

## **Preparing for a Fully Converged Audiovisual World**

### **Response from the Association of Commercial Television (ACT)**

#### **Executive Summary**

- Our sector is in good shape and confident about the future. Viewing of linear television continues to increase. Advertising and subscription revenues for broadcasting, while not immune from recession and the macro-economic cycle, provide a solid basis for diversification and innovation. Specifically, new forms of distribution (OTT etc) are an opportunity rather than a threat and ACT member companies are enthusiastically launching new services (among the 3000 VoD services now available in Europe);
- We remain committed to a high level of investment in content, which underpins our growing popularity with viewers. To date we have established a virtuous circle relying on operators' contractual freedom to invest in, commission and produce the best content and to negotiate appropriate distribution deals, whether exclusive or not, across platforms, time periods and geographies. Broadcasters' investment in new or existing services, is only possible if there is a thriving market in the production and acquisition of content underpinned by strong intellectual property rights.
- The sustainability of current financing models for content production, rather than regulation per se, should be at the heart of the Commission's thinking. EU media policy should be measured against whether or not it increases the range and choice of content on our consumers' screens and the financial viability of those involved in bringing content to the screen;
- Media convergence is a reality but its long-term implications are as yet unclear. In the words of a recent report for OFCOM; *"the impact of innovation is currently nascent and a sudden single transformation (a 'Kindle' or i-Tunes' moment) is unlikely. Instead there will be a messy but exciting period of innovation in technology and services whose cumulative disruptive impact will be significant"*
- Turning to the future of regulation at EU level, the current AVMS regime has important strengths (country of origin regime, platform neutral) which must be preserved;
- As a first step, any evaluation as to the future framework of content regulation at EU level should be based on a rigorous and detailed exercise of scenario planning. An important additional complexity which must be taken into account in this scenario planning is that European media markets are heterogeneous and will experience the phenomenon of media convergence in different ways and at different speeds. To name

but two of the factors, broadband speeds and the strength of local content production markets vary widely across the EU. This may mean that different EU media markets are experiencing different scenarios at the same time, a further challenge to detailed regulation at the EU level – put simply, the challenges facing media content policymakers in Estonia are likely to differ from those in Germany;

- The two-tier (linear/non-linear) AVMS regime made sense when the text was negotiated in 2006 – and may continue to do so - but may be challenged and become unsustainable in a future when consumers will be enjoying linear and non-linear content interchangeably, sometimes on the same screen, as well as video content delivered from the open internet subject to no content regulation.
- As the European Audiovisual Observatory recently noted, *“the vagueness of the [AVMS] provisions has forced member states to find individual solutions to many unsolved questions when transposing AVMS into national laws”*. This is not necessarily a criticism – as the EAO report continues, *“the vagueness of the notion of TV-likeness offers regulators a tool to include or exclude a whole bunch of services for pragmatic reasons”*. In the medium term, there is much to be said for retaining the “TV like” concept and its pragmatism. But the concept may need to be developed and updated as new business models emerge and some Member States confronted with new or borderline cases may welcome interpretative guidance from the EC, on request. This should however not be binding on other markets who may be developing their own solutions.
- The scenarios to be examined by the EC should include, as a minimum:
  - A “status quo plus” model in which the core of the AVMS-D remains valid also into the foreseeable future and issues of interpretation around “TV-like services” can be dealt with by requesting assistance from the EC;
  - A scenario in which there is a fundamental shift in advertising markets, calling into question broadcasters’ ability to sustain current levels of expenditure in content;
  - A scenario in which competition is predominantly from global or unlicensed players including competition with the same content from different sources. In such a scenario, where consumers spend a substantial part of their time on services which are not licensed in the EU/EAA, the utility of policy goals which can only be applied to EU-based services must be questionable, and in particular detailed quantitative advertising rules imposed on linear players would give rise to a distortion of competition;
  - A scenario in which co-regulation or self-regulation by operators can deliver the policy goals sought by AVMS-D
- There should also be separate work – although without any regulatory outcomes - examining the likely future shape of and challenges for the production of content;
- Any rethink of EU-level content regulation should be much more based on principles than on micro-management and should also examine whether policy goals are better

delivered via self-regulation. If regulation is needed, other instruments rather than, or in improved co-ordination with AVMS (i.e., E-commerce, Data Protection, Electronic Comms framework, etc) may already provide the solution;

- Signal integrity will become a key issue (without which the concept of editorial responsibility becomes impossible to sustain);
- Commercial overlays and other novel techniques should not be possible without the prior consent of the broadcaster. This is an important extension of the principle of editorial responsibility: the entity which holds the NRA licence must be in a position to make a prior assessment as to whether a particular overlay should be permitted or not.
- Other key principles include a high level of protection of minors, the retention of clear and unambiguous COO regime, the principle of editorial responsibility and ethical (qualitative) rules on commercial communication;
- These principles should prove capable of being read across to all current and future platforms, whether by statutory licence or self/co-regulation. Self and co-regulation will necessarily play a greater role in future, there are positive examples from some European markets;
- Regardless of whether or not a one-size-fits all must-be-found provision may be introduced in a future rethink of European content regulation, we would call on the Commission to ensure that, in the event that findability does become an issue in some markets, publicly-funded broadcasters do not benefit from preferential treatment;
- On protection of minors and disabled access, there is a commercial imperative which drives players in our sector to position ourselves as best in class;

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Our response will cover many of the detailed questions in the Commission Green Paper. But before so doing, we will consider:

- (1) The current strengths of EU audiovisual markets, in particular our response to convergence and the state of the content business;
- (2) Future challenges, including the changing nature of value chains and challenges to current arrangements for financing content;
- (3) Regulation of our sector to date;
- (4) Preconditions for a successful revision of the current framework

## **Part One: the State of European audiovisual markets: Strengths**

### **(a) Commercial Broadcasters and Convergence**

The European Commission Green Paper (“GP”) rightly notes that broadcasters are moving online. This has happened at a startling pace, with over 3000 video on demand services now available in Europe. Despite this phenomenal growth, to date, the broadcasting sector regards online as an important platform but one which will complement rather than substitute the existing platforms of cable, satellite and terrestrial. This is because of *consumer demand* (linear broadcast viewing is still increasing, with the average European consumer watching scheduled linear television for 235 minutes per day<sup>1</sup>, with on-demand and OTT viewing also increasing but not cannibalising TV). It is also a matter of commercial *efficiency*: according to research from Screen Digest, broadcast distribution is cheaper than online for distribution to more than 8000 households viewing the same content<sup>2</sup>.

To put the impact of the internet on TV in context, for every minute spent on You Tube by European consumers, an hour is spent watching linear television, which still accounts in major EU markets for 95% of overall TV content consumption<sup>3</sup>;

The popularity of broadcast television with viewers is also, broadly, translated into commercial sustainability. Commercial broadcasters’ revenues are holding up though with regional variations linked to the macro-economic performance of the broadcaster’s country of establishment: the European Audiovisual Observatory recoded an average 2.1% increase in commercial TV year-on-year in 2012. In markets where revenue is stable or growing, this provides a solid basis for diversification, allowing innovative new business models to be introduced alongside the more mature revenue streams of advertising and, in some markets, subscription. An illustrative list of new ventures launched by ACT member companies during the consultation period on this Green Paper is attached as an Appendix to our response as evidence of the enthusiasm with which broadcasters are exploiting new technologies to roll out new services and grow consumer choice.

