

## CONTRIBUTION ON THE PUBLIC CONSULTATION ON DIRECTIVE 2010/13/EU ON AUDIOVISUAL MEDIA SERVICES (AVMSD)

By Dr. André Lange, independent expert  
andre.lange.medart@gmail.com

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### About this contribution

The European Commission has launched on the 5th of July 2015 an open consultation on the Directive on Audiovisual Media Services.

In my career as a media expert, I have followed the issue of the regulation of audiovisual services from its early development, in the late 70s. The deregulation of TV services in Europe was the topic of my Ph.D dissertation at the University of Liège (1986). I was then involved in the debate on European media and cultural policy in my successive positions at the European Institute for the Media (1986-1987), at the Council of Europe (Media Section, Secretariat of the CDMM, 1988), at IDATE (1989-1993) and then at the European Audiovisual Observatory (1993-May 2015).

During all those years I have provided European and national institutions with books, reports, statistical data, notes and presentations on the European audiovisual market, including on the circulation of audiovisual media services in Europe<sup>1</sup>. At the European Audiovisual Observatory, I have designed, maintained and supervised the MAVISE database, commissioned by the European Commission, providing a systematic census of audiovisual services in Europe (<http://mavise.obs.coe.int>).<sup>2</sup>

I retired from the European Audiovisual Observatory as from 1st June 2015. Considering my experience in the field, I think useful to contribute to the consultation.

My contribution will be limited to specific aspects of the Directive. It does claim to be a scientific document, but quite the contrary to give some emphasis to political difficulties in the interpretation and implementation of the Directive.

This contribution is purely personal and does not of course imply the responsibility of any of my precedent employers.

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<sup>1</sup> The most recent contribution is the report of the European Audiovisual Observatory *The development of the European market for on-demand audiovisual services* (in collaboration with Christian Grèce, Agnes Schneeberger and Sophie Valais) for the European Commission (freely available on the website of the Commission at : <https://ec.europa.eu/digital-agenda/en/news/development-european-market-demand-audiovisual-services>)

<sup>2</sup> In the following text, « audiovisual services » should be interpreted in a larger sense that « audiovisual media services ». They include services (such as distribution of audiovisual content) currently not regulated by the AVMS Directive.

### **Preliminary remark on the goals of the EU coordination as presented by the EC.**

In the introductory page on its website (<http://ec.europa.eu/digital-agenda/en/audiovisual-media-services-directive-avmsd>), the Commission lists the goals of the EU coordination:

- providing rules to shape technological developments
- creating a level playing field for emerging audiovisual media
- preserving cultural diversity
- protecting children and consumers
- safeguarding media pluralism
- combating racial and religious hatred
- guaranteeing the independence of national media regulators.

The fact that « providing rules to shape technological developments » is quoted in first position of the list is a good indicator of the dominant ideology of the current Commission : technological development has to be considered as the first value, the first priority, more important than democratic values (media pluralism, independence of national media regulators, 5th and 7th position), social values (protecting children and consumers, combating racial and religious hatred) 4th and 6th position), cultural values (cultural diversity, 3rd position).

This hierarchy is not neutral, as some of the goals may be considered as contradictory. Giving more importance to technological development is, from the beginning, giving priorities to the industrial objectives of major communication companies. This fact needs to be underlined, as this objective is never quoted in the current version of the Directive.

On the contrary, the objective of fostering the European audiovisual industry is not quoted. According to the European Audiovisual Observatory estimates, the worldwide market share of the European audiovisual companies on the world market has decreased from 20,7 % in 2009 to 15,4 % in 2013.<sup>3</sup> This loss of more than 5 % of market share in five years has various explanations, but two are certainly directly related to the regulatory aspects covered by the AVMS Directive: the rapid development of on-demand audiovisual services provided by US companies and the fact that the benefit of the growth of the European pay-TV market was mainly captured by US media groups.<sup>4</sup>

### **Preliminary remark on the lack of transparency of the audiovisual markets**

The Directive AVMS includes some minimal rules on transparency (article 5 on the identification of the providers of services). Those rules are rather minimalist and they are not always respected by stakeholders.

On various occasions, in particular in various interventions as key note speaker in conferences organised by the EU Chairing Member State, I had the opportunity to underline the lack of transparency of the European audiovisual market.

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<sup>3</sup> EUROPEAN AUDIOVISUAL OBSERVATORY, *Yearbook 2014*, European Audiovisual Observatory / Council of Europe, 2015, p.18.

<sup>4</sup> Revenues of EU pay-TV companies affiliated to US media groups have increased from 8,4 EUR billion in 2008 to 12,4 EUR billion in 2012 (EUROPEAN AUDIOVISUAL OBSERVATORY, *Yearbook 2014*, p ;28).

This lack of transparency includes:

- difficulties in identifying the providers of services (mainly for on-demand audiovisual services, but also in some cases for TV services) and therefore the country of establishment of the service
- difficulties in identifying the real ownership of some audiovisual companies or audiovisual groups
- difficulties in collecting information on the circulation of services (technical coverage)
- difficulties in obtaining information on the success of on-demand audiovisual services (audience, number of subscribers) and of some TV services (number of subscribers to individual pay-TV channels)
- difficulties in obtaining information on the success of individual works provided by on-demand audiovisual media services (number of download, ratings)
- difficulties in obtaining a minimum of information on the size of the on-demand audiovisual catalogues
- difficulties in obtaining reliable data on the promotion of audiovisual works by providers of both TV and on-demand audiovisual services
- difficulties in obtaining economic data on the companies operating the services (turnover on a country by country or service by service basis ; added value, employment).

The non-disclosure of strategic information is certainly part of the industrial competitive game and some stakeholders quote the stock exchange rules as one obstacle to the disclosure of detailed information. However, it should be considered that a minimum of transparency is necessary for the implementation of public order (identification of the provider of services), protection of copyright owners (disclosure of basic information on the technical coverage and audience success of the service, revenues of the service, from public, advertising, transactional or subscription revenues). Information on the success of individual works should be communicated to individual rights owners and to public bodies providing support to the production.

Basic data on the services are necessary if one wishes to establish precise rules of application on objective criteria. For instance, the suggestion of the Commission in the preferred policy option (c) of application of the Directive to audiovisual media services established outside the EU and targeting EU audiences according to significant market share/turnover does not make sense as no reliable data are available on market shares and turnover.

Simple and not costly basic information (name of the service, name and contact of the company providing the service) on the providers of services should be provided:

- by the providers of services,
- by the Member States
- by the distributors of audiovisual services.

The current situation with obligation of disclosure of financial statements is completely unfair for small companies. A SME company whose activity of provision of a VoD service is the unique activity is obliged to disclose its turnover. A major group with various activities is just requested to publish consolidated statements, without the minimum of information of the

performances of its various subsidiaries. This creates complete asymmetry in both administrative burden and market intelligence.

