, the Commission could play a role in supporting the transition by supporting common technical standards for digital radio, encouraging European car manufacturers to install digital radio alongside FM and to promote the carriage of European radio services on digital networks.

Convergence and the Consumer Experience

The UK is very aware of convergence and how our way of accessing audiovisual content changes through the development of (hardware) devices and (software) services like apps, social media platforms and platforms for user generated content. Ofcom¹ monitors these changes closely in their yearly reports on the communication market². This transition will continue and is likely to accelerate as more consumers change their ways to access content and with improved 4G and broadband connectivity. These trends mean it is important for the framework of consumer protections set out in the existing directive to be assessed and redefined at this time; however we should be cautious about leaving behind tried and tested systems and structures which support the creation of audio visual content and ensure common protections for the dissemination of this content.

While in the consumer experience the boundaries between broadcast and internet services are blurring technically there remains a clear distinction between information that is broadcast and information that is requested on the internet. The UK believes that this is likely to continue and will lead to continued differences in the regulation although not necessarily differences in standards; however the vast majority of issues arising can be solved through a combination of more detailed definition or guidance, technical developments and common technical standards and better cooperation between member states or regulators. Fundamentally, the Commission should take rigorous, evidence based and proportionate approach towards before introducing major changes to the existing system. Concerning the protection of consumers we do not want to reduce the regulatory level we currently have. However, within the current scope of AVMSD we do see potential to align regulation for linear and on-demand content to deregulate the framework as industry at least partly already applies tv rules also for on-demand content.

Protection of Minors

The UK Government is committed to improving the safety of children online, however including more services within the scope of AVMSD does not open up new ways for enforcement in the internet but endangers the current level of protection in the UK.

The UK has a strong track record of working with the Internet industries to tackle online safety issues, and employs a number of measures to protect minors from the risks posed by harmful content. We are committed to taking further action. The Government has recently appointed a Minister with responsibility for Internet safety, and through the UK Council for Child Internet Safety (UKCCIS), we work with a wide range of partners across industry, schools, charities, regulators, and broader civil society to drive progress. Thanks to the energy committed by industry, around 90%

¹ The Office of Communications, the UK's independent regulator for UK broadcasting, telecommunications and postal industries; www.ofcom.org.uk/

² <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr15/>

of UK consumers can now easily switch on parental controls - the four major providers (Sky, Virgin, BT and TalkTalk) provide an unavoidable choice to their customers on family friendly network level filters. Filters are also offered on mobile phones and on public wifi to protect children when they are out of the home.

Through the UKCCIS, we are producing information and guidance materials for schools and social media companies; we are raising awareness of these issues amongst parents, and encouraging families to talk about online safety; we are exploring the potential for age verification of online content; and we are encouraging industry to consider the needs of young people as they develop future tools and technologies. In addition, the Government has committed to further protecting children from harmful sexualized content online, by requiring that sites containing pornographic material introduce age verification – we will be consulting on this shortly, and welcome engagement with member states on this point, so that the UK's approach can be informed by that adopted by other member states.

Content and Advertising

For a thriving media sector, the UK regards the investment in European content, the competition between PSBs and independent producers, and international competition, as essential.

Challenges arising as a result of industrial/social policies/rules (“positive regulation”) in some Member States, e.g. the promotion of European/domestic content, have accompanied AVMS from the very beginning. We think that it is legitimate to promote national aspects and the compromise the Directive found when it was negotiated in 2007 is still valid. However, to strengthen these arrangements would be seen as weakening the single market.

Advertising and other marketing methods in the digital world must remain appropriate, in terms of whom they target, where they are shown, and in the methods they use. Whilst we may be starting to make the transition towards a converged world where there is no difference whether content is broadcasted or transmitted via the internet or on what device it is received by the consumer, this transition is far from complete, and the exact destination is currently hard to ascertain. This is why we believe that different sets of rules for different types of media remain appropriate. However, it is vital that the regulatory regime remains sufficiently flexible and nimble.

The UK benefits from a healthy and successful advertising sector, which is underpinned successfully self-regulation. The Advertising Standards Authority (ASA) administers a system, which is flexible and responsive. As the ASA also has a significant range of powers and sanctions in place to address concerns specific to online advertising and they take action in this area to ban advertisements that fall foul of their rules we cannot see any necessity to harmonise these rules on a European level.

Conclusion

To summarise, the UK believes that the Country of Origin principle is vitally important. Whilst there is scope to develop some common standards, we see a tangible difference between the concepts of broadcasting regulation and internet regulation.

We have achieved a high level of consumer protection for AVMSD content and do not wish this to be diluted.

By contrast, within AVMSD, we would like to see some de-regulation between the different sets of rules for television and television-like content.

Background and objectives

The Audiovisual Media Services Directive (AVMSD³) 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 convergence⁴. 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 Europe⁵, 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"⁶ 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.

³ 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".

⁴ <https://ec.europa.eu/digital-agenda/en/media-convergence>

⁵ 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.

⁶ Hereinafter, "The Green Paper" (<https://ec.europa.eu/digital-agenda/node/51287#green-paper---preparing-for-a-fully-converged-audi>)

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

General information on respondents

What is your nationality?

United Kingdom

What is your name?

Katharina Ribbe

What is your email address?

Katharina.Ribbe@culture.gov.uk

I'm responding as:

The representative of an organisation/company.

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

No

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

National administration

My institution/organisation/business operates in:

United Kingdom

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

UK Government

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?

N/A

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-like⁷ and for which providers have editorial responsibility⁸.

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 Directive⁹, 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.

⁷ 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."

⁸ 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.

⁹ 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')

Set of questions 1.1

Are the provisions on the services to which the Directive applies (television broadcasting and on-demand services) still relevant¹⁰, effective¹¹ and fair¹²?

