Position Paper

EU Green Paper
Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values
30.09.2013

The Federal Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 2,000 companies in Germany. Its 1,200 direct members generate an annual sales volume of 140 billion Euros annually and employ 700,000 people. They include providers of software and IT services, telecommunications and Internet services, manufacturers of hardware and consumer electronics, and digital media businesses. BITKOM campaigns in particular for a modernisation of the education system, for an innovative economic policy and a future-oriented Internet policy.

On 24 April 2013 the European Commission released its Green Paper on Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values. BITKOM welcomes the public consultation and the Commission's approach to carefully assess developments of the audiovisual media landscape prior to introducing policy and/or legislative measures in this field. By submitting the position paper at hand BITKOM would like to cease the opportunity to express its view on the Commission's ideas raised.

1 Preliminary remarks

As technology moves into the 21st Century, so too must media regulation. In view of the increasingly convergent media landscape BITKOM is of the opinion that a forward-looking analysis should evaluate whether and to what extent the current form of regulation, including the differentiation between linear and non-linear services, is still appropriate and proportionate in light of regulatory objectives enshrined in the Audiovisual Media Services Directive (AVMSD).

We consider statutory regulation as a last resort instrument which should only be applied under exceptionally justified circumstances. To this end, we are convinced that forces of competition and self-regulatory initiatives can effectively ensure achievement of several regulatory objectives.

Furthermore, the evaluation of the current regulatory regime should assess, by means of empirical studies, the impact of different audiovisual services on society and users' ability to exercise control over them. Such evaluation should be carried out in a technologically neutral manner and regardless of the current classification of services as linear or non-linear.

Services that are functionally substitutable and have the same impact on society should be treated equally in terms of regulation, irrespective of the service provider's position in the value chain or its prior regulatory status. Lighter regulatory instruments should be used with regard to services that have a lower societal impact and/or offer users a higher degree of autonomy.

Having said this, we are pleased to comment questions put on consultation as follows:

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2 Market considerations

Q1 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?

Reasons for the success of US companies in the audiovisual sector are manifold. In markets for certain audiovisual products and services, US undertakings have been able to take advantage of their early market entry and maintain their competitive edge. Also, US undertakings are often more prepared to venture tests with new products and ideas and have the possibility (e.g. due to easier access to venture capital) and market circumstances (e.g. sizeable domestic market) to build up business models on such new concepts.

More concretely, American companies that distribute audiovisual content start their activity in the US (which is their domestic market), taking advantage of the fact that there is a sizeable single market from which it is relatively easy to expand at a global scale. In general, so-called Hollywood majors (dominating US production studios together with their distribution and marketing branches) benefit from securing financing of their products (particularly films ("blockbusters") and series) already in the home market. Exportation of these productions to EU markets is considered an "add-on"; which often not even requires adaptation to local languages in those cases where audiences in Member States either speak the same language (UK, Ireland) or do not request costly translation.

Also, the US audiovisual industry has achieved an outstanding organisational integration and operational excellence. The projects selected by the majors are developed and operated according to marketing and merchandising approaches (in all phases) and with necessary recurrence to feed the entire value chain (producers, channels, Pay Platforms, etc.).

In addition, proprietary systems in the ICT sector (e.g. for platforms or technical/commercial standards) or vertically integrated business models may result in competitive advantages in different segments of the value chain within the audiovisual market.

Overall, by creating a regulatory environment that promotes innovation and the establishment of new business models, the EU should seek to enable European companies to benefit from similar factors of success within the Internal Market.

To this end we need to underline, that undertakings based in the EU often ought to comply with regulatory regimes that have not yet been fully adjusted to altered digital market conditions. This may constitute a barrier to the implementation of new business models especially concerning traditional publishing and TV broadcast, which are in the course of adapting to an IP-based, on-demand business environment.

Finally, as regards copyright several factors hinder companies to establish a successful presence in the EU's audiovisual market. To this end we would like refer to our response to the Green Paper on the online distribution of audiovisual works published in November 2011[1]. Our comments addressed *i.a.* the following key issues:

[1] http://www.bitkom.org/files/documents/20111108_Stellungnahme_GB_audiovisual.pdf

- Simplification of the multi-territorial rights clearance, but without abolishing the possibility to clear licences with a limited territorial scope;
- Clarification of the technology neutral interpretation of the Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission;
- Simplification of the licensing of music embedded in audiovisual works;
- Harmonisation of the copyright regime - especially with regard to the private copy exemption.

Some improvements to these factors will probably be achieved via the legislative procedure concerning the proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market. However, the process is not yet final and not all of the issues mentioned above are covered by the proposed Directive.

Q2 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?

Access to premium content is generally considered a key asset for many business models in different relevant parts of the audiovisual sector (free TV, pay TV, VoD, etc.). Procedures for obtaining licences from right holders should therefore be open, transparent and in full compliance with antitrust laws. In addition, well-functioning transmission networks constitute an essential pre-condition for the availability of such content. Fostering the roll-out of high-speed networks is therefore of key importance; in this context public support schemes may prove helpful, under certain circumstances, where market forces and private investment alone cannot close profitability gaps in near future.

As far as market practices are concerned, we would like to point out that certain content owners have strong bargaining power which enables them to negotiate highly favourable conditions; for example applying minimum amount guaranteed, upfront fees restrictions of all kinds, licensing windows, limited catalogue, mandatory providers for security issues. To this end, more flexible licencing would contribute to a wider availability of premium content.

In principle, competition law instruments seem to provide adequate remedies in a number of situations in the context of availability of premium services. However, disadvantages related to a preference of behavioural over structural remedies (not just) recently in some Member States[2] have come to the fore. Bearing in mind that competition law interventions take place on a case-by-case basis, a more general approach might be favoured, especially with regard to two aspects:

- **Financing of public service broadcasters should be restricted**

  We strongly support the application and enforcement of *ex ante* tests for significant new services launched by public service broadcasters. State fi-

[2] E.g. in France, Spain, Italy and the UK.

nanced public service broadcasters should not be allowed to replace privately offered services.

- **Rules on compensation have to complement must-carry regulation**

  Broadcasting platforms are often obliged by broadcasting or telecommunications law to carry certain publicly and also privately funded programs. In the past, private program providers have abused this legal imbalance by demanding high fees for access to their programs e.g. from IPTV-platforms. Such occurrence hampers the development of platforms and resembles also a barrier of entry for European companies which eventually intend to extend their platform to another EU country. To ensure a balance of negotiating powers between broadcasters on the one hand, and platform operators on the other hand, must-carry regulation should be complemented by rules on compensation for platform operators. Such compensation should be proportionate to the burden stemming from the must-carry obligation imposed.

At present, establishing a European regulatory framework regarding market concentration and/or media pluralism appears premature taking into consideration the still mostly nationally-fragmented media markets.

