

EDiMA feedback on the proposal for amending AVMS Directive 2010/13/EU

EDiMA¹ would like to support the view that the Audiovisual Media Services Directive (AVMSD) has and continues to be a solid basis for existing and new companies to provide audiovisual content both across the EU and globally. As the European Commission confirms, the audiovisual sector in Europe has “substantial cultural, social and economic significance and shapes identities, projects values and can be a driver of European integration by contributing to our shared European identity.”² Despite obstacles such as complex and cumbersome licensing requirements, digital media and services are already driving growth in the creativity sector to a large extent.³

Digital services allow consumers to discover and access creative content anytime, anywhere, increasing choice, access and opportunities.⁴ Digital technologies also reduce production and distribution costs for content,⁵ as well as allowing producers of content to reach global audiences almost instantly. VOD services, for example, have grown significantly in the recent years, with a growth rate of 59% in Germany and 12.7% in France in 2011 alone, and total revenue generated by video-on-demand (VOD) services in Europe are expected to grow from EUR 850 million in 2011 to EUR 1.5 billion in 2017.⁶

Therefore, when examining the recent Commission proposal amending Directive 2010/13/EU, EDiMA is encouraged by some of the underlying principles in the proposal for revision and especially welcomes the clarification that the proposal will not create any obligations that might conflict with the ecommerce Directive and more specifically the safe harbour entrenched therein which we view as a cornerstone of European economic development. This is echoed by the fact that REFIT exercise of the AVMSD does not impose editorial responsibility to online platforms.

1. Country of origin

AVMSD does set clear minimum standards for linear and non-linear broadcasters and in order to maintain those clear standards, the country of origin principle must remain at the core of the AVMSD. The country of origin principle has been a cornerstone in developing innovative, cross-border services which serve the needs (and foster the spirit) of the Digital Single Market. Legal certainty should be maintained and this principle should not be “chipped away” by carving out certain issues or exceptions (such as levies,⁷ or local rules on financing or prominence) for a different approach, particularly where the promotion of EU works is involved.

¹ EDiMA is the European trade association representing online platforms whose members include Airbnb, Allegro Group, Amazon EU, Apple, eBay, Expedia, facebook, Google, King, LinkedIn, Microsoft, Mozilla, PayPal, TripAdvisor, Twitter, Yahoo! Europe and Yelp.

² Communication: [European film in the digital era, Bridging cultural diversity and competitiveness](#). (May 2014)

³ From 2001 to 2011, all growth in the creative sector has been digital (30bn Euros) (Booz & Co 2013).

⁴ 62% of consumers go online to find unique content that they do not find elsewhere, and two thirds or more of consumers value the diversity of information and opinion they find online (BCG, 2013)

⁵ For example, in the music sector, around 66% of revenues from a digital download now go to the artist and label, compared to around 32% for a CD sale (Booz & Co, 2012).

⁶ European Audiovisual Observatory, Yearbook 2012.

⁷ Levies posed on external VOD providers/services are contradictory to aim of AVMS Directive to simplify cross-border AVMS by introduction of the country of origin principle (as evident in recital 34, art. 2, art. 3, art. 4) “one Member State should

2. Linear/Non-linear

The approach adopted in the proposal does not truly reflect the difference between non-linear services, centred on user control and choice, and traditional television broadcasting services. These services offer very different value propositions for consumers and EDiMA views the current AVMSD regime as providing a solid legal basis for the sector to develop and innovate. Whereas strict rules regarding availability of content were necessary in the offline world in the past today the online world sees consumers able to access a wide variety of content and thus the necessity to have such stringent rules for non-linear players does not exist. We therefore believe that a potential easing of the strict framework used for the linear environment in the past could have provided with a more progressive manner for the current environment.

Furthermore, ensuring a truly competitive and innovative marketplace, where content is made available to all distributors in a non-discriminatory fashion, will serve consumers and contribute to financing of content far better and more sustainably than any burdensome rules.

3. Promotion of creation, distribution, availability of European works

Digital and online services continue to serve as key actors in broadening the promotion and distribution of European creations throughout the EU and the world. For example, European shows and feature films can be exported and viewed by a global audience allowing for more viewers than when a show would be restricted to a national broadcast - or VOD service.

EDiMA supports the aim to promote the visibility and discoverability of European works and the stimulation of the European audiovisual sectors, but views the initiatives presented within the AVMSD to better promote the access to and promotion of European works using quotas and prominence⁸ as detrimental to the sustainability of existing and new business models and personalisation of services that allow European consumers the ability to access a wide variety of European and international content. New ways of promoting the distribution and consumption of European content should be explored which function in the changing world of viewing patterns and choice.

Internet services allow the dissemination, discovery and monetisation of content at little or no cost and on a potentially global scale. Cultures from all over the world are at the fingertips of Internet users.