Relevant? YES

Effective? YES

Fair? YES

Comments:

The UK Government regards the demarcation of the scope of the directive as relevant, effective and fair. However we feel that there is room for improvement by clarifying the application of the current provision.

We would not like to see the inclusion of more types of services (see 1.1.) or to services established outside the EU (see 1.2) in the AVMSD regime. The main reasons for this are that we do not think that the current AVMSD regulation can be applied to other services and we do not want to lose the current level of protection.

We would like to note that this consultation approaches the overarching issues of whether convergence would suggest the inclusion of further services within the AVMSD framework, whether AVMSD still provides the right level of protection for consumers, and whether there is a level playing field for services within the scope of the AVMSD and services out of scope from a variety of starting points in the directive itself. This response seeks to avoid repeating points already made; however as those issues are interrelated this is not always possible.

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?

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NO

¹⁰ Relevance looks at the relationship between the needs and problems in society and the objectives of the intervention.

¹¹ Effectiveness analysis considers how successful EU action has been in achieving or progressing towards its objectives.

¹² How fairly are the different effects distributed across the different stakeholders?

Preferred policy option:

Issuing European Commission's guidance clarifying the scope of the AVMSD. No other changes to Union law would be foreseen.

Please explain your choice:

The UK Government does not want to extend the scope of AVMSD to include more types of audiovisual services because we regard the distinction between linear broadcasting (including broadcasting-like content) and other audiovisual platforms, where the provider has no editorial responsibility (e.g. user generated content, social media) or is not competing for the same audience as linear television services, as valid and think this will continue.

In parallel the UK Government regards the primary purpose of the Audiovisual Media Services Directive - to ensure the effective operation of the internal market for **television broadcasting** services by ensuring the free movement of broadcasting services throughout the EU - as an important feature especially in the development of a single digital market.

However, the existing regulation would benefit from a more common approach and a consistent application throughout Europe regarding how the terms “provision of programme” and “tv-like” are to be interpreted. This could be achieved by developing some guidance; this should be informed by the regulators’ expertise.

We do note that the different types of content are blurring especially from the perspective of the consumer and that because of the development we might need to revisit some definitions to make sure they are up to date to capture the content concerned properly and consistently throughout the EU.

We hold that the audiovisual market in the UK is still tv centred in terms of volume and think this likely to continue. The number of people watching TV each week increased from 53.9 million to 54.1 million viewers between 2013 and 2014 (although the average proportion of the TV population who watch TV each week fell slightly year on year, from 93.4% to 92.4%). It can be seen that new forms of media which is out of scope of AVMSD is used along side or on top of traditional linear tv or on demand content, we cannot see that television is being replaced by other media use.

One might argue that we see a drop in tv uptake and new consumer behaviour in younger consumers. Since 2012 all age groups have had year-on- year declines in daily TV viewing. In 2014 the average number of minutes of broadcast TV, watched on a TV set, was 220 minutes per person (aged 4 and above) per day; 11 minutes less than in 2013. The fall, of 4.9% year on year, represents the second consecutive year of decline.

However, there was an increase in time-shifted viewing (+1 minute) and BARB data suggest that about half of the decline in viewing may have shifted to 8-28 day catch-up and other (unknown) content on the TV set. There was also a three-minute

increase in 'unmatched' viewing (this includes apps on smart TVs, gaming and subscription video-on-demand services such as Netflix), from 26 to 29 minutes.

This data shows that a vast majority of consumers across all age groups still access audiovisual services through services in scope of the current AVMSD. Characteristics of services out of scope of the directive (here: being a service without editorial responsibility for the content provided; for content being out of the territorial scope see 1.2.) make it difficult to apply AVMSD rules easily to user-generated content or social media. The AVMS regulations reflect the characteristics and functions of services with editorial responsibility; they do not make sense on services with no editorial control. For example a tried and tested system like the watershed cannot be applied to internet services which are ready to use 24/7; and services which make available content generated by individuals should be dealt with differently and in a different set of regulation than services which exercise prior control over the content they deliver. Tweaking the rules to make them applicable to all types of audiovisual content may also entail losing the current level of protection for tv and tv-like content.

Also, the decline in traditional TV may be explained by a number of factors including rising employment (which reduces the demand for daytime tv), a lack of events programming as seen in 2011 and 2012, household formation (fewer people aged 25-30 are buying houses but share rented accommodation), and the increase in use of other more portable devices with connected to wireless superfast broadband to watch AV content. For example, the number of 4G subscriptions in the UK has risen from 2.7m to 23.6m during 2014 and Ofcom research shows that 4G users are more likely than other smartphone users to access audio-visual content on their 4G device¹³.

Any issues arising through the increase in take-up of non-broadcast on-demand services should be addressed through regulation to the medium used; we do not think it can be addressed by simply extending the scope of AVMSD (see also under set of questions 2 and 3).

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 Directive¹⁴.

¹³ http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR_UK_2015.pdf, pages 1 and 7

¹⁴ 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)

Set of questions 1.2

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

Relevant? YES

Effective? YES

Fair? YES

Comments:

The UK Government regards the existing provisions as proportionate to ensure access to a competitive, free and pluralistic media environment. AVMSD regulation targets services, which are established in an EU member state, and services using certain technical services of an EU provider such as a satellite up-link. This demarcation is still valid as it is in line with the primary aim of AVMSD that is to create a single market for broadcasting services throughout the EU by ensuring the free movement of broadcasting 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

Comments:

The UK Government notes that video on demand providers established e.g. in North America offer pornographic content in the UK without observing the rules set up in domestic law through AVMSD, i.e. without using age verification systems.

Preferred policy option:

Maintaining the status quo

Please explain your choice:

From a UK perspective, including further services, which target member states from outside the EU without using at least a technical service in the EU, would not add a significant benefit to the UK level of consumer protection while presenting considerable difficulties in enforcement to take undesired content down.