At national level, it might be considered to review existing regulatory instruments that aim at the preservation of cultural or linguistic diversity with regard to their effect on the availability of premium content. Especially for linear services we find a set of very strict sector specific *ex ante* restrictions. Against the background of growing content and provider diversity, decreasing scarcity of distribution channels, convergence and new user patterns it might be questioned whether these instruments are still needed to ensure plurality or even lead to undesirable side effects limiting rather than enhancing the availability of content (e.g. cross-ownership limitations or market share caps limiting distribution and funding of content). As a mid- to long-term perspective, BITKOM encourages - on the basis of fact based scientific findings - to consider the liberalisation of strict sector-specific regulation where appropriate, or where restrictions still prove necessary, to base these on well-founded objective criteria taking into account actual usage patterns.

Finally, we would like to highlight an issue that deeply affects the audiovisual environment albeit not being directly subject to the consultation at hand: BITKOM is of the view that real competition between collecting societies is indispensable for further market development.

The problem of overlapping rights is exacerbated by the fact that reproduction rights and communication rights are often managed by different collective rights management organisations. As a result, content providers, such as digital broadcasters or online content providers, are compelled to accept multiple licenses for what are effectively unitary acts of usage.

Moreover, today right owners and collecting societies provide exclusive licenses on national basis, prohibiting such contents to be distributed over the Internet to other countries. If payments to collecting societies are for use of the repertoire, the territory should not be a limitation.

Collective management of these rights must be made by entities encompassing rights and holders of different nature, promote transparency and competition between collecting societies and avoid single-holder or single-territory models. Of course, the above should be applied not only to musical content but also to musical content embedded in audiovisual works.

Another issue to focus on is collecting societies' tariffs. We have to keep in mind that collecting societies have been *de facto* monopolies and therefore their rates should be checked and validated by an independent administrative body before they enter into force. In many countries the only control so far is done by competition authorities, a model that has clearly demonstrated to leave scope for improvement.

In summary, real competition between collecting societies must be introduced and therefore BITKOM supports the idea of a multi-territory, multi-repertoire licence, which could significantly simplify the current clearance system. Following the International Confederation of Authors and Composers Societies (CISAC) decision, obstacles to the adoption of multi-territory licences have been reduced although in practice, not completely eliminated. However, in the absence of both elements (multi-territory and multi-repertoire), there is still a risk of fragmentation in the market, as repertoires are split and commercial users would still face a multiple reporting requirement and a lack of competition in the market. It is essential for the EC to encourage and improve reciprocal agreements between collecting societies in a way which pushes each collecting society to grant multi-territory and multi-repertoire licenses. Arrangements for multi-territory and multi-repertoire licensing and opening of markets for competition among collecting societies needs to be accompanied by regulatory competition safeguards, especially regarding price competition. It should be guaranteed that collecting societies freely compete in rates and fees charged for the rights licensed.

As a conclusion of the previous paragraphs we can clearly state that a fully harmonised single European market for content rights will benefit EU citizens in terms of having access to a wider variety of content while most likely will also reduce content prices for end customers.

Q3 Are there obstacles which require regulatory action on access to platforms?

More and more devices are connected to the internet and not only (home)-TV is in the centre of interest. The evolution of mobile handsets and available broadband speeds favour new distribution channels for content throughout the Internal Market and beyond. This implies that (home-) TV at some point in time will no longer be the main (or only) device to consume audiovisual media content. New devices (e.g. set-top-boxes, gaming consoles), evolution of existing devices (smart OS-run TVs) and "software TV" (Apps) have led and will further lead to a broad variety of reception paths. Particularly smartphones will become more important as prices for smart handsets fall and the deployment of high-speed wireless broadband services continues.

At European level, the notion of 'platform' seems to require additional attention in describing relevant functionalities and delineating it, in particular from "mere" infrastructure on the one hand, and technologies which are traditionally used in connection with the distribution of content to audiences, on the other. More

specifically, the scope of existing EU directives (AVMSD, eCommerce Directive and the regulatory framework for electronic communications) and their relationship have to be examined more closely, not least in order to verify and if justified, to lower the already existing level of regulation which relevant providers have to observe. Platforms with functional substitutability should be treated equally.

Irrespective of the foregoing, “generic” cases of market failure which would advocate for a more general approach in the regulation of access to “platforms” do not seem to exist. To the contrary, it might well be argued that there is functioning inter- and intra-platform competition and that the interest of media pluralism (being subject to national regulation, where appropriate) is secured through the prevailing design of business models that are applied to new platforms. We believe that a non-discriminatory access to content, hardware and software would allow innovative platforms to emerge. Competition between those platforms might make access obligations unnecessary, because each platform is striving to offer a complete assortment of media products and services to the consumer.

However, the emergence of undue competitive advantages should be prevented in situations where new market players exercise similar or equivalent functions as a provider of a (technical and/or marketing) platform but are not subject to the applicable rules, simply because their role is less service-oriented but rather hardware- (terminal equipment) based. Therefore we point to the fact that close monitoring of market developments is also necessary to avoid new bottlenecks in the value chain. Given the aforementioned context of device diversity, the “front-end-layer” or user interface will become significantly important for controlling the content / services delivered, as well as the way they are received by the user. Build-in operating systems – independent from the device - will determine display and choice of the content which is presented by (self-designed, maybe proprietary) interaction layers (e.g. OS for mobiles or gaming consoles). These layers will provide for control of the content delivered to the user. While usually these layers are adaptable by the user to some extent, market distortions may arise out of proprietary or “closed” interaction-layers directly or indirectly blocking or hindering services to be delivered to the customer.

3 Financing models

Q4 Do the current AVMSD requirements provide the best way to promote the creation, distribution, availability and market appeal of European works?

The AVMSD sets out a generic framework with minimum requirements for the promotion of European works. Nonetheless, it gives some leeway to Member States in order to choose among different instruments deemed apt to reach the overall target of the relevant provisions.

In our view, a combination of requirements relating to promotional activities and the imposition of financing obligations constitute a heavy burden for different kinds of operators. This is especially the case where a single operator is simultaneously imposed multiple obligations in relation to its different business activities. The imposition of multiple obligations thus must be avoided. In any event, the imposition of obligations of any kind should strictly be limited to operators/providers that are directly involved in the exploitation of audiovisual works.

In addition, more flexibility is required with regard to release strategies: release windows should in their entirety become a matter of commercial negotiations between parties, rather than being tied by legal provisions on cinematographic funds or equivalent support schemes.

Furthermore, despite the relative flexibility of the AVMSD, the current system of financing is coming under pressure by new business models and is putting European companies at a disadvantage versus non-EU companies. Non-EU companies may have a significant market presence in a number of EU Member States, yet they do not fall under the scope of current funding requirements of the AVMSD for the promotion of European works. The limited potential of the current system might also be aggravated by an uneven transposition and/or application of Art. 13 AVMSD within the EU.