This new environment creates significant opportunities for players coming from the broadcast world. To date, the broadcasting sector has been able to absorb technological change into its ‘bloodstream’, driving rather than reacting to media convergence as a means to grow the number, quality and variety of content services offered to our consumers. Many of these already well-known changes have their origin in the development of broadband internet to a stage where it is a serviceable platform for distribution of video content, and are flagged in the GP:

- increased second-screen usage;
- changing viewing behaviour leading to an increase in non-live viewing for some genres of content and, potentially, to more ad-skipping<sup>4</sup>
- a rather incremental increase in global on-demand TV revenue, predicted to rise from \$4.2bn to \$6bn between 2012 and 2018;<sup>5</sup>

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<sup>1</sup> Mediametrie research, see [www.mediametrie.com](http://www.mediametrie.com), press release of 21 March 2013

<sup>2</sup> See presentation at [www.privatetelevision.eu](http://www.privatetelevision.eu)

<sup>3</sup> See press release by ACT, EGTA et al, 23 September 2013

<sup>4</sup> Analysis by Thinkbox in the UK suggests however that at least 80% of advertisements are watched at normal speed in PVR homes, and that there is no significant difference in live/PVR viewing as between commercial channels and the advertising-free pubcaster, BBC.

<sup>5</sup> Digital TV Research, 19 August 2013

- cloud-based storage enabling consumers to build up large personal libraries of video content;
- the – possible - arrival of “binge-viewing”, though it is noticeable that, for all the hype, pure OTT players do not disclose viewing figures so the actual extent of this phenomenon is unclear;

As an example of the opportunities posed by convergence, broadcasters are already keen to exploit the second screen as a way to increase overall viewing inter alia through:

- out-of-home consumption (e.g., tablet and smart phone viewing on public transport or during a break in the working day);
- diversification of revenue base, i.e., pay-TV operators offering OTT content and FTA broadcasters devising pay strategies;
- added value consumption (e.g., supplementary content being made available via the interactive menu on a TV screen);
- social media interaction building viewer loyalty and engagement<sup>6</sup>.

The scale, timing and consequences of disruption in our sector is – obviously - impossible to predict. As stated in a recent research report for OFCOM, the UK regulator,

“the impact of innovation is currently nascent and a sudden single transformation (a ‘Kindle’ or i-Tunes’ moment) is unlikely. Instead there will be a messy but exciting period of innovation in technology and services whose cumulative disruptive impact will be significant”.<sup>7</sup>

At this stage, we would agree with this conclusion and only add that, in a European context, the 28 national broadcasting markets will experience different forms of disruption, to varying degrees, at different times. Some of the regulatory tools needed to respond to this “nascent, messy but exciting” period of change will also vary from market to market and from time to time. The policy objectives and the interventions necessary for, say, the Estonian-language content market can be expected to differ from the English-language or German-language markets. As such, there is no need for these tools to be harmonised at EU level, given the heterogeneity of EU markets, though the EU should ensure that policies are compliant with the EU framework.

The challenge of rethinking business models while retaining the best of what has been developed over the past decades could, if one were so minded, be compared to the challenges facing those who regulate the audiovisual media. Just as broadcasters will build on, develop and diversify from successful business models, so regulators may wish to retain many of the features of broadcast regulation.

The particular challenge for business, and for regulators is that action may be needed at short notice – if commercial television were to experience a “kindle or i-tunes moment”, would broadcasters be able to react appropriately? Or would regulatory issues prevent this? Attempting to second-guess whether television will experience such a moment, and if so what

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<sup>6</sup> According to <http://www.nielsen.com/us/en/newswire/2013/new-study-confirms-correlation-between-twitter-and-tv-ratings.html>, 32 million unique individual US citizens tweeted about TV programmes in 2012, with increased Twitter traffic being mirrored in increased ratings. See ACT Newsletters (available via our website) for examples of innovative social media services from Dutch and Turkish member companies.

<sup>7</sup> Future of Commercial Communications on TV and TV-Like Services, published in August 2013

will be the catalyst and when it will happen, would be futile. The concern here is that by the time the symptoms of a decline were to become visible, it would be too late for regulators to design the appropriate framework for the changed circumstances. This particularly applies at EU level, where law-making procedures are necessarily longer than at national level. Hence our call to DG CONNECT is not to “revise the AVMS directive”, but rather to commission in-depth research and modelling to ensure that EU regulation can adapt, quickly if necessary, to a range of possible future scenarios.

### **(b) The Virtuous Circle: Investment in Content**

In general, the ACT believes that the sustainability of current financing models for content production, rather than regulatory notions, should be at the heart of our discussions. Indeed, we suggest that the fil rouge for the Commission’s consideration of responses to this GP should be:

- *does EU policy (actual or proposed) help increase the range and choice of content on our consumers’ screens and the financial sustainability of those involved in bringing content to the screen?*

Consistent with our responses to the Audiovisual Green Paper, to Licences for Europe, and to numerous other consultations, the optimum way to do this is by relying on operators’ contractual freedom to invest in, commission and produce the best content and to negotiate appropriate distribution deals, whether exclusive or not, across platforms, time periods and geographies. Existing contractual arrangements, which may include windowing deals, are not only an expression of contractual freedom, they are also an opportunity for new players to enter the market by using new content, or new windows, to tap into new consumer demand. In this way, the content business has been able to retain value while extending consumer choice including at lower price points.

Broadcasters’ investment in new services is, like our investment in existing services, only possible if there is a thriving market in the production and acquisition of content underpinned by strong intellectual property rights and by operators’ freedom to compete for the right to acquire these rights on the appropriate contractual basis. To date, the European media markets fulfil these conditions and certainly the “Market Considerations” section of the GP contains some negative assumptions about European content which we do not share.