We are concerned that extending the geographical scope of AVMSD would not present significant benefits for the UK consumer because by including more services the UK would lose the opportunity to legislate according to the high UK consumer protection standards.

AVMSD focuses on services established in the EU as those are the primary market participants. The set of secondary technical jurisdiction criteria increase the number of services under EU jurisdiction noticeably; satellite services receivable in the EU will almost always come under the jurisdiction of an EU member state. However AV services that are delivered through cable, DTT or the internet and that are not established in the EU are out of scope of AVMSD. The UK Government believes that the technical differences in the provision of content through satellite, cable, DTT or IP suggest that they should not be brought under one regulatory regime of AVMSD.

For broadcasting via DTT, because of the geographical situation of the British Isles, this does not tend to be problematic as there are few direct borders (especially to non-European countries) and even fewer overspill.

For cable platforms we understand that cable providers in the UK currently do not carry services outside the AVMSD framework. We also understand that other EU member states do regulate such platforms more closely. We would therefore see no necessity to introduce any regulation at a European level. We understand that the regulation for pan-European broadcasting services using satellite or cable networks is to be examined in the on-going consultation on the Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

For on demand content (distributed through the internet), the UK has experienced providers leaving the UK jurisdiction or even EU jurisdiction altogether. Therefore extending the scope of the application of the Directive to providers of audiovisual media services established outside the EU that are targeting EU audiences by requiring those providers to register or designate a representative in one Member State presents an option that might be explored further. However, the UK would not like to see the introduction of a licensing regime for non – EU providers, if this leads to non-EU providers getting a licence in a member state which takes a comparatively light touch approach to regulation (as opposed to the UK where there is comparatively strict regulation). Consequently the UK would not be able to protect consumers to a high standard because we lose the potential to legislate.

We believe that internet filters which can be set up at device or network level provide the best available protection against such services with illegal or undesirable content, where the providers are not established in a EU member state. Furthermore, the Government will shortly consult on proposed measures to require that harmful pornographic material be behind appropriate age verification controls.

However, throughout the EU the approach as to whether content “might seriously impair” minors is very varied. For example, content that needs to go behind access controls in the UK is openly available in other European member states. Child protection measures are further discussed under questions 3.2.

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 communications¹⁵, 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

Effective? YES

Fair? YES

Comments:

On a very general basis the UK Government believes that the AVMSD framework is still fit for purpose. The tiered approach provides a proportionate level of protection for the consumer.

¹⁵ "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.

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

YES

Comments:

Commercial broadcasters have complained that TV faces unequal competition from other advertising vehicles increasingly on the same device but not regulated by AVMSD and that there is pressure on advertising revenues and therefore program investment. They find it harder to innovate and match the online advertising offer.

Preferred policy option:

Other options

Please explain your choice:

The UK Government regards the AVMSD framework for advertising as generally working well from a consumer perspective. In the UK we have created a differentiated framework of direct, co- and self-regulatory models to protect minors from harm through commercial communication. This system delivers a high level of flexibility and speed and furthestmost engagement of the industry.

The advertising content rules at EU level allow for Member States to set their individual level of protection for minors in relation to alcohol and HFSS advertising; we would like to see this continued.

Concerning more flexible rules on commercial communications, the UK Government regards the current rules on minutage as essential to keep the advertising market stable. We have noted the concerns of some broadcasters that competition to (mainly US) online platforms might be weakening as they do not fall under the AVMSD regime. However, broadcast tv advertising has held up well as a proportion of total display advertising. According to WARC, total display advertising expenditure stood at £10.6bn in 2014, of which broadcaster display advertising accounted for 43.5%, an increase of 2.5 percentage points over the last five years, despite increased competition from other media such as online advertising.

Ongoing work done by Ofcom has shown the consumer is aware of the different levels of regulation on audiovisual and information society services but expects the same standard from linear television and vod. The consumer understands the necessity of advertising to be able to fund content although they also would appreciate less minutage. We would therefore welcome discussions about introducing the same rules on advertising on vod as on linear tv by leveling them up to linear tv standard. We have found that most vod providers already apply those; however these should not extend to internet services out of the current scope of AVMSD.

Regarding tighter advertising rules to protect vulnerable viewers, we believe that the AVMSD framework provides the right level of protection for consumers across a number of main areas: human dignity, discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation, encouragement of behaviour prejudicial to health and safety, encouragement of behaviour grossly prejudicial to the protection of the environment. It already sets out a basic agreement on protection from tobacco, alcohol and HSFS and stronger rules for the protection of minors. AVMSD leaves it to the Member States' discretion to set up stricter rules on advertising, a concept the UK uses widely and would like to see continue.

We are aware of some public concerns around on line advertising of alcohol, which crosses borders, and its impact on minors. By definition, it is not possible for Member States to regulate this. We do see a role for the Commission to help monitor developments and risks in this area, without any presumption at this stage as to specific remedies.

However, some regulation in AVMSD concerning product placement has not delivered the intended funding for content. On the one hand, less than half of adult viewers are aware of product placement in television programs, while 14% recognize that the 'P' symbol indicates product placement¹⁶. On the other hand, we believe that stakeholders are not clear about the scope of the existing rules and have preferred to invest instead in online Media. We think that some clarification and a simpler set of rules would be beneficial.

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

Effective? YES

Fair? YES

¹⁶ http://stakeholders.ofcom.org.uk/binaries/research/tv-research/attitudes-to-media/UK_audience_attitudes_towards_broadcast_media_2014.pdf

Comments:

AVMSD's main aim is to facilitate the emergence of a single digital media market and a single information area throughout the European Union. It also sets basic editorial standards and a general basic line in terms of what content is deemed to be unacceptable, i.e. content that contains incitement to hatred based on race, sex or nationality. These rules are set up for consumer protection and there is a special emphasis on youth protection, in particular pornography and gratuitous violence with a different set of protective rules for television and on demand services.

