



Response to

Green Paper

**Preparing for a Fully Converged Audiovisual World:
Growth, Creation and Values**

Transparency Register ID: 16311905144-06

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1. What are the factors that enable US companies to establish a successful presence in the fragmented EU market despite language and cultural barriers, while many EU companies struggle? What are the factors hindering EU companies?

In many cases, TVs include American connected TV providers in their system. For example, Samsung has a Smart TV application called Internet@TV included in its TVs and provides access to Yahoo! Smart TV, Google Smart TV and Netflix smart TV.¹ Another example is Amazon VoD which is automatically included in LG Smart TV along with Google TV.² This creates important questions regarding market definition and competition. It is worth considering the lessons that can be learned from the analysis of similar issues in the context of default browser choices in the Microsoft case.

There is a broad movement away from broadly open access to content – via portals and search engines – towards the “desktops” of Smart TVs, mobile phones, etc, where the visible screen area becomes “prime real estate” with extremely limited space being allocated – either automatically or via customer choice – to a small number of apps or services. This development needs to be very carefully monitored, as it will almost certainly lead to severe market entry problems.

2. What are the factors affecting the availability of premium content? Are there currently practices relating to premium content at wholesale level which affect market access and sustainable business operations? If so, what is the impact on consumers? Is there a need for regulatory intervention beyond the application of existing competition rules?

In many cases, premium content is available on smart TVs when content providers enter into partnerships with platform operators. For instance, LG entered into an agreement to offer premium content on its Smart TV platform.³

These kinds of partnership can hinder competition as some companies will have the exclusivity for some content. As a consequence, consumer’s access to content will be limited and entry to the market for new players will be difficult, particularly in conjunction with the “real estate” issue described above.

Some regulation may be required in order to restore and/or nurture competition in the market, this being highly beneficial for consumer’s access to content and to diversified offers.

3. Are there obstacles which require regulatory action on access to platforms?

Access to content is often geographically limited. In order to permit Europe’s citizens to fully benefit from Europe’s cultural diversity, it would be valuable to remove such restrictions. It appears certain that there will be significant market access problems in this area. It is remarkable that the EU both facilitates legislation which places obligations on

1 See http://www.abu.org.my/Latest_News-@-Yahoo_and_Samsung_in_Smart_TV_partnership.aspx

2 See <http://www.theverge.com/2012/12/21/3793418/amazon-instant-video-app-finally-available-for-lg-google-tv>

3 See <http://trade.connectedhometechnology.com/article/lg-introduces-smart-tv-premium-content-partnerships>

linear audiovisual providers to broadcast European content and, through incoherent and out of date licensing arrangements, permits rights owners to prevent access to European content on a geographic basis.

4. Do the current AVMSD requirements provide the best way to promote the creation, distribution, availability and market appeal of European works?

Chapter IV, Article 13 of the AVMSD states:

“Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.”⁴

This article is reinforced by article 14, which obliges Member States to take measures on non-linear audiovisual media services actions in favour of European works. This obligation to promote European works is significant in linear audiovisual media services as they have a minimum standard to fulfil. On-demand audiovisual media services have to promote European works “where practicable” and have no minimum standard. The underlying problem is not the increasingly untenable distinction between linear and non-linear services, but the fact that licensing of content in Europe is exceptionally difficult, complex and expensive. This creates a disadvantage for European content which cannot be solved by non-market solutions such as the current AVMSD obligations to support certain types of material.

5. How will convergence and changing consumer behaviour influence the current system of content financing? How are different actors in the new value chain contributing to financing?

This question addresses the wrong issue. Certain actors – such as payment service providers – can provide essential elements in a value chain while doing nothing directly to finance content. It is very important that new related markets are not distorted or destroyed by efforts to increase the funding base for content. The dangers can be seen in the ancillary copyright debate – efforts to ensure that search engines contribute to the financing of the news media will almost certainly lead to levels of cost and bureaucracy that create barriers to enter a market that is currently almost completely controlled by non-European service providers, while also failing to achieve the intended goal of the legislation.

4 See AVMSD p. 17 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

6. Is there a need for EU action to overcome actual or potential fragmentation and ensure interoperability across borders? Is there a need to develop new or updated standards in the market?

The EU should try to overcome the current fragmentation in order to ensure interoperability as it would be beneficial for consumers. Connected TV devices bought in a Member State should work in any other Member State and not only in the country where the sale took place, as it is often the case today. The EU should facilitate the development of a harmonised standard for connected TV. This will foster the entry of new players in the single market and will allow existing national player to extend their market, improving the completion and consumers' welfare.

