

# CONSULTATION

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

### *A media framework for the 21<sup>st</sup> century*

#### **Response from Ofcom, UK**

##### **Introduction and Executive Summary**

Ofcom welcomes the opportunity to contribute to the European Commission's consultation on a media framework for the 21<sup>st</sup> century. We consider that the AVMS Directive has been crucial in promoting successful and innovative European audiovisual media services, and supporting the industry around them. It has also ensured that audiences are adequately protected from harm, while allowing Member States to take into account national sensitivities in transposition. This has ensured that European citizens have growing access to a plurality of high-quality media.

The audiovisual media environment and viewers behaviour are developing and changing as a result of increasing choice of audiovisual content and of the ways in which audiences can watch. It is timely and relevant to consider how the current framework should evolve to reflect these trends and anticipate future developments.

Any revisions to the Directive should secure the protection of consumers and encourage further investment in content and cross-border provision – notably by preserving the country of origin principle and reducing the regulatory burden where possible. Changes should also reflect what the Directive currently acknowledges: that audiovisual media services are as much cultural as they are economic, and that they support the individual Member States' public interests in many ways. It is therefore particularly important that the Directive continues to ensure a sufficient level of audience protection, and that it strikes the right balance between universal provisions which ensure all EU audiovisual services meet a set of minimum protection standards, and the preservation of flexibility for Member States to determine the regulatory frameworks in their own domestic markets.

With all of this in mind, Ofcom believes the provisions of the Directive should remain broadly the same. We call on the Commission to propose some amendments that will help clarify the current provisions and increase consistency in the application of the Directive across Europe. We would also encourage the Commission to look for opportunities to simplify regulation and use high-level principles as the means of securing regulatory goals.

More specifically:

1. We consider that the provisions that determine the scope of the Directive have proved largely to be relevant, effective and fair. These provisions and definitions could be clarified and possibly supported with additional Commission guidance, in consultation with ERGA, to ensure consistency of application across Member States. In addition, there may be a case for considering whether players who are not editorially responsible (e.g. not providing AVMS) may

have roles to play in relation to some of the broad goals which the AVMS is intended to support. However, the AVMS Directive is clearly focused on editorially responsible media service providers and on the editorial obligations such service providers should bear; any possible regulation covering the roles and responsibilities of non-editorial players may be better addressed through the broad platforms investigation in the Digital Single Market (DSM) programme.

2. The provisions that determine the geographic scope of the Directive have proved to be relevant, effective and fair. We consider the possible expansion of AVMS regulation to cover providers operating from outside EU jurisdiction should be approached with caution. A broad expansion - to seek to impose and enforce EU standards on the global providers of AV content – risks being disproportionate and impractical. We are unaware of evidence that significant competitive distortions will, in practice, arise from the absence from the AVMS regulatory regime of measures covering non-EU services. While there may be real consumer risks from non-EU AVMS, addressing them would require worldwide regulatory coverage of AVMS, which could be disproportionate; we believe solutions to the relevant consumer risks may be best developed by individual Member States.
3. The advertising content rules at EU level have allowed Member States adequately to protect minors from specific product types and we propose maintaining the current content rules. We are satisfied that the current quantitative rules in the Directive, on the amount and placement of advertising, provide a good balance between consumer protection and funding for content. However we could support a review of the rules provided it took a full and balanced account of both of consumer protection and of the impact on content funding. In the long term, we believe high-level principles are preferable to detailed prescriptive rules at EU level. We believe the current product placement provisions are unnecessarily complex and could be simplified.
4. We consider that the protection afforded to children in on-demand services should be the same as protections in place for broadcast services. Specifically, we propose that the obligations on AVMS providers should be framed to reflect the ways in which they control minors' access to content – with greater flexibility afforded to AVMS providers when strong access control mechanisms are in place, whether on broadcast or on-demand services. This approach may also help align Member States' approaches to the strongest material permissible on AVMS. Some work, potentially through ERGA, on clarification of the application of “seriously impair”, or the definition of content subject to the strongest restrictions, might also be considered as part of the revision.
5. The current AVMS Directive requirements for European works have helped to foster growing investment in European content for a wide range of linear and on-demand television services. Without the flexibility the arrangements provide, new market entrants would find it much harder to establish themselves, and then to build investment in European production. We therefore consider the provisions in the AVMS Directive remain relevant, effective and fair for promoting cultural diversity and European works.

6. The Country of Origin principle remains the cornerstone of the AVMS Directive. It has broadly enabled regulators to pursue their duties and policy objectives in the EU at the same time as – most crucially – protecting and enabling cross-border content provision and the plurality of voices and views necessary for a democratic society in Europe, supporting the principle of freedom of expression. We recognise that there are national concerns, tensions and some practical difficulties in relation to the operation of the principle. We believe these could be addressed through a series of adjustments to the current framework, while retaining the Country of Origin principle.
7. The ways in which people are able to find and view content are changing rapidly and may lessen the effectiveness of current interventions in securing availability and prominence. This is clearly a question which the DSM programme should examine; however, we support a model which enables flexibility for Member States to intervene as needed in relation to their local “public interest content” goals, as the present one does. An essential consideration in examining future prominence regulations should be to maintain such flexibility, and best enable Member States to intervene in a rapidly-changing market.
8. While we believe the status quo in relation to access services is largely satisfactory, we would not object to the consideration of stronger obligations. However, we acknowledge that individual Member States are probably still best placed to introduce appropriate provisions in their territories at this early stage of the development of relevant technologies in some sectors and within each different country.

***Please note: in our response, below, we have included only the questions from the consultation and the policy options (not the additional contextual explanations).***

## SET OF QUESTIONS 1.1

**Are the provisions on the services to which the Directive applies (television broadcasting and on-demand services) still relevant, effective and fair?**

Relevant?  YES –  NO –  NO OPINION

Effective?  YES –  NO –  NO OPINION

Fair?  YES –  NO –  NO OPINION

### Summary:

We consider that the provisions that determine the scope of the Directive have proved largely to be relevant, effective and fair. These provisions and definitions could be clarified and possibly supported with additional Commission guidance, in consultation with ERGA, to ensure consistency of application across Member States.

In addition, there may be a case for considering whether players who are not editorially responsible (e.g. not providing AVMS) may have roles to play in relation to some of the broad goals which the AVMS is intended to support. However, the AVMS Directive is clearly focused on editorially responsible media service providers and on the editorial obligations such service providers should bear; any possible regulation covering the roles and responsibilities of non-editorial players may be better addressed through the broad platforms investigation in the Digital Single Market programme.

### COMMENTS:

We believe that the current public policy goals of the Directive are being achieved by the current boundaries of scope and the current suite of media service providers covered: the Directive strikes an appropriate balance between

- Providing a broad definition of AVMS, which captures the whole “TV” market, in the context of the continuing development in that market
- Avoiding the undesirable attempt to impose mass media content regulations, intended for TV businesses, on other digital services and/or on thousands of individuals creating and sharing content online

With this in mind, discussions about extending scope of the AVMSD should look at the specific role that each type of business plays in delivering AV services. While it may be appropriate to consider whether intermediary providers (notably hosting platforms) might play a role in fulfilling the goals of AVMSD, we believe it would be inappropriate to extend the concept of “editorial responsibility” to cover these platforms, which exercise no prior control over the content that is delivered through their service.

This section provides some context on consumer behaviour and the development of the AV market since 2009. It then examines the issues around:

(1) **editorially responsible providers**, and in particular the need to reflect on the criteria which determine what constitutes a regulated VOD service, notably “principal purpose” and “TV-like programmes”, and

(2) **platforms and intermediaries** -where any obligations should be ex-post and the desirability of bringing such actors within the framework should be carefully weighed up against the impact on the openness of the internet.

## 1. Context: Changes to the AV environment and consumer expectations

The audiovisual environment has changed since the current Directive was transposed in 2009. A review of Ofcom’s research into the UK television market highlights how the UK has seen a number of developments we believe are relevant to the discussion of the operation and scope of the AVMS.

- There has been a very significant expansion in the availability of on-demand services, both online and on traditional TV platforms
- Almost 6 in 10 adults (57%) now claim to use on-demand services
- Although AV content which is not “TV-like”, such as short clips on YouTube etc., represents a negligible proportion of overall AV content consumption among adults (2%), it is significant among children and to a lesser extent young adults.
- Ofcom diary research found that 92% of UK adults’ total AV viewing time is taken up by broadcast TV, and on-demand services; 5% is attributed to DVD, Blu Ray and VHS, and only just 2% is taken up by short form viewing (YouTube etc.).<sup>1</sup> However, the picture is different among 11-15 year olds, for whom short form content and clips take up 19% of viewing time
- The most popular on-demand services online are those provided by the most popular TV broadcasters (BBC, ITV etc.).
- Of the 8% attributed to on-demand viewing among UK adults, most was to content provided by broadcasters’ free on-demand ‘player’ services (5%) such as BBC iPlayer, as opposed to new stand-alone (paid for) on-demand operators (3%) like Netflix or iTunes.
- The TV industry has been robust: advertising has increased by 22% and subscription by 29% over the 5 years 2009-2014.

Ofcom has conducted some detailed research into **consumers’ regulatory understanding, attitudes, and expectations** in relation to audiovisual content. A critical finding from the research is that the majority of audiences have an expectation of comprehensive and broadly homogenous regulation across broadcast TV and catch-up, and for many, video-on-demand services; and that “internet content” is different and that different approaches to protection should apply. Audiences also saw “internet content” as different and believed that different approaches to protection should apply. In other words, audiences understand that there is a “TV-like” space, with a set of standards protections; and that there is an “internet” space where these protections are not in place, and consumer responsibility is greater.

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<sup>1</sup> Ofcom Digital Day 2014, Overview of findings published in the Communications Market Report 2014, [http://stakeholders.ofcom.org.uk/binaries/research/cross-media/2014/Digital\\_Day\\_2014\\_Overview\\_of\\_Findings.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cross-media/2014/Digital_Day_2014_Overview_of_Findings.pdf)

The extent to which today's on-demand industry is an offshoot of the broadcast television industry; the limited overall impact of non "TV-like" content; and the fact that audiences recognise there are both regulated and unregulated AV services available to them – all lend support to the current AVMS framework. We believe that the current AVMS criteria, which seek to delineate a regulated "TV-like" environment, broadly reflect the purposes of the Directive, and the expectations of consumers.

However, as explained below, we consider that the application of a number of the criteria, notably "principal purpose" and "TV-like programmes", have presented real practical challenges. Ofcom and our co-regulator ATVOD<sup>2</sup> have developed some interpretative guidance to the application of the AVMS criteria<sup>3</sup>, and seek to clarify our interpretation through the drafting and publication of individual decisions about services. Nonetheless the application of the criteria continues to give rise to difficulties and disputes.

There is also evidence that that the approaches across MS are not always consistent. In a report published by the European Platform of Regulatory Authorities (EPRA), a comparison of approaches taken by European regulators to interpreting the scope criteria suggests differences of implementation exist between European countries (including EU Member States).<sup>4</sup>

Further guidance to clarify the scope criteria would provide greater consistency and ease of application across Member States; this could be potentially be developed by ERGA in consultation with industry and the Commission. Any such clarification or modification of the criteria should take into account the technical characteristics of the service, the distinctions that viewers make, and the level of protection that they might reasonably expect.

## **2. Editorially responsible providers**

### **The *Principal Purpose* criterion**

An audiovisual media service falls within the scope of the AVMS Directive if it has as its *principal purpose* the provision of programmes. This criterion has been significant in a number of decisions Ofcom has taken about the regulatory status of a service<sup>5</sup>. Its application is a challenge given the

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<sup>2</sup> ATVOD (the Authority for Video on Demand) is Ofcom's co-regulator in the UK for on-demand programme services.