Taking into account the current situation and trends, we believe that the Commission should seek other ways, relying more on market forces and competition, to promote European works, including the promotion of new digital online content. Encouraging online availability of European works and allowing the online creative economy to develop are also important in this context. We think that audiovisual media providers would be willing to promote those European works they consider good enough to benefit from their distribution. At the same time, this would have a positive impact on content creators, because their interest in receiving such support would strive them to create high quality European content.

Q5 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?

With regard to content financing we would like to highlight, that non-linear services and online distribution possibilities have had a highly favourable impact on the production and distribution of (European) creative works. Positive developments have become most apparent with regard to music markets, yet they generally hold true to other media. In this context it seems useful to point out a few trends revealed in recent studies:

“The internet has a positive impact on cultural diversity and the production of cultural works. In Europe, for instance, more records are being produced than ever. In qualitative terms, the internet is also associated with more diversity, as the share of independently produced records has grown, and as the number of artists achieving commercial success has also increased. This can be explained by various factors. Technological developments have lowered the costs of creating cultural content. They also allow creators to reach global audiences easily and at a lower cost. They allow creators to be discovered more easily, as the importance of some bottlenecks - such as limited airwaves and channels - is reduced. Social media, user generated reviews and recommendations now also play a significant role in allowing artists to be discovered and reach their audiences. As a result, a broader diversity of creative content is being produced than ever before. “[3]

“Consumers benefit significantly from these changes. 40 to 60% of the perceived value that consumers get from media is derived from online media. In a growing

[3] Mike Maznik, The Sky is Rising 2 (2013), based on UNESCO data.

number of media categories and countries, the "consumer surplus" from online media now exceeds that from offline. Several factors help understand why consumers value the internet so highly. It provides them with increased access opportunities. Europeans are consuming more (and higher-quality) media through an expanding variety of connected devices, including smartphones, tablets, e-readers, and Internet-enabled TVs. It provides consumers with increased choice and diversity - 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. It also provides them with opportunities to actively participate - about eight in ten Europeans consumed UGC or participated in a social network during the past 12 months; about three in ten uploaded a video or personal picture online; and nearly two in ten were editing or managing a blog or website.[4]

The creative sector also benefits from these changes, as business models on the internet are evolving fast and already demonstrate the viability of a sustainable model for continued diversity and content production. From 2001 to 2011, all growth in the creative sector was generated by digital (30bn Euros) (Booz & Co 2013). In the music sector, the value of the digital music market from 2004 to 2010 has increased by more than 1000% (IFPI, 2011) and 2012 marked an estimated 8.5 to 9 percent increase in digital revenues (Strategy Analytics 2012; IFPI, 2013a). According to PwC (2012), global spending on digital music will surpass psychical distribution in 2015, as is already the case for the UK, the US, Sweden and South Korea (BPI, 2013). Contrary to some views, the internet has not diminished the appetite for paid content. Between 2001 and 2011, consumer spending on content in Europe is up by 25%, and all growth in European creative industries (an additional 30 billion Euros revenues) is driven by digital media (Booz&Co, 2013)."[5]

Beside factors like audience development and the extension of coverage, content is becoming one of the most important assets for business models in the AVMS value chain. Investment into creative content should therefore be sustainably secured and the value of creative content and content aggregators financing this content preserved. This implies a commitment of all stakeholders along the value chain to the protection of intellectual property; the availability of attractive legal offers to consumers; as well as an effective copyright enforcement.

Regarding linear audiovisual media we need to emphasise, that European broadcasters invest a substantial part of their revenues into the production of high quality audiovisual content. Broadcasters fear that novel techniques may also have a negative impact on their business model: Using the possibilities of a convergent technology, new players like device manufacturers or app providers may downscale and overlay linear content to place their own advertisement visible at the same time on the screen. With this, they can thwart the goals of the AVMSD to keep specific content (e.g. news) free of commercial communication. And they can deprive money out of the financial circle that otherwise could be reinvested in the production of audiovisual works. Whilst we acknowledge that content of linear programmes should be protected from being altered, in our opinion the user should be able to determine how he uses his screen, through which he receives such content. Trends in the convergent media world show, that consumers will increasingly use multi-window displays and several screens

[4] BCG - Follow the Surplus - European Consumers embrace online Media, April 2013.
[5] BCG - Follow the Surplus - European Consumers embrace online Media, April 2013.

at the same time. The user should be able to choose viewing options of his preference including the simultaneous consumption of multiple content elements by way of (novel) techniques, like overlays, downscaling or split-screen.

In the context of content financing we also have to underline that exploitation of film and TV rights in relation to non-linear services differs from established patterns in the field of linear audiovisual media. For example, the latter considers theatrical release as a necessary pre-condition for success in subsequent release windows. In our opinion, terms and conditions of exploitation should be left in the discretion of parties and not be predetermined by law. Individual commercial negotiations could lead to innovative exploitation of works and more flexible release solutions.

In our view, businesses should freely acquire or create content which is attractive to their customers. Market dynamics should drive companies' decisions to finance or create content. Artificial financing obligations should not be imposed on either linear or non-linear services or on distribution platforms (e.g. IPTV platforms).

Every audiovisual media service provider should freely buy or finance the content which it considers fit to provide good returns. This is market practice in the USA, where PayTV platforms/providers, on top of acquiring content rights, also create their own original content as part of the relevant strategy for differentiation.

Moreover, other funding obligations on telecommunication operators through specific and arbitrary taxes should be removed. This will make European service providers more competitive within Europe and outside Europe and will foster the creation of European works. After all, the rising number of platforms and the sinking cost of creating content through digitalisation make public intervention ever more unnecessary. Consumers today have access to a vast selection of platforms (e.g. DVB-T, satellite, internet, IPTV, cable, mobile) and services (e.g. youtube, zattoo) capable of fulfilling virtually all their needs regarding media consumption.

4 Interoperability of connected TV

Q6 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?

BITKOM strongly supports industry led standardisation, but opposes any perpetuation or extension of regulatory intervention with regard to interoperability irrespective of the type of platform.

The European Commission should refrain from mandating any standard, which has not proven to be widely accepted by the market in terms of market share and sales figures. Mandating standards can hinder further innovation in this area. In the long run, interoperability for media services may be reached - far from today's solutions - by distributing media services in a manner which is based on a pure "browser logic" and which uses existing browser standards. However, the promotion of standards via bodies like ETSI could foster market penetration of standards on a voluntary basis and thereby help to achieve more interoperability.

Standards are likely to result in lower cost devices, such as Smart TVs or other type of equipment and they can provide a stable framework for players in the market. Knowing in advance equipment functionalities enable market players to define services and adapt distribution channels with a longer term strategy (i.e. they do not need to redefine/modify services pursuant to constant changes of equipment). Standards are also likely to facilitate a single European market, with pan-European players being able to emerge and provide services across the EU (without having to define/implement different services for each country depending on the different CPEs or platforms).

Open ecosystems should be given priority in course of standardisation. Closed devices and proprietary solutions may result in different bottlenecks across the value chain, with operating systems being probably the "common element" across these devices. For this reason, standardisation should focus on operating systems, which can be the seed for dominant positions through the vast range of devices and through the multimedia value chain.