More importantly, in order to protect privacy, it is often necessary to use encryption and free software operating systems. Audiovisual media convergence implies that the separation between the device that is used to write correspondence, the device that is used for audio conversations and the device that is used to view "premium" video content is getting blurred, and it may eventually totally disappear. If "premium" video content requires digital rights management (DRM) software, and the DRM mechanism is not made available for free software operating systems, this might lead to a situation where people are effectively forced to choose between giving up their fundamental right to privacy and giving up their fundamental right to take part in cultural life.

Devices that include DRM mechanisms often prevent the full capacity of the technology being used and forbid uses that were entirely uncontroversial before technological "progress" gave parts of industry the chance to prohibit them (we see this in efforts to prevent the re-sale of e-books, for example). It is therefore particularly crucial to avoid digital restriction technologies disrupting the market and the relationship of trust between service providers and citizens. For further information and detailed examples on this topic, we recommend EDRI's booklet on DRM, available at <http://www.edri.org/files/2012EDRiPapers/DRM.pdf>.

7. How relevant are differences between individual platforms delivering content (e.g. terrestrial and satellite broadcasting, wired broadband including cable, mobile broadband) in terms of consumer experience and of public interest obligations?

Securing the open and neutral Internet will ensure that such differences are minimised through technological and service innovation. Network neutrality, i.e. the core principle of the Internet whereby anyone can connect with anyone, maximises the size of the available market for audiovisual services, thereby maximising incentives to ensure a seamless customer experience across different platforms. Net neutrality allows individuals and companies alike can create content and provide new services due to the open architecture of the internet - which therefore contributes to innovation and economic growth. Therefore, the importance of net neutrality must be safeguarded as a priority in this policy area. For further information, we recommend to read our previous position papers, responses to public consultations⁵ and recent letter to the European Commission, available at <http://www.edri.org/node/3281>.

⁵ For example <http://www.edri.org/edriagram/number10.16/nn-consultation-answer-edri> and <http://www.edri.org/edriagram/number10.20/edri-answers-net-neutrality-consultation>

8. What frequency allocation and sharing models can facilitate development opportunities for broadcasting, mobile broadband and other applications (such as programme-making equipment) carried in the same frequency bands?

It is a misconception that spectrum is a commodity on the verge of depletion or that it is a commodity to which access needs to be reserved to only a few licensed operators. In reality, spectrum scarcity is mainly due to its partitioning and the arbitrary allocation of frequencies than to growing usage of spectrum. We believe that shared and unlicensed access to the spectrum should therefore be supported to the extent technically possible. We therefore recommend the authorisation of shared access to new bands of frequencies, and in particular to those located between the bands allocated to audiovisual broadcasters. These so-called white spaces can give rise to a new generation of wireless broadband and long-range networks. There must be solid, scientific justifications for any white space that is not being allocated and legacy operators, TV broadcasters in particular, must not be allowed to retain any spectrum on the basis of simple assumptions of possible future needs. All licensed spectrum must be used as efficiently as possible.

9. What specific research needs with regard to spectrum have to be addressed to facilitate such development?

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10. Given convergence between media, is there evidence of market distortion caused by the regulatory differentiation between linear and non-linear services? If yes, what would be the best way to tackle these distortions while protecting the values underpinning the EU regulatory framework for audiovisual media services?

Linear and non-linear services do not offer the same content. Connected TV offers a wider but different range of services than “traditional” TV. The regulatory differentiation resulting from this distinction does not appear to cause market distortion. There is a lack of competition between Connected TV platforms. However, this does not result from the regulatory differentiation between linear and non-linear services. See also our response to Question 11, below.

11. Is there a need to adapt the definition of AVMS providers and / or the scope of the AVMSD, in order to make those currently outside subject to part or all of the obligations of the AVMSD or are there other ways to protect values? In which areas could emphasis be given to self/co-regulation?

There is a grave risk that the regulatory approach to this issue will be restricted to questions of how much the existing linear regulation can be extended to the non-linear environment. This would be disastrous for the development of new services, availability of European content and the ability of European innovators to compete with non-European services – as we already see in other online markets.

The solution lies neither in self nor co-regulation but in European and national policy-makers cooperating with European companies to create the conditions for the achievement of the public policy goals in question in a targeted, efficient and evidence-based manner. It is not a question of “regulating” but creating an environment that enables crucial public policy targets to be achieved.

12. What would be the impact of a change of the audiovisual regulatory approach on the country of origin principle and therefore on the single market?

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13. Does increased convergence in the audio-visual landscape test the relationship between the provisions of the AVMSD and the E-Commerce Directive in new ways and in which areas? Could you provide practical examples of that?

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14. What initiatives at European level could contribute to improve the level of media literacy across Europe?

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15. Should the possibility of pre-defining choice through filtering mechanisms, including in search facilities, be subject to public intervention at EU level?

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16. What should be the scope of existing regulation on access (art. 6 Access Directive) and universal service (art. 31 Universal Service Directive) in view of increasing convergence of linear and non-linear services on common platforms? In a convergent broadcast/broadband environment, are there specific needs to ensure the accessibility and the convenience to find and enjoy 'general interest content'?