Additionally, for on demand services, member states may - notwithstanding the principle of country of origin - take measures against on-demand audiovisual media services, which prejudice or present a grave risk to public policy. In particular - criminal offences, the protection of minors, the fight against incitement to hatred or violations of human dignity, the protection of public health, public security or the protection of consumers.

Again, we are faced with the change in how consumers access audiovisual content in a converged world: Audiovisual content from inside and outside EU jurisdiction can be accessed via smart tvs, set-top boxes, games consoles and through various EPGs with and without backward and forward function.

Broadcast brands in the UK offer their content on linear and non-linear services including catch-up and preview services ("hybrid services" e.g. BBC iplayer, Sky GO).

The UK Government believes that the minimum standards in AVMSD set out above are still valid and that the distinction between linear and on-demand services is still relevant, effective and fair. For broadcasting services, the UK operates a licensing system in which the broadcaster has to comply with a set of requirements on an ex-ante basis. This ensures a higher protection from criminal or undesirable content than the provisions that derive from the e-commerce directive, and at the same time, does not undermine the country of origin principle. As on-demand audiovisual media services (in contrast to linear services) are also classified as ISS, there is a lesser level of protection, mirroring the provisions for ISS in the e-commerce directive.

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

YES

Comments:

Recent instances where there has been a desire to derogate from the freedom of expression and freedom of reception principles have shown a need for close co-operation between regulators, particularly with regard to the cultural background on which content is consumed and a need to optimise and fast-track procedural rules. However the UK Government would like to advise against growing exemptions from

the country of origin principle as it dilutes the impact of that principle, The UK Government regards COO as the core of AVMSD - lowering barriers by facilitating operation for industry and reducing costs while at the same time promoting the principle of freedom of transmission and plurality.

As convergence blurs the boundaries between linear and on-demand content as well as between regulated and unregulated content, research suggests that consumers want to see a more consistent approach to standards at least for all AVMSD regulated content. The UK provides for the protection of minors from sexually explicit material - see further discussion under 3.2.

The UK Government is increasingly concerned about the availability of extremist content - to some extent on TV but particularly via the internet. The Government is considering a number of steps to make it harder for extremist content to be broadcast, and to promote the broadcast of anti-extremist messages, for example by challenging broadcasters to give a platform to moderate religious spokespeople. As part of this, the Government is considering how Ofcom's role can be strengthened to enable it to better tackle extremist content. Whilst there are considerable challenges to be grappled with around the need to balance user protection against freedom of expression, the Government is confident this can be achieved within the existing AVMSD framework and does not see a need for any changes at European level to enable it to address this issue.

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? NO

Effective? NO

Fair? NO

Comments:

A system of graduated regulation currently applies to the protection of minors: the less control a viewer has and the more harmful specific content is, the more restrictions apply. This is getting less and less relevant as consumers and especially children cannot distinguish between on demand content and linear TV any longer even though they have increasing access to a wide range of audiovisual content through a variety of fixed and mobile devices (computers, tablets, mobile phones, games consoles)¹⁷.

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

YES / NO

Comments:

Whether the AVMSD has been effective in protecting children from seeing/hearing content that may harm them cannot be answered simply with yes or no; it depends on the type of the service. It has been successful in protecting children from harmful linear and on-demand content for the service in scope of the directive. The UK operates a tried and tested system for these services including the watershed, parental controls and filters, and a system of co- and self-regulation, which is still valid as tv uptake is still very high. Although we note marked differences between age groups, consumers aged 16 to 24 still spend 50% of their viewing time watching traditional television. This figure increases with age; over-65s spend 82% of their viewing time watching traditional TV. Viewing of VoD services represented 8% of total viewing among UK adults aged 16+, rising to 13% of viewing time among 16-24s¹⁸.

What are the costs related to implementing such requirements?

Costs:

Comments:

N/A – only for commercial enterprises

What are the benefits related to implementing such requirements?

Comments:

N/A - only for commercial enterprises

¹⁷ <http://stakeholders.ofcom.org.uk/market-data-research/other/research-publications/childrens/children-parents-oct-14/>

¹⁸ <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr15/>

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

YES

Comments:

Convergence makes certain content which is not in scope of the AVMSD easily available for children, i.e:

- user generated content
- social media
- internet content provided from outside the EU.

Amongst member states, there are wide discrepancies in terms of content considered to fall within the scope of the Directive or whether content is regarded as harmful. In certain cases, this has led to vod providers moving to member states with lighter touch regulation.

Preferred policy option:

Other option

Please explain your choice:

The UK would be open to match the AVMSD regulation for protection of minors for linear and on-demand content by levelling up, however we do not think they should be extended to other platforms, i.e. UGC on social media, for which we think working with industry and encouraging self-regulation should continue. We would also like to see more clarity on the definition on tv-like content; the decision on which content is deemed to be appropriate for minors needs to rest with the member state.

In the UK, Ofcom has a statutory duty to secure standards on broadcasting content; these include the protection of minors. These standards and their enforcement broadly work well.

On-demand programme services are co-regulated by Ofcom and ATVOD. In 2014, the UK Government introduced regulation to ensure that material which is rated R18 by the BBFC and therefore can only be bought in hard copy in specialised shops, and can only be made available in a manner that ensures that persons under the age of 18 will not normally hear or see it. Consequently UK regulated on-demand services offering R18 material must use a "Content Access Control System" which includes effective age verification (e.g. generally a credit card must be used).

The UK Government has some measures in place to address audiovisual content which does not fall within the scope of AVMSD, such as online content and is committed to improving the safety of children online and has a strong track-record in

working with the internet industries – the UK is a world leader in child internet safety. Around 90% of UK consumers can now easily switch on parental controls - the four major providers (Sky, Virgin, BT and TalkTalk) have delivered on their commitment to provide an unavoidable choice to their customers on family friendly network level filters. Filters are also offered on mobile phones and on public wifi to protect children when they are out of the home.