In order to define a coherent and balanced playing field, the EC should take the initiative of a regulation on transparency in the audiovisual sector. Specific EU rules on the transparency of the audiovisual sector may probably be defined on the basis of Article 114 of the TFEU, as it is the case for example for the Directive 2013/50/EU on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. Reinforcement of rules in the bank sector were also announced the 17 June 2015 by the adoption of a proposal for a regulation on reporting and transparency of securities financing transactions (known as SFT<sup>5</sup>). The concept of « systemic risks » due to lack of transparency could very well be applied at the audiovisual sector, considering its importance for the European public sphere and its role in the creation of cultural diversity. The Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups could also be a reference, but is probably not adapted to most of the audiovisual companies (even the larger ones) as it concern only the companies with more than 500 employees.

### **Preliminary remarks on the absence of official reporting on the implementation of the Directive.**

Article 33 of the AVMSD invites the Commission to submit regularly a report on the application of the Directive to the European Parliament, the Council and the European Economic and Social Committee. So far, the only implementation report was published in May 2012 and is related to the years 2009-2010.

As for the promotion of European works, or broadcasting services, the Commission has to report every two years on the application of the provisions concerning European works and independent productions on the basis of statistical data provided by the Member States (Articles 16 and 17). For on-demand services, Article 13 sets out an obligation for the Member States to report on the implementation of the provisions to the Commission every four years. Since the adoption on the Directive, the only report on promotion of European works based on Member States reports was published in September 2012, with data related to years 2009 and 2010.

Considering the rapid development of on-demand audiovisual services, in particular of VoD services, the absence of official data published by the Member States is dramatic and does not allow for the provision of assessments based on solid official facts and figures.

### **Assessment of the overall impact of the Directive**

It is obvious that the Directive TVWF and the Directive AVMS have created a legal framework allowing the circulation of TV and on-demand audiovisual media service in Europe. Thousands of services have de facto a pan-European circulation.

The two major indicators of the impact of the Directive are relatively easy to calculate for television services:

*Economic impact:* the economic impact of the circulation across Europe of TV channels may be estimated by adding the turnover operated by broadcasting companies outside of the

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<sup>5</sup> [http://europa.eu/rapid/press-release\\_IP-15-5210\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5210_en.htm)

national market. According to my estimates (obtained by crossing information from the MAVISE and from the AMADEUS databases) around 200 European TV companies are operating turnover outside of their respective country of establishment. The data on turnover are available for most of them, but without breakdown between turnover operated in the country of origin and turnover operated in other countries. Using a simple methodology (national/foreign revenues calculated on the pro rata of the number of digital TV households in the markets covered by individual companies), I arrived at the rough approximation that revenues collected by EU companies in 2013 outside of their country of establishment represented around 4,5 EUR billion, i.e. 6,4 % of the total turnover of EU broadcasting companies.

The United Kingdom is, by far, the first beneficiary, with more than 2 EUR billion collected by British companies (not counting BSkyB distribution revenues in Ireland, estimated to be 400 EUR millions in 2013).

Around 50% of the revenues operated outside the country of establishment by EU companies are the result of pan-European operations of thematic channels under US control, mainly established in UK.<sup>6</sup>

Estimated turnover operated outside of the country of establishment by European broadcasting companies (2013)	
Companies established in :	in EUR Thousand
AT	315 000
CZ	150 000
EE	50
ES	23 600
FR	500 000
GB	2 152 500
HU	17 000
IT	150 000
LU	780 000
LV	70
NL	150 000
RO	2 500
SE	348 300
<b>Total</b>	<b>4 589 020</b>

Source : André Lange  
on the basis of the turnover of individual companies

<sup>6</sup> According to the European audiovisual Observatory (Yearbook 2014, p. 27), the operating revenues in EU of broadcasting companies owned by non-EU groups have increased from 4,9 EUR billion in 2008 to 6 EUR billion in 2012. Revenues from broadcasting companies affiliated to US groups had the lion share : 4,5 EUR billion in 2008, 5,6 billions in 2012.

*Audience impact.* The second interesting indicator for the assessment of the impact of circulation of TV channels is the data on daily audience market shares of foreign channels in the various EU countries. This data is elaborated by the European Audiovisual Observatory on the basis of the data provided by Eurodata-TV Worldwide and national audience measurement institutes. Only ad minima data can be calculated as the audience for small channels (often including foreign channels) are not necessarily available and are aggregated in the category « Others ». Comparisons between 2009 and 2013 have to be considered with care as changes may just be related to the availability or not of data for small channels.

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Ad minima audience of foreign established channels  
in EU countries (2009-2013) – Daily market share

	2009	2013
AT	>45,1	>42,5
BE (CFR)	>62,9	>60,7
BE (VLG)	>3,3	>4,9
BG	>6,7	>8,1
CY	>2,7	>1,5
CZ	>2,2	>1,2
DE	>0,9	>0,7
DK	>22,1	>25,1
EE	>23,7	>25
ES	>8,6	>4,5
FI	>1,4	>1,1
FR	n.a.	n.a.
GB	n.a.	n.a.
GR	n.a.	>2
HR	n.a.	>3,5
HU	>11,1	>19,9
IE	>27,7	>24,6
IT	n.a.	n.a.
LT	>5,6	>15,7
LU	>89,3	>89,9
LV	>6,3	>23,2
MT	n.a.	>30,4
NL	>34,6	>38,8
PL	>4,7	>12
PT	n.a.	>17,7
RO	>7,3	>14,1
SE	>30,2	>31,1
SI	>7,6	>21,5
SK	>12	n.a.

Source : European Audiovisual Observatory (Yearbook 2014)  
on the basis of data provided by Eurodata-TV Worldwide (except for LU and MT)

Even if those data are not perfect, it is easy to identify three main categories of countries:

- countries where the audience of foreign channels is very important (> 40 %) : Luxembourg (>89,9 % in 2013), French Community of Belgium (> 60,7 %), Austria (>42,5 %) ;
- countries where the audience of foreign channels is significant (between 10 and 40 %) : The Netherlands (>38,8 %), Sweden (>31,1 %), Malta (> 30,4 %), Denmark (>25, 1% in 2013), Estonia (> 25 %), Ireland (> 24,6 %), Latvia (>23,2 %), Slovenia (> 21,5 %), Hungary (>19,9 %), Portugal (17,7 %), Lithuania (>15,7 %), Romania (>14,1 %), Poland (>12 %), Slovakia (>12 % in 2009).

Countries where the audience of foreign channels may be considered as marginal (<10 %). It includes the larger countries (DE, ES, FR, GB, IT) and some small countries relatively protected by their language (French Community of Belgium, Czech Republic, Croatia, Cyprus, Finland, Greece). Unfortunately, due to the lack of transparency of the market, it is not possible to provide similar figures for the on-demand audiovisual services, and in particular for the VoD services. However, a major conclusion may be drawn: in contrast to the television market, where the major countries have not been affected in a significant manner by the pan-European circulation of channels, those countries are now confronted by VoD services established in Luxembourg (iTunes, and, during a period, Netflix and Xbox Video), the Netherlands (Netflix), in Ireland (Xbox Video) in Switzerland (Viewster) or in US (Google Play Movies, MUBI, MSN). A calculation done by the European Audiovisual Observatory has shown that almost 50 % of the reception of VoD services were for services established outside of the country of reception. This certainly illustrates the success of the AVMS Directive but also the challenge it represents for national regulators to keep track and to maintain implementation capacities on the markets they are supposed to regulate.