This question mixes several different issues. From the perspective of non-linear services, legislation is certainly necessary in order to ensure net neutrality and careful analysis is needed with regard to search neutrality. As a general principle, it is important for both networks and services to provide neutral access to online content – ensuring maximum choice, competition and innovation.

17. Will the current rules of the AVMSD regarding commercial communications still be appropriate when a converged experience progressively becomes reality? Could you provide some concrete example?

18. What regulatory instruments would be most appropriate to address the rapidly changing advertising techniques? Is there more scope for self/co-regulation?

It would be helpful, when asking such questions, for the Commission to be more specific. What does it mean by “address”? What problems would be “addressed”? What public policy

goal would be pursued?

19. Who should have the final say whether or not to accept commercial overlays or other novel techniques on screen?

Since SmartTV enables companies to use customer data for advertisement purposes, questions regarding data protection and consumer protection need to be addressed. In the recent study „HbbTV – I know what you are watching“⁶, researchers of the TU Darmstadt showed that TV channels can engage in targeted tracking activities, estimate in real time how many people tune in to a programme and then choose and display personalised advertisement. Contents are downloaded on an automated basis via HbbTV without the knowledge of the users as soon as they have activated data services. As a general principle, users should remain in control and be given the choice whether or not they wish to receive targeted and personalised advertisement. That is also a requirement of European data protection law in relation to other marketing use of personal data (see Article 14(1) of the main data protection directive, Directive 95/46/EC).

20. Are the current rules of the AVMSD appropriate to address the challenges of protecting minors in a converging media world?

This question is wrongly based on the premise that the rules in the AVMSD are the only ones which are available to protect children in a converged media world. The question is also entirely unclear regarding the challenges that it is referring to. We are not aware of any new concerns being raised regarding the protection of minors in the traditional linear environment. With regard to non-linear services, there are absolutely no grounds to believe that there are problems that have been identified, which could be addressed – let alone effectively or proportionality – by the AVMSD.

21. Although being increasingly available on devices and platforms used to access content, take-up of parental control tools appears limited so far. Which mechanisms would be desirable to make parents aware of such tools?

The European Commission should base policy development on evidence rather than launching consultations on what “appears” to be the case regarding unspecified tools of unspecified effectiveness/usefulness to address unspecified problems. There was already an extensive discussion within the context of the “CEO Coalition” about the development and use of parental controls – duplicating these discussions in an evidence vacuum in the context of the AVMSD appears somewhat unwise.

22. What measures would be appropriate for the effective age verification of users of online audiovisual content?

The measures that would be appropriate (i.e. proportionate) would depend on the problems that they would be seeking to solve – it is pointless to ask this question in isolation. This is a very complex issue, which raises issues of data protection, freedom of communication, the

6 Marco Ghiglieri, Florian Oswald, Erik Tews, *HbbTV – I know what you are watching* https://s3-eu-west-1.amazonaws.com/media.cased.de/files/2013_CASED_HbbTV.pdf

right to anonymous communication, etc. It is a subject which has already been discussed in great detail in the context of Safer Internet Action Plan and related initiatives. It is neither appropriate nor helpful to re-hash those discussions, particularly in the absence of any specific context.

23. Should the AVMSD be modified to address, in particular, content rating, content classification and parental control across transmission channels?

Content rating and content classification can be useful, but there is most certainly no need to impose – especially at this stage – regulatory obligations.

24. Should users be better informed and empowered as to where and how they can comment or complain concerning different types of content? Are current complaints handling mechanisms appropriate? and

25. Are the means by which complaints are handled (funding, regulatory or other means) appropriate to provide adequate feedback following reports about harmful or illegal content, in particular involving children? What should be the respective roles/ responsibilities of public authorities, NGO's and providers of products and services in making sure that adequate feed-back is properly delivered to people reporting harmful or illegal content and complaints?

This question is already comprehensively addressed in the context of the Safer Internet programme of DG CONNECT. There is nothing to be gained from duplicating this work in this context.

26. Do you think that additional standardisation efforts are needed in this field (Accessibility for persons with disabilities)?

Article 7 of AVMSD states that “*Members States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with visual or hearing disability*”.⁷

As the European Commission Green Paper on Fully Converged Audiovisual World admits, the implementation of the provision made in article 7 “varies considerably” from one Member State to another.⁸ New technologies offer a wide range of new possibilities for increased accessibility, some of which are already being rolled out. It would be valuable for the European Commission to ensure that best practice is shared and that restrictive IPR on new technologies (patents, in particular) do not serve as a barrier to their roll-out and use.

27. What incentives could be offered to encourage investment in innovative services for people with disabilities?

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⁷ See AVMSD p.15 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

⁸ See Green Paper of the European Commission on Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values p. 16 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>