<sup>3</sup> [http://www.atvod.co.uk/uploads/files/Guidance\\_on\\_who\\_needs\\_to\\_notify\\_Ed\\_4.0\\_Feb\\_2014.pdf](http://www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed_4.0_Feb_2014.pdf)

<sup>4</sup> 35<sup>th</sup> EPRA meeting, 31 May – 1 June 2012, Plenary Session 1: New Media & Regulation: Towards a Paradigm Shift?, New Services and Scope: "What's in, what's out revisited", [http://epa3-production.s3.amazonaws.com/attachments/files/2011/original/Plenary%201\\_overview\\_responses\\_questionnaire\\_publicversion.pdf?1340972148](http://epa3-production.s3.amazonaws.com/attachments/files/2011/original/Plenary%201_overview_responses_questionnaire_publicversion.pdf?1340972148)

<sup>5</sup> Ofcom's 'Sun Video' Decision sets out in detail the characteristics we would use in determining 'principal purpose'. The 'Everton TV' Decision also includes a detailed analyses of 'principal purpose' based on the criteria identified in Sun Video. In the 'Viva TV Music' Decision we considered a service which had two separate principal purposes, one which related to the promotion of the linear offering and a separate VOD service whose principal purpose was the provision of TV-like content, specifically music videos. In the 'Frankie and Friends' Decision we considered the balance of material between the audiovisual and photographic materials which appeared on the service and the means by which the information was conveyed. See <http://stakeholders.ofcom.org.uk/enforcement/video-on-demand-services/sun-video-decision-appendices/>; <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Everton-TV.pdf>; [http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/MTV\\_Viva\\_TV\\_Decision\\_Annexes.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/MTV_Viva_TV_Decision_Annexes.pdf); and [http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Frankie\\_and\\_Friends\\_Decision.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Frankie_and_Friends_Decision.pdf)

increasing availability of hybrid services which combine a significant catalogue of audiovisual on-demand material with other content (such as a large archive of photographs, or a substantive blog or text offering). This hybrid form is also characteristic of the online versions of print news services, which typically include significant AV material alongside text and still images.

The difficulty in applying the principal purpose criterion in relation to such services is illustrated further by the *New Media Online GmbH* case (Case C-347/14) which being considered by the European Court of Justice, and asks specifically about the application of “principal purpose”.

### **The TV-like programmes criterion**

The application of the *TV-like* criterion involves significant exercise of judgement; a number of Ofcom decisions have relied on our assessment of how *TV-like* the programming on a service is. Ofcom’s views on what constitutes *TV-like* content, and the characteristics we consider relevant, are set out in its decisions<sup>6</sup> on appeals of the regulatory decisions of ATVOD. Of note are:

- The ‘Urban Chick Supremacy Cell’ decision<sup>7</sup> where the material was not sufficiently *TV-like* because: the content was experimental and did not have a narrative structure that was comparable to linear television; the programmes were not produced with professional equipment and the production values were not closely comparable to linear television.
- The Channel Flip decision<sup>8</sup> Ofcom determined that the material was not *TV-like* due to the lower production values and the short duration of the clips, typically around 3-4 minutes.

While the publication of these decisions go some way to clarifying Ofcom’s approach, we remain of the view that EU-level guidance and clarification would help regulators and industry across the EU in clear and consistent application of the AVMS criteria

### **Platforms, Intermediaries and the AVMS**

We welcome the European Commission’s desire to consider, under the Digital Single Market programme, what roles platforms such as pay-TV platforms or internet content hosts might play in delivering the public policy objectives of the AVMS Directive.

However, we consider that this review should be part of the comprehensive review of online platforms and intermediary regulation that the European Commission is conducting in parallel, rather than as part of the AVMS Directive Review. This is because there is a broad range of public purposes which platform regulations might be intended to secure, not limited to the purposes of the AVMS; the discussion of the roles platforms might play, and the intended and unintended consequences of regulation, must take place in the light of all such purposes.

Further, any platform obligations should not be the same as those imposed on editorially responsible providers. The AVMS regulations are structured to reflect the characteristics and functions of the service providers to which they apply. If a new type of service provider does not qualify as an editorially responsible provider, then it would seem inappropriate to seek to impose

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<sup>6</sup> These are also all published on our website: <http://stakeholders.ofcom.org.uk/enforcement/video-on-demand-services/>

<sup>7</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/ucsc.pdf>

<sup>8</sup> [http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Channel Flip scope appeal.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Channel_Flip_scope_appeal.pdf)

regulations which imply editorial responsibility, and in particular an obligation to determine which content is available on the service according to its editorial characteristics

It is important also to recall that there are numerous “traditional” platforms that would equally be subject to any extension of the AVMS Directive’s obligations to cover platform operators. These could include (in the UK, for example) Sky, Virgin Media or Freeview. It would be particularly unhelpful if TV platforms had editorial obligations which sat alongside or cut across the responsibilities of the channels and on-demand services on their platforms; if the locus of responsibility became less clear, regulators’ ability to oversee and enforce the rules could be undermined.

Instead, any new obligations on platforms should be designed in a similar way to those that currently apply to other intermediaries (for example in the notice and take-down frameworks).

Consideration of any such obligations should also take careful account of the impact their imposition may have on the openness of the internet environment, the extent to which it allows the rapid development of new and innovative services and in particular how it enables individual citizens to participate in the creation and distribution of content.

**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)

COMMENTS:

#### **Scope and fair competition**

We do not consider that there is a competition issue arising from the current scope of the Directive. In particular, we do not consider that content hosts like YouTube, or intermediaries like ISPs or search engines, none of which exercise editorial control over content, are in direct competition with linear broadcasters and on-demand providers, certainly in relation to the advertising or subscription income on which AVMS providers rely. In this context it is also worth noting that TV advertising spend has remained resilient in the context of the dramatic growth in online advertising.

We consider YouTube to share more characteristics with a traditional TV platform than an AVMS provider, as it supports the distribution of AV services offered by third parties, some of which may themselves meet the definition of an audiovisual media service. As such, it is not in direct competition with AVMS providers. While it might be reasonable to consider whether YouTube and other AV platforms might have some specific regulatory responsibilities – potentially including roles which support the same purposes as the AVMSD - these responsibilities will need to reflect their specific role and function of platforms and should not, for example, entail some kind of editorial scrutiny of the characteristics of the AV content hosted.

#### **Scope and consumer protection**

We do not consider there is a problem arising from the fact that the AVMS consumer protection provisions only apply to AVMS currently within scope. For example, the protection of minors from

harm, especially in relation to potentially harmful content and other risks on the internet, is a critical public policy goal. However, this objective goes well beyond audiovisual media, and includes the risks of potentially harmful contact (e.g. bullying) and conduct (inappropriate sharing of personal information). It is not obvious that these risks will usefully be addressed by including under AVMSD regulation new types of AV provider or intermediary which do not satisfy the current criteria for being “TV-like”. (We consider protection of minors further below).

### **Scope and investment in European works**

A similar argument applies to questions about the contribution made by platforms and intermediaries to supporting the origination of European works. The existing AVMSD obligations in this area cover the proportion of content in a linear schedule – something over which intermediaries would not have control (as they do not select content). This type of responsibility would not fit with the role played by intermediaries. Some countries impose obligations (levies etc.) related to the turnover of AVMS providers to further EU production goals; a levy framework of this kind could be extended to cover a wide range of service-providers associated with audiovisual media. However, Member States should retain flexibility in determining content funding arrangements in line with national market conditions, and we would not support the development of a levy framework of this kind at an EU level, although individual Member States may wish to introduce local initiatives of this kind. This would require significant and potentially disruptive changes to content funding arrangements in Member States which do not currently impose a levy framework. We would also note that an EU levy framework would have unpredictable effects on investment in any individual member state, as online platforms and intermediaries will often be providing Information Society Services, which benefit from country of origin protection in the same way as do AVMS. This topic is discussed in greater detail in our response to Question (4).

**In summary**, we believe that some arguments to extend the scope of the Directive have been made in large part to allow Member States to better deliver specific policy goals such as those discussed above. We disagree this is the right approach, and consider instead alternative mechanisms to address these individual policy goals under the individual sections in the remainder of our response.

#### ***Preferred policy option:***

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

**PLEASE EXPLAIN YOUR CHOICE:**

**As above**

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## 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

### Summary

The provisions that determine the geographic scope of the Directive have proved to be relevant, effective and fair. We consider the possible expansion of AVMS regulation to cover providers operating from outside EU jurisdiction should be approached with caution. A broad expansion - to seek to impose and enforce EU standards on global providers of AV content – risks being disproportionate and impractical. We are unaware of evidence that significant competitive distortions will, in practice, arise from the absence from the AVMS regulatory regime of measures covering non-EU services. While there may be real consumer risks from non-EU AVMS, addressing them would require worldwide regulatory coverage of AVMS, which could be disproportionate; we believe solutions to the relevant consumer risks may be best developed by individual Member States.

### COMMENTS:

The primary focus of the AVMS is AV services originating from within the EU. However, the AVMS Directive contains a set of secondary criteria determining which EU state, if any, may have jurisdiction over a channel which uses EU satellite broadcasting facilities (uplinks or satellites) and is available in some or all EU Member States. These secondary jurisdiction criteria increase the likelihood that AVMS receivable in the EU will fall under the jurisdiction of one of the Member States, even if the provider of the service is not “established” within the EU under the primary criteria<sup>9</sup>. The question legitimately raised for the current AVMS debate is whether it is appropriate to seek to extend the “non-EU” reach of the AVMS to cover services other than those using EU satellite facilities. We first consider the operation of the satellite criteria and then the arguments for covering non-EU services using other distribution technologies.

#### 1. Ofcom’s experience with the application of the secondary technical jurisdiction criteria for satellite services

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<sup>9</sup> It remains possible for audiences in the EU to receive satellite services which are not covered by the primary or secondary jurisdiction criteria. For example, the “overspill” or “unintended reception” areas of services using satellites belonging to North African countries, Turkey and Russia will include areas of the EU. In these cases, the broadcaster will not come under the jurisdiction of an EU Member State and will therefore not be caught by the AVMS rules. Some of these broadcasters will be under the jurisdiction of signatories to the European Convention on Transfrontier Television.

Ofcom regularly audits the services that are uplinked from the UK to determine whether they are subject to jurisdiction in a Member State. (If a service is not subject to another Member State's jurisdiction, and does not secure a UK licence the uplink provider is directed to cease provision).

We recently conducted an audit of services uplinked via facilities in the UK and found that some non-EU providers had not realised they were under UK jurisdiction and therefore required a UK licence. Additionally, uplink providers often sub-contract work among themselves. For example, one provider had contracted with an Italian company and believed that they were uplinked from Italy (where there is no requirement to obtain a licence for non-EU broadcasters), when in fact an Italian uplink provider had sub-contracted the work to a UK uplink provider. As a result, the broadcaster's EU country of jurisdiction had changed without their knowledge. This sub-contracting is relatively common with uplink providers, and makes the enforcement of any requirement to be authorised difficult. When investigating a complaint, it can take time to determine which Member State has responsibility for that service.

Nonetheless, the clear link between the non-EU broadcaster and an EU provider of uplink or satellite services both enables specific identification of the country of jurisdiction and provides a clear method of enforcement. We therefore consider that the satellite jurisdiction framework is effective.

## **2. Ofcom's experience in relation to methods of content delivery other than satellite**

There are no secondary technical criteria that apply to AV services delivered using cable, digital terrestrial or the internet, and that are not otherwise "established" in a Member State. It is possible therefore for EU audiences to access services which are not under the jurisdiction of any EU country, and hence are not obliged to comply with the rules of the AVMS.

We have considered the extent of UK citizens' potential exposure to services that fall outside EU jurisdiction. The main UK TV platform providers largely require the linear services they carry to hold EU licences or authorisations so audiences using those platforms will not typically have access to non-EU services.

In relation to DTT, some Member States may use their control over the licensing of spectrum to ensure that terrestrial broadcasters are covered under the AVMS Framework (e.g. by restricting spectrum licenses to providers which are established in the EU). DTT spectrum licensees may operate EPGs which link to non-EU services; member states could also restrict this use of DTT spectrum.

Finally, there are some non-EU services available online that would meet the definition of a regulated service under the Directive. While these services are only widely available through internet browsers and are not generally available on the TV platforms, this position is changing rapidly.

In these cases, by contrast to DTT or cable, there need not be an EU provider of a technical platform or service, with a contractual relationship with the online AVMS providers. This means there is no operator which has granted the AVMS operator access to the EU market, and which might be the basis for identifying country of jurisdiction and point of leverage for enforcement. This also suggests it is very unlikely there will be a unique country of jurisdiction for online-delivered AVMS which can be defined technically.

We have also seen some UK on-demand service providers leaving UK jurisdiction, and subsequently removing measures which had been in place to protect minors whilst subject to EU regulation. For example, “Playboytv” moved its operation/ownership from the UK to Canada after it was found to be providing an on-demand service subject to UK regulation (and would have therefore been obliged to introduce an age-verification access control on its service).<sup>10</sup>

However, this practice is generally rare. It is very unlikely that a major EU provider could operate without any meaningful EU presence, or that the economic benefits of such a circumvention strategy would outweigh the practical difficulties it presented. This is why the major new entrants in the EU AV market – Netflix, Amazon Prime, Vevo, etc. – have established themselves in the EU already.