Q1 asks why US content companies are successful in the EU market ‘while many EU companies struggle’. In television broadcasting or production, the opposite is the case: national commercial and public channels head the ratings in every EU market. Local content is more popular than US series in almost every EU market, and EU companies such as CME, MTG or RTL Group operate in many EU markets. US operators are generally strong players in certain genre-specific channels (factual, entertainment, music) rather than competing for the mass audience. So we can only assume the question is based on theatrical distribution rather than broadcasting. While it is undeniable that US companies have a strong position in theatrical distribution of films, this is not currently translated into television broadcasting or distribution<sup>8</sup>. In the broadcasting market, according to the European Audiovisual Observatory; the highest audience share of the seven big international groups is 4.7 per cent, recorded by Viacom channels in German-speaking Switzerland. Nor is US content dominant in the programme

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<sup>8</sup> For example, in relation to the supply of Hollywood movies on pay TV, the UK Competition Commission has recognised that in the current UK market environment, movies are no longer the drivers of pay TV subscriptions that they once were

market, where national content (usually fiction or entertainment shows) and sport dominate the lists of most-watched programmes in almost every European territory. To illustrate the point; the table below summarises the top twenty TV shows in selected European markets<sup>9</sup>:

<b>Country</b>	<b>Domestic</b>	<b>Sport</b>	<b>US</b>	<b>Other</b>
Croatia	4	15	1	
Czech Republic	20	-	-	
Denmark	13	6	-	1
Flanders	18	1	-	1
France	8	2	11	
Germany	11	5	5	
Greece	9	10	-	1
Italy	9	9	2	
Netherlands	17	3	-	
Poland	11	7	1	1
Portugal	6	14	-	
Spain	1	19	-	
Sweden	15	3	1	1
UK	20	-	-	

From this we would conclude that US broadcasting groups are – successfully – targeting niche audiences with largely thematic channels rather than challenging EU commercial and public broadcasters for the mass audience, and that US series and movies, while an essential part of any commercial broadcaster’s schedule, do not generally attract the audiences of local content or sport.

For whatever reason, it appears that European consumers enjoy watching US movies in the cinema, but prefer to watch locally-produced TV shows at home.

This does not mean that Europe can be complacent, or that US content is not important to our viewers. Consumer tastes are constantly evolving. Today, entertainment shows are a European success story - "homegrown" formats like X-Factor, Voice, Got Talent, Dancing with the Stars etc are, outside a big football tournament, European viewers’ most watched programmes, with many formats having been sold to the US. But the US has arguably established an advantage

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<sup>9</sup> Data taken from RTL+IP Television Key Facts; numbers do not always add up to 20 because of some national/US coproduction; data deliberately taken from a year without FIFA World Cup or UEFA European Championships. ‘Other’ includes content from third countries or sui generis programming such as the Eurovision Song Contest

over Europe in producing large-scale series along the lines of “Game of Thrones” – in passing, an interesting example of content which works equally well on linear and on-demand platforms, with over 1m on-demand views on Sky Deutschland alone. There are encouraging signs that European producers are now competing with the US, with an increasing (if still niche) demand for series from other European markets, led by the boom in Nordic drama (The Killing; Borgen etc).

We will develop this point further at Q5 below.

For Q2, there is no case for any ex ante regulatory intervention on so-called “access to premium content”. The television marketplace has proved itself to be very open to new entrants, with European TV channels growing from 47 to 10000 in the past twenty years. One consequence of media convergence will be that the number of new entrants is likely to continue to increase and that this will include operators from outside the media market and from outside the EU. The evidence to date suggests that players such as Belgacom, BT Sport, Al Jazeera/BE in Sport do not in practice require regulatory intervention to acquire rights to key content.

Negotiation with rightsholders, rather than regulatory arbitrage, is the optimum way for new entrants to compete with existing players and thereby to grow the sector as a whole.

The GP rightly notes, at page 7, that the UK has, via its NRA OFCOM, assessed the need for regulatory intervention in sport and first-run Hollywood movies, though it would have been helpful for the GP to have also noted that in neither case were any new regulatory measures imposed. For the sake of completeness, the GP should also have made reference to the findings of the Competition Appeal Tribunal, which overturned Ofcom’s original ruling that BSkyB had acted in a way that was prejudicial to fair and effective competition in relation to the distribution of its main sports channels and concluded:

“Ofcom's core competition concern is unfounded. [...] "The tribunal is of the view that Ofcom has, to a significant extent, misinterpreted the evidence of these negotiations, which does not support Ofcom's conclusion. We have found a significant number of Ofcom's pivotal findings of fact in the statement to be inconsistent with the evidence”<sup>10</sup>

There are two points here of wider interest to the European debate: first, the CAT found that Ofcom had failed to recognise the “regulatory gaming” of Sky’s competitors. The examples we quote above of recent new entrants into content markets suggest that the European content sector would be better served by businesses investing and innovating on the content market rather than seeking regulatory advantage. Secondly, we have already referred at footnote 9 above to the fact that, in relation to the supply of Hollywood movies on pay TV, the Competition Commission concluded that no intervention is required. It may be relevant to the EC’s deliberations on convergence that this conclusion is based inter alia on an acknowledgement of the rapid change in the audiovisual sector, particularly with the growth of the ability to deliver audio-visual services to consumers via the internet.

## **Part Two: the State of European audiovisual markets: Challenges**

### **(a) Changing Nature of the Value Chains**

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<sup>10</sup> See [www.catribunal.org.uk](http://www.catribunal.org.uk); case reference 1158/8/3/10

Convergence may also call for a rethink in terms of how operators in the sector define ourselves. Structurally, players in the media sector have historically been defined by their medium of distribution and their sources of finance. So players have been categorised as TV or print media, as commercial or publicly-financed, or as pay or free-to-air TV. Some of these distinctions may still be relevant in the future. But in the medium term, the key distinction may rather be between aggregators and publishers. It is those in the latter category – including broadcasters<sup>11</sup> and other media businesses who have historically taken the risk of investing in content (while, in the case of commercial broadcasters, also being the most strictly regulated media business). The possible threat here of a commoditisation of content – presupposing a scenario when value shifts from content production to its distribution – was noted in the recent Lescure Report in France which commented that in such an event, this “*disruption of the value chain would constitute a major competitive challenge for Europe*”<sup>12</sup>.

### **(b) Sustainability of the current ‘virtuous circle’ in content financing**

The GP also asks how far new actors are investing in content production. Here, the putative publisher/aggregator distinction we refer to above may become relevant. As always in the messy but exciting period of convergence, this is not a black and white divide and there is evidence that new actors who would be categorised as “publishers” are investing – Netflix invests around 10% of its \$2bn global content spend on original productions, including, interestingly for the EU debate, in co-productions with European players (‘Lilyhammer’ was co-produced with Nordic public TV) and is on record as aiming to increase their investment in original content. This evolution over time from pure distributor of third-party content towards the higher-risk strategy of investing in exclusive rights is consistent with the experience of commercial FTA and pay operators – many ACT member companies quickly moved, from the mid-1980s onwards, beyond the “start-up” model of schedules of largely acquired material to create the virtuous circle of higher revenues being reinvested in more expensive content, once the revenue streams from advertising and subscription were sufficient to recoup the additional costs.

Pure OTT aggregators, by contrast, appear less interested in investing in content. Whether this is a market failure which becomes a structural concern for European media markets will depend on the viability of the publishing model – only if the economic conditions are such that existing and new publishers can continue or increase our current level of investment in news, sport, drama, factual and entertainment content, can the current high-value, choice-rich content environment be preserved.

## **Part Three: EU Regulation of the sector to date**

### **a. Encouraging transfrontier distribution: the country of origin rule**

The original *raison d’être* of EU-level regulation of broadcast content was of course the need to establish clarity as to jurisdiction over transfrontier broadcasters (clarity which was delivered via the country of origin principle).