### **Preliminary remarks on the scope and the definitions**

The Directive is related to the provision of audiovisual media services. It is part of a complex set of rules regulating directly or indirectly audiovisual activities (Telecom Package, Directive on e-commerce, Directives on copyright, State Aids rules). This fragmentation of rules may lead to complex legal issues and regulatory deadlocks. The possibility of regrouping some of the regulatory measures in a common text should be considered in order to provide a clearer and more operational framework for a new balanced European audiovisual ecosystem.

In particular the Directive should:

- provide some clarification on the definition of services
- review the exclusion of its scope of specific audiovisual services (in particular the so-called « UGC services ») when they are, de facto, active on the same markets as the audiovisual media services
- integrate rules related to distribution of audiovisual services
- provide solutions to the strategies of delocalisation by major stakeholders with the view of bypassing national rules (in particular when related to the promotion of European audiovisual works).

A lot of weaknesses of the text and difficulties of implementation follow on from the limited definitions provided by the Directive, in particular for on-demand audiovisual media services. The definitions, drafted at a very early moment of the development of on-demand audiovisual media service, are restrictive, and vague and therefore providing a lot of opportunities for tricky interpretations.

### **Concrete problems with definitions of on-demand audiovisual media services**

#### *Problems of definitions*

The definition of on-demand audiovisual media services proposed by the Directive and the differences in interpretation by Member States has been underlined at various occasions by lawyers and has given to national legislators and regulators opportunities to provide specific definitions<sup>7</sup>. As summarised by Francisco Cabrera Blazquez:<sup>8</sup> *“The vagueness of the abovementioned provisions has forced member states to find individual solutions to many unsolved questions when transposing the AVMSD into national law. Moreover, some national regulatory authorities (NRAs) have felt it necessary to adopt regulations and release guidelines and recommendations to explain how they will interpret the rules included in their national legislation. In many cases, they have relied on the guidance provided by the recitals of the AVMSD (sometimes reproducing them literally), even if the recitals of EU directives are not legally binding.”*

Reviewing the definition of services concerned could certainly help to avoid uncertainties. Rather than a broad general definition it may be considered to provide a typology of the main kind of services to be covered by the Directive, with possible ad hoc rules.

#### *The identification of the providers and of the country of jurisdiction*

Article 5 of the Directive says that

*“Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:*

- (a) the name of the media service provider;*
- (b) the geographical address at which the media service provider is established;*
- (c) the details of the media service provider, including its electronic mail address or website, which allow it to be contacted rapidly in a direct and effective manner;*
- (d) where applicable, the competent regulatory or supervisory bodies.*

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<sup>7</sup> See Comparative Background paper (EPRA/2012/02a) prepared by Emmanuelle Machet, EPRA Secretariat for the Plenary session: “New Services and Scope: What’s in, What’s out Revisited”, 35th EPRA Meeting, Portorož, 30 May – 1 June 2012. (Public version), available at:

epra3production.s3.amazonaws.com/attachments/files/2011/original/Plenary1\_overview\_responses\_questionnaire\_publicversion.pdf

<sup>8</sup> F. CABRERA BLAZQUEZ, « On-demand Services : Made in Likeness of TV ? » in EUROEPAN AUDIOVISUAL OBSERVATORY, *What is an on-demand audiovisual services ?*, IRIS Plus 2013-4, <http://www.obs.coe.int/documents/205595/865106/IRIS+plus+2013en4+LA.pdf>



In practice, however, Member States may face difficulties in identifying the services under their own jurisdiction. This succeeds in particular when providers have no obligation to register or when they do not fulfill their obligations defined in Article 5.

It is easy to observe (as the European Audiovisual Observatory does it in the daily practice of maintaining the MAVISE database) that numerous services do not respect the article 5 of the Directive. This is particularly the case for branded channels on open distribution platforms, branded catalogues on contractual distribution platforms such as iTunes or XboX, services accessible through applications provided by application stores. But this is also the case for numerous services accessible through a website. It is often the case that the name of the providing company is quoted only in the “Terms of use” page. In numerous cases the name of the company and the country of establishment is not even quoted in the “Terms of use”. It may also be discussed if the “Terms of use” have any legal value as for the compliance with article 5 : “Terms of use” define the relations between the users and the provider, but not between the provider and the competent Member State.

In absence of clear information provided by the provider, its identification (and the identification of the country of establishment) needs investigations that are sometimes assimilated by civil servants of regulatory authorities to real police investigations. The identification of the provider of a service provided through a webservice may be identified through registers of domain names, but domain names may be obtained in other countries than the real country where the decisional and editorial activities take place. For services provided through contractual distribution platforms, a principle of the liability of the distribution platforms should be considered, at least for the identification of the providers of distributed services.

It seems that the article 3, par.2 (b) creates possibilities of creating ambiguity on the country of establishment or even to bypass a national regulation. It would certainly be more simple to consider that when a provider has its headquarter in one of the Member States, it is established in this Member State, even if the editorial activities are established elsewhere. One other option could be to consider the country were the main server of the service is based.

### *The TV-like criteria for on-demand audiovisual media services*

The recital 21 says that *“it is a characteristic of on-demand audiovisual services that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive”*. This was encapsulated (in particular in UK) as the « TV-like » criteria.

I found this assimilation particularly problematic. It presumes a clear idea of what a TV programme is. This is of course a very subjective matter, based on individual perception. A study by OFCOM has very well illustrated this.<sup>9</sup> It means that any kind of on-demand audiovisual service providing content not similar to a TV programme could be excluded from the scope of the application of the Directive. As a matter of fact, the decision by OFCOM of not

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<sup>9</sup> ESSENTIAL RESEARCH, *The regulation of video-on-demand: consumer views on what makes audiovisual services “TV-Like” – a qualitative research report*, OFCOM, December 2009, <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/vod.pdf>

considering two branded channels on Youtube provided by BBC Worldwide is based on the consideration of the short length of the programme (5 to 8 minutes)<sup>10</sup>. It was argued that the content should be considered as clips and not as programme, and was therefore not « TV-like programmes ». In what legal text is it written that a content of less than 8 minutes is not « TV-like »? The history of television is full of famous « fillers », some of real creativity as the *Clap* created in the 80es by Marc-Henry Wajnberg for the RTBF (1200 episodes of 8 seconds).

The limits of such a comparative approach for definition could be illustrated by the absurd examples: the provider of an on-demand service specializing in pedo-pornography may very well argue that the service is not « TV-like », as, of course there is no pedo-pornographic TV programme or channel. ; a service providing a collection of 10 seconds hate speeches could very well argue that the Directive is not applicable as no TV channel broadcast similar programmes.

It should be recommended that a definition should be based on objective, technical criteria, rather on highly disputable criteria of genre or length.

#### *Definition of a catalogue*

The definition of a catalogue does not include any indication of the minimum number of works necessary to constitute a catalogue. Therefore, it may be considered that a service providing only one work are already one on-demand audiovisual media services. This may lead to an inflation of the number of services to be identified and monitored: for example the application stores operated by manufacturers of connected TV sets may include collections of Apps with an individual App by feature film.