Furthermore, in some cases, non-EU operators have expressed a desire to be licensed or authorised within the EU – i.e. voluntarily fall under EU jurisdiction – in order to give legitimacy to their services and to facilitate negotiation with the operators of EU TV platforms and distribution channels.

**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)

#### **COMMENTS:**

One potential risk we have identified is that non-EU internet-delivered linear or on-demand services may be made available on TV platforms such as DTT through “linking” services<sup>11</sup>. As this AV content is outside EU regulation, the consumer protection framework may not be in place.

#### ***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.*

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<sup>10</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/playboy-tv.pdf>

<sup>11</sup> The “linking” services hold an EPG licence, but they provide no more than a link to the content that audiences will eventually see. EU-origin content may also be made available in this way, but that content is of course subject to regulation in the EU country of origin.

- c)  *Extending the scope of application of the Directive to audiovisual media services established outside the EU that are targeting EU audiences and whose presence in the EU is significant in terms of market share/turnover.*

*As for option b), this could be done, for example, by requiring these providers to register or designate a representative in one Member State (for instance, the main target country). The rules of the Member State of registration or representation would apply.*

- d)  *Other option (please describe)*

PLEASE EXPLAIN YOUR CHOICE:

We caution against an extension of the geographic scope of the Directive, whether through new technical criteria or through the introduction of measures directed at services “targeting” one or more EU states. It seems to us that the current provisions of the Directive to bring non-EU established services within the geographical scope of the Directive are – while limited – broadly speaking proportionate to the dual purposes of protecting audiences and ensuring access to a competitive, free and pluralistic media environment.

In relation to competition concerns, and the possibility that non-EU providers could develop a presence which is “significant in terms of market share”: as noted above we do not believe that a major EU provider could operate without any meaningful EU presence, or that the economic benefits of such a circumvention strategy would outweigh the practical difficulties it presented.

On the other hand, there are legitimate concerns about consumer protection – for example protection of minors in relation to harmful content, or the prevention of hate speech. But addressing these through a wholesale extension of the geographical scope of the Directive would require comprehensive or universal regulation of online AV providers to be effective. This seems disproportionate and fraught with practical difficulties which may defeat the purpose; there are already domestic solutions available which may help address this potential risk.

Ultimately, if the decision is taken to amend the regulatory framework policy makers need to identify what they want to achieve (e.g. the enforcement of the full set of EU rules on non-EU services at one end of the spectrum, or a limited control over the most potentially dangerous content at the other) and then consider whether the solutions developed are proportionate to those goals.

Even a move to a full “country of destination” approach would not prevent the widespread availability of non-EU content online, unless it was combined with wholesale blocking of non-EU services (a very extreme intervention).

Instead, a better way to achieve the intended goal would be through a mixture of voluntary industry initiatives, improved media literacy and personal responsibility, and the development of better technical tools to address issues like protection of minors online.

We suggest possible approaches below.

## **Options for AVMS oversight that do not involve scope extension**

### **Voluntary registration**

Instead of an extension of scope, we could consider a voluntary registration scheme for services that want to be considered “legitimate” within the EU, and a voluntary adherence to AVMS. This would not necessarily give any EU Member State jurisdiction, nor resolve the challenges around enforcement, but could offer some reassurance to viewers and distributors.

Such a system should begin its life as a voluntary one, to judge its efficacy without placing too great a burden on regulators or, more significantly tending to limit the universal access to online services which characterises the operation of the open internet.

Additionally, although information sharing already occurs on an ad hoc basis, we would welcome a better developed information-sharing platform or mechanism for NRAs. A system of information sharing, such as an information portal – particularly about services’ compliance records and services whose broadcasting authorisation (if applicable) had been withdrawn – could certainly be of benefit to help prevent EU citizens from being exposed to potentially harmful content, and ensuring that only responsible broadcasters can take advantage of the freedom to transmit their content across the EU.

### **Warnings and Viewer Information**

In the UK, we are examining another approach, specifically for providers of regulated EPG services using DTT spectrum. Where such providers wish to include in their EPG non-EU internet-delivered channels, we may request they present a full-screen warning when viewers choose a non-EU channel. While this may not be appropriate as a harmonising measure for the AVMS, it illustrates how MS are able to address the consumer protection concerns raised by non-EU services, specifically in environments where viewers can be expected to have an expectation of protection.

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## 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

The advertising content rules at EU level have allowed Member States adequately to protect minors from specific product types and we propose maintaining the current content rules. We are satisfied that the current quantitative rules in the Directive, on the amount and placement of advertising, provide a good balance between consumer protection and funding for content. However we could support a review of the rules provided it took a full and balanced account of both of consumer protection and of the impact on content funding. In the long term, we believe high-level principles are preferable to detailed prescriptive rules at EU level. We believe the current product placement provisions are unnecessarily complex and could be simplified.

### COMMENTS:

The AVMS Directive makes clear that the purpose of advertising regulation is to protect the interests of consumers as television viewers. This focus on consumers as *viewers* is important, because, as the Directive also acknowledges, audiovisual media services have a role which is as much cultural as economic. Although commercial communications by definition serve an economic purpose for both advertisers and service providers, within our regulatory framework they are permissible only to the extent that they do not undermine the cultural benefits of programme content.

Advertising-funded television has been robust, but faces increasing competition; while we consider that the existing regulatory framework for commercial communications continues to provide a suitable basis for the protection of viewer interests, the introduction of greater flexibility in some specific areas would be welcome.

**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)

## COMMENTS

### a. The amount of advertising on AVMS

Ofcom's research indicates that many viewers have concern about the content and amount of advertising when prompted – in 2014, for example, 57% of UK viewers agreed with the statement “there are already more minutes of advertising in an hour than I am really happy with”. However, viewers also appear to understand the relationship which exists between advertising and the funding of content: 72% of UK viewers questioned in 2014 identified without prompting that advertising represented the primary source of funding for the UK's three main free-to-air commercial television services (ITV/STV/UTV, Channel 4 and Channel 5), which between them account for 24% of UK adult television viewing and just under £1.5bn (€2.1bn) in programme spend.

Nevertheless, the growth of audiovisual services delivered over the internet is creating an increasingly competitive environment for television services, which are subject to a range of regulation covering commercial communications. Concerns have been expressed about a perceived asymmetry between the regulatory regimes faced by broadcasters and providers of online media. Qualitative industry research commissioned by Ofcom in 2013 indicates a widely held view within the industry that technological innovation will ultimately “enable dramatic change in the market” with significant “cumulative disruptive impact”<sup>12</sup>. In such an environment, with viewing habits evolving and challenges growing to that traditional contract between viewers and broadcasters that sustains the advertising market, questions about the effectiveness of a the current, detailed regulatory framework are inevitable.

As far as the advertising market is concerned, the evidence indicates that although television is going through a period of change, it has not to date entered a period of decline. In 2014, UK TV advertising revenue increased by 3.9% in 2014 to £3.8bn, its highest ever. According to WARC, a specialist advertising research agency,<sup>13</sup> television spot advertising in the UK accounted for 36% of UK display advertising expenditure in the first quarter of 2015, “the same share of display spend as it did two decades ago”. This suggests that the significant growth in online advertising over the same period has not come at the expense of TV advertising.

In comparison, although advertising revenues from on-demand services have increased rapidly in recent years, according to data from IHS, free-to-view UK online TV services such as ITV Player and All 4 generated just £240m in advertising in 2014, equivalent to 5.6% of the total TV advertising and sponsorship market in the UK. In the medium term, therefore, a regulatory regime which reflects the strength of traditional media without placing onerous requirements on still small, if fast growing media, remains relevant.

Of course, fragmentation of viewing over time could have a significant impact on these services. However, current audience levels enable the UK's commercial public service broadcasters to maintain a strong share of the advertising market (generating £2.14bn in net advertising revenue in

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<sup>12</sup> [http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Future\\_of\\_Commercial\\_Comms.pdf](http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Future_of_Commercial_Comms.pdf)

<sup>13</sup> See: <http://mediatel.co.uk/newsline/2015/07/29/uk-adspend-on-display/>

2014, some 55% of the total UK advertising market), helping to maintain a virtuous circle of investment in original European production – to a combined level of £2.59bn in 2014 – including a broad range of highly valued genres, such as news and current affairs content.

We would also note that, despite viewers' likely resistance, it is certainly possible that the removal of regulations could lead to significant increases in overall volume of advertising. Analysis conducted by Ofcom in late 2011 suggested that, if the regulatory restrictions operating in the UK were loosened, competition could encourage UK broadcasters to increase minutage to maintain their share of commercial impacts. In such circumstances, it was possible that overall advertising revenue could fall, potentially reducing the amount available for investment in content. It is interesting to note that television advertisers, who we would expect to benefit from an increase in supply, have consistently argued against such a change as it could "dilute the viewer's preparedness to view adverts".<sup>14</sup>

#### **b. Protection of minors in commercial communications**

In the UK, we have sought to apply a detailed framework of direct and co-regulatory models to build on the fundamental principle expressed in the Directive that commercial communications must not cause physical or moral harm to minors. In practice, we seek to achieve this through a mixture of direct, co- and self-regulation – a system which we believe delivers a high level of flexibility, speed and practicality.

Over the past decade, much of this work has focused on limiting the exposure of children to advertising for specific product types highlighted in the Directive, including alcohol and foods which are high in fat, salt or sugar. In addition to the setting of clear rules intended to ensure that advertising approaches likely to appeal to children are not used inappropriately, this has also involved sophisticated analysis of television viewing patterns so that unsuitable advertising does not appear around programming of particular appeal to children.<sup>15</sup> Broadly speaking we consider this approach has been effective, although we acknowledge that it might not work for all Member States.

#### **c. Restrictions on product placement**

Following the liberalisation of rules on product placement in the AVMS Directive, which was intended to give greater funding options to the content industries, Ofcom has permitted UK-based broadcasters to transmit such content since February 2011. Although the level of revenue that the limited forms of product placement permitted would provide were unclear, with predictions from industry that UK broadcasters would generate between £25m and £150m within five years, recitals

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<sup>14</sup> From ISBA response to EC Green Paper q17: <http://ec.europa.eu/digital-agenda/en/news/consultation-green-paper-preparing-fully-converged-audiovisual-world-growth-creation-and-values>. Notably, although the United States operates under very different market conditions, it may be relevant that, according to at least one recent report from Bernstein, declines in viewer numbers have led some US broadcasters to increase the amount of commercial and promotional material to "prop up ad revenue in the face of declining audiences" potentially contributing to further audience decline "as well as decreasing the efficacy of the advertising that is still seen".

<sup>15</sup> In late 2013, for example, following research by Ofcom about a small increase in the exposure of children to alcohol advertising, our co-regulatory partner, the Broadcast Committee of Advertising Practice, issued technical guidance to broadcasters on how to identify television programmes which should exclude advertising for alcohol and other age-restricted products.

to the Directive made clear the principle that regulation should allow a certain degree of flexibility to broadcasters. The liberalisation has not, in the UK's experience, resulted in any regulatory concerns.

It is clear, however, that the market remains nascent and that – to date – broadcaster activities within the existing rules have not generated significant funding or encouraged additional production and innovation. Qualitative industry research conducted on Ofcom's behalf in 2013 indicated that marketers and broadcasters were not confident of the application of the current AVMSD rules so that the development of more innovative forms of placement has been constrained. Ofcom has also found the ambiguity in the current regulations challenging.

***Preferred policy option:***

a)  *Maintaining the status quo*

b)  *Rendering the rules on commercial communications more flexible, notably those setting quantitative limits on advertising and on the number of interruptions.*

c)  *Tightening certain rules on advertising that aim to protect vulnerable viewers, notably the rules on alcohol advertising or advertising of products high in fat, salt and sugars.*

d)  *Other options (please describe)*

**PLEASE EXPLAIN YOUR CHOICE:**

Given continuing viewer expectations, it is not clear that viewers would be well served by a removal of the existing limitations on the amount of advertising that television broadcasters are permitted to show, and as a result, we are not currently minded to make amendments to the rules which apply in the UK (which has traditionally adopted stricter quantitative rules than permitted by the AVMS Directive). Although viewing in the UK has been shifting away from the traditional 'terrestrial' services since multichannel services began to transmit in the late 1980s, the main five channels available in all UK homes continued to account for over half of all viewing in 2014. Overall, there could be scope to review the current AVMS Directive rules on the amount and frequency of advertising – carefully balancing the two – if there appear to be benefits for certain types of services from greater flexibility in how they allocate time to advertising.