This aspect of the directive, and its predecessor TVWF, has worked well in allowing broadcasters a degree of clarity and simplicity and by resisting attempts of more protectionist

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<sup>11</sup> Publicly-financed broadcasters are also of course significant investors in content, albeit without incurring the same financial risk as private companies

<sup>12</sup> Lescure, (unofficial translation)

Member States to introduce ‘double jeopardy’ jurisdiction and penalise transfrontier operators. The interests of the broadcasting industry in retaining this relatively clear rule are clear. We assume that the EU institutions, which are keen to boost the proportion of European content which flows across frontiers, would also favour a retention of this model – indeed, any move to further increase the powers of the countries of reception would be a bizarre result for a directive aimed at encouraging pan-European television.

Other stakeholders are also affected. Advertisers should have the right to use a range of media, not just those favoured by the state. And platform operators, whether cable, satellite or broadband, should have the right to offer to European consumers channels from around the EU.

#### **b. Exclusivity in Content, and contractual freedom**

The GP refers, without a specific question, to transfrontier distribution of content (the Polish Erasmus student). The ACT and our member companies have been very active participants in discussions around this subject in Licences for Europe, and have prepared detailed presentations to that exercise which have illustrated that transfrontier circulation, including portability of content can be delivered by the market under the current copyright framework. Many examples from ACT member companies and other stakeholders – e.g., in the area of EST of independent movies - support our view that further regulatory intervention is not needed in this area.

In view of the importance of this discussion for our sector, we would like to restate the key points we have made to date in Licences for Europe:

- Broadcasters are one part of a **complex series of value chains**, each stage of which has its own business rationale and investment decisions to underpin strategies on distribution;
- In today’s multi-platform, multi-window world, territorial distribution is frequently the optimum way, via **exclusivity and price differentiation**, of maximising revenues. Crucially, this revenue then flows back into new **investment in content**. Around 40% of the €85bn broadcaster turnover in Europe is reinvested in new content production annually;
- Not only do national language, tastes and interests vary, but **programme genres** are key factors in determining value across markets. Sport – which viewers wish to watch live – raises different issues from a drama series or classic movie. Even within genres, different commercial factors will inform the distribution strategies of niche sports (ice-hockey, rugby, etc) from those with global appeal. Distribution strategy will often be decided on a programme-by-programme basis. So innovative initiatives for increasing portability, e.g., for EST of independent movies on pay-VoD platforms, will not necessarily work for other genres and business models of content distribution. Other initiatives such as ‘download and play’ or one-day subscription packages for sports channels are being trialled;
- **Consumer demand** is uneven. The Plum study recently carried out for DG MARKT is good evidence of this point. Plum estimates the total demand for transfrontier audiovisual services at €760m annually (0.7% of the EU television market). But demand

is uneven across the 702 markets<sup>13</sup> analysed. In over 200 such markets, the value is below €10,000 p.a. In others, where the demand is commercially interesting – e.g., Romanian language services in Spain or Italy are valued at over €40m p.a. - commercial broadcasters often already provide services for many such expatriate groups;

- An EU AV market without territorial exclusivity risks homogenised (Anglophone?) content and monopolies all along the value chain with adverse impact on **non-economic goals of media regulation** such as media pluralism and linguistic diversity

### c. EU regulation and non-linear services

The very structure of retaining very different frameworks for linear and non-linear content may be thought appropriate for now but may produce market distortions as the two forms of distribution converge, and, as the GP itself notes, services “*increasingly compete on the same screen, sometimes even offering over two delivery channels the same content for the attention of the same audience*”. Not only are the rules more onerous on linear players, but the regulations themselves may impact on corporate culture and discourage precisely the sort of innovation which the EC is keen to encourage. To put it simply, a broadcaster’s sales house with a new method of selling TV airtime or sponsorship has to check whether the idea is compliant with the rules imposed by the national regulator, by the AVMS directive and the jurisprudence of the Court of Justice of the European Union (and; potentially, with various interpretative communications). That sales house’s online competitor, by contrast, has to ask themselves one question only: “will this new method deliver more revenue”?

This hyper-regulation of one part of the media value chain, broadcasting, creates a significant risk that innovation may be thwarted – also damaging the European audiovisual content sector.

The dual structure of linear/non-linear does not of course mean that non-linear content is unregulated, though this regulation may be based on notification rather than ex-ante licensing, and be carried out via co-regulation rather than statutory regulation (e.g., ATVOD in the UK). AVMS also allows Member States who so wish to impose obligations on non-linear players to invest in content.

This two-tier regime made sense when AVMS was negotiated in 2006 and may remain appropriate but will be challenged and may become unsustainable in a future when consumers are increasingly enjoying linear and non-linear content on the same screen, as well as video content delivered from the open internet subject to no content regulation at all. At present, AVMS requires seven cumulative criteria to be met for an audiovisual media service:

- A service as defined by Article 56/57 TEU;
- Under the editorial responsibility of a media service provider;
- The principal purpose of which is;
- The provision of programmes
- In order to inform, entertain or educate
- To the general public

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<sup>13</sup> Plum analysed demand for the intra-EU migrant population in each of the then 27 Member States, i.e., 26 migrant groups per Member State, see TNS/Plum, Study on the economic potential of cross-border pay-to-view audiovisual media services, January 2012

- Via electronic communications networks

In such a scenario, each of the seven criteria (in reality, eight as one should also consider recital 28 which states that electronic versions of print media products are not covered) would need to be re-examined to see if they are still valid and how far they assist in guaranteeing a market which is characterised not just by fair competition but also by a high degree of investment in content and by expanding consumer choice.

The relationship with the E-commerce directive is also an issue which needs further consideration. This relationship is explained – without any recommendation as to any revision of this directive – by the Lescure report.

#### **Part Four: Preconditions for a successful revision of the current framework**

The AVMS directive (and its predecessor) have delivered an important benefit in creating clarity over jurisdiction for transfrontier operators. Against this background of legal certainty in jurisdiction, and with a high level of protection of IP (delivered via different national, European and international instruments), media companies have felt able to make investment in content which has proved popular with viewers and with advertisers, thereby generating the revenues necessary for further investment. However, the current AVMS framework cannot be expected to last for ever and may increasingly come under pressure if media convergence facilitates the entry into the media market of global players from outside the current sector. At this stage, we believe it might be appropriate to set out what we believe could be the preconditions for a successful revision of AVMS, at whatever stage the Commission believes it politically prudent to do so.

##### **a. The Policy Objective**

Commissioner Kroes is on record as stating that convergence means “business as usual is not an option” for media companies. She is right. And ACT member companies are indeed re-examining every aspect of their business models. But regulation needs to converge as well as business. Given the timelines involved in drafting, negotiating, agreeing and implementing EU level regulation, the outcome of this discussion will be the regulatory framework which governs the converged media business between 2020 and 2030

The EC should address the entire legislative apparatus with a view to achieving a framework whereby demand and supply substitution, and not different business models, defines the degree of regulation and determines the best possible consumer protection regime across all delivery platforms.

