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International Information for International Business

**VOLUME 10, NUMBER 8 >>> AUGUST 2015**

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## **EU Audiovisual Media Services Directive Open for Debate**

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### **Background and Objectives**

The European Commission launched July 6 a public consultation on the Audiovisual Media Services Directive 2010/13/EU ("AVMSD"), entitled "A media framework for the 21st century," paving the way towards a single European market for audiovisual media services.

The AVMSD, which was first adopted in 2007, harmonized the rules on audiovisual media, for both linear (traditional TV broadcasts) and non-linear (on-demand) services, and facilitated the cross-border provision of audiovisual media services across the European Union on the basis of the country of origin principle.

Since its 2007 adoption, the audiovisual media landscape has undergone significant changes due to the convergence of media services. It is becoming possible for linear and non-linear audiovisual media services and numerous other communications services to be consumed on one and the same screen, be it a tradi-

tional TV screen, computer, tablet or any other mobile device. Consequently, lines are blurring between the familiar 20<sup>th</sup> century consumption pattern of linear broadcasting received by TV sets and the on-demand services delivered to computers. Although this transformation in the audiovisual media landscape has the potential to create a new viewing experience for audiences and new opportunities for businesses, many questions arise and a lot of pressure is put on the AVMSD. In particular, as a consequence of this convergence, it is now barely apparent to the user what kind of service is being consumed, which in turn leads to uncertainty as to the level of legal protection that can be expected.

In its *Communication on a Digital Single Market Strategy for Europe*, published on May 6, 2015, the European Commission announced under the title "A media framework for the 21<sup>st</sup> century" that it will review the AVMSD in 2016 with a focus on its scope and the nature of the rules applicable to all market players. In particular, measures for the promotion of European works, rules regarding the protection of minors, and advertising rules.

Earlier in April 2013, the commission adopted a Green Paper entitled "Preparing for a Fully Converged Audio-

visual World, Growth, Creation and Values” and invited stakeholders to share their views on the converging media environment and its implications for the AVMSD. The outcome of that consultation has helped the commission to shape its current public consultation.

## Key Questions Raised

The aim of this recently published public consultation is to invite all stakeholders, ranging from market players to individual users of audiovisual media services, to share their views on an array of issues related to the AVMSD in order to review the existing rules and offer a regulatory environment for audiovisual media services fit for the digital era.

Through the consultation process, respondents can express their views specifically on several detailed questions structured by the commission around six key topics, such as creating a level playing field, enhancing consumer protection, ensuring the protection of users (e.g. minors), promoting European audiovisual content, strengthening the single market and strengthening media freedom and pluralism.

## Scope of the AVMSD

One of the key questions raised by the commission seeks views on whether the provisions defining the material and territorial scope of the AVMSD are still relevant, effective and fair.

The AVMSD regulates traditional television broadcasts (e.g. BBC1) and on-demand media services (e.g. Netflix), notably programs and services that are TV-like and for which providers have “editorial responsibility.”

The scope of the AVMSD, however, is not adapted to a converged media environment, in which platform operators (e.g. YouTube), portal operators (e.g. Samsung Smart Hub) and aggregators (e.g. Virgin TV Anywhere) are increasingly offering their services to the consumer. Although the aforementioned players have established a gatekeeper position in the content delivery chain, they do not have editorial responsibility and may consequently operate outside the scope of the AVMSD.

Nevertheless, as those players compete for the same audience and operate in between the content editors and the consumer, legislative action is recommended to restore the uneven playing field shared by traditional media service providers subject to the AVMSD and those that fall outside the scope of the AVMSD.

Pursuant to the existing national media legislation in Belgium, France and Germany, these “gatekeepers” could be brought within the scope of the AVMSD by introducing a new category of actors that would only be subject to a set of core obligations of the AVMSD (e.g. regarding the protection of minors and commercial communication).

## Graduated Regulatory Approach

The commission is also seeking views regarding whether or not the graduated regulatory approach should remain in its current form.

The AVMSD acknowledges that a core set of societal values should apply to all audiovisual media services (television broadcasts and on-demand services), but provides for lighter requirements for on-demand services when compared with television broadcasts. This approach has been justified in the recitals of the AVMSD by relying on the different degree of choice and control the consumer can exercise (which is larger for on-demand services) and on the service’s impact on society (which is considered larger for television broadcasts).

While the aforementioned distinction made sense in 2007, it seems less appropriate in a converged media environment with a focus on internet TV and automated selection tools. As set out above, it would be relevant to establish lighter requirements for “gatekeepers” when compared with media services over which a provider has editorial responsibility, regardless of whether it concerns a linear or non-linear media service.

## Country of Origin Principle

The commission is also interested in views regarding whether the country of origin principle is still appropriate when determining jurisdiction in a converging world.

Under the AVMSD, audiovisual media service providers can provide their services in the EU by complying only with the rules of the member state under whose jurisdiction they fall. Derogations to this principle are possible in cases of incitement to hatred, protection of minors or where broadcasters try to circumvent stricter rules in a specific member state. In those cases, specific cooperation procedures are to be followed.

Although the current wording of the country of origin principle is clear, in practice it remains difficult to determine the national applicable law. Notably for non-linear services that are not offered by a traditional broadcaster, it proves to be difficult to determine the competent national jurisdiction. Even more problematic is the determination of jurisdiction for content delivered over the internet from countries outside the EU who specifically target the EU. Although it cannot be denied that said services provided by non-EU based providers have an impact on European audiences, the country of origin principle does not permit the attribution of any European jurisdiction over those services. Therefore, it might be recommended to bring non-EU based providers under the scope of the AVMSD and consequently under the country of origin principle, by obliging them to register themselves in the EU or to designate a local representative (as is currently also under discussion within the field of data protection).

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## Looking Ahead

The launch of the public consultation is an appropriate next step in the process of revising the AVMSD, with the view of making it fit for a digital and converging era.

The public consultation ends Sept. 30, 2015, and on the basis of the outcome, the commission is expected to submit a legislative proposal for amending or replacing the current AVMSD in 2016.

The review of the AVMSD, however, only concerns one part of the puzzle. In order to put in place a European legal framework that is future-proof, a reform of the EU regulatory framework for electronic communications, of the rules governing the cross-border dissemination of copyrighted works, as well as of the rules on online platforms and online intermediaries, will also be required.