The UK Government expects social media companies to have robust processes in place to address inappropriate and abusive content, including clear reporting channels, and removing content, which does not comply with their acceptable use policies or terms and conditions. To support smaller emerging social media platforms, the UK Council for Child Internet Safety (UKCCIS) will publish industry-led best practice online safety guidance later this year.

On 18 August 2015, the UK Government announced that the music industry had agreed to make permanent their voluntary scheme giving BBFC age ratings to online music videos produced in the UK, wherever they are unsuitable for children. Further work is underway to explore how parental controls could be applied to music videos and how lessons learned in the UK could help international partners adopt a similar approach.

However while convergence makes content which is not in scope of AVMSD easily available for children (i.e. user generated content, social media and internet content provided from outside the EU), we do not believe that the scope of AVMSD should be extended to cover such content.

This is for three reasons:

Firstly, the UK seeks the best protection available, regardless of how content is distributed or accessed and we do not believe in levelling down protection levels by adapting regulation for different platforms. Although we are observing a change in the use of media, especially in minors and younger generations, we still see a continuing high use of television services. The average number of minutes of broadcast TV watched on a TV set in 2014 only fell for the second consecutive year. On average, people watched 220 minutes of television per day in 2014, 11 minutes/day less than in 2013. TV viewing varies greatly by age, and between 2013 and 2014 it fell by varying degrees among all age groups. The largest decline was among children aged 4-15, with a 17 min/day (-12.4%) fall, compared to a 1 min/day (-0.3%) decline among viewers aged 65 or over.

Therefore the regulation of TV is perceived to be highly important in the UK. Ofcom commissioned a series of deliberative research workshops with members of the public to understand what people think of current protections for audio-visual content delivered on different platforms and on a range of internet connected devices, and what protections they considered they should have both now and in the future.

The regulation of TV sets was perceived as most important as the majority of participants agreed that the often passive nature of TV viewing and potential

exposure to inappropriate content meant that TV sets should be highly regulated, in particular, to protect minors and vulnerable individuals.

The regulation of more personal devices, such as smartphones and tablets, was considered less important as they were associated with more active viewing choices.

However most participants wrongly assumed that catch-up programming was subject to the same regulatory standards as broadcast TV because the content had previously been broadcast.

There was broad understanding that the internet generally was not a protected or regulated environment.

While working with the main on demand providers – which are also broadcasters - we found that although there is less or less heavy regulation for their on-demand content, they are actually gold plating and applying the rules for linear content on the vast majority of their on-demand content. This is why we would support matching the AVMSD regulation for protection of minors for linear and on-demand content by levelling up. However, these tried and tested rules (e.g. the watershed or pin protection for vod services) are not suitable for e.g. user generated content on YouTube.

Secondly, we have experienced wide discrepancies as to other member states' concept of what kind of content either is regarded to be in/out of scope of AVMSD. This is why we would welcome a more harmonised approach as to what is to be regarded as “tv-like content” so that member states regulate the same types of services. As explained above, we regard “tv-like content” to be a valid category, and consider that it should be regulated in the same way as linear tv content. However, to maximise protection, the UK adopts a wide definition of the term “tv-like” and regards this as being an example of best practice.

Thirdly, there are large differences in what is regarded as harmful throughout Europe. This has in some cases led to businesses moving from the UK to member states which have a lighter touch regulation. In its election manifesto, the Government committed to requiring age verification for access to sites containing pornographic material. We are considering our approach now, and will consult later in the autumn. Our intention is to hold companies to account for the content they make available. However, while we would generally appreciate a more common approach on what is deemed to be harmful throughout Europe, we again are not prepared to level our standards down or adapt our cultural sense of what is appropriate. We regard the UK's approach as gold standard when it comes to the protection of minors and would welcome further consideration being given to levelling up standards on a European level. On the other hand, we openly accept that other member states will have different standards and that these are valid, and have differing cultural norms and practices. Consequently the decision on which content is deemed to be appropriate for minors needs to rest with the member state.

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 works¹⁹ and independent productions²⁰. 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

Effective? YES

Fair? YES

Comments:

As audiovisual media services are as much cultural services as they are economic services, ensuring the effective operation of the internal market must be balanced with other public interests i.e. cultural diversity. For television channels, the majority of their transmission must be reserved for European content. Additionally 10 % (program time or budget) shall be commissioned from independent producers. For the UK Government the balance between the interests of a free market and cultural diversity is (still) struck.

Any change would raise the threshold for new market entrants to establish themselves and invest in European productions.

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:

No opinion.

¹⁹ For European works: a majority proportion of broadcasters' transmission time.

²⁰ For European works created by producers who are independent of broadcasters: 10% of broadcasters' transmission time.

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

No opinion.

Comments:

The UK Government agrees that it is desirable for consumers to be able to more easily access films in/from other EU countries.

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

YES

Comments:

Concerning independent productions, the UK is posing an even higher quota obligation than 10 % quota in AVMSD on their Public Service Broadcasters²¹. However although the public service broadcasters spent just over £2bn on new UK content in 2013 and the multichannel sector's equivalent investment was around £350m²², the UK faces difficulties in meeting the 50% quota for European works. This is due to the lively but international and pan-European broadcasting sector situated in the UK.

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:

The requirement for the promotion of European works secures cultural diversity and investment in domestic content.

Comments:

In the UK, Public Service Broadcasters (all BBC channels + S4C and Channel 3, Channel 4 and Channel 5, UTV, STV) have substantial original production quotas ranging between 50 % and 90 % of qualifying output²³ and must commission 25% of their broadcast time from "independent producers".