#### *Definition of a service in case of multilingual / multi-territorial offer*

Various providers of on-demand audiovisual services (such as iTunes s.a.r.l., Microsoft Luxembourg s.à.r.l., Netflix, MUBI,...) provide geo-localised services for national markets, with national linguistic lay-out and de facto different catalogues. Various NRA and the providers consider that the various national/linguistic versions constitute only one service. This point of view is highly questionable, in particular as for the monitoring of Article 13 on promotion of European audiovisual works. It is very easy to observe that the catalogues, but also the manner of insuring prominence, are different from one version to another and therefore each specific national/linguistic version should be considered as a different service. This rule should be specified in the text, to avoid any ambiguity in the interpretation.

The same remark could also be made for the pan-European TV services, existing in various linguistic versions and targeting specific markets. Their content (in particular, the advertising content, may differ from one version to the other).

#### *Interpretation of the definitions by Member States*

While comparing the lists of on-demand audiovisual services provided by NRA and realities of the markets (as done with the MAVISE database), it is easy to observe the following problematic issues:

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<sup>1010</sup> D. GOLDBERG, « ATVOD's Rulings on What is a "Video-on-Demand" Service Overturned », IRIS, 2013/4, European Audiovisual Observatory, <http://merlin.obs.coe.int/iris/2013/4/article14.en.html>

- various NRAs have established lists including catch-up Tv services provided by well identified broadcasters but neglecting major VoD services established in the country
- Branded channels by broadcasters (or other kind of commercial operators) on open distribution platform as YouTube are generally not listed by NRAs as on-demand audiovisual media services.
- Branded catalogues on the various kind of distribution platforms (such as UGC platforms, Apps stores, iTunes and XboX Video) are not listed by NRAs.
- The exclusion of video pages on newspapers websites should be reviewed. Newspapers, broadcasters but also news aggregators (such as MSN) or distributors proposing news pages are competing on the same market (providing audience to advertisers) with similar content. There is no reason of discriminating them.

### **The issue of exclusion of the so-called UGC services**

The main problem related to the scope of the Directive is certainly the exclusion of services distributing user generated content as defined in the recital 21: *« Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest »*. This exclusion has a certain logic: the main criteria for the definition of an audiovisual media service is the identification of a catalogue under the editorial responsibility of a provider. The conception that providers of UGC services could not be liable for all the content they distribute was the main reason of the exclusion.

However, the qualification of open distribution platforms as « UGC » is completely out-dated and misleading. This initial conception (defined at a very early moment of development of open platforms) was rapidly challenged by the forthcoming developments of those services. Open distribution platforms (such as Youtube, Facebook, Dailymotion) propose at least seven different categories of editorial possibilities:

- Content effectively created from scratch by users (whatever professional or amateurs) and uploaded without commercial purpose
- Content created by users but incorporating copyright protected material and uploaded without commercial purpose
- Content not created by users but up-loaded without the agreement of the right owners.
- Content uploaded by commercial operators without commercial agreement with the operator of the distribution platform (i.e. for promotional purposes and without remuneration)
- Content uploaded by commercial operators, in the context of a commercial agreement with the operator of the distribution platform including remuneration on the basis of audience success, and advertising collected,... (« branded channel »)
- Content uploaded by commercial operators in the context of a commercial agreement with the operator of the distribution platform and accessible for the public through payment (transactional VoD or subscription VoD)

- Content uploaded by the operator of the distribution platform itself, either as promotional, free VoD or paying VoD (Youtube, for instance, provide various VoD services).

The Commission has recognised on various occasions that « branded channels » may be considered as individual on-demand audiovisual media services. However this doctrine has not been adopted by most of the Member States. Branded channels are not listed in the registers of national regulatory authorities (NRA) and the identification of the provider is not easy. Operators of distribution platforms do not cooperate in the identification of providers of branded channels (and, if I see correctly, do not have any obligation of doing so). As a consequence, Member States are not in a position to implement correctly the article 5 of the Directive.

It is completely absurd to argue that services consisting of the provision or distribution of audiovisual content generated by private users are not in competition with television broadcasting. They are (exactly as commercial radio, press financed by advertising, cinemas screening advertising and any other advertising media) on the same market: providing audience to advertisers. The legal difference is that they are not liable for content. The main economic difference is that they are proposing content at a lower costs (either because it is amateur non-remunerated content, or because it is pirated content or content provided by commercial operators for promotional reasons). But the market should be therefore considered the same and a common regulatory framework (for commercial communication, protection of consumers and minors, promotion of European audiovisual works) should apply.

The open distribution platforms either promote some of the content of the first page, or use specific algorithms to organise the content. The choice of those algorithms is not neutral and may be considered as an editorial choice. Whatever the origin of the content, there may be solid reasons to include those kind of the service in the scope of the Directive.

Private broadcasters have good reasons to complain of the unfair treatment: a leading open platform such as Youtube is competing on the same audience and advertising market, very often with their own production illegally uploaded by users and without similar obligation of promotion of European works. In the case of countries (like France, Italy, Spain) where broadcasters have to contribute to the funding of national productions, this unfair regulatory treatment may lead to a pressure to reduce the mandatory contributions. However, in the current regulatory framework, the liability of open distribution platform cannot be recognised by Courts, as illustrated by the TF1 v Youtube case law in France<sup>11</sup> or the Telecinco v. Youtube case law in Spain.<sup>12</sup>

The enlargement of the scope of the Directive should be considered. This would not necessarily mean the same regime for all kinds of on-demand services, but common rules should be defined when necessary for the creation of a level playing field related to a same market.

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<sup>11</sup> A. BLOCKMAN, « All TF1's Complaints against YouTube Rejected », IRIS, 2012/7, European Audiovisual Observatory, 2012. <http://merlin.obs.coe.int/iris/2012/7/article22.en.html>

<sup>12</sup> C. RAAB, « Civil Provincial Court of Madrid Clears YouTube of Liability », IRIS, 2014/4, European Audiovisual Observatory, 2014, <http://merlin.obs.coe.int/iris/2014/4/article12.en.html>

### **Absence of a common set of rules for distribution activities**

The Directive does not provide rules related to the distribution of audiovisual services. Some of the distribution activities are regulated by other texts (« Paquet Telecom », e-commerce Directive, Cable and Satellite Directive,...), but there is not a common set of rules applying to all kind of distribution platforms.

A distinction should be established between open distribution platforms (to which the provider of a service can have access without negotiation with the company operating the distribution service) and contractual distribution platforms (where the company operating the distribution service has the capacity to choose the services distributed and where some negotiation takes place for the sharing of revenues)

In my analysis, contractual distribution activities of audiovisual services include:

- Terrestrial distribution (either free or paying)
- Distribution by cable
- Distribution by satellite
- Distribution by IPTV network
- Distribution by paying application allowing access to individual AV services (ex Zattoo)
- Distribution by UGC platforms (Youtube, Dailymotion) in case of branded channels with sharing of advertising revenues
- Distribution of third services by VoD platforms (for instance branded catalogues and TV and OD services apps on iTunes)
- Distribution by application stores (operated by manufacturers of connected TV sets, or Internet stakeholders such as Google, Apple and Microsoft)
- Distribution by dongles (for instance Google Chromecast)

Based on the principle of technological neutrality, all those forms of distribution should be regulated by a unique and common set of rules.