Objectives should increasingly become platform-neutral, just as viewers’ consumption of content is likely to do so. Hence the importance of retaining the platform-neutral architecture of AVMS. These objectives will also, necessarily, be expressed more by principles which can be read across to non-linear services and implemented there, probably with a higher degree of self-regulation than has been the case in the broadcast environment. We therefore welcome the fact that the GP has developed from a consideration of “Connected TV” into the wider issues of media convergence. “Connected” or “smart” TV is only one way in which the strengths of broadcast TV and online distribution will converge, and there is some evidence that other devices such as tablets, set-top boxes, games consoles or smart phones will for many consumers represent their preferred route to a converged media environment<sup>14</sup>.

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<sup>14</sup> BBC i-player data

In a context in which the specificity of broadcast distribution becomes less clear, it may be that the reliance placed in AVMS of a definition of “TV like services” may be increasingly difficult to sustain. While it is true that viewers today do retain different expectations of content delivered via television channels from that delivered online<sup>15</sup>, it is possible that, as content categories continue to blur and services are increasingly consumed on multiple screens, a younger generation of consumers will not make this distinction.

The notion of TV-like services may already be coming under strain today, as was explored in detail in a recent report for the European Audiovisual Observatory, “What is an on-demand service?”. This report comments on the seven/eight criteria we set out above in the following terms: “*the vagueness of the abovementioned provisions has forced member states to find individual solutions to many unsolved questions when transposing AVMS into national laws*”. The EAO then goes on to itemise the solutions found for newspaper websites providing video, professional UGC channels, download to own and download to rent services. Specifically, the report then examines the notion of TV-like services, noting on the one hand that the concept “*is not conducive to legal certainty*” but on the other that “*the vagueness of the notion of TV-likeness offers regulators a tool to include or exclude a whole bunch of services for pragmatic reasons*”, noting in particular the contrast between the UK co-regulator ATVOD whose guidelines give significant prominence to the concept (now being developed by jurisprudence) and the Dutch regulator which considers the concept too vague to be taken into consideration.

The tension between legal certainty (which can be a double-edged sword in so far as legal certainty is easiest to deliver via detailed, prescriptive over-regulation) and a pragmatic, case-by-case approach is not new. In the medium term, i.e., at least for the rest of this decade, there is much to be said for retaining the “TV-like” concept. But it is clear that the concept needs to be developed and updated by regulators and co-regulators as new business models emerge (the examples studied by the EAO were not viable business models when AVMS was negotiated). Accordingly, we suggest that the EC could offer guidance, on request, to Member States who are confronted with new or borderline cases. This should however not be binding on other markets who may be developing their own solutions.

## **b. Market Analysis and Scenario Modelling**

The EC will of course have to carry out full regulatory impact assessments in advance of any proposal to amend the regulatory framework. In particular, it will be important for the EC to commission research into the developments expected in media markets during the likely lifetime of whatever regulation replaces AVMS. A useful such modelling exercise was carried out before the revision of TVWF<sup>16</sup> and a similar exercise must be undertaken in advance of any proposed revision to the audiovisual framework, on the understanding that European media markets are heterogeneous in structure, and that policy changes must be thought through in terms of how they impact on actual markets not on a (hypothetical) standard European market.

Our working assumption is that the pace of change will continue to accelerate, with more players offering more services to consumers on more devices. From the GP, it appears that the EC shares this assumption. And it is possible, if by no means inevitable, that this process will

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<sup>15</sup> See EC Application report on AVMS, CSA research etc

<sup>16</sup> Outlook for the Development of Technologies and Markets for the European audiovisual sector to 2010, Andersen Consulting, June 2002

lead to increasing regulatory asymmetry between players offering comparable services, depending on whether they are classified as linear, non-linear or outside the scope altogether<sup>17</sup>.

But it would not be wise at this stage for the EC to base all its thinking on this scenario. A range of options should be modelled.

Specifically, the EC should also look into possible scenarios around the future markets for audiovisual content consumption and commercial communications – again, exactly as was done in the first part of the last decade at European level and is being done now at national level (notably in the OFCOM research we quoted earlier and in forthcoming French consultations).

While there will be many possible scenarios, there are four which we feel merit particular detailed study:

- a) A “status quo plus” model in which the core of the AVMS-D remains valid also into the foreseeable future and the core positive values of AVMS – notably country of origin and platform neutrality – are read across also to the new environment. This is not a “do nothing” option, but would rather involve the EC studying how Member States are choosing to regulate, co-regulate - or, crucially, not to regulate – these new services. The EAO study is a good starting point here. Issues of interpretation around “TV-like services” can be dealt with by assistance from the EC;
- b) A scenario in which advertising expenditure undergoes a fundamental shift, undermining broadcasters’ ability to sustain current levels of expenditure in content, instead driving broadcasters to adapt their business model by devising new forms of sponsorship or closer integration with programme content, which may require a rethink of the extremely detailed rules governing product placement which were negotiated in 2006/07.
- c) A scenario in which competition is predominantly from global players, i.e. consumers spend a substantial part of their time on services which are not licensed in the EU/EAA. Here, the utility of policy goals which can only be applied to EU-based services must be questionable, in particular detailed rules on commercial communications imposed on linear players which could give rise to a distortion of competition;
- d) A scenario in which self- or co-regulation can become the main ways in which detailed standards for TV-like content are delivered – see pp 18-19 below;

Our goal is neither to protect incumbent services and penalise new services, nor to protect linear services and penalise non-linear services. Our goal is a coherent framework that covers as much of the media consumption in the EU/EAA as possible – regardless of the type of service and regardless of who provides that service from whatever jurisdiction. There is an important additional complexity in this scenario planning, namely that European media markets are heterogeneous and will experience the phenomenon of media convergence in different ways and at different speeds. To name but two of the diverging factors, broadband speeds and the strength of local content production markets vary widely across the EU. This may mean that different EU media markets are experiencing different scenarios at the same time, a further challenge to detailed regulation at the EU level.

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<sup>17</sup> See EU Media Futures Forum, September 2012

### **c. AVMS in a wider context: regulatory instruments**

AVMS is not an “all or nothing” protection against an unregulated Wild West. It is clear from the GP, which makes frequent references to other EU instruments, that the European Commission shares this view. Rather, AVMS forms part of a tapestry of global, European and national regulation and self-regulation. One of the changes in broadcasting since 1989 has been the emergence in 27 EU Member States of independent national regulatory authorities. NRAs were rather less developed in 1989, but now have typically at least two decades’ experience of regulation the daily operation of the broadcasting business. As such, they could now play a more clearly defined role in future EU media regulation.

In the GP itself, the EC hints at such a debate in places – notably at p4 where the GP rightly comments that convergence of the media will also impact on other instruments. We agree that AVMS cannot be seen in isolation but has important overlaps with E-Commerce, Data Protection, Unfair Commercial Practices, the Electronic Communications Framework, Copyright, etc. And while it may be difficult for the EC at present to organise a reflection across so many different directorates-general, this is precisely the sort of obstacle which needs to be overcome if we are to secure a logical regulatory framework for the converged world.