In relation to the protection of vulnerable viewers, and particularly children and young people, we are concerned that over-prescriptive rules can have counter-productive effects (for example resulting in the movement of advertising across schedules or across media in such a way as to *increase children's exposure*).

For example, as noted above, television viewing has fallen among younger groups. According to the Broadcasters' Audience Research Board (BARB) in the UK the amount of time spent watching television by children fell between 2010 and 2013 by 10.8% to 134 minutes per day, before falling by a further 12.4% to 118 minutes per day in 2014. At the same time, widespread availability of technology means that alternative media have become increasingly accessible to children. In the

UK, 71% of children aged 5-15 had access to a tablet at home by the end of 2014, up from just over half (51%) in 2013, with 34% aged 5-15 having their own device<sup>16</sup>. Additional rules could have a counterproductive effect when other media are becoming more important for children, and make audiovisual media less attractive to advertisers marketing products of interest to children; ultimately this may limit the ability of AVMS providers to invest in a variety of content for children<sup>17</sup>.

Finally, with respect to product placement, it is not clear that the regulatory provisions have had the desired effect in opening up new funding streams for content producers – which was the original intention of the changes to the Directive. So, although we are suggesting maintaining the status quo, and consider restrictions on product placement are necessary to maintain editorial independence, it may be appropriate to review and simplify the detailed rules in Article 11 of the Directive. We consider the two principles, that editorial content must be readily distinguishable from advertising, and the additional proscription on “undue prominence” may be somewhat duplicative; and that potential instances of “undue prominence” are particularly hard for producers and regulators to assess fairly and consistently. There could be scope to consider re-wording the current provisions on product placement to underline that the practice is permitted with exceptions, rather than prohibited with exceptions.

In the longer term, regulation should carefully minimise any additional burdens on industry, given the implications additional regulatory burdens could have on the ability of AVMS providers to continue to fund high-quality content. As we suggested in our response in September 2012 to the Commission’s discussion paper on the update of the interpretative communication on certain aspects of the “Television Without Frontiers” Directive, it might be desirable to base the future regulation of commercial communications on a set of high-level principles set out in EU legislation. Such an approach would offer flexibility to national regulatory authorities to regulate in a manner that reflects and appropriately responds to change.

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<sup>16</sup> <http://stakeholders.ofcom.org.uk/market-data-research/other/research-publications/childrens/children-parents-oct-14/>

<sup>17</sup> In our recent review of public service broadcasting within the UK, we noted only limited production of non-animated programming outside the BBC. Since 2008, total spend on original children’s programming by UK’s public service broadcasters has fallen in real terms, from £103m to £88m in 2014, with nearly 97% of this total accounted for by the licence-fee funded BBC

### SET OF QUESTIONS 3.1

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

Relevant?  YES –  NO –  NO OPINION

Effective?  YES –  NO –  NO OPINION

Fair?  YES –  NO –  NO OPINION [You've ticked two boxes!]

#### **Summary:**

The overall level of protection afforded by the AVMSD is relevant, effective and fair, but changes may be appropriate, in particular to level out the protection offered to viewers of linear and on-demand services. We discuss these changes in the relevant sections below.

#### **COMMENTS:**

In our view, this question has two parts: whether or not there is a continued justification in differentiated standards for linear and on-demand services; and whether or not the AVMS Directive as a whole contains sufficient provisions to ensure an acceptable minimum level of protection for audiences across the EU. We note throughout our response the blurring boundaries between linear and on-demand, and the challenges this creates for regulation and audience protection. And we note from our latest audience research that audiences want more consistent standards protection across “television” services that fall under the AVMS Directive. Ofcom has been clear in the past that revisions of the regulatory system under AVMS may be needed to address this expectation.

The AVMS sets somewhat different standards for linear television and on-demand, notably in relation to the protection of minors and right of reply (as well as in relation to some aspects of the regulation of commercial communications). We think there is a case – in light of the blurred boundaries and changes in audience expectation we have noted – to extend AVMS rules on right of reply to on-demand services and to level out the rules on the protection of minors. We discuss this in the relevant sections below. Our views on maintaining the status quo for commercial communications are discussed above.

Turning to the rules as a whole, we have suggested in a previous consultation response<sup>18</sup> to the Commission that a future regulatory approach could establish a common set of principles and aims across a diverse media landscape, which could include core areas of protection as a minimum standard, building on current provisions of the AVMS for video on-demand, which already covers hate speech, content harmful to minors, and a range of protections relating to commercial

<sup>18</sup> <http://stakeholders.ofcom.org.uk/binaries/international/international-responses/green-paper-sep13.pdf>

communications. We considered at the time that additions to the current on-demand rules could include enhanced protection of minors (e.g. protection from exposure to sex, violence, dangerous behaviour, health risks and commercial influence) and consumer harm provisions (e.g. protection from financial harm, health and medical risks); as well as protecting individuals against unfair treatment (e.g. by ensuring right of reply).

Reviewing this position, we can draw on Ofcom’s more recent audience research on “protecting audiences in an online world”<sup>19</sup>. This looked at public attitudes of current protections for AV content on different platforms, and what they consider they should have in the future. The findings from this research suggest that there was universal agreement that protection of minors is the most important area for regulation and it is extremely important to apply protections across all AV delivery methods. The prevention of incitement to hatred and securing accuracy in news were also consistently perceived as extremely important across broadcast TV, catch-up and on-demand (and other internet viewing).

We believe that there is a clear understanding that the protection of minors and prevention of incitement to hatred are of such clear importance that they must form the basis of the minimum protections provided by the Directive. UK audiences clearly have a number of other concerns, and we acknowledge that these might not be reflected in the cultural and policy concerns of other Member States (which also have their own individual concerns). We believe it is important to ensure that Member States retain the flexibility and freedom to protect audiences in their territories as they feel appropriate, and in the UK, for example, we are working with industry to understand how everyone in the value chain can help to offer viewers the level of protection and high standards they expect on a voluntary basis where these are not already covered by existing legislation.

On that basis we believe minimum standards provided by the Directive are relevant, but should be applied equally across linear and on-demand services.

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<sup>19</sup> [http://stakeholders.ofcom.org.uk/binaries/research/tv-research/protecting-audience-online/Protecting\\_audiences\\_report.pdf](http://stakeholders.ofcom.org.uk/binaries/research/tv-research/protecting-audience-online/Protecting_audiences_report.pdf)

### SET OF QUESTIONS 3.2

We answer the following questions together:

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

Relevant?  YES –  NO –  NO OPINION

Effective?  YES –  NO –  NO OPINION

Fair?  YES –  NO –  NO OPINION

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

YES –  NO –  NO OPINION (see below for our response in relation to different services)

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

YES –  NO (If yes, please explain below)

#### Summary:

We consider that the protection afforded to children in on-demand services should be the same as protections in place for broadcast services. Specifically, we propose that the obligations on AVMS providers should be framed to reflect the ways in which they control minors' access to content – with greater flexibility afforded to AVMS providers when strong access control mechanisms are in place, whether on broadcast or on-demand services. This approach may also help align Member States' approaches to the strongest material permissible on AVMS.

Some work, potentially through ERGA, on clarification of the application of “seriously impair”, or the definition of content subject to the strongest restrictions, might also be considered as part of the revision.

The protection of minors is a fundamental public policy goal within the UK and other Member States. Delivering this goal is becoming more challenging with the continuing expansion of the range of environments, devices, and delivery platforms through which children access content and

services. The market, children's behaviour and broader audience expectations have all changed since the AVMS was introduced.

Any judgement of the efficacy of this aspect of the Directive relies on an understanding of the way minors find and consume content, and of audience expectations

### **1. Convergence and children's media consumption**

The increasing availability of connected devices mean children now have access to a wide range of media content via a variety of different mobile devices, such as mobile phones, tablets and games consoles, potentially without adult supervision. Children consume significant quantities of online and on-demand content. Ofcom research published in October 2014<sup>20</sup> shows that in the UK, seven in ten children aged 5-15 have access to a tablet computer at home, one-third watch on-demand TV services<sup>21</sup> and 20% of watch television programmes on a tablet computer.<sup>22</sup> While our research suggests that television is still the most popular medium for children and that the TV set is the device that children would miss most, children aged 12-15 now spend more time online than watching television (17.2 vs. 15.7 hours).

### **2. Audience expectations**

As noted above, research commissioned by Ofcom and published in December 2014 found that the majority of audiences have an expectation of comprehensive and broadly homogenous regulation across broadcast TV and catch-up, and for many, video-on-demand services; and there was universal agreement that protection of minors is the most important objective for regulation and protections should apply across all AV platforms (broadcast TV, catch-up, on-demand, and other internet).<sup>23</sup> These findings inform our approach to the protection of minors under the AVMS.

### **3. Current rules for the protection of minors rules on linear and on-demand services**

The AVMSD imposes different rules for protection of minors on linear and on-demand services. It is prohibited to include programmes "which might seriously impair the physical, mental or moral development of minors" in a linear service, but such programmes may be offered on-demand provided they are "made available in such a way as to ensure that minors will not normally hear or see" them.

Programmes that are "likely to impair" the development of minors are permitted on linear services, provided measures are taken to ensure that minors "will not normally hear or see" them, but the AVMSD imposes no condition on on-demand media services for this content.

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<sup>20</sup> [http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-use-attitudes-14/Childrens\\_2014\\_Report.pdf](http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-use-attitudes-14/Childrens_2014_Report.pdf)

<sup>21</sup> 'On-demand' includes TV programmes or films on-demand through the household's TV service – including pay-per-view services (e.g. Sky Box Office), subscription services (e.g. Netflix) or catch-up services (e.g. BBC iPlayer).

<sup>22</sup> [http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-use-attitudes-14/Childrens\\_2014\\_Report.pdf](http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-use-attitudes-14/Childrens_2014_Report.pdf)

<sup>23</sup> [http://stakeholders.ofcom.org.uk/binaries/research/tv-research/protecting-audience-online/Protecting\\_audiences\\_report.pdf](http://stakeholders.ofcom.org.uk/binaries/research/tv-research/protecting-audience-online/Protecting_audiences_report.pdf)

## Protection of minors in the current AVMS

Type of Service	Moderately Strong Content: “...likely to impair...”	Very Strong Content: “...might seriously impair...”
Broadcast AVMS	<ul style="list-style-type: none"> <li>Only if made available in a way which “ensures that minors will not normally hear or see...”</li> </ul>	
On-demand AVMS	<p><b>Permitted</b> (Without restrictions)</p>	<ul style="list-style-type: none"> <li>Only if made available in a way which “ensures that minors will not normally hear or see...”</li> </ul>

This approach means that children may have unrestricted access to specific content on demand, even though the same content is restricted on broadcast services: for example Rihanna's music video for the song S&M contains themes of sexual bondage, dominance and sadomasochism and was considered by Ofcom inappropriate to be broadcast before the 9pm watershed: we consider it satisfies the “likely to impair” test. However, it is available throughout the day on video on-demand services under the terms of the AVMS.

#### 4. Application of the existing AVMS definitions and rules across the EU

Applying the protection of minors’ provisions in the AVMSD involves making a decision about:

- a) whether content is “likely to impair” or whether it might “seriously impair” minors’ development; and
- b) where relevant, what measures must be taken to ensure that children “will not normally hear or see” this content (i.e. what constitutes an adequate access control mechanism).

Different views among member states about which content is “likely to” or “seriously” impair the development of minors, and on what constitutes an adequate access control mechanism can lead to asymmetries in the application of the minimum standards set in the Directive between different Member States. This can lead to tensions in the operation of the country of origin principle (which we discuss further in our response to Question 5).

The real cultural and societal differences between Member States will legitimately inform their individual approaches to content regulation. However, such cultural factors may also influence MS’ approaches to the harmonised minimum standards in the AVMS Directive, which are intended to be common to all Member States, specifically in determining which content should be banned on broadcast television – and hence may have led to a more or less restricted scope of application of the “seriously impair” threshold.

