



The Consumer Voice in Europe

GREEN PAPER PREPARING FOR A FULLY CONVERGED AUDIOVISUAL WORLD

BEUC RESPONSE

Contact: **Kostas Rossoglou – digital@beuc.eu**

Ref.: X/2013/064 - 11/09/2013

Summary

The European Consumer Organisation (BEUC) regrets the absence of a coherent EU audiovisual policy and the significant delay in the establishment of a Single Market for Audiovisual content.

BEUC has identified the following as the main bottlenecks:

- **lack of consumer-friendly legal offers** for audiovisual content that respond to consumers' expectations;
- **complexity of licensing systems**, particularly in terms of legal uncertainty as regards the scope and the rights that need to be cleared;
- **absolute territorial exclusivity** and market fragmentation is irreconcilable with the Treaty, as confirmed by the European Court of Justice in the recent Premier League case;
- **national chronological and territorial release** windows make no sense in the online environment;
- **outdated copyright exceptions and limitations** fail to establish a balance between the rights of creators and the rights of the general public.

With regards to policy initiatives that need to be undertaken, BEUC:

- believes that all service providers, be they linear or non-linear should be bound by the same obligations to comply with consumer protection and data protection rules for as long as the provider has **responsibility for the choice** of the content;
- stresses the need for providers of audiovisual media **services from countries outside the EU** to be subject to EU legislation when they target their services to consumers within the EU;
- notes that data protection concerns should be addressed early in the development of connected devices (**privacy by design**) and be respected by the default settings (**privacy by default**);
- calls for legislative action with regards to **net neutrality** to ensure the open and non-discriminatory access to information and content for all citizens;
- supports the revision of the current system of **copyright exceptions and limitations** with the aim of restoring the balance between the exclusive rights of right holders and the right of consumers and society as a whole.

The European Consumer Organisation (BEUC) welcomes the launch of a consultation on media convergence in the audiovisual environment. Media convergence has fundamentally changed the traditional model when broadcasters controlled what consumers watched and when. Media convergence provides consumers with new services to enjoy the content of their choice at anytime, anywhere and on any type of device.

However, the everyday online experience of consumers is different; currently, consumers experience geo-blocking and territorial restrictions when they try to have access to legal services for audiovisual content online. Access to legal services for audiovisual content remains restricted alongside national borders, thus depriving consumers of effective choice and creators of the opportunity to reach new audiences.

Audience demand drives the supply of high quality and engaging content and incentivises suppliers throughout the value chain to devise innovative business models. In return, substantial provision of attractive legitimate sources of content can help to counter illegitimate content sources.

BEUC therefore supports the ambition of the European Commission to ensure the widest possible access to European diversified content for all Europeans.

Market considerations

(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?

(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?

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

The digital environment offers new possibilities and opportunities for both creators and consumers. EU consumers have an unprecedented cultural sector on their doorstep, but the barriers preventing them from accessing content are overwhelming. For consumers to benefit from the economies of scale offered by the Digital Single Market¹, concrete policy actions are needed to overcome the remaining barriers.

The Single Market for European audiovisual content is, so far, a distant dream. The patchwork of different audiovisual markets in Europe is mainly the result of varying technological, economic and regulatory circumstances across the EU.

¹ Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market.

Europe's audiovisual industry is highly fragmented and consists primarily of micro-businesses and SMEs who produce two to three films a year on average. Large Hollywood studios face little competition from individual European film. It is because of this structural weakness and the strength of major Hollywood studios that European rights holders have difficulty accessing markets beyond the country of production and co-production. Cross-border circulation of audiovisual works in Europe remains weak².

It is also important to stress that there is currently significant uncertainty as to whether EU legislation applies to US companies. For instance the obligations of the Audiovisual Media Services Directive³ do not apply to US companies, thus distorting competition to the detriment of EU companies.

Consumer demand

Despite the existence of diverging consumer preferences, the objective of a coherent EU audiovisual policy should be to build consumer demand for audiovisual works, both European and international, and to increase the works available online. The main problem remains the lack of satisfactory legal offers for audiovisual works which respond to consumers' expectations.

The situation is even worse when it comes to European works; consumers are provided with hardly any choice regarding European works; the majority of works available are Hollywood productions which tend to dominate the European market. The same applies to TV programmes and sports events to which consumers are refused access when trying to watch from another EU Member State.