5 Infrastructure and spectrum

Q7 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?

In general there are two major categories of audiovisual media content: linear and non-linear content. Linear content is mainly provided according to a predefined schedule. No interaction with the customer is needed. The major application for linear content is broadcasting. Non-linear content is provided to the consumer on its individual request and today mainly in a unicast connection. The customer decides when to receive what content. This requires an interaction between the customer and the content or platform provider.

The individual platforms mentioned in the consultation question are all capable in delivering audiovisual content to the customer but they differ *i.a.* in terms of coverage, quality and availability and also in their ability to directly interact with the customer.

Satellite broadcast networks cover a number of countries, terrestrial broadcast and mobile broadband networks provide more or less nationwide coverage, whereas wired broadband and cable networks are usually limited to certain areas.

The technology used in all of these networks differs, and so does their capabilities for providing audiovisual data services. The delivery of individual content requires a unicast connection to the individual user. Such a unicast connection cannot be provided by terrestrial and satellite broadcast networks but by mobile and wired broadband networks. Satellite broadcast and terrestrial broadcast networks are suited to provide linear content to a high number of customers simultaneously; they do not need a backward channel to allow the customer to interact with the provider or to make their choice on individual content (except for switching between programs). Wired and mobile broadband networks and cable networks are suited to allow interaction between the customer and the content provider, but there are differences when it comes to the technical and practical realisation of the interaction. In mobile and IPTV networks the content delivery is

realised by one service the customer has to subscribe to. This usually includes applications enabling seamless switching between linear and non-linear content provision. Cable networks are in principle also capable of providing two-way communication, yet this usually requires the customer to subscribe to a separate broadband service in addition to the TV service.

When it comes to the used technology in the networks, it can be observed that due to fast technological development, differences between individual platforms decrease. Yet in particular terrestrial broadcast networks are not capable to keep pace with the development of customer demand. The state of the art quality of TV programs today is HD; more advanced features like 3DTV or even UHDTV are evolving or are under development. Satellite and IPTV networks are capable to adapt to new trends quite quickly; terrestrial broadcast networks, however are lagging behind. Even cable networks seem to lack sufficient flexibility to adapt to new developments in a timely manner.

Beside the used technology the regulatory framework often prevents providers from introducing new programs or technologies. New networks and digital platforms can much more contribute to consumer experience than conventional platforms:

- As to mobile networks, LTE is currently being deployed, offering to consumers up to 50 Mbp/s bandwidth and more. Already mobile operators are testing the next generation of mobile technology which delivers 1,000 Mbp/s and more. To achieve and improve this sort of technological advance, spectrum and backhaul availability has to be improved. Furthermore, a mode for broadcasting linear content of LTE called evolved Multimedia Broadcast/Multicast Service (eMBMS) has been standardised and first implementations are announced for early 2014 (e.g. in the United States). eMBMS allows to efficiently deliver linear content to large audiences in a given area by the mobile broadband network. Also, with regulatory pressure on mobile termination and roaming charges, financial options for mobile operators diminish. Policy measures therefore should aim to meet spectrum needs of the industry and relax regulation of mobile network operators.
- Fixed networks are advancing too. NGA networks are gradually being deployed. In perspective, FTTH and comparable technologies can provide much higher bandwidth than current fixed networks, with vast capability to deliver high quality content even for multi-room environments. Cable networks today offer up to 150 Mbp/s of bandwidth based on DOCSIS 3.0 standard which allows for possible data rates of up to 400 Mbp/s. In combination with fiber, even much higher speeds will be possible in the future. Also new vectoring technologies enable high bandwidth data transmission; for example presumably "out-dated" copper networks can provide bandwidths of currently up to 100 Mbp/s. Operators in Germany will start to roll out this new technology to most households already next year. At the same time, compression methods and other technologies improve. Already in 2009, operators in Germany started to offer IPTV in HD quality based on ADSL copper networks with 16 Mbp/s, compressing a HDTV channel to 6 Mbp/s. HD IPTV in 3D will probably require 20 Mbp/s or less. Cable operators are in the process of employing DVB-C2 technology which will substantially increase compressing efficiency for program delivery. However, the part of the network behind the access infrastructure, the

backhaul, is increasingly congesting. Regulators should hence give operators the flexibility to find intelligent methods to manage service performance and adjust tariff structures accordingly.

As regards content delivering platforms it should also be noted, that even though the number of TV minutes consumed has remained quite stable or even slightly increased over the years, the consumption of non-linear content has been rapidly increasing. OTT players like YouTube are massively driving this development.

Finally, the public interest obligations are historically referring to specific broadcasting networks for providing content to people living in a certain territory. Although a number of new distribution channels and in addition a high number of new commercial and pay TV providers have entered the relevant markets, these obligations have hardly been reviewed or changed. All transmission platforms mentioned in the consultation question can, in principle, comply with the public interest obligations, albeit some would need to make huge investments.

In our view, public interest obligations should be proportionate firstly, to the functionalities of the distribution channel and secondly, in light of the general interest objectives. In particular, obligations should more stringently focus on content which effectively fulfils the "public-interest" criterion.

Moreover, as multiple content platforms with almost unlimited capacity have the ability to offer all content, it is high time regulators relax their public interest obligations (e.g. "must carry" obligations). Should a transmission platform be subject to must-carry-obligations, the appropriate remuneration of the platform operator must be assured. With a view to ensure a balance of negotiating powers between broadcasters on the one hand, and platform operators on the other hand, must-carry regulation should be complemented by rules on compensation for platform operators. (See Q16).

Q8 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?

For the provision of reliable high-quality mobile broadband services an exclusive access to spectrum resources is inevitable. In particular, for the coverage of rural areas frequencies below 1 GHz constitute a precondition for an economically viable deployment of mobile broadband. The allocation of the 700 MHz band to wireless broadband can decisively contribute to the Digital Agenda target of providing every European with high-quality and high-speed internet access.

The future development of broadcast service depends on its capability to meet customers' needs in terms of HD programs and mobile access. This is not only a question of spectrum but also of technology, network topology and the right choice of program formats. The possible introduction of DVB-T2 combined with more dense broadcast networks offer the chance to deploy wide area Single Frequency Networks (SFN), which improves the efficiency of use of the UHF spectrum and leaves sufficient capacity for the distribution of high-definition TV programmes. In addition, three factors seem to be important for future-proof terrestrial digital TV transmission: firstly, certainty concerning the allocation of spectrum, enabling long-term investment for providers; secondly, business

models allowing a refund of expenses related to production and transmission of HD-content; and thirdly, a guarantee for the transmission of programmes.