²¹ section 277 CA03 (and Sch 12 for the BBC)

²² http://www.thecreativeindustries.co.uk/media/254048/pact_censusreport_2014_final-2-.pdf

²³ <http://www.bbc.co.uk/commissioning/tv/articles/who-we-are-how-we-commission#independent-production>

The policy aim behind the mandatory quota for the public service broadcasters in the Communications Act is threefold:

- to promote cultural diversity and to open up the production system to new energies and voices;
- to stimulate the growth of small and medium sized enterprises, promoting creativity and fostering new talent; and
- to tackle vertical integration within the UK programme supply market.

In the UK PSBs are publicly funded or operate on a commercial basis, but in either case they must deliver programmes like regional news and content from independent producers through their licence agreements.

The UK is also stimulating the production of content that is culturally British (and therefore qualifying European works for purposes of the AVMSD quota) through film and television tax reliefs for UK qualifying productions.

Purely commercial channel operators (Sky, Discovery, Turner) have no PSB obligation and receive no public support in terms of funding. Sources of income are derived from, for example, advertising, subscription and platform payments.

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?

Comments:

N/A

Preferred policy option:

Maintaining the status quo.

Please explain your choice:

For a thriving media sector, the UK regards the investment in European content, the competition between PSBs and independent producers, and international competition, as essential.

Public Service Broadcasters in the UK (the BBC, S4C, and Channels 3, 4 and 5) are an important part of the broadcasting landscape. Distinctly from other commercial broadcasters (like BSkyB), they have a unique set of obligations set out in the BBC Charter or legislation which requires them to show particular programming such as news and current affairs but also to commission content from independent producers.

These obligations are over and above the normal licensing conditions, which are applied to all broadcasters in the UK.

The UK supports investment in the creative industries and promotes their economic growth, both through the creative content tax reliefs and through wider engagement with the sector to identify and mitigate barriers to growth in areas such as skills, accessing finance, promoting exports and attracting inward investment. We believe this action has had a positive impact.

European member state production of content continues to focus on the domestic market.

The independent production sector, which supplies a range of content to national broadcasters in the UK, forms a well-established and successful part of the UK's media market. It makes around 50% of qualifying UK television programmes, making the independent production sector now a bigger employer than the combined broadcasting divisions of the BBC, ITV, Channel 4 and Channel 5.

However regarding the investment in European/domestic content, we believe that such a supply side intervention is more successful rather than intervening on the demand side through quotas. We consider that incentives have an important role to play here. The UK is stimulating culturally British (and therefore qualifying European works for purposes of the quota) both through film tax relief and television tax reliefs for economic purposes.

For example under the High-End TV tax relief between April 2013 and March 2014 the UK spent of domestic UK and co-production HETV programmes was £170 million (43%) covering 30 projects including Atlantis (13 episodes), Critical (13 episodes) and Call the Midwife (8 episodes).

The UK would like to note that the measures to promote European content should not be understood as a measure primarily for cultural exchange; it acts as a measure to protect member states' culture in media. However, for the UK this culture also includes strong ties with other English speaking nations and we regard the exchange with their audiovisual content as essential.

While viewers in the UK enjoy a wide range of international programming, content from other EU member states is also valued highly. The BBC has been showing a number of well loved and critically acclaimed series including Borgen (Danish), the Killing (Danish/German), Inspector Montalbano (Italian) and The Bridge (Swedish/German). Last but not least there have been some very successful co-productions including Zen (BBC/Mediaset/ZDF). The Tunnel and The last Panthers (both Sky/Canal+).

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

Effective? YES

Fair? YES

Comments:

This set of questions addresses three different issues: The country of origin principle (COO), jurisdiction and procedural rules.

For the United Kingdom COO is the core of the directive and must not be lost or eroded. The criteria to determine when a service falls under the jurisdiction of a member state set out in the Directive are relevant, effective and fair. The UK agrees that it would be helpful to speed up the existing procedures. Most important still will be the cooperation of regulatory authorities in carrying out the assessment of content deemed to offend in a member state.

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

YES

Comments:

Although Ofcom has licensed the majority of broadcast channels that operate cross border in the UK, since 2005 there has been no case for derogation and only a small number of complaints have been made. In complaints cases, we have observed that close cooperation is key to solving issues. However, it has been discussed whether an emergency or fast track procedure for television content is needed.

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?

N/A

Preferred policy option:

Maintaining the status quo for the COO and jurisdiction.

Strengthening existing cooperation practices for procedure.

Revising the rules on cooperation and derogation mechanisms, for example by means of provisions aimed at enhancing their effective functioning for procedure.

Please explain your choice:

The UK Government regards the country of origin principle (COO) as fundamental and critical precondition for the generation of a Digital Single Market in content; it is the core of the directive and must not be lost or eroded. The COO gives broadcasters important clarity and certainty about their operational arrangements making them subject (only) to the regulatory standards of whichever country the service is based, as opposed to requiring a channel to adhere to 27 slightly different regulatory standards in each country in which it is received. COO lowers trade barriers by facilitating operation for industry and reducing costs. Any change to COO will endanger investment in content and availability of content.

The broadcasting market has benefited from COO, we have seen an increase in the number of channels from 47 in 1989 to over 11,000 today, an increase for VoD revenue from 61 million Euros in 2007 to 616 million Euros 2011 (up 45.7%)* and have seen the emergence of regional broadcasting hubs.

COO is also linked inherently to the principle of freedom of transmission and plurality. We consider that making a number of supposedly minor changes to address a variety of related issues could erode this principle. For example the UK observes that the principle of free movement of broadcasting services and the principle of freedom of transmission and plurality challenged by radicalised, undemocratic or otherwise unwanted content threatens our society. Media technology makes the distribution of such content easy but dealing with it much more difficult. However, we need to ensure that any solutions to such challenges are tested on whether the aim of those proposals can be achieved and whether there are any unintended negative consequences.

Any suggestion that receiving Member State's decisions should take precedence over the decisions of the Member State with jurisdiction over a service provider would fundamentally undermine the country of origin principle.