#### 5. Protection of minors in the UK

We consider that the “likely to impair” and “seriously impair” thresholds are open to interpretation; our extensive investigation of the relevant literature has revealed that it is difficult to establish when they are met and what the distinction is between them. We consider that the different levels of protection that apply to each threshold, and in respect of linear and on-demand services, may influence the way that they are applied by a Member State. Specifically, a Member State’s views about content that should be banned on broadcast television may determine the content which it

identifies as likely to “seriously impair” the development of minors, rather than an objective, evidence-based assessment as to whether or not that is a likely outcome of the content in question.

In order to address the uncertainty it has identified, the UK has introduced additional, specific rules to clarify the obligations of linear and on-demand providers.

The UK’s rules for linear services (the “Broadcasting Code”) describe potentially harmful content and cover areas such as drug use, smoking, alcohol, violence, dangerous behaviour, sexually explicit material and offensive language.<sup>24</sup>

The Broadcasting Code has different rules apply to content depending on its severity, ranging from prohibition (for content equivalent to an R18 rating under the British Board of Film Classification (BBFC) system);<sup>25</sup> requirements for technical controls like PIN codes and age-verification tools; requirements for broadcast scheduling based on the 9pm watershed; and EPG positioning.

The UK government recently introduced legislation which provides a similarly graduated set of requirements in respect of on-demand material, depending on the severity of the content in question.<sup>26</sup> The inclusion of material that would not be deemed suitable for an R18 certificate is prohibited; “specially restricted material”, which includes R18 material and “...material which might seriously impair”, may only be made available in on-demand services “*in a manner which secures that persons under the age of 18 will not normally see or hear it*”.

The practical consequence of the rule in relation to “specially restricted material” is that UK regulated on-demand services must operate a ‘Content Access Control System’ (“CAC System”) in respect of such material which includes effective age verification. The criteria for being effective would, for example, allow credit card but not debit cards as a proof of age (as credit cards may only be issued to adults, but debit cards are not restricted). A warning page or a self-declaration of age would not be adequate.

The research findings noted above, and the practical experiences that we have had of applying the different standards provided for in the Directive, suggest to us that the distinction between the rules for protection of minors that apply to linear and non-linear services may not meet audience expectations of consistent regulations. More importantly, the prohibition on the broadcast of material which may seriously impair minors does not reflect the fact that the same mechanisms to manage minors’ access to potentially harmful content are available both to on-demand and broadcast service providers. Further, a Member State’s reluctance to implement the prohibition may result in potentially harmful material not being identified as appropriate for control in the on-demand environment.

We consider that the AVMSD protection of minors framework should therefore consider not only the severity of material, but also the range of access control measures available: clear information

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<sup>24</sup> <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/protecting-under-18s/>

<sup>25</sup>

[http://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202014\\_5.pdf](http://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202014_5.pdf)

<sup>26</sup> The Audiovisual Media Services Regulations 2014

([http://www.legislation.gov.uk/uksi/2014/2916/pdfs/uksi\\_20142916\\_en.pdf](http://www.legislation.gov.uk/uksi/2014/2916/pdfs/uksi_20142916_en.pdf))

guidance and content warnings; and tools to control access. Critically, the framework should also reflect the fact that much television is consumed through sophisticated digital TV platforms that can offer the same information tools and technical protection measures for linear content as for on-demand services.

**What are the costs related to implementing such requirements?**

Costs:

**What are the benefits related to implementing such requirements?**

Benefits:

**COMMENTS:** N/A

***Preferred policy option:***

a)  *Maintaining the status quo*

b)  *Complementing the current AVMSD provisions via self- and co-regulation*

The status quo would be complemented with self-/co-regulatory measures and other actions (media literacy, awareness-raising).

c)  *Introducing further harmonisation*

This could include, for example, more harmonisation of technical requirements, coordination and certification of technical protection measures. Other possibilities could be the coordination of labelling and classification systems or common definitions of key concepts such as minors, pornography, gratuitous violence, impairing and seriously impairing media content.

d)  *Deleting the current distinction between the rules covering television broadcasting services and the rules covering on-demand audiovisual media services.*

This means either imposing on on-demand services the same level of protection as on television broadcasting services (levelling-up), or imposing on television broadcasting services the same level of protection as on on-demand services (levelling down).

e)  *Extending the scope of the AVMSD to other online content (for instance audiovisual user-generated content or audiovisual content in social media), including non-audiovisual content (for instance still images)*

One option could be that these services would be subject to the same rules on protection of minors as on-demand audiovisual media services.

f)  *Other option (please describe)*

PLEASE EXPLAIN YOUR CHOICE:

**New rules for protection of minors covering all regulated AVMS:**

We believe that the protection of minors framework in the AVMS should be modified to

- remove the distinction between broadcast and on-demand services
- allow a more graduated approach to potentially harmful content, which recognises the different ways that minors’ access may be controlled

We acknowledge that application of the “likely to impair” and “likely to seriously impair” thresholds may differ across MS; we believe this may be a result of cultural differences and different views on whether specific content should be banned on broadcast television (which is the consequence of the “seriously impair” classification).

We propose an alternative approach that could deliver greater harmonisation without requiring MS to change their fundamental approaches to standards or to the range of content permitted on AVMS. There should be level protections across linear and on-demand for the protection of minors, which take account both of the severity of content and the adequacy of the content access tools. The strongest content will only be permitted on AVMS with the strongest content access controls, with less harmful content permitted with less strict access controls.

**Future model for protection of minors**

Way of controlling minors’ access		<i>Moderately Strong Content</i>	<i>Very Strong Content</i>
No control (e.g. in daytime, free-to-air)	• Broadcast AVMS		
	• On-demand AVMS		
Moderate control (e.g. after watershed or with age-ratings)	• Broadcast AVMS	Permitted	
	• On-demand AVMS	Permitted	
Strong control (e.g. age-verification)	• Broadcast AVMS	Permitted	Permitted
	• On-demand AVMS	Permitted	Permitted

(Note that in the UK, we would expect that “very strong content” would cover the same ground as defined in the UK legislation described above, such as R18 material).

This could be complemented with more detail on how this can be achieved, for example, through development of guidance by ERGA suggesting different types of access restriction appropriate to

the potential of the content to cause harm to minors e.g. “scheduling/the watershed” for content that causes less concern or “subject to technical tools” for the strongest material.

We recognise that this approach might not eliminate the differences in views as to which kind of content might pose a risk of harm to children, and therefore which level of protection should be applied. However, we believe it would result in the most problematic content (for example, but not limited to, hardcore pornography) being consistently subject to effective access controls, across the EU.

#### **Acknowledging the limits of the Audiovisual Media Services Directive:**

The connected environment presents new challenges for individuals and families; the protection of minors from potentially harmful content on connected devices remains a significant concern. There are many online services which fall outside within the definition of AVMS, but which raise some of the concerns which the Directive seeks to address though its provisions on the protection of minors.

We would not consider that a significant extension of the scope of the AVMS to cover more service providers would be an appropriate or effective mechanism for furthering child online safety. The Directive should be seen as one element of a broader policy framework for the protection of minors. This will include measures and actions taken by governments, regulators and industry, spanning broad educative initiatives to improve media literacy and awareness; the provision of information and guidance; and technical tools like online content filters. These will enhance protection and enable personal responsibility, giving families the tools to protect children online.

As part of this, consideration is needed of the roles and responsibilities of all players in the value chain to ensure they make an appropriate contribution to protecting minors. Policy makers will need to create an environment within which relevant intermediaries that fall outside the scope of the AVMS Directive have incentives to provide consumers with appropriate technical tools. This is already happening in the UK, and examples such as the commitment by the major UK fixed ISPs to offer subscribers network-layer, whole-home content filtering, will continue to be important to address the risks to minors. Ofcom has also been actively engaged in supporting relevant stakeholders develop guidelines to protect children within social media technologies from potential harmful content and conduct.

We believe audio visual media providers, device manufacturers and platform providers all have an integral role to play in creating a safer consumer experience. In particular, providing appropriate and effective information guidance (e.g. through signposting and warnings), and technical tools to control access to content for individuals and families to manage their own access to potentially harmful content. These tools could be provided by platforms and online intermediaries, without subjecting them to editorial responsibility or involving the indiscriminate blocking of unregulated (but not necessarily harmful) content/services.

Media literacy is critical. We note that this consultation does not ask explicitly about the Directive’s provisions on media literacy, but would stress our view that children and adults are responsible for developing resilience in their media consumption. They need to understand the risks and norms of online activity, exercise due caution and use protective tools where these are available.

Governments and regulators therefore need to support citizens by focusing on ways to help them develop that resilience.

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## SET OF QUESTIONS 4

**We answer the following questions together:**

**Q: 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

**Q: 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).**

**Q: 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

### Summary

The current AVMSD requirements on European works have helped to foster growing investment in European content for a wide range of linear and on-demand television services. Without the flexibility these arrangements provide, new market entrants would find it much harder to establish themselves, and then to build investment in European production. We therefore consider the provisions in the AVMS Directive remain relevant, effective and fair for promoting cultural diversity and European works.

Our analysis below explains the nature and range of the interventions that are in place in the UK, and the results that they deliver for UK viewers.

#### 1. Approach to promoting cultural diversity and European works

In relation to linear services, the UK meets its obligations under the Directive both through the appropriate application of the general EU works rules, and through the designation of public service broadcasters who bear a significant range of obligations for domestic production, including volume and genre requirements.

In relation to on-demand content, the UK's ATVOD writes to each UK provider of an On Demand Programme Service annually to encourage them to promote, where practicable and by appropriate means, production of and access to European works, and by collecting data (hours of European works available) at regular intervals and submitting a report on the data received to UK Government via Ofcom.<sup>27</sup>

## 2. Understanding the market: the UK's experience

The television broadcasting sector in the UK consists of a wide range of organisations, with varied remits and strategies, operating under different funding models.

Public service broadcasters (PSBs) have obligations to produce high volumes of originations, to commission content from the independent production sector, to commission a certain proportion of output from outside London, and to meet certain genre quotas (such as news and current affairs). The PSB system as a whole must meet a number of statutory purposes, including:

- Facilitating civic understanding and fair and well-informed debate on news and current affairs in the UK and from around the world
- Disseminating information and providing education and entertainment
- Reflecting, supporting and stimulating UK cultural activity and diversity

PSBs' programmes are expected to meet a number of characteristics, depending on the exact nature of their specific statutory remit (which is different for different PSBs) including: high quality; original; innovative; challenging; widely available; and trustworthy.

The PSBs can be split into two broad groups:

- *Publicly-owned:* The BBC is funded predominantly through the licence fee, although it also operates a large commercial arm which returns profits to the public service. S4C operates independently from the BBC but is funded by the licence fee. Channel 4's main source of revenue is advertising. While it receives no public money it does receive access to DTT spectrum and prominence in EPGs.
- *Publicly-supported, commercially-owned:* The Channel 3 operators (ITV, STV and UTV) and Channel 5 are commercially owned organisations who meet certain PSB obligations (such as national or regional/nations news). In return for the fulfilment of their PSB obligations, they receive access to spectrum and are guaranteed prominence on electronic programme guide). But the organisations more broadly are predominantly funded via advertising, although ITV in particular is increasing its revenues from its production business.

All of the BBC's services are PSB. However, only the main channels from ITV, STV, UTV, Channel 4 and Channel 5 are PSB. These organisations also operate a number of purely commercial portfolio channels, funded predominantly through advertising.

There are also a large number of purely commercial channel operators, including Sky, UKTV, Discovery, Sony and Turner, which have no PSB obligations and receive no public support. Revenue sources include advertising and subscription.

There is also a nascent sector of commercially-owned local television broadcasting in the UK. This is publicly supported with spectrum, prominence, and public funding (from the BBC licence fee); in

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<sup>27</sup> [http://www.atvod.co.uk/uploads/files/2012\\_European\\_Works\\_Plan\\_FINAL\\_2\\_061112.pdf](http://www.atvod.co.uk/uploads/files/2012_European_Works_Plan_FINAL_2_061112.pdf)

return channels have local programming obligations. It is a diverse sector, ranging from commercial channels with substantial coverage areas, to smaller, community-focused, non-profit channels.