This common set of rules for distributors of audiovisual media services should include:

- Obligations related to transparency of the distribution company. The first rule to be established should be transparency related to the localisation of the distribution company. So far, distribution platforms have generally operated on the market of their country of establishment, but a certain level of delocalisation may already be observed for the distribution of TV services by satellite (some pay-TV satellite platforms targeting Central European countries or Belgium are established in Luxembourg). Open distribution platforms such as Youtube generally suppose a delocalisation of the distribution activity. The localisation of application stores operated by manufactures of TV sets or by Internet companies is far from easy to be identified.

Other transparency obligations should be related to the identification of the providers of the services distributed by the distribution companies as well as data on technical coverage and number of subscribers)

- Rules related to protection of minors and consumers (similar to the one applying to providers of services)
- Rules related to copyright.(The scope of the Cable and Satellite Directive should be extended to all kind of distribution platforms).

- Rules related to promotion of audiovisual works. In various countries (Belgium, Croatia, France, Germany, Poland, Portugal, Spain) mandatory contribution of certain categories of distributors (in general cable-operators, ISP or IPTV operators, operators of satellite pay-TV platforms) are already established. Those systems were validated by the EC as State Aid.
- Rules related to must carry. The fact that cable operators are submitted to must carry rules when other distributors are not may certainly be considered as discriminatory.

The objective of defining a common frame for provision and distribution of audiovisual media services is certainly an ambitious one, but it is probably the only way to create a coherent set of definitions and rules operational for the audiovisual sector as a whole.

### **Geographical scope of the Directive**

Numerous TV channels accessible in European Union countries are established outside of the Union. It is a paradox that EU Member States seems to be reluctant to harmonize criteria for welcoming refugees but is more and more open to welcome audiovisual media services established outside its borders.

In most of the cases, they are national channels of non-European countries, not designed to target specifically national European markets. Their importance can be considered as marginal, as long as they do not create problems with the public order, in particular by promotion of hate, racism or antisemitism. The fact that satellite operators have been considered liable after the revision of the TVWF Directive in 2007 in case of problems related to non-European channels that they relay has certainly reduced the risks. However, the distribution of TV channels by Internet has created new risks and liability issues. For instance, albeit the Hezbollah TV channel Al-Manar TV has been banned by various European decisions, it is still reported as available in Europe through Russian and Arabic satellites, servers established in UK and Netherlands and various social media<sup>13</sup>. The liability of ISPs, application distribution platforms and/or of providers of servers services may have to be considered for this kind of services, by application of the principle of technological neutrality.

Numerous on-demand audiovisual services, in particular paying VoD services, designed for European markets are established outside of Europe. This is the case of VoD services operated by Google (Google Movie, Youtube paying VoD services), various independent SVoD services accessible on Youtube, probably most of the branded channels and branded catalogues operated by Hollywood studios on Youtube, iTunesStore, XBoX Video. The arthouse SVOD service MUBI is also established in the US and certainly the most important on this tiny market segment. The video news services MSN, at the origin provided by a

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<sup>13</sup> See S. STALINSKY, « Al-Manar TV, Banned By The U.S. And U.K., Now Hosted On U.K. And Netherlands Servers, The Middle East Media Research Institute, November 8, 2012. <http://www.memri.org/report/en/0/0/0/0/0/6797.htm> ; S. STALINSKY, « Tracking Hizbullah online », The Middle East Media Research Institute, May 16 2014, <http://www.memri.org/report/en/0/0/0/0/0/7987.htm>

Microsoft affiliate company in Luxembourg are now, according to the Terms of Use, established in California.

The European Audiovisual Observatory has identified in December 2014 236 on-demand audiovisual services established in the US and targeting Europe, 15 services established in Switzerland and 2 in Canada. Most of those services are VoD services. Due to the absence of precise data it is difficult to assess their market share but the Swiss-based service Viewster is regularly identified as a leading service on the market of free-VoD. Google Play Movies is the paying VoD service provided by default to users of tablets equipped with Android and has therefore a probable significant audience.

The risk of services established outside of Europe by-passing EU and national rules is real, in particular regarding the non-respect of Article 13. It is obvious that the studios branded channels and branded catalogues on YouTube, iTunes Store, Xbox Video provide almost only US films or TV programmes. According to rapid estimates, less than 20 % of the new films in the French version of Google Play Movies in August 2015 were European. With the exception of a segment « French films », much less visible than the segment « Studios » on the top of the page, there is no prominent editorial lay-out related to European films

In order to avoid those services by-passing the EU and the national laws, I think that the extension of the scope of application of the Directive should be considered. Considering the current absence of data on market share/turnover, the option of limiting this to significant services suggested by the Commission is not workable.

This possible extension of the scope of application of the Directive should also be considered for open distribution platforms such as Youtube (currently established in California, US). Currently, open distribution platforms such as YouTube are regulated by the e-commerce directive, which also apply the principle of country of establishment (with restrictions for the copyright issues, that may be regarded from the point of view of the country of destination). Case laws in Europe are progressively implementing a principle of accessibility to enforce national regulation. The jurisdictional competence of the country of reception has been recognised in France by the Constitutional Court for matters of copyright<sup>14</sup>. Other copyright case law by national courts can also be found in Germany and Spain. Some case laws of national Courts exist also on content issues In Germany, in its decisions of 7 August 2013 and 23 September 2013, the *Oberlandesgericht Hamm* (Hamm Appeal Court - OLG) ruled that the YouTube video platform is not obliged to delete videos concerning a fatal traffic accident that name the person responsible<sup>15</sup>. In the Netherlands, on 7 November 2014, the District Court of The Hague declared Dutch musician Honzy guilty of making death threats to politician Geert Wilders through a music video.<sup>16</sup> In those cases, the courts seem to have considered the country of establishment of the providers of content rather than the country of establishment of the service. Nevertheless, the information on the jurisdictional frame provided to the European users by Google continue to indicate that the Californian law is applicable.

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<sup>14</sup> N. RUFFIN, « Compétence des juges français en matière d'atteinte aux droits d'auteur : le critère de l'accessibilité consacré », *Journal du Net*, 28 février 2014.  
<http://www.journaldunet.com/media/expert/56675/competence-des-juges-francais-en-matiere-d-atteinte-aux-droits-d-auteur---le-critere-de-l-accessibilite-consacre.shtml>

<sup>15</sup> M. RUPP, « OLG Hamm Rules that YouTube Fatal Accident Video Does not Need to be Deleted », *IRIS*, 2014/2, European Audiovisual Observatory, <http://merlin.obs.coe.int/iris/2014/2/article12.en.html>

<sup>16</sup> E. KANNEKENS, *IRIS*, 2015/1, European Audiovisual Observatory, 2015.

## 2. Providing for an optimal level of consumer protection

Since the adoption of the Directive, advertising on UGC platforms such as YouTube or Facebook have considerably increased. The extension of the rules defined for television and on-demand audiovisual media services should be considered, in order to create a level playing field and to reinforce consumers' protection.