Consumers are increasingly willing to pay for legal content, including for films, TV shows and sporting events⁴. It is only by providing valuable services to the consumer that unauthorised copyright infringement will be reduced. According to a recent survey, 71% of consumers say online content of any kind will have to be considerably better than what is currently free before they will pay for it⁵.

Copyright related bottlenecks

An additional bottleneck relates to the inefficiency of current licensing schemes for audiovisual content. Commercial users are confronted with divergent rules and rights when trying to establish multi-territory and pan-European legal offers for audiovisual content. In most countries, the rights to a film are transferred by the authors and performers to the film producer who then holds the rights and can licence the work. However, the contracts by which rights are transferred to the producer do not always cover new means of exploitation, thus necessitating renegotiation of the contract and additional licensing costs.

² 'Multi-Territory Licensing of Audiovisual Works in the European Union', Report by KEA European Affairs.

³ Directive 2010/13/ EU of the European Parliament and the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation of administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

⁴ The Nielsen Company, February 2010, changing models: global perspectives on paying for content online.

⁵ Idem.

In addition, the EU copyright framework remains technology specific. For instance, the current definition of broadcasting does not appear appropriate in an environment in which the means of transmission are converging and becoming increasingly interchangeable. In addition, a number of key notions, such as the notion of the “public”⁶, and what constitutes “on demand” distribution are not clearly defined in EU copyright law, resulting in legal uncertainty as to the rights needing to be cleared.

Net Neutrality

BEUC shares the analysis by the European Commission that platforms for distribution of content could favour certain companies or their own services in the case of vertically integrated companies.

Such practices put at risk the internet model based on non-discrimination i.e. any content, application or service could be put online without needing to ask operators or anyone else for permission. This model has allowed innovative content and applications to be developed and disseminated across the internet, thereby also opening a whole new world of possibilities for SMEs and consumers. This virtuous cycle of online innovation has in turn generated constant consumer demand for more and better internet access services.

Altering these fundamentals will have serious negative consequences. Any new model which breaks this virtuous cycle will hamper innovation and dissuade the millions of content and application providers who innovate every day thanks to the possibilities offered by the open internet.

Unless the European Commission undertakes urgent action to safeguard net neutrality, the creation of a ‘fast lane’ on the internet would allow the few biggest and wealthiest content providers, to dominate the internet. In such a scenario, the impact on cultural diversity would be dramatic.

The current framework, which is based on transparency and *ex post* intervention of competition rules, is inadequate to protect net neutrality. While these are necessary mechanisms to construct a healthy market, they do not effectively enable citizens to exercise their fundamental rights and enjoy their freedom of expression by being able to access an open and neutral internet. Users, not network providers, should be able to decide on their own what they want to do with their internet connection. BEUC has issued a Call for Action together with the citizens’ organisation European Digital Rights (EDRI) to restore and protect net neutrality⁷.

⁶ It is an open question how many persons are necessary to constitute a public and to what extent the persons must have personal relationships in order not be regarded as a public. Defining the terms public is left to national law and to the courts of EU Member States.

⁷ [Call for Action](#): Time to truly protect Net Neutrality in Europe

Financing models

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

The Audiovisual Media Services Directive⁸ (Article 3i) explicitly requires Member States to ensure that not only television broadcasters, but also on-demand audiovisual media services promote European works. However, this provision is implemented differently by EU Member States, with the majority of them not including specific quotas or detailed provisions⁹. It is crucial the European Commission closely monitors the implementation of the AVMSD and provides guidelines to Member States regarding the specificities of Article 3i.

(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?

The current models of film financing and distribution, based on staggered platform and territorial release windows, are no longer relevant in the context of online audiovisual services.

Although national chronological release windows allow distributors to maximise their revenues, they also result in a fragmentation of the market along national borders and hamper the development of new digital distribution platforms. The traditional hierarchy with cinema as the first window followed by DVD, pay-TV, free-to-air TV and Video on Demand no longer makes sense with the emergence of new distribution channels. Banning the digital distribution of a film on VOD for four months and up to 3 years after the cinema release, as is the case in France, fails to reflect the reality of the 21st century.

Similarly, territorial release windows within the European Union and even between neighbouring countries with the same cultural background cannot be justified. For example, the European film *Océans* was released in Belgium on 27 January 2010 and in Sweden only 10 months later on 1 October 2010; the European film *Potiche* was released in France and Belgium on 10 November 2010 and in Germany 5 months later (March 2011)¹⁰.