As regards sharing models concerning the UHF band we would like to highlight two scenarios. In both cases the coexistence and compatible use of fixed and wireless telecommunication services must be ensured by appropriate procedures:

- The entire UHF band below 700 MHz will be used for an integrated Broadcast/Broadband system capable of providing both linear and non-linear content via terrestrial channel to customers. Such a system will most probably be based on the LTE standard including its broadcast mode eMBMS. Since such a converged system would fully utilise the entire spectrum on a permanent basis other applications would need to be moved to other frequency ranges.
- Coexistence of both broadcast and mobile service but in separate bands. The UHF band below 700 MHz will be divided in two sections, one exclusively allocated to mobile services, whereas the other will be used for broadcasting. In this case convergence would only take place in users' equipment. Within the spectrum allocated to broadcasting, just as it works today, other applications can be operated in channels not used by broadcasting.

BITKOM acknowledges that at present terrestrial digital TV uses spectrum to address general needs of public interest. We believe however, that there are alternative technologies which are able to meet commercial content demand in much better and economical ways. From a spectrum efficiency point of view, it seems hardly reasonable to maintain terrestrial digital TV channels taking into account the low number of users of this transmission service in Germany. Moreover, terrestrial digital TV is, in many Member States still limited to SD-quality, whereas other transmission networks already offer HD-quality to users. Also, features like interactivity are not supported by present terrestrial digital TV, while other networks do. Therefore in our view, spectrum dedicated to terrestrial digital TV channels should be at least partly allocated to other technologies such as mobile technologies (i.e. LTE with eMBMS).

BITKOM would additionally like to point out, that it is important, that sufficient spectrum is available for the unlicensed use of Wi-Fi applications to provide for relaying content e.g. within the home from the primary content delivery such as cable, satellite or fixed broadband connections to portable and mobile devices. In addition to today's Wi-Fi allocations at 2.4 GHz and 5 GHz, additional spectrum can be made available in the 5 GHz range.

Q9 What specific research needs with regard to spectrum have to be addressed to facilitate such development?

For the introduction of a new converged integrated system capable of providing both broadcast and mobile broadband, it is necessary to adapt current standards. In particular, the LTE standard with its eMBMS mode should be enhanced to be able to realise required functionalities. For this purpose it is also essential to evaluate requirements of terrestrial broadcast content distribution, including the number of transmitted programmes, the required quality and further requirements, such as reliability or coverage. Standardisation and evaluation of re-

quirements can only be carried out economically at European level ensuring a harmonised approach and respective research activities.

6 Regulatory framework

Q 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?

Five and a half years after the introduction, at EU level, of the regulatory differentiation between linear and non-linear services it is still premature to deliver any fact-based evidence for market distortions between these services, not least given late transposition and implementation of the relevant legal frameworks at national level. It is rather in the medium term, that technical differences will be increasingly reduced and take-up of services as well as blurring of boundaries from a consumer perspective might lead to a situation, where market distortions could occur.

Irrespective of the question with regard to market distortions, the differentiation made between the forms of audiovisual media services might be challenged, as such by technological development and changes in content consumption patterns. The usage of non-linear content is increasing and viewers can now glide seamlessly between linear and non-linear content without necessarily realising that different regulatory standards apply. Hence the current regulatory distinction between linear and non-linear content often no longer seems to be practical or justified. Well-known examples in this respect are advertising restrictions (in quantity and quality): While linear services may not be interrupted by advertisements for more than 12 minutes per hour there is no comparable restriction for non-linear services, where business models based on targeted advertising are well established. Further, e.g. a linear news magazine may not be interrupted by advertisements for the first 30 minutes, practically banning any advertising as no news magazine on German television exceeds 30 minutes. Yet if the same news magazine – or an offer provided by a newspaper publisher but also including audiovisual content – is delivered to the consumer 10 minutes later as non-linear content, it may very well include advertisements.

These developments might necessitate a complete paradigm shift in the way in which services covered today by the AVMSD are described. BITKOM is of the opinion that a forward-looking analysis should evaluate whether and to what extent the current form of regulation, especially regarding linear services, is still appropriate and proportionate in light of regulatory objectives enshrined in the AVMSD. Where appropriate, regulatory measures could be relaxed or replaced by self-regulatory schemes, bearing in mind that for the sake of proportionality differentiation between services may be justified. However, such differentiation (i.e. graduated regulation) must not necessarily rely on the criterion of linearity. In order to identify appropriate criteria upon which justification for regulatory intervention or a graduation of regulation can rely, we propose the Commission to consider the set of criteria that were also discussed in the course of the last review of the AVMSD. These may include, *inter alia*, as mentioned in our prelim-

inary remarks, a service's impact on society and the ability of the user to exercise control over how he uses a service.

Q11 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?

Digitisation and convergence become especially clear in merging of applications and devices as well as in the progressive fusion of network and distribution technologies. Media consumption patterns also go through changes: while linear TV consumption continues to grow, internet usage increases, accompanied by rising demand for personalised, interactive and social use of media. These developments lead to profound structural changes, particularly with regard to market players. Public and private broadcasters as well as infrastructure operators face new (global) players of the telecommunication, internet and device manufacturer industry that have entered the media landscape. All "traditional" and "new" players develop novel business and revenue models, which compete with or complement each other, yet they may rely on diverging distribution technologies.

Furthermore, market entry of new players has transformed the media ecosystem and the structure of competition. Platforms of device manufacturers, mobile platforms and internet platforms are not necessarily bound to their own network infrastructure; they in fact increasingly operate without owing such. Players may gain a strong market position in the media market even without being a network operator or a content provider.

However, the impact of online media services on society and media pluralism cannot yet be fully assessed. Transformation of media usage, in terms of quality and quantity, its implications for the right to information and for opinion forming are to be thoroughly examined. It seems even more difficult to carry out a conclusive assessment in this respect with regard to digital natives, who grow up in a digital environment and clearly tend to exclusively use traditional media services to a lesser extent than other groups of the population.

BITKOM is of the opinion that a forward-looking analysis should evaluate whether and to what extent the current form of regulation is still appropriate and proportionate in light of regulatory objectives enshrined in the AVMSD.

Moreover, the evaluation of the current regulatory regime should assess, by means of empirical studies, the impact of different audiovisual services on society and the risk they may pose to regulatory objectives of the AVMSD (freedom of information, media pluralism, protection of minors, consumer protection) as well as users' ability to exercise control over these services. Such evaluation should be carried out in a technologically neutral manner and regardless of the current classification of services as linear or non-linear.

Taking into account increasing transmission capacities, more competitive market circumstances and the increased user autonomy, it could be justified to relax media regulation. We consider statutory regulation as a last resort instrument, which should only be applied under exceptionally justified circumstances. To this end, we are convinced that forces of competition and self-regulatory initiatives can effectively ensure achievement of several regulatory objectives.

Services that are found functionally substitutable, have the same impact on society and may pose comparable risks for regulatory objectives should be treated equally in terms of regulation, irrespective of the service provider's position in the value chain or its prior regulatory status. For the sake of proportionality regulatory differentiation of services (i.e. graduated regulation) may be justified. Lighter regulatory instruments should be applied with regard to services that have a lower societal impact, imply a lower risk for regulatory objectives and/or offer users a higher degree of autonomy.