This mixed ecology has served citizens and consumers in the UK well:

- *TV remains popular:* People consume on average 3 hours 40 minutes per day, with the main five main PSB channels still accounting for over half (51.2%) of all viewing despite growing choice;
- *People have a wide choice and range of quality content:* Citizens and consumers have access to more channels than ever before, offering high quality programming, both popular and niche, covering a wide range of subjects. Audiences enjoy the wide choice of content from the UK as well as the best that Europe and the rest of the world has to offer;
- *There are high levels of content production:* PSBs continue to produce a very high volume of new UK content each year, with the commercial sector also contributing significantly;
- *And high levels of investment:* UK Public service broadcasters in particular continue to invest heavily in original content, spending over £2bn last year, across a range of genres, and thereby promoting cultural diversity. Non-PSB investment has also grown, from £1.36 in 2008 to £1.93 in 2013 (although this is predominantly sports programming); and
- *We have a thriving independent sector:* underpinned by PSB investment, the independent production sector produces high volumes of creative content and provides competition to broadcasters.

Of course, the system in the UK is not perfect. Ofcom's recent PSB Review identified a number of areas of concern:

- *How to sustain investment in content:* with PSB investment falling in real terms and non-PSB programming not growing fast enough to fully offset the decline;
- *How to ensure provision in certain genres which face challenging economics:* such as children's programming and drama; and
- *Reflecting diversity:* how to ensure people from all areas of the UK and different ethnic or cultural backgrounds are well represented and fairly portrayed.

### 3. Assessing the outcomes

#### PSBs make the largest contribution to cultural diversity and the promotion of European works

One of the key ways in which the UK meets its objective to support EU content investment is through the Government's designation of a number of PSBs, as described above, which each have substantial origination quotas, ranging up to 90% of qualifying output by channel. The purposes and characteristics of PSB, described earlier, help to ensure that the PSB system promotes cultural diversity.

The PSB system secures cultural diversity through a range of output covering news, current affairs and investigative, drama, natural history programming, documentaries, classical music (The Proms), sport, entertainment and children's programming.

#### Commercial channels are making a growing contribution

While the PSBs continue to account for the majority of new, UK content, the wider market is playing a growing role. The non-PSB channels have significantly increased their investment in non-sport first-

run original UK programmes by 43% since 2008 in real terms. These channels now account for around 15% of the value of all UK non-sport originations. The commercial sector is particularly strong in news and sport, although there is also material investment in drama, comedy, and arts programming

#### The content market is international

While many of the most popular programmes in the UK are domestic productions, there is also a growing appetite for co-productions with partners from Europe, the US and elsewhere.

Our experience in the UK is that the content market is becoming increasingly global. There have been a range of notable co-productions between UK broadcasters and US players including NBC, Amazon, HBO and PBS; and EU players including ZDF and Canal+.

Viewers in the UK also value European programming, with the BBC airing a number of critically-acclaimed acquired series including *The Killing* (Danish/German), *Inspector Montalbano* (Italian) etc.

#### Meeting audience needs

The current requirement for the provision of European Works does not distinguish between domestic and non-domestic production.

It is clear that audiences in the UK have a strong appetite for content which reflects life in the UK. A recent study conducted by the European Commission made similar findings. It revealed that European still have a strong preference<sup>28</sup> for content made in their own countries and this will impact on providers' editorial decisions (as a result of which easy access to a significant volume of European content is already ensured in the UK without the need for regulatory intervention).

But many UK viewers also want the best global content. Research for Ofcom's recent PSB Review found that, when asked to make a choice between two opposing statements, nearly half (49%) of people would prefer to receive the best programmes made in the UK that reflect life in the UK (49%) compared with a third (35%) who would prefer the best television programmes from the USA, Europe, Australia and other countries. The popularity of such content is reflected in its central place in Sky's TV package and the continuing growth in take-up of services such as Netflix and Amazon Prime.

Currently the majority of the works consumed on UK-licensed channels and UK-notified on-demand services are of European origin, but viewers also have access to the best content from elsewhere. Although audience measurement systems for on-demand services are still under development, there is evidence to suggest that the majority of on-demand content viewed in the UK is of European origin. Data suggests that in the UK, the majority of the most popular non-linear services are catch up services provided by public service broadcasters who are already required to produce a high level of original European content on their linear services (as described above). The majority of programmes in the catalogues of these services are of European origin and as a result, the on-demand services accessed most frequently by UK viewers – most notably, the BBC iPlayer, which remains by far the most popular on-demand service in the UK – automatically contain a high proportion of European content, (and the periodic census conducted by ATVOD will help to confirm whether that remains the case over time).

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<sup>28</sup> [http://ec.europa.eu/avpolicy/docs/library/studies/art\\_13/final\\_report\\_20111214.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/art_13/final_report_20111214.pdf)

Therefore, while the majority of the most viewed content on Netflix and Amazon Prime appears to be non-European, the most popular on-demand services provide a significant amount of European content, and we have seen the emergence of a wide range of smaller and niche services offering viewers an extensive choice of European content that otherwise would be unavailable to them. In the UK for example, services such as BFI Player, MUBI and Journeyman Pictures make available a significant range of content typically found on public service channels.

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

YES –  NO –  NO OPINION

**COMMENTS:**

N/A

**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)

**COMMENTS**

As noted above, we consider the results of the current regulatory interventions provide a vibrant and attractive choice of content for viewers, and do a great deal to promote the production of high quality European content that is increasingly international in flavour.

**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:**

**COMMENTS:**

N/A

***Preferred policy option:***

- a)  *Maintaining the status quo*
- b)  *Repealing AVMSD obligations for broadcast and/or for on-demand services regarding the promotion of European works. This would entail the removal of EU-level harmonisation on the promotion of European works, which would then be subject to national rules only.*

- c)  *Introducing more flexibility for the providers' in their choice or implementation of the measures on the promotion of European works.-*

This could imply, for example, leaving more choice both to TV broadcasters and video-on-demand providers as to the method of promoting European works.

- d)  *Reinforcing the existing rules.*

For television broadcasting services this could be done, for example, by introducing additional quotas for non-national European works and/or for European quality programming (e.g. for fiction films, documentaries and TV series) or for co-productions; or by setting a clear percentage to be reserved to Recent Independent Productions<sup>29</sup> (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)*

We consider the current provisions ensure that European works are adequately represented in schedules without undermining viewer choice or a pluralistic media, and would support maintaining the status quo.

That said, any new framework, including one that goes beyond the status quo, should:

- Secure appropriate levels of local, European and international content
- Support viewer choice, including of non-EU origin content
- Allow Member States to support the creation of European works as necessary, whether through public funding or the use of public assets
- Give Member States flexibility to address territory-specific issues
- Encourage inward investment to increase the funding available for high-cost, high value programming, notably drama
- Where possible, avoid additional burdens on industry, given the implications additional regulatory burdens could have on the ability of AVMS providers to continue to fund high-quality content.

Any move to introduce compulsory methods, particularly for on-demand services, to meet obligations to promote European works should take into account the proportionality of such a change (i.e. whether or not the policy aims are already being met via the current arrangements); and the potential for such a change to damage the further development of the on-demand market. Indeed, the aims listed above might best be achieved through further removing the requirements for

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<sup>29</sup> Works transmitted within 5 years of their production.

linear services and applying the high-level principle for on-demand services (a broad encouragement to promote European works, with flexibility to choose the means of doing so) for all AVMS.

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## 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

### Summary:

The Country of Origin principle remains the cornerstone of the AVMS Directive. It has broadly enabled regulators to pursue their duties and policy objectives in the EU at the same time as – most crucially – protecting and enabling cross-border content provision and the plurality of voices and views necessary for a democratic society in Europe, supporting the principle of freedom of expression. We recognise that there are national concerns, tensions and some practical difficulties in relation to the operation of the principle. We believe these could be addressed through a series of adjustments to the current framework, while retaining the Country of Origin principle.

### COMMENTS:

The principles of freedom of reception, of unrestricted transmission and of Country of Origin are the cornerstones of the AVMS Directive, and of the European single market for audiovisual content. They have broadly enabled regulators to pursue their duties and policy objectives in the EU at the same time as – most crucially – protecting and enabling the plurality of voices and views necessary for a democratic society in Europe, and supporting the principle of Freedom of Expression.

It is not without its tensions, and many NRAs and Member States have concerns about aspects of the operation of this principle, often linked to their ability to support their local content industries and to meet national public policy objectives. We acknowledge that improvements could be made to the operation of the Country of Origin principle which we discuss below.

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

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

### COMMENTS:

Complaints are an imperfect measure, but it is notable that their levels are low in respect of cross-border content in the UK. There have been no cases since 2005 that have warranted a UK derogation from the principle of unrestricted transmission and freedom of reception. And we have also seen

genuine cooperation and mutual support develop between Ofcom and our fellow regulators. However, our experience leads us to make the following observations:

**a. Establishing jurisdiction is complex**

Determining jurisdiction involves the application of a number of concepts; some are defined in the Directive, but still open to interpretation. Each case may require detailed analysis to determine which national business or business unit takes the editorial decisions which establish country of jurisdiction, and this can be complex and time-consuming. Arguably the relative ease with which a company can become established in a given Member State by following the criteria to the letter runs the risk of companies setting up in one jurisdiction purely in order to avoid other countries' rules.

**b. Differences between Member States exist as a result of different national rules and different interpretations of EU standards**

The AVMS Directive seeks to achieve a compromise between facilitating cross-border European content provision, and respecting cultural diversity among Member States and the ability of their respective regulatory authorities to protect their citizens accordingly. Member States are free to have *stricter* rules, but citizens in a state with stricter rules may still have access content licensed in another Member State and subject to the more liberal standards applicable in that jurisdiction. This creates a tension, which should be mitigated to some extent by the set of harmonised minimum standards (including broadcasting standards) in the AVMS Directive which every Member State must apply, and by mechanisms supporting the framework.

In Ofcom's experience, divergences of national standards have most frequently occurred in relation to the protection of minors (although more recently, we have also had experience of different interpretations of the provisions on hate speech). In our view they stem from **different applications of existing harmonised standards** (rather than different national standards above and beyond the EU minimum standards). Our experience of the major differences in relation to national rules relate to advertising content restrictions, when some Member States have prohibited entire categories of advertising e.g. alcohol or gambling, or advertising to children.

**c. Ofcom's experience of the application of the COO principle**

**Informal Cooperation:** In our experience this has worked well. National regulators have considerable experience of day-to-day cooperation, including through the development of bilateral relationships and even regional networks, often with successful outcomes. Many issues can be successfully addressed through informal cooperation, without the need to rely on more formal procedures, for example with regulators exchanging complaints to ensure that the content of cross-border services is subject to regulation by the appropriate authority. In some cases exchange of views can also expose – and therefore potentially resolve – different interpretations either of the minimum content requirements of the Directive or its various definitions and criteria. In some cases it can even be a potential means of solving problems that might arise due to Member States' right to introduce stricter or more detailed rules domestically for services within their jurisdiction. That said, there have been times when we have informally worked with other regulators over issues of concern to the UK without a satisfactory conclusion – for example, in relation to pornographic content falling under other jurisdictions that does not comply with our own domestic rules.

**Formal Cooperation:** Our experience of formal cooperation has led us to the view that the current provisions and procedures are of very limited efficacy. We understand that we are not the only regulatory authority to have experienced its limitations. The procedure does have the benefit of promoting cooperation in principle and can help raise awareness of what are often complex issues involving a significant degree of subjective judgment.

**Circumvention:** The UK has never followed this path, in part because we believe establishing deliberate circumvention is unlikely to be a straightforward task, even where a broadcaster has moved from the UK to the relevant host state following previous enforcement action in the UK.

**Derogation:** The UK has not exercised the power of derogation under Article 3 of the AVMS Directive but did make effective use of an equivalent provision in the Television Without Frontiers Directive in 2005<sup>30</sup>. In addition, Ofcom has recently been in communication with the Baltic States (in particular, Lithuania) over their strong concerns about services carrying Russian-origin content and licensed in the UK (in 2014, the Lithuanian regulator relied on the derogation provisions in the AVMS Directive to suspend a UK-licensed service in Lithuania). Questions have also been raised about the correct jurisdiction of these services. Some regulators have also argued more broadly that in the present circumstances the Country of Origin Principle should not apply at all and that they should not be bound by its framework.

We do not believe there is evidence in the UK of services suffering from material competitive disadvantages as a direct result of the Country of Origin principle. There are certainly circumstances in which UK rules are stricter than rules applicable in other Member States. It is also true that, through the operation of the Country of Origin principle and the principle of freedom of transmission and unrestricted transmission, service providers established in other Member States but receivable in the UK may be subject to less strict rules as compared to providers established in the UK. And there are some on-demand services available in the UK that fall outside of EU jurisdiction altogether. However, we do not believe there is a systemic problem of unfair competition resulting from these differences.