The current system of territorial and chronological release windows is highly detrimental to small, low-budget works with limited access to theatres and means of promotion; having to wait months before making the film available online does not make any sense at all.

⁸ Directive 2010/13/ of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

⁹ Multi-Territory Licensing of Audiovisual Works in the European Union, Report by KEA European Affairs- October 2010.

¹⁰ <http://www.imdb.com/>.

Reverse windowing, where films become available on VOD shortly before their release in cinemas with the aim of building a fan base, has been successful so far.

As regards current funding schemes, BEUC is concerned with the practice followed in most EU Member States which subjects public support for film production to specific release windows. Similar funding schemes are out of date and efforts should be undertaken to increase funding for innovative distribution methods.

State or public funding for film production should seek to leverage the benefits and extended audience provided by online distribution and a Digital Single Market. Such public funding should not discriminate against specific platforms nor include territorial restrictions.

Interoperability of Connected TV

(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?

Convergence of devices is becoming more and more of an everyday reality with connected TV models and cloud computing. Consumers are provided with the possibility to access content by using different devices (internet-enabled TV sets, PCs, smartphones and tablets).

Consumers expect to be able to use Information Society products and services securely and without undue technical restrictions. However, the real consumer experience is often different¹¹. It may happen that a connected device bought in one Member State does not allow modification of its settings to receive services from other Member States.

BEUC supports EU action to overcome fragmentation and ensure interoperability across borders.

Regulatory framework

(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?

(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?

(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?

¹¹ ANEC position [paper](#) on interoperability and the role of standards

(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?

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

The Audiovisual Media Services Directive has been successful in combining the right to provide audiovisual services with the right to freedom of expression and information and the protection of important public interest objectives. However, media convergence and the emergence of connected devices, marks a major challenge to the regulatory framework. The boundaries between linear and non-linear services are blurring.

Within the AVMSD, the relaxed rules for non-linear services and the stricter rules for linear services apply to content on one screen. For example, linear TV news must not be interrupted by commercials. However with Connected TV, the commercials could appear on the same screen at the same time as a news show.

Evidently, this may lead to unequal competitive conditions and unacceptable discrepancies in the protection of users. Such hybrid receiving systems allow users to browse indiscriminately between TV channels and the internet, including websites which illegally offer audiovisual content.

Aspects that warrant regulation (as per the regulation objectives of the Directive), include protecting children, ensuring diversity of opinion and of the media, accessibility for the visually and hearing impaired, safeguarding fair competition, quality and content based regulation of advertising.

BEUC believes that all service providers, be they linear or non-linear, should be bound by the same obligations to comply with consumer protection and data protection rules for as long the provider has responsibility for the choice of the content and determines the manners in which it is organised.

Compliance with data protection rules is even more necessary when considering the possibility for the provision of personalised content services to consumers. Data protection concerns should be addressed early in the development of connected devices ('privacy by design') and be respected by the default settings ('privacy by default').

It is equally important to ensure that providers of audiovisual media services from countries outside the EU are subject to EU legislation when they target their services to consumers within the EU, including 'free services' which are based on monetising the secondary use of consumers' data.

With regards to the interaction with the e-Commerce Directive BEUC would be opposed to any revision of the "temporary" derogations to the country of origin principle which can be justified on the grounds of public health, public order or consumer protection. A possible revision of Article 3.4 of the e-Commerce

Directive¹² might result in consumers being exposed to abuses and unfair practices from providers in other Member States. In addition, the risk of forum shopping, where service providers establish themselves in the Member State with the most advantageous legislation, is considerable and cannot be ignored.

Lastly, BEUC would have a more cautious approach to the self and co-regulation with regards to internet issues. Digital technologies, although beneficial to consumers, also raise challenges for the protection of fundamental rights. In those cases, self and co-regulation cannot be considered appropriate solutions. On the contrary, there are a number of conditions which need to be met for self and co-regulation to deliver benefit to consumers, including effective monitoring, adequate redress, strong enforcement, the definition of clear objectives, robust standards and a strong independence governance.

Media freedom and pluralism

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

(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'?

BEUC shares the analysis of the European Commission regarding the role of search platforms in defining consumers' access to content.