This means more diversity on the supply side and on the demand side, as consumers access more diverse content. In music, the number of releases by independent labels in the US now exceeds

have jurisdiction over an audiovisual media service provider" (34th recital), namely the Member State, in which the provider is established (Art. 2 AVMS Directive). Those Member States, in which the service can merely be accessed, but in which the provider is not established, may not prevent the further distribution of the services (Art. 3). The Member States can principally only impose stricter regulations than envisaged in the Directive upon domestic providers (Art. 4)."

⁸ Article 13 '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.'

releases by major labels by a factor of two. There are more artists achieving success; the number of different artists per year featured in the Billboard Top 200 has increased from about 600 in 1999 to 1000 artists in 2010, a 67% increase.⁹ In news, according to the Reuters Digital News Report 2015,¹⁰ online news users use more sources of news than offline users: in the UK, offline news consumers consult 2.8 different news sources in a typical week, as opposed to 4.28 sources a week for online news consumers.

European content is achieving global reach online - allowing for more viewers than when a show would be restricted to a national broadcast or VOD service. On YouTube, in 2015 alone, there have been over 60 billion views of European videos by consumers from around the world. A quarter of the global watch-time is attributable to content uploaded in Europe.

Tobias Moller of the Berlin Philharmoniker oversees digital to bring classical music for his institution to new audiences - in his own words: "Our viewers come from all over the world — from Brazil to Taiwan — and many of them would never be able to come to Berlin to enjoy a concert live. Technology has allowed us to find fans we never knew existed."

European film production (including documentaries) and the share of European films in the European box office are at a record historical high: 1603 European films were produced in 2014 (up from 1499 in 2010) and their share of box office (theatrical released) reached 33.6% (up from 25.4% in 2010).¹¹ Between 2005 and 2009, four European countries were amongst the top 20 film producers in the world (France, Germany, Spain, Italy), and the number of films produced in all those countries increased.¹²

3.1. Quotas

The imposition of strict numerical quotas to ensure the promotion of European works by on-demand audio visual media services is a prime example that the proposal does not fully reflect the nature and difference of these services. Rigid numerical quotas risk suffocating the market for on-demand audiovisual media services, and in particular, the VOD market segment. An obligation to carry content to meet a numerical quota may cause new players to struggle to achieve a sustainable business model, causing distortions as such players may have to spend resources on content in excess of its economic return. For example, hours-based or titles-based numerical quotas risk creating a perverse incentive

⁹ (Waldfoegel, "And the Bands Played On: Digital Disintermediation and the Quality of New Recorded Music" (2012).

¹⁰ See Reuters Institute for the Study of Journalism, University of Oxford, 'Reuters Institute Digital News Report 2015' (2015), available at https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Reuters%20Institute%20Digital%20News%20Report%202015_Full%20Report.pdf

¹¹ European Audio-visual Observatory, 'Box office up in the European Union in 2014 as European films break market share record', May 2015, available at http://www.obs.coe.int/en/-/pr-cannes-2015-film-market-trends-2014?redirect=http%3A%2F%2Fwww.obs.coe.int%2Fpress%2Findividual-press-releases%2F2015%3Fp_p_id%3D101_INSTANCE_AboWabb2yPCc%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_pos%3D2%26p_p_col_count%3D3

¹² UNESCO, 'From International Blockbusters to national hits: Analysis of the 2012 UIS Survey on feature film statistics', available at <http://www.uis.unesco.org/FactSheets/Documents/ib8-analysis-cinema-production-2012-en2.pdf>

for VOD service providers to license more of the least expensive European titles and fewer premier European titles. This undermines what should be the goal of promoting European works: ensuring that European content producers that succeed in Europe and internationally are rewarded for their success, creating a positive feedback cycle for high-quality and internationally competitive European content production.

There is no real need for the imposition of strict numerical quotas to ensure the promotion of European works by on-demand audiovisual media services. On-demand audiovisual media services, not being constrained by the limited “shelf space” of programming hours, inherently offer opportunities for the promotion of European works. It is also essential to bear in mind that VOD catalogues are built to provide customers with what they want to watch. In the EU, culture, tastes and languages differ, so to be successful it is important to offer a selection of exclusive movies and series across all genres, languages and countries of origin. Furthermore, some broadcasters in certain EU MS are allowed exemptions to the set quotas today already.

Finally, VOD service providers provide a mix of licensed and original European content, contributing to the promotion of European works not only within Europe, but also internationally. For example, Netflix has produced, in association with NRK1, the series “Lilyhammer”, Amazon will become the first video online service to finance a German movie production with its participation in ‘Bullyparade- Der Film’ and recently confirmed production on “You are Wanted”, the first German original series produced by a video online service. At the same time, VOD service providers offer high-quality European content outside the EU, such as “The Artist” or “Downton Abbey”.

In terms of the proposal, EDiMA would therefore like to understand how in these instances a level playing field can be achieved? It is also important to clarify the definition of what constitutes a European work, as the current text entails a heavy burden in terms of research and reporting.

3.2. Prominence

When watching content via a VOD service, subscribers already control their own viewing experience and the titles surfaced to them are highly personalised. There is, therefore, no need of any regulatory measures that would interfere with a VOD company’s “personalised” approach to providing their services.