We believe the establishment criteria in the Directive are clear. In the UK a service can only obtain an Ofcom licence if it meets those criteria. They were created to establish one jurisdiction only, an aim we should not lose. Editorial responsibility is well defined (“effective control”) and if editorial responsibility falls elsewhere then other criteria are used to determine jurisdiction (e.g. significant part of the workforce). If both editorial responsibility and the head office are in a third country outside the EU, then the secondary technical criteria apply.

We are uneasy about adjusting jurisdiction criteria especially with regard to editorial responsibility. Although this is a wide definition, we believe it was devised to protect EU citizens by ensuring non-EU content is subject to the European standards and rules if it is able to be received by those EU citizens. There can be no vacuum, at least in relation to linear broadcasting.

However, information about newly licensed channels is crucial to determine their establishment. As well as developing the MAVISE database we should keep an open mind to exploring more ways to provide the most up to date and accurate information possible.

Recent live cases have shown that content needs to be assessed not only in a wider (European) context but also in the cultural and historical context of the country which receives an audiovisual media service. This makes the need for collaboration of regulators very obvious. However the regulation in AVMSD is aiming for a compromise when providing content cross-border: To protect their citizens, member states are allowed to have stricter rules than the basic rules set out in AVMSD for the services established in their country. When a service is received from outside its jurisdiction the rules of the country of origin need to be observed – provided these are in line with AVMSD.

Most frequently national standards diverge in the relation to protection of minors; recently we have also seen differences in the interpretation of hate speech.

For dealing with arising issues in trans-border provision of audiovisual broadcasting, we believe that cooperation works best. However the current provisions and procedures could be refined for more efficacy and speed. This could be done by formalising cooperation, reviewing the existing timeframes or identifying objective criteria to make a case for circumvention procedures.

The UK Government would like to stress that we do not believe establishing a country of origin principle for linear content and in parallel a country of destination principle for on-demand content is possible from a practical point of view. Audiovisual Media Services provide mostly linear and on demand content; removing the country of origin principle also removes their freedom of transmission and the consumer’s freedom of reception.

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

Effective? YES

Fair? YES

Comments:

The public's ability to access a wide range of independent news, views and information about the world in which we live is central to the health of our democracy and our society.

UK law ensures that Ofcom performs their duties and decision making independently from

Government. Ofcom's statutory duties and established powers are set out in the Office of Communications Act 2001 and the Communications Act 2003.

Under the European regulatory framework for electronic communications, Member States are required to guarantee the independence of the national regulatory authority with competence over ex ante market regulation and dispute resolution and Ofcom is the national regulatory authority for these purposes.

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

NO

Comments:

The UK regards the setting-up of Ofcom as best practice. The independence provisions in the Framework Directive require Member States to ensure that national regulatory authorities (NRAs) act independently and do not seek or take instructions from any other body in relation to the exercise of certain key regulatory tasks assigned to them. Only appeal bodies may suspend or overturn decisions by national regulatory authorities, and the head of a national regulatory authority and other members of the collegiate body fulfilling that function may be dismissed only if they no longer fulfil the conditions required for the performance of their duties laid down in advance in national law.

Preferred policy option:

Other options

Please explain your choice:

The UK Government believes that independence is fundamental for any regulatory body to be able to work in the best interests of citizens and consumers, and regulators should be able to fulfil their role free from actual or perceived interference.

The UK Government has made a number of commitments to independent regulation, including statutory features that contribute to the independence of Ofcom, the UK communications regulator. The principle of independence is central to Ofcom being able to have oversight of the communications sector and carry out effective regulation of areas such as investment in communications network infrastructure; competition across the market as a whole (including media ownership issues); and maintaining high standards in broadcasting. In particular, independent broadcast regulation by Ofcom ensures that standards for broadcast content are applied in the interests of citizens and consumers rather than for political or commercial benefit.

The UK Government would support an EU requirement for regulatory independence in a revised Audiovisual Services Directive, based on principles such as those described for Ofcom (comparable to the obligations to which Ofcom is already subject under the Framework Directive in the electronic communications sector).

Must Carry/Findability

In the context of the regulatory framework applicable to the telecoms operators, under the Universal Service Directive²⁴, 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 Directive²⁵, Member States can also set rules on the inclusion of radio and TV services in electronic programme guides (EPGs)²⁶ 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

To ensure that PSB content is widely available for consumers in the UK there is legislation in place to ensure that PSB television channels must be offered and must also be carried by major platforms and be given appropriate prominence on EPGs.

In the UK, Section 310 of the Communications Act 2003 requires Ofcom to draw up a code of practice to be followed in the provision of EPGs containing guidance on the degree of prominence appropriate for the public service channels (BBC TV services, Channels 3, 4 and 5, S4C and Local TV). This code permits a measure of discrimination in favour of PSB channels, but it is not prescriptive about what appropriate prominence means. It gives EPG providers discretion to determine this. In considering whether the approach is justifiable in terms of securing appropriate prominence, Ofcom has regard to the interest of citizens and the expectations of consumers.

²⁴ Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC

²⁵ 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

²⁶ 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.

The UK Government considers the regime established by the Communications Act 2003 to secure appropriate prominence for our PSBs to be important because:

- PSBs are responsible for the lion's share of investment in UK content – £ 2.9 billion, and we want this to continue;
- PSB content, from local news to children's programmes, delivers cultural and social benefits that might otherwise be undersupplied;
- Consumers value public service content.

As we were concerned that the regime is at risk of becoming obsolete, because it only applies to broadcast services and does not apply to Video-on-Demand or new technical services like HD and there seemed to be a lack of clarity, or consistency of understanding, about what appropriate prominence means in a multichannel world DCMS published a consultation on the Balance of Payments between Pay Television Platforms and Public Service Broadcasters²⁷.