### **d. AVMS in a wider context: political objectives and debate**

Initiatives such as this GP are helpful and necessary, but must not be seen as sufficient. If Europe is to realise the enormous growth potential of our TV content sector and continue to secure the citizen benefits which result from a vibrant media sector, we believe that some wider issues need to be addressed before the Commission considers revising AVMS. For example, European media has changed radically since 2007, when the AVMS directive was negotiated, and beyond all recognition since 1989 when the TVWF Directive was introduced. A debate is needed to reflect today’s reality: that a digital media business can be located as easily to the US or the Pacific as in Europe and European businesses will suffer if we legislate in isolation. How is the global nature of tomorrow’s media business taken into account in any policy process? Further, if global media convergence is already a reality, is it sustainable to continue with a regime of narrow market definitions which may inhibit the development of the scale required to compete on a global stage? There are no easy answers to these questions, and we certainly do not propose any solutions, but we suggest that an eventual revision of AVMS will be more constructive and durable if it also takes into account these wider issues.

### **e. Principles for a future regulatory framework**

In this response, we will not enter into detail on some of the questions posed in the GP. At the current stage, we would prefer to see the EC focus on high-level principles, as the GP, in general, attempts to do.

Certainly today, a further incremental revision of the detail of AVMS would be an inappropriate policy response to the challenges faced by the media industry in the era of full media convergence – challenges which are well described in the Commission Green Paper. We do not wish to see another renegotiation of the micro-management of regulation of television and call on the EC to ensure that there is broad political consensus on this point among the Member States as a precondition to any future reshaping of EU-level regulation of content. There are some signs, notably in the recent European Parliament resolution on Connected TV, that MEPs are taking the necessary longer-term view but we would need to see evidence of a strong consensus being built around this point before being confident that a revision was timely.

Instead, what is needed is a forward-looking vision from the EU to establish which principles from the old world of broadcast regulation we wish to see carried forward into a fully converged world, in a regulatory framework which will endure until 2030?.

We believe that the five principles below should be enshrined in EU law, to be delivered by all operators offering audiovisual content to consumers:

- a. **Maintain the current levels of provision for protection of minors.** Adults do not need media regulation to ‘protect’ them from content other than that which is already governed by the criminal law (hate speech, incitement, racial hatred, sexually abusive material). For children, by contrast, there is no dispute about the responsibility on operators to create an environment which, at least, does not completely undermine parents’ efforts to curate their children’s access to online content. Quite *how* we deliver the necessary protection is another matter, as is the appropriate division of labour between business, parents and regulators;
- b. **Maintain current standards of ethics in commercial communication,** including transparency/labelling and rules around privacy (where these rules are dealt with elsewhere in EU legislation, there should be clear signposting and cross-referencing). Existing rules on advertising of tobacco, alcohol, pharmaceuticals etc should also be retained in a platform-neutral manner;
- c. **Defend the principle of editorial responsibility** (without which, actual compliance with any EU or national rules becomes very difficult);
- d. **Guarantee the signal integrity of broadcasters** as a quid pro quo for editorial responsibility (this responsibility cannot be guaranteed if third parties interfere with the broadcast signal) and introduce requirements currently absent from the AVMSD framework, but which belong in a modern regulatory framework for the media sector, e.g., a commitment to uphold intellectual property rights, with a view to reducing the current amount of illegally available media content.
- e. **Retain the existing rules on jurisdiction for transfrontier operators**

This is dealt with at p 18 below

### **Methodology**

We believe that our thinking is not far removed from the European Parliament which in its Resolution on Connected TV (Kammerevert report) of July 2013 called for:

“the Commission to provide a breakdown, on the basis of its consultation process entitled ‘Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values’, of which regulatory mechanisms are still necessary and useful against the background of convergence and which should perhaps be established in order to create a level playing field for all content and service providers, taking account of the following minimum requirements and maintaining the existing overarching regulatory objectives, so as to ensure fair competition among content providers”

## **Part Five: Detailed Responses to the Questions in the Commission Green Paper**

The GP refers to the 2009 Communication on State Aid to Public Broadcasters, though it does not follow it up with a specific question. We regard this as an area which must be kept under review. The 2009 text was a useful compromise between the desire of publicly-funded broadcasters to launch new online services and the need to safeguard fair competition when these well-funded ventures compete with commercial broadcasters and print media publishers, but also new market entrants.

According to this communication, Member States have to ensure that public broadcasters have their proposed new digital activities evaluated by a neutral, independent body before launch. However, to date implementation has been patchy. While there has not yet been a pan-European analysis of implementation carried out by DG COMP, according to the ACT's own information, ex ante control mechanisms to implement the 2009 Communication have only been introduced in around half of the EEA markets<sup>18</sup>. This may partly be due to the pressures on state budgets meaning that some state broadcasters were not in a position to launch new ventures. But additionally in some Member States where the Communication has been implemented, early experience shows that there are certain lacunae in the Communication, notably a lack of clarity in some definitions, which have led to sub-optimal implementation of the spirit of the Communication. Overall we are concerned that this lack of political will at national level is impeding a meaningful implementation of the 2009 Communication, which will logically result in an increased case load for the EU Commission, even if the commercial media sector had shared the initial objective of the Commission to move this scrutiny more to the level of independent national bodies rather than filing further cases in Brussels.

### **Financing Models**

Q4 and 5 are about content production and distribution. The simplest way of course to promote local and European content is to allow broadcasters the editorial and contractual freedom to produce, commission and schedule the content which we believe our viewers wish to see. As we demonstrate above, this is overwhelmingly local content. In terms of how regulators can help, the bigger picture here should be encouraging MS to maintain media markets with three strong pillars of revenue: subscription, advertising and state funding - this is the optimum way to ensure a steady supply of finance to the content sector. Two more specific ideas which we would like to see taken up are:

- The European Parliament's call in its July 2013 Resolution (Kammerevert report) for a clear statement that there will be no further bans or restrictions on television advertising introduced at European level. If this EP statement could also be endorsed by the Commission, this would be a helpful aid to continuing the current model of a high level of reinvestment of advertising revenue in original content;
- For the same reason – of encouraging the continuation of a virtuous circle of reinvestment of revenues into content production - the EC should put the

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<sup>18</sup> According to our sources, such tests had by December 2011 been introduced in Austria, Flanders, Croatia, Denmark, Finland, Germany, Ireland, Netherlands, Norway, Sweden and the UK and were under discussion in Estonia and Latvia.

protection of copyright and the fight against piracy at the heart of its media policy.

Q5 of the GP asks how changing consumer behaviour will influence the current system of content financing. This issue - adapting or sustaining commercial models for domestic content production - is perhaps the key strategic challenge for the EU in this debate. While regulatory intervention is not required here, further studies may be helpful to ensure that the EC has an accurate and up to date understanding of the challenges and objectives in this area as a follow up to this Green Paper.