The domestic content producers are best positioned to benefit from the increased consumer choice enabled by VOD service’s large catalogue of titles. Content producers working in the same linguistic, cultural, and artistic context as potential consumers have an inherent advantage in producing works that attract those consumers, but the limited “shelf space” of linear TV has diminished the value of that advantage.

This mixture of global and local content is driven by a desire to delight European consumers and competition from a number of different distributors including other Internet-delivered services, public and private broadcasters and other pay-tv operators. This is not driven by regulation; it is driven by competition to deliver the best service possible. In a world of increasing choice, the services best

positioned to respond to consumer demand will continue to distribute a certain amount of local content.

The consumer personalisation approach taken by many VOD services allows for more European works to be available to consumers in Europe, and helps those members find those European works. In effect, promoting them. EDiMA encourages an approach to the proposal which continues to favour the freedom of services to be able to provide consumers quality content that best meets their interests, culture, tastes and languages, while continuing to promote European and international creators without stringent quotas that do not fit the digital environment or consumer expectations

4. Protection of Minors and prohibiting hate speech online

EDiMA welcomes the Commission's co- and self-regulatory approach to online media platforms, as an alternative to regulation and look forward to engaging in stakeholder dialogues on fighting illegal content online, protecting minors, improving the experience for families on the Internet and ensuring that our platforms are not facilitating the incitement to hatred.

Regarding the protection of minors, EDiMA views the current rules offer a solid and robust framework that appropriately address the protection of minors in the media world. The Internet has led to the development of a wide effective ecosystem, backed by the e-commerce Directive, which offers a strong and flexible legal framework. These include industry codes of conduct, self/co-regulation and the development of industry best practices. These approaches have proven successful to ensuring a stable, well-regulated market.

VOD service providers for example, have built a variety of means to ensure that parents can protect their children from inappropriate content.¹³ Varying from age rating information to specific children's sections and PIN protection measures, VOD service providers aim to create an environment that is safe for minors and that give parents suitable options to find appropriate content for younger children.

User generated content websites, YouTube, Facebook, Twitter and others, services which are not targeted at under-13 year-olds, have developed rules and community guidelines that clearly describe the type of content and behaviour that is and is not allowed on the site. Policies have been developed which deal specifically with sensitive content as well as tools such as interstitials which contain sensitive media warnings. A user will see a warning and must click through before viewing the content. Community flagging systems and efficient reporting mechanisms, designed for desktop and mobile, have been developed and are used to help identify content that violates these rules and guidelines. Certain tools have also been developed to empower users to have a safer online experience, control the content they view and the users they interact with and to fulfil their responsibilities regarding the content they make available. For example, tools have been designed which allow users to hide and/or block objectionable content.

¹³ For example, Apple (<https://support.apple.com/en-us/HT201659>); Amazon (<http://www.amazon.com/gp/help/customer/display.html?nodeId=201423070>); Google Play (<https://support.google.com/googleplay/answer/1075738?hl=en>); and Netflix (<https://help.netflix.com/en/node/264>) to name a few.

The Internet industry has signed a number of codes of conduct and charters in various European countries and in Brussels that commit them to aggressive action to protect minors online and to prevent the spread of child sexual exploitation imagery online. For example, these include the Better Internet for Kids¹⁴ strategy and agenda and The ICT Coalition membership and principles.¹⁵ Companies also offer advice and guidance on their websites to parents and teachers about online safety and work with third party experts and NGOs to solicit their views on policies, tools and reporting procedures.

In order to allow VOD service providers to scale and serve users in multiple member states, EDiMA supports the development of flexible self-rating tools. Such tools should respect local cultures and initiatives while allowing companies to rate new content quickly without having to submit to a rating board in all 28 Member States of the EU.

Provisions regarding self- and co-regulations should be developed for AVMS as they are currently defined. If the scope were to be extended, for example, the AVMSD would risk undermining currently established, as well as developing, schemes created to meet the specific natures and scale of information society services. As well, new schemes designed for video-on-demand would also not function.

Measures for further harmonisation could be encouraged, but as participants have experienced within the CEO Coalition for a Better Internet for Kids, there are a number of difficult issues that need to be addressed to create greater harmonisation.

EDiMA would continue to support the levelling down approach concerning the current distinction between the rules covering television broadcasting services and on-demand AVMS, which would impose on television broadcasting services the same level of protection as on-demand services. This does not mean less protection for minors, but rather that the protections that exist are more appropriate to the medium.

¹⁴ Where 26 leading companies have come together to form a new Coalition to make a better and safer internet for children. Priority actions include making it easier to report harmful content, ensuring privacy settings are age-appropriate, and offering wider options for parental control, reflecting the needs of a generation that is going online at an increasingly young age

¹⁵ The ICT Coalition for Children Online aims to help younger internet users across Europe to make the most of the online world and deal with any potential challenges and risks. With the internet now one of the most important sources of information, education and entertainment for many people, it is vital that industry, government, schools and other relevant organisations work together to help children and young people use the internet in a safe and responsible way.