When deciding on the kind of instrument to adopt (statutory regulation, co-regulation or self-regulation) the respective potential benefits and disadvantages of the solution favoured must always be borne in mind. Self-regulation has its merits in flexibility and ability to adapt more rapidly to technological and market developments compared to legislative processes. Where appropriate, self-regulation may also be seen preferential in order to close gaps in the exhaustive pursuit of policies, particularly where the states' scope of jurisdiction would not allow for reaching the desired effect, e. g. due to lacking possibilities for the inclusion of players which are highly relevant in view of the public interest objective concerned, but are outside the regulatory reach.

In general, co-regulation in its turn will aim to combine the characteristics of a well-designed self-regulation scheme with some sort of state involvement, e. g. by providing for back-stop-powers where such are necessary. Still, attention must be paid to a proper set-up of the 'state part' of a co-regulatory scheme and an appropriate and even handling of powers vested in this part. Specifically in terms of monitoring and application/enforcement, the principles of inclusive coverage, adequacy and proportionality must be duly observed in order not to risk to frustrate those engaged in said systems and not to create distortions among players situated in different EU Member States but subject to different (national) regulatory authorities.

In any event, incentives for establishing a self- and/or co-regulatory system must be ensured, in particular flexibility, predictability of inherent burdens and the ability to further develop general guidelines (possibly formulated upfront by the legislator) with more concrete provisions and procedures.

Looking at state regulation, we acknowledge its potential in terms of clearly defining the content and boundaries of obligations which service providers have to observe and of providing for an adequate system which secures monitoring and enforcement.

BITKOM is convinced that self- and co-regulation can generally be an effective regulatory option for a variety of areas (e.g. marketing obligations, protection of minors) and should therefore not be limited to certain topics. In particular, self-regulatory initiatives in the areas of minor protection and accessibility for people with disabilities should be encouraged. Minor protection initiatives in Germany have, to date, proven very successful. Further positive examples in this area can also be found in various other Member States and at EU level (e.g. GSMA Alliance).

Q12 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?

The country-of-origin principle with regard to audiovisual media services should continue to ensure an Internal Market for media services, which as the Green Paper reiterates, has been the main rationale for the regulation of audiovisual media services at EU level in the first place. By enabling cross-border broadcasting and online content provision within the EU, it contributes to large extent to a prosperous, versatile media landscape and facilitates access to a diverse, complex market which is often subject to specific regulation transcending national characteristics. To this end, it also reinforces freedom of speech. It further constitutes a basis for the provision of pan-European services and promotes growth and innovation.

However, as the European Commission further states in its Green Paper, the AVMSD does not apply to providers which do not come under the jurisdiction of a Member State and does thereby not cover content delivered over the internet from countries outside of the EU. Yet such content competes within the EU's Internal Market with audiovisual media services of EU providers falling under the regulatory regime of the AVMSD. Therefore regulation applying to EU companies should be adjusted for strengthening their competitiveness in global competition, and at the same time, in order to enhance the potential of the EU's media market. Such adjustments should in the first place focus on relaxing current regulatory obligations within the remit of the AVMSD. In case legislators and regulators cannot adapt the present regulatory regime to this effect, the competitiveness of EU providers and fair competitive conditions within the Internal Market should be ensured by other means, which may include alternative regulatory instruments.

Q13 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?

Other audiovisual services, which currently do not fall under the scope of the AVMSD, as for example user generated services, will typically be subject to the eCommerce Directive if provided on demand. The latter Directive provides rules for measures possibly to be taken in view of illegal content, but does not specify any rules with regard to the protection of minors, the promotion and/or financial contribution to the production of European works or more substantial rules with regard to commercial communications. While both directives are Internal Market instruments and function on the basis of the country-of-origin principle, the named examples show that the level of harmonisation differs quite considerably. (However, if further directives are also taken into account, e. g. on tobacco advertising and sponsorship or on unfair commercial practices, the gap in harmonisation might be narrowed down for some of the relevant issues.) Against this background, we propose the Commission to evaluate the relationship between the two directives and the services at the interface thereof. As already pointed out in our response to question 10, justification and form of current regulation under the AVMSD should be re-assessed in light of certain (new) criteria. These could include the set of criteria that were already discussed in the course of the last review of the AVMSD; e.g. the service's impact on society and the ability for the user to exercise control over them. This review could lead to

relaxing current obligations under the AVMSD with regard to certain services that are comparable, according to the criteria chosen above, with services that are at present not subject to rules of the AVMSD.

This does, however, not necessitate any change of the eCommerce Directive, as the delicate balance achieved with regard to the liability provisions within this directive continues to be appropriate for eCommerce services.

It should be pointed out, that besides the material perspective presented so far, also the issue of implementation (application, i. e. in particular monitoring and enforcement, of national rules transposing the respective European Union *acquis*) might show relevant divergences between services subject to the AVMSD and those covered by the eCommerce Directive as well as by additional instruments. In the latter case, feasibility of regulatory supervision and enforcement encounters limitations which are due to the inherent features of the services concerned. Also in this respect, the benefits of having recourse to co- and/or self-regulation should be borne in mind.

Q14 What initiatives at European level could contribute to improve the level of media literacy across Europe?

Fast development and the rapidly increasing use of technology already improve, as such the level of media literacy. Technological and commercial advances further optimise customer experience and ease the use of digital products and services. For instance, smartphones, tablets and related applications facilitate access for many people to the digital world. On top of that, the second generation of users who grew up in a highly digitalised environment (so-called “digital natives”) is already more media literate than previous generations.

As to the active promotion of media literacy, several adequate initiatives exist already. The EU´s Safer Internet Programme has been implemented to promote media literacy amongst children, parents and teachers and to increase the awareness of possible dangers on the internet. With the initiative “Klicksafe”, the internet hotlines “internet-beschwerdestelle.de” and “jugendschutz.net” as well as a telephone helpline “Nummer gegen Kummer”, Germany has already taken successful steps to reach these goals. A similar project at EU-level is the “Coalition to Make The Internet a Better Place for Children”, a self-regulatory initiative involving 31 leading undertakings. Within the self-regulatory framework “ICT Coalition for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU”, companies commit to voluntarily promote education and awareness regarding internet usage. The initiative focuses on the responsible use of specific services, and also provides assistance to teachers and parents regarding their crucial role in guiding children on how to use the internet safely. One of our members is also involved in other international initiatives, like Think Big, Campus Party or Interactive Generation Forum in Latin America.

The success of these projects is based on the efficient, voluntary interaction between industry and regulators, striving to achieve a common societal goal. In our view, there is no need for further regulatory action. Also, measures to promote media literacy have to take into account national differences and specific needs. Therefore, such measures genuinely have to differ across Europe and

there is no one-size-fits-all solution. However, in some cases cross-border coordination, e.g. at EU level, may leverage synergies and best-practice-sharing.