## 3. User protection and prohibition of hate speech and discrimination

### *Protection of minors*

In the last years, the debate on protection of minors was focalised on the issue of access by children to adult content, in particular online.

The popularity of adult websites for the children and youth audience is well documented by audience measurement services such as comScore Videometrix. In December 2013, 14 % of children (6-14 years old) in the six observed countries had visited an adult website, representing 35 % of their viewing time. The proportion for boys is 21,6 %. Analysis of data available show that the viewing of such websites is not occasional but a regular practice.<sup>17</sup> Most of those services are freely accessible, without any minimal warning related to their contents. Individual programmes are indexed by video search tools such as Google, providing a direct access without going through a frontpage with possible warning elements<sup>18</sup>.

The large amount of adult material easily and freely accessible for children and youth is certainly a new moment in the history of education and human relations. The issue is very difficult to tackle, as various theories, from ideological and moral point of views as well as consideration on freedom of expression are involved. It seems that the dominant point of view in Europe is still that allowing minors, and in particular children, to access harmful editorial content is not desirable, even if large differences of perceptions exist in what should be defined as harmful from one country to one other. As summarised by Maja Capello, "it is worth noting

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<sup>17</sup> See C. GRECE, « Children Audience of Adult Websites in Europe – Audience data in 6 EU countries », Presentation at the Conference of the Greek Presidency of the European Union, Athens, 14-15th April 2014.

<sup>18</sup> In UK, the ATVOD has identified in the last three years almost 200 providers not respecting the law related to protection of minors. The Authority complains for not having the possibility to act against services established outside of UK. See ATVOD, "ATVOD acts against 21 UK websites found in breach of rules on extreme material and hardcore porn", 21 August 2015, <http://www.atvod.co.uk/news-consultations/news-consultationsnews/atvod-acts-against-21-uk-websites-found-in-breach-of-rules-on-extreme-material-and-hardcore-porn>



that the response to the recent Green Paper of the EU Commission show a certain consensus on the fact that more could be done, whereas the level of disagreement is quite high on the means that would be necessary to achieve this result".<sup>19</sup>

The argument used by the leading publishing company of such services (as the Luxembourg based company Mindgeeks<sup>20</sup>) that they use parental control and warning tools cannot be considered as convincing. Following the proposal of the UK Government to ban free access to adult services the adult industry has proposed new forms of age identification: a scheme would see adult sites verifying visitors' identity with organisations such as banks, credit reference agencies or even the NHS. However, this proposal has immediately raised concern about the risks for privacy<sup>21</sup>.

It should be considered that the most popular of those websites uses a mixed business model. Free users generated content is offered as appealing material to premium paying content. Those services escape therefore partly the current frame of the AVMS Directive.

Furthermore, it could be argued that services providing child pornography are not to be covered by the Directive. The Directive uses indeed a concept of « TV like ». Not a single TV channel would dare to broadcast child pornography, therefore those kind of on-demand services could never be considered to be « TV like ».

The conflict of priorities between freedom of expression and protection of minors should be considered seriously. A medium way could be to consider the possibility for Member States wishing a serious protection system for children to implement complete prohibition of free adult websites. The fact of having to pay will certainly be a more efficient barrier than parental control tools that, in general, kids handle better than their parents. After all, it is written nowhere that freedom of expression means that all content should be accessible free of charge.

#### *Hate speech and propaganda for terrorism*

Hate speech and propaganda for terrorism is, at a current stage, more an issue for open distribution platforms than for audiovisual media services. In January 2015, a spokeswoman

<sup>19</sup> See F.J. CABRERA BLAZQUEZ, M. CAPELLO, S. VALAIS, *The protection of minors in a converged media environment*, European Audiovisual Observatory, June 2015.

<sup>20</sup> Mindgeeks Holding s.a.r.l. has taken over in October 2013 the assets from the former Manwin company. In 2013, the adult industry news website [XBIZ](#) described MindGeek as "the largest adult entertainment operator globally", and a spokesperson from Manwin, who spoke to the Irish Independent newspaper in 2013 stated that they are "one of the top five bandwidth consumption companies in the world". The Internet pornography review site TheBestPorn.com lists 164 pornographic membership sites that are owned or represented by MindGeek from article Mindgeek in Wikipedia, consulted 6 September 2015. <https://en.wikipedia.org/wiki/MindGeek>

I have no information on the country of establishment of the 164 pornographic membership sites that are owned or represented by MindGeek. The "Terms of use" of the leading one, YouPorn, indicate that this service acts under Cyprus jurisdiction.

<sup>21</sup> D. GAYLE, "UK pornography industry proposes user ID checks for adult websites", *The Guardian*, 26 May 2015, <https://web.archive.org/web/20150611135714/http://www.theguardian.com/culture/2015/may/26/pornography-industry-user-id-checks-adult-websites-privacy>

of Google recognised that it was almost impossible for YouTube staff to withdraw material representing propaganda for terrorism, even with the support of specific tools to allow users to indicate such material.<sup>22</sup> However, the recent decision *Delfi A.S. vs Estonia*<sup>23</sup> by the European Court of Human Rights has re-opened the issue of the liability of user generated content platforms regarding insulting content. This case law should probably lead to a revision of the regulation related to the liability of providers of open platforms for the distribution of audiovisual content in matter of incitation to hate, racism and antisemitism.<sup>24</sup>

#### 4. Promotion of European works

It is obvious for observers that the implementation of articles 13, 16 and 17 of the Directive, with a few exceptions, has never been a real matter of priorities for the Member States and the regulatory authorities<sup>25</sup>. This is the result of various considerations:

- Some countries are, from the period of the mid-80s, reluctant to enforce measures considered as restricting the freedom of expression and the editorial responsibility of the providers of services
- Providers of services, in particular providers of pan-European services, prefer countries with a low level of implementation of those articles. Proposing a low level of implementation is a way of attracting foreign investment
- The monitoring of the implementation has an administrative costs. For reducing the costs, most of the regulatory authorities just ask the providers to communicate data, without a real independent monitoring.

As a result of this weak implementation and the absence of recent official implementation reports published by the Commission, there is little reliable data to consider. Considering the only solid sources are the report edited by Attentional for the Commission (published in April 2012<sup>26</sup>, related to 2010 data) and the data published by the European Audiovisual Observatory.

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<sup>22</sup> Verity Harding, policy manager at Google, during a hearing at the European Parliament, quoted in « YouTube staff too swamped to filter terror content », <http://www.theguardian.com/technology/2015/jan/28/youtube-too-swamped-to-filter-terror-content>

<sup>23</sup> D. VORHOOF, « European Court of Human Rights *Delfi AS v. Estonia* (Grand Chamber) », IRIS 2015/7, European Audiovisual Observatory, 2015  
<http://merlin.obs.coe.int/iris/2015/7/article1.en.html>

<sup>24</sup> For instance, a platform such as Youtube maintains, despite complaints, after years, numerous video and even a video channel of a well known negationist and self defined national-socialist militant, Vincent Reynouard, already condemned in France and jailed for his statements.