Millions of consumers use search engines on a daily basis to source the information most relevant to them and to access content of their choice. The fact that search engines select and rank results according to perceived relevance is, in general, of tremendous benefit to consumers. Consumers trust that search results are impartial and based solely on relevance to their query, without any manipulation of the order of results. It is important that the European Commission exercises its powers to sanction dominant companies who abuse their position to the detriment of consumer welfare.

A competitive media market is essential for pluralism of media. European and national competition authorities should take into account the specific value of media pluralism in the enforcement of competition rules. They should also take into account the increasing merging of different channels of communication and media access in the definition of the relevant markets.

The dominant position held by some network access providers or internet information providers should not be allowed to restrict media freedom and pluralism. An open and non-discriminatory access to information by all citizens must be protected by enriching the principle of net neutrality in law and by ensuring its

¹² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

effective enforcement. A regulation of net neutrality would avoid certain industry players becoming gatekeepers of media organisations and EU citizens' communications and their right to freedom of expression and to impart and receive information. Consumers' right to access information and freedom of expression must be protected.

Commercial communications

(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?

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

BEUC believes the rules on commercial communications in the Audiovisual Media Services Directive are still relevant. There should be further assessment as to whether linear and non-linear services targeted to consumers in the EU should be subject to the same rules.

An essential element of media convergence is the provision of personalised content offers to the consumer. Despite the potential benefits in terms of convenience and consumer choice, such personalisation raises serious data protection concerns. Any personalisation or individualisation of services usually requires the collection and cross-linking of personal data. Full respect for consumer privacy and compliance with the data protection rules are essential conditions to enhance consumers' trust in new innovative media services.

The European Union has legislation in place governing the main aspects related to the collection of information about users through cookies and other tracking technologies¹³, as well as rules which apply where this information is considered personal data¹⁴. A proposal for a Data Protection Regulation was adopted in January 2012 and is currently being debated in the European Parliament and the Council. Although the outcome of the institutional negotiations is hard to predict, the draft proposal as adopted by the European Commission has sought to clarify a number of key issues in light of technological developments.

Self and co-regulation could potentially play a role in the area of online advertising. However, the recent initiative on Online Behavioural Advertising launched by the Interactive Advertising Bureau (IAB) in order to implement the new provisions of the amended e-privacy Directive on the storing and accessing of cookies, has failed to respond to the concerns raised by consumer associations.

¹³ Directive 2009/136/EC of the European Parliament and of the Council amending Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

¹⁴ Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

BEUC has been largely critical of the initiative for multiple reasons. First, it is not a solution to online tracking as it does not stop tracking. Second, the initiative has not received the endorsement of the whole industry.. Third, it comes with complex compliance and enforcement mechanisms without the participation of third parties and namely consumer. Finally, the information presented to users is misleading and the choice mechanism confusing.

Furthermore, it is also highly questionable whether an icon-based system can actually enhance consumer empowerment. A recent TRUSTe study in the US with a comparable logo, showed that out of approximately 20 million consumers (7 million unique visitors), it was accessed 56,000 times with 44,000 unique views. If calculations are made just on the unique visitors and unique views, this means that only 0.6% of consumers clicked through to the ad info page. This, in no way, signifies informed consent.

With regards to industry standardisation initiatives, the ongoing discussions within the World-Wide-Web Consortium (W3C) with regards to the development Do Not Track standard (DNT) which could allow users to choose whether or not they want to be tracked while they navigate the internet have highlighted the difficulty of an industry-led solution.

Protection of minors

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

(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?

Accessibility for persons with disabilities

(26) Do you think that additional standardisation efforts are needed in this field?

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

Article 30 of the United Nations Convention on the Rights of People with Disabilities recognises the right to “enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats”.

It is estimated that over 81 million adults in Europe have hearing defects and 30 million people serious sight impairment. These people are unable to interact with digital content unless the content is made accessible. The main problems are obvious and relate to the lack of interpretative services such as audio description, subtitling and captioning to name a few. However, these problems are not only relevant to disabled people, but are also crucial components of a coherent strategy to increase the availability of audiovisual content across Europe.

Disabled people should be able to access all the services available to others and therefore a fundamental right should be recognised in EU law.

The EU should support the development of technologies and their integration with digital content. Technology makes it possible to eliminate barriers to communication and to access information. Technologies allowing for automatic subtitling of videos and live events transmitted online, the development of mobile applications allowing subtitling and language selection, automatic generation of voices for audio description, automatic translation have already been developed. Therefore, the focus should be on their widespread integration into digital technologies.

END