Writing in September 2013, we can state that TV advertising remains a viable business model and, if the macro-economic outlook is not too negative, generates a dependable stream of revenue which broadcasters choose to reinvest in content. Whether this will still be the case in ten years' time is impossible to predict. Research into this issue could also consider the impact of the boom in US series production. Recent academic work<sup>19</sup> shows that US pay-TV providers (primarily HBO, FX and Showtime) commissioned 77 original dramas and 48 comedies in 2012, up from 28 and six respectively in 2002. Clearly not all of these will sell well internationally, but it is evidence of alternative sources of well-produced professional content which may become attractive if the returns on European first-run content become squeezed so that local advertising and subscription revenues were no longer able to sustain the business risk of investment in original content. Additionally, it could be argued that Europe's current, nationally-focussed production markets may need to adapt if the current trend for large-scale series on the model pioneered by HBO is to continue. Our current market structure is, perhaps, better suited to delivering a local show rather than a series with the global appeal of a "Game of Thrones". The budgets and risk involved in commissioning such series may make cross-border co-productions increasingly attractive. Broadcasters are already experimenting along these lines (e.g., the BSkyB/C+ co-production of the Tunnel) but there may be scope here for a greater role the EU, notably via the new Creative Europe programme.

### **Interoperability**

The ACT's default position here is that EU intervention would not be helpful and would run the risk of freezing innovation as new standards are developed. Certainly in the connected TV marketplace, the fact that there are three different standards under development, partly as a result of different legacy equipment, in the four largest markets (Italy and the UK each having their own standards, France and Germany working on a combined standard) suggests limited scope for a pan-European intervention. The EC will be aware that national and international bodies involved in profiling and defining the middleware standards, specifically the HbbTV Consortium and the DVB Project, are looking at HTML5, the markup language standard developed by W3C Consortium, as a potential future evolution of their respective middleware for the connectable TV devices.

The issues set out at p9 of the GP – notably that a connected TV device bought in one Member State may not work in another one – are more a matter for manufacturers than for content providers. We would encourage the EC to rule out regulatory intervention here and instead to focus on better dialogue among stakeholders. The Forum for Advanced Media in Europe (FAME) has already done some useful work here, notably on information sharing and aspects of organisational interoperability, and we would encourage the EC to continue to support and to give greater visibility to this work.

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<sup>19</sup> Olivier Braet, I-Minds/SMIT at the Vrije Universiteit Brussel – see [www.privatetelevision.eu](http://www.privatetelevision.eu)

## Spectrum

It is essential for broadcasters to have as many platforms as possible to distribute our content, to maximise the benefit for consumers. As mentioned above, there is no trade-off between TV and Internet (but rather synergies), so these distribution technologies are complementary to each other, not alternative; although to date, point to multi-point platforms (both satellite and DTT) are still the most efficient way to deliver broadcasting services (at a lower cost for consumers). We would therefore hope to see future research into, and decisions over allocation of spectrum based on a thorough “opportunity cost” analysis taking in consideration the impact on the audiovisual market (nation by nation) and on consumers’ welfare.

### **Regulatory Framework (regulatory imbalances, scope of AVMS and country of origin, self-regulation, E-commerce directive and media literacy)**

The GP also asks what would be the consequences for a change – we would say a further change – from the country of origin rule for jurisdiction on transfrontier operators. Any such move would signal the death knell of any attempts at a harmonised EU audiovisual policy – what possible justification could there be for the harmonisation of national media policies if Member States can impose their own licensing obligations on broadcasters from neighbouring countries?

There will never be more than a limited pan-European single market in broadcasting for obvious reasons of language, regulation and market structure. But the EC, keen as it is to encourage transfrontier distribution of content (see Licences for Europe) should recognise that it is precisely the COO rule which has allowed the small but growing level of transfrontier distribution of content which we currently have in the EU market. This comment is largely made on the basis of our experience in linear broadcasting, where the COO has served the market well. As the GP rightly points out, more complex issues may arise in the potentially global marketplace for on-demand content distribution.

We welcome the emphasis on pp 11-12 of the GP on self and co-regulation and regard the increased reliance on these tools as an important scenario for the future. Consumers demand certain standards from media providers, standards which we are proud to meet. Our consumers expect constant innovation in technology and outstanding content, delivered to generally-accepted societal standards. In practice, all parts of the broadcast value chain (producers, channels, platforms) have a strong commercial imperative to meet expectations around audience protection by ensuring that the content of the programme is appropriate, that ethical standards around advertising are respected and that additional means of self-protection are offered to customers (e.g. PIN protection). Additionally, to date, the vast majority of content that is accessed on-demand has already appeared on linear services, and therefore has already been subject to the “broadcast” regulatory regime, so most of these standards are in practice easily transposed to an on-demand environment.

These clear business imperatives have driven broadcasters to earn our consumers’ trust, regardless of regulatory requirements and we agree with the GP (at Q 11) that media convergence is an opportunity for examining whether co-/self- regulatory models would be more appropriate ways of regulating standards of all TV-like content. Many of the regulatory obligations still imposed on platforms and channels were devised in a distant, pre-internet era when broadcasting was the unique means of distributing programmes, and channel scarcity meant that notions of consumer choice or competition were underdeveloped. In a hyper-competitive, consumer-driven cross-platform world, regulatory obligations could be steadily

reduced to a set of core principles and the reliance on competition between brands for consumers' trust increased.

Media literacy: future work on media literacy should, we believe, also include a concerted effort on the part of public authorities, academia and the media industry to explain to young consumers the importance of respect for copyright and legal content. If respect for copyright is undermined by vague notions of 'freedom', then future generations will not enjoy the same level of investment in high-quality diverse content as we currently have in Europe.

### **Media Freedom and Pluralism (discoverability)**

The issue of "discoverability" or of "must-be-found" is an example of the GP correctly identifying a potentially important issue. There is an important and perhaps challenging balance to be struck here between allowing consumers easily to access popular services and not enshrining in stone the privileged status of certain "incumbents". Our first reaction here is that the Commission has identified the correct instruments in the GP (Universal Service Directive and Access Directive) and that this case-by-case, competition-law driven approach is preferable to the approach hinted at in the European Parliament resolution of granting, ex ante, privileged status in EU legislation to certain categories of service providers. The electronic communications framework already contains a provision on fair, reasonable and non-discriminatory access to platforms – preventing abuses by vertically-integrated operators.

This appears to be more flexible and future-proof than the request in the EP resolution that the Commission examine whether certain content providers could have privileges with regard to findability on "first-screen" devices. For the EC to do this would require a daunting exercise in defining what is a first-screen device (and, indeed, what is a platform) in a manner which will be meaningful across all European media markets for the next fifteen years or so. We would prefer the approach in the GP which stresses that Member States may, under existing EU law, specify those services to which access must be granted, and that NRAs may impose obligations on operators with regard to EPGs.