Public initiatives, by means of awareness campaigns and direct support, can also help to improve the levels of media literacy. To this end it should be noted, that several players of the ICT sector can facilitate success of such initiatives, e.g. by communicating with users and informing them about awareness-raising measures and undertakings' participation in such projects.

7 Media freedom and pluralism

Q15 Should the possibility of pre-defining choice through filtering mechanisms, including in search facilities, be subject to public intervention at EU level?

The open internet offers consumers access to a huge variety of content and services which they can use regardless of time and place. However, as the number of available offers increases, so does the importance of classification-, rating-, listing- and pre-selection-services. Operators of filtering mechanisms, which usually run an integrated platform, may become the new bottleneck of the digital service sector in near future, pretty much the same way like television broadcasters held the key to access to information in the past. Nowadays, the problem is not the mere availability of content within a certain platform (e.g. a cable network or IPTV bandwidth) but the role of a provider that is able to decide which available content should be made accessible to users. The consumer relies on these services to navigate through endless sites of content and to find relevant information. His decision which content to consume or not, is often guided by EPGs, navigators, portals, electronic devices or platforms. Providers' choice on which content to suggest, to list first or to place prominently on a screen may have an impact on the right to information and on opinion forming. Where abuse in this respect can be excluded, no regulatory action is required. Where this is not the case, regulatory intervention may rely on varying instruments depending on their functionality and the relevant market situation.

In order to protect freedom of access to information, media pluralism and cultural diversity it is necessary to closely monitor those cases in which a provider has a dominant position in the markets for EPGs, navigators, online portals, electronic devices or platforms as well as search or filter mechanisms. However, it can be assumed that as long as these services apply browsers with access to the open internet and there is no intended blocking regarding the selection of content, regulatory intervention is not deemed necessary. To this end providers shall also ensure that their users are able to exercise full control over setting options for these services.

Q16 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'?

With a view to secure a level playing field among platforms enabling users to access audiovisual content, regulators should focus their activity on promoting competition and ensuring non-discrimination, particularly with regard to “gatekeepers”. Accessibility of content is a major competitive asset for content providers. In our opinion there is no need to extend the scope of existing access regulation in view of convergence. However, the scope should be rearranged in a service-oriented manner in situations where new market players exercise similar or equivalent functions as a provider of a hardware-based platform but are not subject to the applicable rules.

Along the same lines of reasoning, “must-carry obligations” should in our view be relaxed and not be extended to additional infrastructures/platforms, since it is becoming easier to broadcast programmes through different internet platforms. We believe that the national application and particularly the review of imposed obligations should more stringently focus on content which effectively fulfils the criterion of “general interest”; careful monitoring of the latter at European level should be continued.

Because broadcasting platforms have been obliged by law to carry certain publicly and also privately funded programmes, in the past, some programme providers have abused this legal imbalance by demanding high fees for access to their programmes e.g. from IPTV-platforms. Such occurrence hampers the development of platforms and resembles also a barrier of entry for European companies which eventually intend to extend their platform to another EU country. With a view to ensure a balance of negotiating powers between broadcasters on the one hand, and platform operators on the other hand, must-carry regulation should be complemented by rules on compensation for platform operators. Such compensation should be proportionate to the burden stemming from the must-carry obligation imposed.

Moreover, we consider an extension of must-carry related obligations to other forms of media services than specific linear audiovisual media services as unnecessary: New audiovisual services (IPTV, streaming services, etc.) do not constitute a physical bottleneck for content. The so-called "long tail" argument stipulates that capacity and content in the digital world is abundant and even niche interests will be served at close to zero marginal cost. For this reason, especially scarcity considerations cannot be applied to those platforms that are relevant in the case of access to on-demand services; particularly not, if there are different infrastructures among which the user can choose.

8 Commercial communications

Q17 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?

Speaking of the role of advertising in the media sector in general, we would like to stress, that the digital world provides an almost unlimited capacity for media services and choices for users. There is high consumer demand for appealing content that is free of charge or offered at a low price. Several business models for content provision are financed by advertising and offer content to users free of charge. The number of these models might further increase in future. Consumers wishing to benefit from services based on different models, can switch to another provider or choose to limit commercial messages by signing up to paid content.

Focusing more on audiovisual media, we observe, that digitisation and convergence become especially clear in the merging of applications and end devices and the progressive fusion of net and distribution technologies. New, powerful and globally operating competitors are entering the European media landscape. Linear and non-linear audiovisual services compete with other media content and services on the same screens. The results are profound structural changes to the whole media landscape as lines between formerly autonomous services and audiences such as print, broadcast, online and infrastructure sectors blur.

In our view in times of increasing user empowerment and growing global competition the competitiveness of the European audiovisual media sector should not be hold back by outdated advertising regulation.

Current rules established in the AVMSD should be adapted to the convergent world, where boundaries of linear and non-linear services diminish. We believe that this could be achieved by means of adequate deregulation and simplification of rules. For example, advertising restrictions in quantity with regard to linear services (according to which the programme may not be interrupted by advertisements for more than 12 minutes per hour) should be relaxed.

Product specific advertising provisions should also be re-assessed regarding their appropriateness in light of convergence and current competitive trends; outdated rules should be withdrawn. Regulation in advertising should be more focused and limited to the minimum. For instance, advertising provisions on the protection of minors should merely set minimum standards concerning all audiovisual services.

Finally, any potential review of the AVMSD should ensure coherence with other legal instruments such as the Directive on Unfair Commercial Practices or the Consumer Rights' Directive.

Q18 What regulatory instruments would be most appropriate to address the rapidly changing advertising techniques? Is there more scope for self/co-regulation?

Given the rapid changes of the advertising market, a stiff and detailed set of rules can be outdated quickly, especially regarding the online world. As a consequence any regulation in this area should be rather generic and leave room for self-regulatory approaches.

We are convinced that forces of competition and self-regulatory initiatives can effectively ensure achievement of several regulatory objectives while adapting more quickly to the constantly evolving advertising markets and techniques as well as changing consumer needs. In order to ensure the effectiveness of self-regulatory instruments, it is absolutely key to ensure a broad participation of market players of the whole ecosystem along the entire value chain. There are successful self-regulatory initiatives already up and running in this field, for example the European cross-industry self-regulatory initiative for online behavioural advertising. It has established a regulatory framework, a certification procedure, national bodies for the management of complaints (e.g. DDOW in Germany - Deutscher Datenschutzrat Online Werbung) and an information website available in 29 countries (http://www.youronlinechoices.eu/).[6]

Q19 Who should have the final say whether or not to accept commercial overlays or other novel techniques on screen?