<sup>25</sup> A good example of the lack of support to the European programmes is the derogation provided by the Italian authority, the AGCOM to the animation channels provided by Walt Disney Italy in March 2014. The broadcaster was relieved of the obligation to invest in Italian production with the argument that the European animation producers were not in position to provide programmes adapted to the editorial line of the Disney channels. See <http://www.agcom.it/documents/10179/1260162/Delibera+103-14-CONS/34940c7c-e8c6-4841-91d7-a83c2e4ef57d?version=1.0>

<sup>26</sup> See Press release by the European Commission, 30 April 2012/: Study on the promotion of European works, <https://ec.europa.eu/digital-agenda/en/news/study-promotion-european-works>

The Attentional report concludes that « 2010 data confirm the general level of compliance of European broadcasters with Articles 16 and 17. In 2010 broadcasters typically offer: • 50-90% of European works (average of 66.4% across our sample). • 15-40% of Independent European works (average of 29.4%). • 80-100% of Recent Independent European works (average of 85.2%). ».

The European Audiovisual Observatory report<sup>27</sup> (based on data commissioned from ROVI) is not based on the criteria of European works defined by the Directive, but is focalised on fiction (TV series, TV films, feature films, short films and animation) broadcast by a sample of European TV channels between 2006 and 2013. If one consider that fiction is the core of the economy of the programming to be considered for the promotion of European works, the data published by the Observatory do not illustrate a so successful efficiency of the Directive. The compliance observed by Attentional may result from the inclusion of the national calculations of some entertainment programmes (« émissions de plateau »).

The main conclusions are summarised in the Observatory press release<sup>28</sup> :

#### *Origin of fiction programmes*

*The analysis of the origin of fiction programmes shows that the situation varies considerably according to the type of channel and the channel's country of reception.*

*Only two categories of channel have more than 50% of European fiction in their programme schedules. Cultural and educational channels (those that broadcast the least amount of fiction) mainly offer European works (78.3% of the programme schedule time in 2013, of which just under one-third consisted of national programmes and two-thirds were imported or were co-productions). The proportion of the programme schedule time devoted to European fiction broadcast by the public service general-interest channels was 57.6% in 2013 and a majority of these were non-national works.*

*All the other channel categories have programme schedules that devote less than 50% of their airtime to European fiction. Overall, children's and youth channels schedule 43.1% of their airtime for European fiction. This proportion, which is nevertheless relatively high, is reached thanks to the proportion of European animated works. Commercial general-interest channels and film channels offer a fairly similar proportion of European works (35.1 and 37.5% respectively in 2013), but the proportion of national works is higher in the schedules of the commercial general-interest channels.*

*Not surprisingly, the principal origin of non-European fiction works, in all categories, is the United States.*

#### *The impact of transfrontier distribution*

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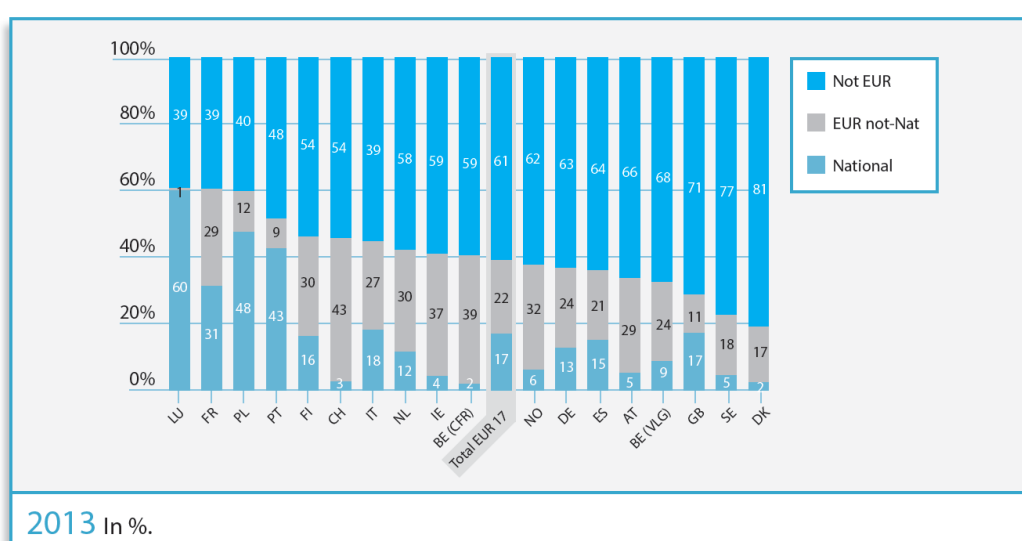
<sup>27</sup> André Lange (ed.), *Fiction on European TV channels (2006-2013)*, *La fiction sur les chaînes de télévision en Europe (2006-2013)*, *Fiktionale Formate auf europäischen Fernsehsendern (2006-2013)*, European Audiovisual Observatory, Council of Europe, December 2014

<sup>28</sup> <http://www.obs.coe.int/en/-/pr-fiction-on-european-tv-channels>

The scheduling of European fiction programmes (national fiction, imported or co-produced European fiction) or non-European fiction varies from one country to another. While the statistics are compiled by classifying channels according to the country of reception, it appears that Luxembourg, France, Poland and Portugal are the countries where the proportion of European fiction is highest. This can be put down to the large amount of national fiction broadcast (more than 30% of total fiction broadcasting time). On the other hand, non-European fiction makes up over 70% of the programme scheduling of the Danish, Swedish and UK channels in the sample.

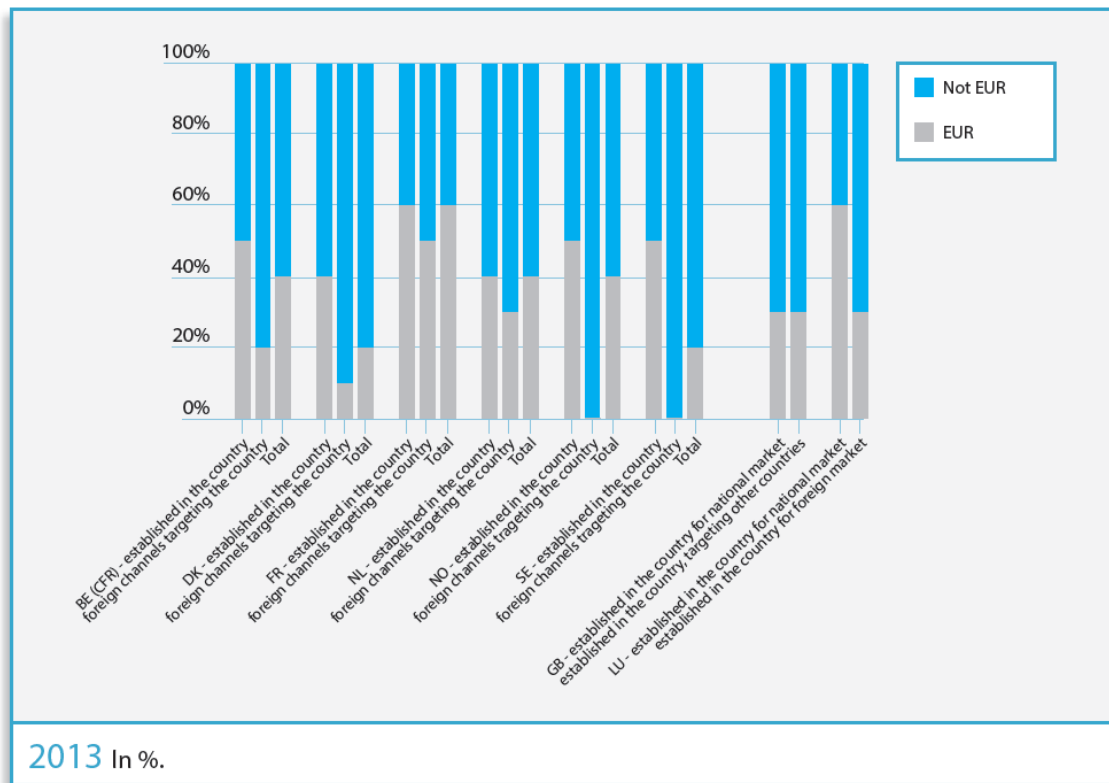
## Origin of fiction programmes broadcast by a sample of TV channels in 17 European countries