In any event, there are many other possible causes of any perceived imbalances, e.g. varying levels of public funding for AVMS providers, increased on-demand viewing and decreasing linear viewing (where providers subject to different regulations are competing for the same audiences) and differences between Member States in the levels of investment in production facilities or media hubs (which might have been set up originally as part of investment in public service broadcasting).

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<sup>30</sup> This was in 2005 in relation to Extasi TV, an Italian-licensed satellite channel showing violent pornography featuring sexual imbalance. In making the order, the UK Government held that the material contained “very strong forms of pornography” and its broadcast was against the public interest, in particular because of its potential to “seriously impair the mental and/or moral development of any children who may see it”. The Secretary of State was satisfied that the measure was compatible with equivalent provisions in the Television Without Frontiers Directive. The decision was not challenged.

We believe that the development of cross-border and pan-European services offers choice to viewers, and that the freedom of cross-border content provision is not only central to the pursuit of the European single market, which is at the heart of the EU project, but also contributes to a pluralistic media environment with the freedom of expression and freedom to receive information at its core.

**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:

N/A

***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)*

***PLEASE EXPLAIN YOUR CHOICE:***

As noted above, we consider that the framework in place to support the operation of the Country of Origin principle (including the application of the minimum standards and the cooperation mechanisms) has enabled regulators to pursue their audience protection duties in the EU.

Moving away from the principle and to a Country of Destination approach for any of the minimum standards agreed on in the Directive could have a profoundly undermining effect. However, our experiences have helped us to identify areas where this operational framework could be improved for the benefit of audiences and industry.

We believe that in considering the merits of any potential amendments to the framework around the operation of the Country of Origin Principle, it is essential to assess the extent to which they undermine the Principle itself, and in each case whether their potential benefits are justified by their potential cost/impacts. This assessment might require stakeholder input or further research. But our initial view is that in order to support the Country of Origin framework the AVMS Directive should continue to make derogation possible only in exceptional circumstances and focus more on improving cooperation mechanisms and trying to help prevent deliberate circumvention (e.g. through setting evidentiary standards and improving information sharing).

With that in mind, the Commission could consider a number of refinements to the current Framework, including:

**Clarifications of establishment criteria**, while bearing in mind that if the criteria were to change, companies might change their structure to follow their requirements. Any changes intended to discourage deliberate circumvention in principle, should therefore be sufficiently robust.

**Amending the grounds for and processes supporting derogation**, such as aligning the grounds for derogation for linear services in Article 3(2) with those for on-demand services in Article 3(4); ; or reviewing the timeframes given in Article 3(2). Any changes should not fundamentally undermine the integrity of the Country of Origin Framework (including Freedom of Reception) and should first consider whether every Member State has adequate provisions in place on which they can rely if they need to act under Article 3.

**Formal cooperation and proving circumvention** are the provisions that seem to offer greatest opportunities for enhancement, be it removing the “wholly or mostly” targeting test as a pre-requisite for formal cooperation (thus allowing formal cooperation to take place in any circumstance where the receiving Member State does not have jurisdiction over the service in question), or identifying the kind of objective evidence that would be relevant to establishing that circumvention had taken place.

Some Member States have also proposed formalising some of the best practices that have arisen from **informal cooperation** over the years (processes for dealing with cross-border complaints, regular meetings and others). In our view, too detailed a set of procedures could have a detrimental effect by making well-developed mechanisms more rigid and excluding new means of cooperation. However, there could be benefits in affirming the role of informal cooperation further, raising the « status » of such cooperation/network, and possibly developing a set of « best practice » guidelines. There could also be a formal role for ERGA.

Finally, we would like to comment on the policy option (e), which seems to suggest that it might be possible to operate country of origin and country of reception frameworks at the same time. We do not consider this to be a practical proposal: if a pan-European service can subject to up to 27 different local rules whether in relation to EU or domestic works, or to any other aspect of the regulatory framework, then freedom of transmission and reception have, effectively, been removed.

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## SET OF QUESTIONS 6.1

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

Relevant?  YES –  NO –  NO OPINION

Effective?  YES –  NO –  NO OPINION

Fair?  YES –  NO –  NO OPINION

### Summary

The main characteristics of regulatory independence identified by the INDIREG study and by the forthcoming ERGA report should be reflected in a revised Directive in order to make them more explicit. It may also be beneficial to align the requirements for effective regulation alongside those required in Article 3 of the Framework directive, given the increasing convergence between audiovisual content and electronic communications.

### COMMENTS:

The AVMS Directive does not itself set out explicit formal provisions for the establishment of an independent regulator where one does not exist. It could be argued that Article 30 of the Directive, when read in conjunction with Recital 94 Article 10 ECHR and Article 288(3) TFEU, obliges member states to put in place a regulatory framework that is structurally capable of impartially implementing the aims of the Directive. This was the view expressed in the INDIREG study conducted by the Hans-Bredow Institute.<sup>31</sup> The study also found that most regulators had a strong level of de facto independence.

That said, the AVMS Directive could more clearly and more explicitly impose a requirement of regulatory independence for audiovisual media regulators. This has also been recommended by the High Level Group on Media Pluralism in 2013<sup>32</sup>, and by ERGA most recently [add reference].

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

YES –  NO (If yes, please explain below)

### COMMENTS:

<sup>31</sup> <http://ec.europa.eu/digital-agenda/en/news/study-indicators-independence-and-efficient-functioning-audiovisual-media-services-regulatory-0>

<sup>32</sup> <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>

From a UK perspective, we have not experienced any issues with Ofcom's independence arising from the provisions of the AVMS Directive. As a converged regulator with responsibilities for the electronic communications sector, Ofcom's independence is already required by EU legislation. Article 3 of the European Framework Directive requires Member States to guarantee the independence of the national regulatory authority with competence over ex ante market regulation and dispute resolution, and Ofcom is the UK NRA for these purposes.

The independence of Ofcom is enshrined in UK law. The Office of Communications Act 2002 established Ofcom as a statutory corporation separate from government, and expressly provides that Ofcom employees are not civil servants. While the chair and non-executive members of Ofcom are appointed by the Secretary of State, all other appointments are then made by Ofcom itself (the Secretary of State can direct the maximum number of board members).

The Secretary of State does have some powers to direct Ofcom in the exercise of its functions, but these are limited to (a) public interest matters such as national security, public health and safety and international relations (see section 5 Communications Act 2003); and (b) matters relating to Ofcom's radio spectrum functions (see section 5 Wireless Telegraphy Act 2006). The Secretary of State's powers to direct under section 5 Communications Act are expressly further limited by section 5A which prohibits the Secretary of State from giving any direction to Ofcom in respect of a function that, pursuant to Article 3(3a) of the Framework Directive, must be exercised by Ofcom without seeking or taking instructions from any other body.

These provisions, together with the fact that Ofcom exercises its functions and powers under the relevant legislation and in accordance to duties that are specified in legislation (section 3 of the Communications Act 2003), formalise Ofcom's independence.

***Preferred policy option:***

a)  *Maintaining the status quo*

b)  *Laying down in the AVMSD a mandate for the independence of regulatory authorities, for example by introducing an explicit requirement for the Member States to guarantee the independence of national regulatory bodies and ensure that they exercise their powers impartially and transparently.*

c)  *Laying down minimum mandatory requirements for regulatory authorities, for example detailed features that national regulatory bodies would need to have in order to ensure their independence.*

Such features could relate to transparent decision-making processes; accountability to relevant stakeholders; open and transparent procedures for the nomination, appointment and removal of Board Members; knowledge and expertise of human resources; financial, operational and decision making autonomy; effective enforcement powers, etc.

d)  *Other options (please describe).*

*PLEASE EXPLAIN YOUR CHOICE:*

The INDIREG study<sup>33</sup> identified a number of essential and best practice characteristics of independent regulatory bodies, including funding and staffing, due process and appeals and appointment of board members. Ofcom set out its own views on this in June 2013, in our response to the European Commission’s consultation on the independence of audiovisual regulatory bodies.<sup>34</sup> The European Regulators Group for Audiovisual Media Services (ERGA) is also preparing a report which has the objective of identifying common features of independence.

We would recommend that the Commission incorporates the main characteristics identified by the INDIREG study and by the forthcoming ERGA report in a revised Directive in order to make them more explicit.

It may also be beneficial to align the requirements for effective regulation alongside those required in Article 3 of the Framework directive, given the increasing convergence between audiovisual content and electronic communications.

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<sup>33</sup> <http://ec.europa.eu/digital-agenda/en/news/study-indicators-independence-and-efficient-functioning-audiovisual-media-services-regulatory-0>

<sup>34</sup> <http://stakeholders.ofcom.org.uk/binaries/international/responses/june2013.pdf>

## SET OF QUESTIONS 6.2

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

Effective?  YES –  NO –  NO OPINION

### Summary

The ways in which people are able to find and view content are changing rapidly and may lessen the effectiveness of current interventions in securing availability and prominence. This is clearly a question which the DSM programme should examine; however, we support a model which enables flexibility for Member States to intervene as needed in relation to their local “public interest content” goals, as does the present one. An essential consideration in examining future prominence regulations should be to maintain such flexibility, and best enable Member States to intervene in a rapidly-changing market.

### COMMENTS:

We agree that content which has been identified by a Member State to be of particular public interest (in the UK this is the case, for example, with public service broadcasting content) should be universally available, easily accessible on systems that viewers use, and prominent for ease of selection.

To date, the UK has not experienced any significant issues regarding the availability or discoverability of PSB services.

Currently regulation is in place in the UK which is intended to ensure that public service broadcasting (PSB) television channels are:

- Offered to major platforms by PSBs ('Must offer' provisions);
- Carried by major platforms ('Must carry' provisions)<sup>35</sup>; and
- Placed in appropriately prominent positions in electronic programme guides.

These interventions may carry some costs for PSBs but generally they constitute benefits, particularly EPG prominence. These benefits help fund the provision of specific programming, such as national and regional news, and current affairs.

To date, the UK has not experienced any significant issues regarding the availability or discoverability of PSB services and prominence continues to be a vital component of PSB sustainability.

However, the ways in which people are able to find and view content are changing rapidly and we expect this to continue:

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<sup>35</sup> These powers have not been used to date.

- **Changing technologies and models of distribution:** superfast broadband availability will rise to 95% by 2017, based on the Government’s current plans, with the potential for a broadband universal service obligation at speeds that could allow people to stream HD channels. In addition, hybrid platforms, seamlessly combining broadcast and IP delivery, are likely to become ubiquitous over the next decade, with the potential for more and more content to be delivered over the internet.
- **Changing user interfaces are driving new consumption habits:** there is significant innovation in user interfaces across all devices for AV content consumption, moving away from simple channel-based grid EPGs to advanced search and recommendation models, often built around programmes, content and population and personal viewing data. The current major platforms - Sky, Virgin and Freeview - are all likely to upgrade their current set-top boxes with improved user interfaces in the next two years. These interfaces will seek to make accessing on-demand content much easier for the viewer. In addition, new internet platforms have different and innovative user interfaces across all devices to make the viewer experience as seamless as possible. Many of these interfaces focus on individual pieces of content rather than channels.
- **New international players:** access to television-like content is no longer limited to traditional TV platforms. Service providers offering streaming and download services online, such as Netflix and Amazon Prime, are expanding and are increasingly popular. As part of their growth strategies they have started to invest in new commissions as well as acquiring third-party archive material. The evidence today is that these services are largely complement to traditional TV viewing rather than replacing it - , although drama is one genre where some replacement appears to be taking place. However, these companies are evolving very quickly, using global scale to fund technology innovation and, increasingly, content investments.
- **New platforms:** as the ways in which content is distributed become more complex, the number of firms involved in the production and distribution of content grows, it may be harder for PSBs to get access to some key platforms, or for them to get access in a manner which enables them to retain their prominence. Given the variety of content offered on hosting platforms like YouTube or on-demand services like Netflix, and their significant investment in technology and the user experience, it may be increasingly difficult for PSB channels to maintain their current large audiences to their own on-demand offerings. In addition, new interfaces may emerge on which PSB prominence will be important – for example smart TV homepages – and which are outside current regulatory frameworks.

As content distribution and discovery become increasingly complex, and content providers have to compete harder for viewers, the importance of ensuring that PSB is universally available and easily discoverable arguably grows. At the same time, given current interventions focus predominantly on linear services and broadcast technology, it may become harder to guarantee these outcomes.