Specifically, the European Parliament's emphasis on publicly-funded broadcasters as beneficiaries of this privileged status also raises issues of definition and of equal treatment. A more logical approach would be to leave this to the discretion of Member States, who may well decide that a commercially-funded news service is worthy of greater 'findability' than a publicly-financed entertainment channel. Smaller Member States may also take the view that services with a high proportion of content in their language is deserving of greater prominence ... but, again, this will not be an issue in all EU markets and as such should be left to Member State/NRA discretion.

### **Commercial Communications (incl. overlays)**

Given the primary role which television advertising plays in financing content, this section should more logically have been linked to QQ 4 and 5 on content production. We have already commented in that section on the need for the EC to make clear that further sector-specific advertising bans and restrictions are not on the policy agenda, and we agree with the analysis in the GP that privacy and data protection will become increasingly important in the converged era. Q 17 asks whether current AVMS rules on commercial communications will remain relevant in the converged environment. As we have already commented, we believe that the qualitative AVMS rules should form the basis for a platform-neutral guarantee of ethical advertising as one of the key principles of the future framework. Apart from these ethical

standards, we expect to see EU policy here move away from micro-management and towards greater operational flexibility.

Q 19 raises an issue which is of fundamental importance. It is essential for the future of the EU audiovisual market to ensure the integrity of high value, highly-regulated content. Commercial overlays and other novel techniques should therefore not be possible without the prior consent of the owner of the content in question. This is an important extension of the principle of editorial responsibility: at present, the extremely detailed level of audiovisual regulation at EU and national level is only sustainable because the NRA can hold a broadcaster responsible for all compliance-related issues (many of which, e.g., defamation, are not harmonised at EU level). Third-party overlays potentially threaten this regime - for example, if content which is otherwise compliant with e.g., requirements on protection of minor, then the broadcaster must have the ability to refuse consent for third-party applications which would otherwise render it non-compliant. The entity which holds the licence from the NRA must always be in a position to make a prior assessment as to whether a particular overlay should be permitted or not.

We would expect that, in line with the overall development of the market, some platforms may also wish to offer consumers a choice as to whether or not to view overlays. But this should be a secondary, commercial, decision, and a matter purely of competition between platforms. The ex ante, regulatory, obligation to ensure overlays are compliant should rest with the broadcaster/service provider – i.e., the person who is legally responsible for ensuring the regulatory obligations in the service licence are met.

### **Protection of Minors**

Broadcasters accept that we have a responsibility to help ensure that parents are able to guide their children's viewing. Indeed, there is a commercial self-interest in building a reputation as a responsible outlet which can be trusted by parents. But this must be a collaborative effort between media service providers, regulators, parents and schools – all we can do is play our part. The fact that different technologies will need different solutions was recognised as long ago in 1989, when the first Television without Frontiers directive, rightly, established different rules for protection of minors depending on whether or not the service was encrypted. In the convergent world, it will be essential for other players, notably content aggregators and technology companies, also to commit as mature and responsible players. If new players cannot come to terms with an equitable regulatory framework, there is a danger that technology will disrupt not only competition and business models – which is unobjectionable – but also will undermine the consumer trust which European families with children have placed in the content business.

Given the diversity of European content markets, it is inevitable that different solutions will be adopted by media companies in order to comply with the objectives of the AVMS-D and in many cases to go beyond them. We refer the European Commission to the submissions to this Green Paper from individual ACT member companies and their national associations for more detail on this point.

### **Access for the Disabled**

While we recognise the political importance of this issue it may not be one which is easily harmonised at EU level. In larger European markets, there may be a commercial imperative for media service providers to extend their services to some disabled groups – this is illustrated by the initiatives of many of our member companies, e.g., BSkyB. But the commercial imperatives for a business with over 10m subscribers will never be matched by smaller platforms, especially

those in markets with lesser-spoken languages. So further harmonisation beyond what is already contained in AVMS may be unrealistic. Instead, the Commission might wish to convene discussions among stakeholders to see how far the technologies developed in larger markets – whether at the platform or the content level – can be exported also to smaller markets. Certainly for subtitling, sign language and audio description, there will be a need to develop the talent base in smaller languages, something which could perhaps be explored with the assistance of EU funding programmes.

### **Conclusion**

Throughout this response we have called for a wide-ranging discussion which is focussed on principles. This is not a new request. Indeed the European Commission in the original “Convergence Green Paper” in 1997 called for

“A fundamental reassessment and reform of today’s regulatory environment [...] promote flexibility, remove inconsistencies, avoid discrimination within and across sectors and ensure public interest objectives [...] covering all sectors. This would require a broader definition of communication services to supersede those of telecoms and audiovisual within EU law”

The 1997 Green Paper went on to qualify this, stating that perhaps the time was not right for such a discussion. If such a debate is to start now, our starting point is that we do not call for public funding, nor to constrain new business models. Our sector does not require any ‘protection’ from new competitors. Our only precondition, which we believe is shared by the EU, is that any new framework creates the space for the development of a vibrant and rapidly growing European TV content sector, meeting the needs of citizens and consumers. A digital society in which news, sport, drama, films and entertainment are reduced to mere commodities is neither in our interest nor that of European citizens.

**Association of Commercial Television  
Brussels  
30 September 2013**

**EU Transparency Register ID: 18574111503-28**

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**Appendix: New ventures launched by ACT member companies during the consultation period of the European Commission's Green Paper: *Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*, 24 April 2013 – 30 September 2013**

- **BSkyB** launched NOW TV box (£9.99) connecting internet to the most basic of TV displays. NOW TV provides access to Sky Movies and Sky Sports without a long term commitment and offers BBC iPlayer, Demand 5, the BBC News App and Sky News.
- **BSkyB's** NOW TV launched on PlayStation 3.
- Content from the **Canal+** VOD service Canalplay Infinity is made available on Apple TV in France.
- **ITV** launches new Player app with paid option for ad-free catch up TV.
- **Mediaset** launched TGCOM24, an innovative cross platform news outlet.
- **Modern Times Group (MTG)** launched MTGx, a Group-wide initiative to drive innovative solutions, e.g. synchronized ads between TV and second screen app Like.TV.
- **MTV Media** in Finland is undergoing a major reform project with new on-demand and streaming services, e.g. renewed mtv3.fi and radionova.fi websites and the launch of the VOD service Filmnet.
- **Pro TV (CME)** in Romania introduced a free second screen app for the show *Romanians have talent*, onto their smartphones and tablets.
- **RTL Deutschland** will be making six of its channels available to German viewers via Magine, the new online-based TV delivery platform.
- **RTL Group** has acquired the leading OTT operator Broadband TV
- **RTL Deutschland's** RTL Now is expanding to include formats by independent third-party broadcast providers that will be available for seven days following their broadcast on TV.
- **ProSiebenSat.1** launched HbbTV service with its female skewed channel Sixx, the fourth channel of the broadcaster with an interactive red button service;
- **Sky Italia** launched SkyTG24 HD, the first Italian all-news channel in high definition;
- Irish **TV3** rolls out a new hourly online video news service that will run alongside its on-air output
- **TV Nova (CME group)** Czech on demand service Voyo extended its reach to subscribers using Android devices.