2013 Channels ranked by country of reception.



## Origin of the fiction broadcast programme: the impact of delocalised channels

2013 Channels ranked by country of reception.



2013 In %.

European Audiovisual Observatory on ROVI data

The data relating to Denmark and Sweden, as well as the French Community of Belgium and the Netherlands, are significantly affected by the presence in the sample of channels that target these respective markets, but are established in other countries (United Kingdom for the Nordic countries, Luxembourg for the French Community of Belgium and France). These “delocalised” channels offer a significantly lower proportion of European programmes. For example, the proportion of European works offered by the channels established in the United Kingdom and targeting the Nordic countries is less than 6% of their airtime devoted to fiction.

As for on-demand audiovisual services, the services have the possibility to choose the means of promotion of audiovisual works (proportion of works in the catalogue, providing prominence to European works or contribution the financing).

A report edited by the European Audiovisual Observatory, after sending questionnaires to providers of services, has indicated that « 50% of services stated that the proportion European works was below 50% and 24% above 50%, while 25% did not provide any information on the proportion of European works Half of the respondents (37 services) said their proportion of European works in their catalogues was below 50%. Almost a quarter (18) said it was above 50% while the remaining quarter (19) did not provide information on the proportion of European works in their catalogues. »<sup>29</sup>

<sup>29</sup> The development of European on-demand audiovisual markets, op.cit., p.207

It should be noted that the leading pan-European services did not respond to the questionnaire or have refused to disclose even data on the total number of works in their catalogue.

Very few countries (French Community of Belgium, France, Germany) have implemented mandatory contributions by providers of on-demand audiovisual services to contribute to the national production, either by direct investment either by contribution to the film fund. In some other countries (Croatia, Poland, Portugal, Spain) similar obligations exist for operators of cable/pay-TV platforms, which, in general, are also providers of VoD services. The efficiency of such mechanisms is clearly put under threat by services established outside of the country and targeting the national market, in competition with national services. In those conditions, the claim by national operators to see their own obligations reduced is a normal and legitimate move. Germany and France have modified their respective legislation with the perspective of extending the mandatory contribution (a levy in Germany, a tax in France) to foreign operators in order to create a level playing field for national operators. The Commission has delayed the implementation of those rules, raising the question of conformity with the EU law and in particular with the principle of country of establishment of the AVMS Directive.<sup>30</sup> As a consequence, implementation of the French tax to foreign VoD services was also postponed.

Should the Commission (or possibly the European Court of Justice) refuse the Member States the possibility of creating a common set of rules for national and non-national providers of services, this will clearly reinforce the position of the services established in countries not requiring a contribution. This is already the case with numerous TV services, which have chosen the establishment in UK or in Luxembourg, much less demanding than France or Belgium. If by-passing the national rules of mandatory contribution is recognised as possible (as it is currently the case), it is clear that, in the medium term, the willingness of national providers of services to respect the rules will be reduced and this will put the overall concept of funding national production by mandatory contributions (a system existing in at least 10 European countries) in danger.

This issue needs a clear review, taking account of the reality of current funding policies.

The ideal solution would be harmonisation by a general up-grade: stricter implementation of articles 13, 16 and 17 by broadcasters and providers of services and the creation of mandatory contributions in all EU countries. Such a solution has of course little chance to be accepted and implemented by all Member States. The possibility for the services (in particular the on-line services) to establish themselves outside of the EU would anyway remain as a possibility for pan-European stakeholders, if no protective measures are considered.

In the absence of such a solution, the possibility for Member States to apply a similar treatment with national providers and providers of services established in one other country (EU or not-EU) clearly targeting the national market should be established.

The fact that a service is specifically targeting a market is rather easy to establish when one or several of the following criteria are observed:

- The service has obtained from the programmes' right holders licences for the territory considered<sup>31</sup>
- The service is providing the programmes in the language of the country targeted, while different from the official language of the country of origin,
- The service has agreements with a distributor of audiovisual services operating in the country
- The service is marketed in the country

<sup>30</sup> Änderung des Filmförderungsgesetzes

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_36753](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36753)

<sup>31</sup> This would of course suppose the principle of territoriality of rights within the EU to be maintained.

- The service provides news or advertising specifically related to the targeted country
- The service is provided with prices in a currency different of the country of origin<sup>32</sup> ;

In order to make this system operational, the Directive should:

- Include in the article 3 (a) (i) possibility of derogation for reasons related to cultural objectives (including the organisation of the system of financing the national fund or the production of audiovisual works by mandatory investments of providers of audiovisual media services and providers of distribution services)
- Establish rules of communication to the Member States of a basic sets of data (turnover operated in the country)
- Extend the dispositions of article 4 to on-demand audiovisual media services (or at least to VoD services)

Possible other amendments related to the promotion of European works:

- The activities of monitoring of the promotion of audiovisual works could be reduced or even cancelled for catch-up TV services.
- The activity of monitoring of the compliance with the objective of the promotion of European works could be limited to services reaching a certain ceiling of turnover of audience (to be defined at the national level)
- Promotion of European works could be limited to certain categories of programmes (fiction, animation, documentary) at the exclusion of live entertainment programmes.
- Programmes of minority co-production with non-EU countries could be considered as EU works.
- In the larger countries, major TV channels use to fulfil their obligations of programming of European content with national production. This does not converge with the objective of increasing the circulation of European works. Objectives of programming of European non-national works could be considered.

The monitoring of the compliance of services with articles 13, 16 and 17 could be facilitated by the creation of a pan-European database identifying the origin of the programmes and the fact that those programmes was produced by an European independent company.<sup>33</sup>

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<sup>32</sup> For instance, various US established SVoD services accessible on YouTube propose subscription prices in USD but also in EUR, indicating that they are clearly targeting EU countries.

<sup>33</sup> The identification of the fact that a programme was produced by an independent company may be very difficult : in the last years various independent companies were taken over by my major broadcasting group.