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

YES –  NO (If yes, please explain below)

COMMENTS: N/A

**Have you ever experienced problems regarding access to certain ‘public interest’ content?**

YES –  NO (If yes, please explain below)

**COMMENTS:**

As noted above, we have not yet seen any problems in this area in the UK.

***Preferred policy option:***

a)  *Maintaining the status quo, i.e. keeping in place the current EU rules on must carry/ EPG related provisions (i.e. no extension of the right of EU Member States to cover services other than broadcast).*

b)  *Removing 'must carry' /EPG related obligations at national level/at EU level.*

c)  *Extending existing "must-carry" rules to on-demand services/and or further services currently not covered by the AVMSD.*

d)  *Amending the AVMSD to include rules related to the "discoverability" of public interest content (for instance rules relating to the prominence of "public interest" content on distribution platforms for on-demand audiovisual media services).*

e)  *Addressing potential issues only in the context of the comprehensive assessment related to the role of online platforms and intermediaries to be launched at the end of 2015 as announced in the Digital Single Market Strategy for Europe.*

f)  *Other options (please describe).*

**PLEASE EXPLAIN YOUR CHOICE:**

The AVMS Directive does not currently provide for “must carry” or EPG prominence (these are dealt with, respectively, in the Universal Service and Access Directives). The EPG prominence provisions that are in place at EU level allow Member States to introduce domestic rules to achieve their

individual preferred policy goals in relation to any kind of service; similarly, Member States are allowed to impose must-carry obligations on distribution platforms.

Some of the policy options presented by the European Commission suggest a fundamental change to the relationship between the Directives and may risk conflating the services and obligations covered in one framework with those in another.

Whilst we support the need to consider how best to ensure the necessary prominence of public interest content in an on-line environment, the focus should be on preserving or extending flexibility for individual member states to intervene in relation to prominence and carriage issues to support local public interest content objectives. We would not support introducing new EU-wide prominence obligations as part of the review of the AVMS, either for AVMS providers or network and platform operators.

We should avoid extending editorial obligations and responsibilities for content to online intermediaries and “platforms” on the one hand, and introducing carriage or other “non-editorial” obligations related to networks and services – to “editorial” services such as AVMS on the other. Specifically, there would seem to be a risk of conflict between the principle that the provider of an on-demand AVMS chooses the programmes which are offered to consumers; and the idea that an on-demand AVMS should face an obligation to “carry” public interest content originated by a third party.

The debate about prominence and must carry obligations should therefore give very careful consideration to the interaction between the AVMSD and other Directives, to ensure that Member States are able to adapt regulation in a rapidly changing market.

The current provisions in the Telecoms Framework dealing with access and prominence do not create or impose obligations on service providers, but rather **enable** MS to develop and impose local obligations relating to access/carriage and prominence of public interest content on providers of electronic communications networks and services– something which would not otherwise be possible under the Telecoms Framework.

In considering the development or expansion of rules intended to ensure the availability of public interest content, it will be essential to bear in mind that the current scheme is based on local interventions: it is important to preserve the freedom of Member States to intervene at domestic level to address their countries’ individual specific cultural and social needs. Aside from the practical challenges raised by the development of an effective and coherent regulatory framework noted above, public interest content policy is typically specific to individual member states (for example, the UK is concerned with the prominence and accessibility of its public service broadcasters such as the BBC, but other countries may have different priorities).

Maintaining the availability and discoverability of public interest content is an essential policy goal, which may well come under pressure as the content market develops. However we do not believe that the introduction of prominence *obligations* at an EU level would be the right approach to securing this outcome.

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### SET OF QUESTIONS 6.3

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

Effective?  YES –  NO –  NO OPINION

#### Summary

While we believe the status quo is largely satisfactory, we would not object to the consideration of stronger obligations. However, we acknowledge that individual Member States are probably still best placed to introduce appropriate provisions in their territories at this early stage of the development of relevant technologies in some sectors and within each different country.

#### COMMENTS:

The way that the duty in Article 7 is framed provides strategic direction coupled with flexibility for Member States to secure progress in accordance with differing national circumstances.

In the UK, action taken by the UK Parliament and national regulatory bodies (Ofcom in respect of linear broadcast services, and ATVOD in respect of on-demand services) has taken account of the differing degrees of maturity of the two sectors.

Linear broadcast sector accounts for a large majority of audiovisual content consumption. The relative maturity and profitability of this sector has enabled Ofcom to develop a framework for improving accessibility that takes account of the benefits to people with hearing and/or visual impairments, and the costs to broadcasters. Over a ten year period since 2004, rising obligations have led to a substantial improvement in accessibility. In 2015, some 79 domestic channels provide access services for people with hearing and /or visual impairments; this will increase to 83 domestic channels in 2016, accounting for over 90% of viewing<sup>36</sup>.

The UK on-demand sector accounts for a smaller, though growing proportion of viewing to audiovisual content. It is also a less mature sector but not one that should be considered nascent in the context of providing accessibility. To date ATVOD has been tasked by legislation with encouraging progressive improvements in accessibility, in line with Article 7. This process is now bearing fruit, with a number of on-demand services either providing access services, or committing to doing so in the near future. Some of the UK's larger providers (e.g. broadcaster catch-up services such as the BBC iPlayer) are providing access services on some platforms. Work has been carried out and reports published on how best to repurpose access service files for use when delivering them as part of on-demand services, and this has gone some way to improve the accessibility of certain

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[http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/Channels\\_required\\_to\\_provide\\_television\\_access\\_services\\_in\\_2016E.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/Channels_required_to_provide_television_access_services_in_2016E.pdf)

content on certain mainstream VOD services in the UK. ATVOD's access services reports for 2013 and 2014 noted increases in the levels of access services on platforms that already made them available.

However, securing wider provision remains a challenge. This is particularly the case when services are provided on third party VOD platforms. We would expect to see a more consistent provision of access services across devices and platforms regardless of the method of content delivery.

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

YES –  NO (If yes, please explain below)

**COMMENTS**

As discussed above, for linear broadcasts, legislation in the UK, which was in place prior to the introduction of the AVMS, goes beyond the duty to encourage provided for by the Directive, requiring linear broadcast services to include specific and increasing levels of subtitling, audio description and signing. As such, the majority of the most popular TV in the UK now carries some form of access service. However, the UK's decision to impose only the minimum AVMS Directive requirement "to encourage" the provision of access services for on-demand providers has resulted in discrepancies between the level of access services on these services and linear broadcast services. This has resulted in programmes on linear TV being made accessible when the same programme provided by the same broadcaster's on-demand services doesn't carry the same access services.

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

YES –  NO

Cost:

N/A

***Preferred policy option:***

a)  *Maintaining the status quo*

b)  *Strengthening EU-level harmonisation of these rules.*

Instead of encouraging it, the EU Member States would be obliged to ensure gradual accessibility of audiovisual works for people with visual and hearing impairments. This obligation could be implemented by the EU Member States through legislation or co-regulation.

c)  *Introducing self and co-regulatory measures*

This could include measures related to subtitling or sign language and audio-description.

d)  *Other option (please describe).*

PLEASE EXPLAIN YOUR CHOICE

The UK's approach to the application of Article 7 has been to impose different obligations on linear and on-demand services in this area; and we have placed increasing and significant regulatory obligations on the former. The current provisions of the AVMS Directive allow Member States the flexibility to do this while at the same time recognising the technical challenges faced by content providers and the fact that different national circumstances may not allow identical speeds of development in all Member States. For this reason we are comfortable with maintaining the current status quo, although we would have no objection in principle to the possibility of strengthening the EU-level rules to ensure wider access for those with sensory impairments. Any change should reflect the widely varying scale of providers in the on-demand environment, and the additional technical challenges – that action both by AVMS providers and the operators of on-demand platforms is required to secure wider availability of accessibility services.

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## SET OF QUESTIONS 6.4

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

Relevant?  YES –  NO –  NO OPINION

Effective?  YES –  NO –  NO OPINION

Fair?  YES –  NO –  NO OPINION

### COMMENTS:

Articles 14(1) to 14(3) of the AVMS Directive provides the basis for Member States to implement measures to ensure that events regarded by a given Member State as being of major importance for society (whether domestic or international) are not broadcast on an exclusive basis so as to deprive a substantial proportion of the public in that Member State of the opportunity to follow such events by live or deferred coverage on free television. The detail of how this should be implemented has been left to Member States, allowing flexibility to decide on appropriate mechanisms, and to adjust these over time, should the need arise.

In the UK, mechanisms to secure this objective have been implemented in legislation. To date, there have not been significant problems in securing this objective.

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

YES –  NO (If yes, please explain below)

### COMMENTS:

As indicated above, there have not been significant problems in securing the objective of ensuring that a substantial proportion of the public should not be deprived of the opportunity to follow events of major importance for society.

#### *Preferred policy option:*

a)  *Maintaining the status quo*

b)  *Other options (please describe).*

PLEASE EXPLAIN YOUR CHOICE

As noted above, we have no evidence of any problems with the current provisions and therefore do not consider it would be proportionate to consider other options.

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**SET OF QUESTIONS 6.5**

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

Relevant?  YES –  NO –  NO OPINION

Effective?  YES –  NO –  NO OPINION

Fair?  YES –  NO –  NO OPINION

**COMMENTS:**

Article 15 sets out the objective clearly, which is that any broadcaster established in the European Union should have access to short news reports on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis. It leaves to Member States the mechanisms for achieving this objective.

In the UK, consistent with Article 15(4), the broadcasters have established mutually acceptable arrangements which work smoothly to enable the use of exclusive material in short news reports.

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

YES –  NO (If yes, please explain below)

**COMMENTS**

There have been no obvious problems with the use of short news reports in television broadcasting services.

***Preferred policy option:***

a)  *Maintaining the status quo*

b)  *Other options (please describe).*

PLEASE EXPLAIN YOUR CHOICE

As there have been no problems with the current provisions, and we do not envisage any arising in the future as a result of audiovisual convergence or any other of the trends observed in this response, change appears unnecessary.

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## SET OF QUESTIONS 6.6

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

Relevant?  YES –  NO –  NO OPINION

Effective?  YES –  NO –  NO OPINION

Fair?  YES –  NO –  NO OPINION

### COMMENTS:

#### 1. Linear broadcast

The UK meets the requirements on right of reply through a series of duties set out in Section 3 of the Communications Act 2003 and the Broadcasting Act 1996 (s107)(as amended)<sup>37</sup>, including to draw up a code for television and radio, covering standards in programmes including (among other things) fairness and privacy.

The ‘standards’ in respect to unjust or unfair treatment are set out in Section Seven (Fairness) of the Broadcasting Code.

Section Seven (Fairness) of the Broadcasting Code sets out a series of “practices to be followed” by broadcasters when dealing with individuals or organisations participating in or otherwise directly affected by programmes, a failure to follow which could result in unfairness to an individual or organisation in the programme.

With particular regard to “right to reply”, these include:

- if a programme alleges wrongdoing or incompetence or makes significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.
- where a person approached to contribute to a programme chooses to make no comment or refuses to appear in a broadcast, the broadcast should make clear that the individual concerned has chosen not to appear and should give their explanation if it would be unfair not to do so.
- where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner.

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<sup>37</sup> <http://www.legislation.gov.uk/ukpga/1996/55/section/107>

The Broadcasting Code also contains a number of further practices to follow, as well as standards in relation to the protection of the privacy of those who participating in or directly affected by programmes. We consider that the Directive's provisions have adequately enabled us to ensure the protection of programme participants in linear services, and agree that the Right of Reply is an important minimum standard that should be applied across all EU services.

## 2. On-demand services

The AVMS Directive does not currently include a right of reply provision for on-demand programme services. In our response to section 3.1, we suggest that core areas of protection should apply across linear and on-demand content. This could include ensuring right of reply in relation to on-demand services.

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

YES –  NO (If yes, please explain below)

### COMMENTS:

None, although see comments above in relation to on-demand services.

### *Preferred policy option:*

a)  *Maintaining the status quo*

b)  *Other options (please describe).*

### PLEASE EXPLAIN YOUR CHOICE

In our view, the overarching requirement of the AVMS Directive is set at the appropriate level and ensures that right of reply is guaranteed while allowing Member States the flexibility to determine the most suitable regulatory approach for them. We note however that there are no equivalent provisions for on-demand programme services and believe it worth considering extending the right of reply to all regulated audiovisual media services.