The consultation focused on the questions of whether the current 'Must Offer/ Must Carry' and Technical Platform Services (TPS) regimes should be amended or removed to allow for freer negotiations between the PSBs and the pay television platform providers, also giving Ofcom a stronger mediating role; and whether the current Electronic Programme Guide (EPG) regime is fit-for-purpose (particularly, whether to amend the existing framework to be technology neutral; whether to include video on-demand; and whether to integrate High Definition (HD) services into the existing framework).

We are currently considering the responses with a view to publishing the Government's response in the autumn.

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

N/A.

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

NO

²⁷ <https://www.gov.uk/government/consultations/the-balance-of-payments-between-television-platforms-and-public-service-broadcasters-consultation-paper>. The consultation closed on 30 June 2015.

Preferred policy option:

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).

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.

Please explain your choice:

“Must Carry” or EPG prominence is not regulated by AVMSD, it is dealt with in the Telecoms framework, respectively in the Universal Service Directive and in the Access Directive. However, both sets of rules do not prevent member states from domestic regulation. The UK Government would like to see this continue, the decision of what content should be given prominence is a cultural decision to be taken in each member state individually. However, both must carry and prominence are issues that should be discussed further when and if major changes to platform regulation or the relationship of the existing directives take place. These are issues to be explored carefully; we consider it unlikely that one set of rules will fit all platforms and players. However must carry and prominence are not only issues on platforms. They may also affect devices. Smart tvs are developing new forms of EPGs and interfaces and are using them to do business with content providers, however they are not caught by any of the regulations cited.

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

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

YES

Comments:

Sensory loss charities in the UK applaud the provision of access services for linear TV content, however they are of the view that the provision of access services for

video-on-demand (VoD) content is inadequate. They acknowledge the provision is increasing; however progress for on-demand is slow.

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

Comments:

N/A

Preferred policy option:

Maintaining the status quo.

Please explain your choice:

The UK is a world leader in the extent and quality of TV access services – subtitles, audio description and signing. The UK Communications Act 2003 is regarded across the world as a good example of a legal framework for television access services. Sections 303 to 305 of the Act require Ofcom to draw up a Code on Television Access Services, which provides guidance as to the extent to which television services should provide access services. Ofcom monitors the provision of access services and publishes annual reports reflecting licensees' performance against the target. Ofcom has the power to take action against broadcasters who fail to meet their target.

However VOD providers continue to identify persistent barriers to the provision of subtitles and audio description. The biggest problem seems to be delivery of 'accessible' programs to multiple platforms in multiple formats. A program may have been broadcast with subtitles, but the VOD version of the program can be available via a range of platforms (set top boxes, websites, apps, connected TVs, etc.) all requiring different technical formats for the subtitles to 'work'.

Although barriers remain, the ATVOD 2014 survey²⁸ revealed many more conversations between content providers and platform operators, in attempts to overcome these barriers. Public service broadcasters ("PSBs") like ITV, Channel 4 and Channel 5 again appear to be making the most significant progress in providing subtitled VOD services. These accessible services are still most commonly available via a computer on own brand websites (the 4oD website, for example). Provision of subtitles via such websites is steadily increasing.

²⁸ http://www.atvod.co.uk/uploads/files/Provision_of_Access_Services_2014_Report_FINAL.pdf

In 2014 we also started to see accessible services provided via other platforms, such as mobile apps. 'Demand 5' and the 'STV Player' are good examples of services available with subtitles this way.

We believe that any further legislative action, if needed, should be for MS to decide and not at EU level within the scope of the AVMSD. The UK is already working with industry, ATVOD and Ofcom to encourage industry to develop and invest in access services. As there is room for improvement to be covered on a national level, we consider that these issues are best dealt with at a national level at this stage.

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

Effective? YES

Fair? YES

Comments:

The UK regards the provisions of the AVMSD concerning events of major importance for society as crucial to ensuring that the broadcasting market in relation to such events operates in the interests of its population both as citizens and as consumers.

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

NO

Comments:

So far as we are aware the regime of the directive has in the UK always operated effectively with the outcome that the rights to designated events have been acquired directly by free to air broadcasters. The BBC has held all rights for the Olympic Games until now and holds the UK rights for coverage of the next three Olympic

Games [summer 2016, 2020 and winter 2018]. The rights for the winter 2022 and summer 2024 Olympic Games have been acquired by French subsidiary of Discovery on a pan-European basis. However as the Olympics remain protected as a listed event in all European member states, coverage will have to be shown on a free-to-air broadcaster.

Preferred policy option:

Maintaining the status quo

Please explain your choice:

Our experience is that the regime works in the public interest and strikes a fair balance with the interests of broadcasters and sporting bodies.

The decisions of the Court of Justice in FIFA v Belgium and UK and of the EFTA Court in FIFA v Norway shows that the courts uphold the operation of the regime.

Individual Member States should continue to have a broad discretion to determine whether an event is of major importance to its society.

Short news reports:

The AVMSD requires Member States to ensure that broadcasters established in the Union have access, on a fair, reasonable and non-discriminatory basis, to events of high interest to the public for the purposes of short news reports.

Set of questions 6.5

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

Relevant? YES

Effective? YES

Fair? YES

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

NO

Preferred policy option:

Maintaining the status quo

Please explain your choice:

According to AVMSD, broadcasters established in the EU should have access to short news reports on a fair, reasonable and non-discriminatory basis where events transmitted are of high interest to the public. In the UK broadcasters have come to a mutually accepted agreement on the use of exclusive material in short news reports which is working well. We do not foresee any change due to convergence.

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

Effective? YES

Fair? YES

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

NO

Preferred policy option:

Maintaining the status quo

Please explain your choice:

In the UK, the right of reply is implemented in the Ofcom Broadcasting Code made under the Communications Act 2003 and Broadcasting Act 1996. Section Seven of that Code includes rules about Fairness. These include rights of reply and rules on how replies should be dealt with.

AVMSD does not include a provision for a right of reply of on-demand services. Up until now this has not led to any problems.

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.



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