As a preliminary remark, it is essential and useful to look at the current situation regarding techniques that affect the reception of content on screen:

Providers of audiovisual media services often apply, already for years, overlays as part of their general practice, particularly when content is “on air”. In these cases, apparently the interests of authors and right holders (as referred to in a specific context of the AVMSD’s rules) are not seen to be prejudiced. For example, by using the red button technology the viewer is directed from the linear programme (either content or TV advertising) presented on screen to a different, on demand-like environment. It is the interest of the broadcaster to secure that it remains in control over what is presented in this on demand environment, particularly in a walled-garden setting. Another rather well-known example of a (at the time of its introduction) novel technique is split-screen; it is also commonly used by media service providers.

Trends in the convergent media world show, that consumers will increasingly use multi-window displays and several screens at the same time. With regard to future developments, it appears therefore necessary to identify, on a case-by-case basis, the kind of recognised interest that is eventually protected, by restricting access to new technologies. Ultimately, potential regulation on accepting overlays and other novel techniques on screen should firstly, not single out a specific party that is exclusively empowered to decide the question and secondly, not hinder the development of new business models that could favour the interests of the viewer.

Whilst we acknowledge that content of linear programmes should be protected from being altered, in our opinion the user should be able to determine how he uses his screen, through which he receives such content. Hence first and foremost the user should be empowered to exercise control over his display, includ-

[6] The German online advertising industry has already been busy developing means of increasing Internet users’ control over the processing of their data for the purpose of online behavioural advertising (OBA) even before. As the setting of cookies on users’ browsers is one of the main technical means of conducting OBA, the German advertising industry has developed a website (meinecookies.org), where Internet users can learn about cookies generally. The website also contains a tool (“Präferenzenmanager”) designed to help Internet users take control over which advertising networks can set cookies on their browsers and which can be installed on the websites of individual content providers.

ing *i.a.* overlays, downscaling or split-screen. As long as the presentation of content elements on the screen is a result of intended interaction with the viewer, third parties shall not have the right to claim protection for their interests conflicting with the viewer's settings. As long as providers of such techniques ensure users' control over setting options, regulatory intervention is not deemed necessary. However, in the interest of users, the idea of imposing mutual obligations on both the programme provider and the provider of additional / accompanying services to keep processes transparent, might be taken into consideration.

9 Protection of minors

Q20 Are the current rules of the AVMSD appropriate to address the challenges of protecting minors in a converging media world?

Convergence facilitates that the same content of linear, non-linear and other audiovisual media can be viewed on the same (mobile) device, while being subject to different legal requirements under the AVMSD concerning the protection of minors. The current graduated legal approach sets out that pursuant to Art. 27 (1) AVMSD content that might seriously impair minors is not admissible in linear media. According to Art.12 AVMSD such content in non-linear media can only be made available in such a way as to ensure that minors will not normally hear or see it. For content which might only impair minors, pursuant to Art. 27 (2) AVMSD broadcasters have to observe broadcasting times or other technical measures to protect minors. No such requirement applies to non-linear content.

While following the objective of the protection of minors, this graduated regulatory regime is still appropriate based on technological differences and feasibilities that allow users, especially parents and carers, to apply protective measures in the field of non-linear media, which do not exist for broadcasting services. In contrast to linear audiovisual content, access to non-linear content can easily be restricted by the provider of the content or platform by applying age verification systems with regard to content which might seriously impair minors (e.g. pornography). Moreover, electronic communications providers as well as the software market as such provide an abundance of software tools effectively allowing parents and carers to protect minors from inappropriate content. Such self-administration tools can filter content in a user autonomous manner for different age groups, limit time online and promote education. It is in parents' responsibility to apply such tools to protect their children. These technical solutions can be supplemented by awareness raising measures in relation to non-linear and other audiovisual content. Warning signs, reporting tools and clear terms of use provide guidance and advice to parents and children. Furthermore, public-private-partnerships for positive content, such as "Ein Netz für Kinder" or the specialised search engine "FragFINN" in Germany, can foster the protection of minors.

BITKOM is of the view that co/self-regulatory initiatives would constitute effective means of meeting the challenges of minor protection in a converging media world. There are already examples of such successful initiatives, which are deemed particularly effective at EU level, and in which some of our members participate: The IT and communications industry has established effective self-regulatory frameworks providing safeguards for the protection of minors, e.g. the "ICT Coalition for the Safer Use of Connected Devices and Online Services by Children and Young People in the EU", GSMA Europe's "European Framework for safer mobile use by younger teenagers and children" or GSMA's 'Mobile

Alliance Against Child Sexual Abuse Content'. In Germany, multiple self-regulatory systems for the protection of minors are in operation, e.g. the “Freiwillige Selbstkontrolle Multimedia-Diensteanbieter” (FSM) with regard to online content and the “Freiwillige Selbstkontrolle Fernsehen” (FSF) with regard to television programmes.

Finally, with regard to rules of the AVMSD we would like to emphasise that legal certainty is essential for providers. In particular, illegal content needs to be defined along EU-wide standards. In addition, the promotion of a more harmonised age-rating system could help to increase legal certainty and provide a better protection for minors.

Q21 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?

Hardware and software manufacturers as well as service providers and infrastructure operators offer numerous possibilities to exercise parental control, most of which are built-in to devices and are ready to be used on an optional basis. Filtering mechanisms have been offered by internet providers for a long time and they are being continuously improved. Appropriate freeware tools for parental control are also available for different operating systems. Telecommunication service providers offer an abundance of parental control tools for mobile and fixed devices empowering parents to let their children safely use linear and non-linear services. The convenient and intuitive usability of these tools are equally important.

Furthermore, a pre-condition for any take-up of parental control tools is that parents and carers are aware of means that enable children to use the internet in a safe and positive environment. Therefore, raising awareness is an essential measure in this context. Marketing campaigns developed by the private sector have proved successful.

Public bodies can also facilitate the take-up of parental control tools by measures in the field of education and training or by launching awareness campaigns.

In terms of generating greater awareness multiple initiatives for the promotion of media literacy and child protection already exist in Member States, often on a self-regulatory basis. Such initiatives should also be encouraged at EU level. An example in Germany is “Sicher online gehen”, a joint initiative of industry and the German state (both at federal and regional levels). The project informs parents about potential risks for their children in the internet, supports them in advising their children and offers information on technical solutions for child protection. One of the strategies adopted to increase awareness, is an advertisement aired by TV and radio broadcasters, which informs parents of approved minor protection programmes available for installation on PCs.

Q22 What measures would be appropriate for the effective age verification of users of online audiovisual content?

Provisions of the AVMSD (Art. 12 and 27 (2)) imply the use of age verification systems as means for the protection of minors, yet they are not explicitly required by the AVMSD. This has led to very diverging transposition of these rules in Member States. Although clarification about the appropriateness of using age verification systems would foster the internal market, fast technological development would soon render detailed legal requirements outdated.

When developing guidelines for requirements, it is of key importance to understand that no age verification system can provide for absolute safety for minors. Thus rules must strike the right balance between requirements for effectiveness and the usability of any of such age verification systems. For example, face-to-face identification prior to the start of using a service and PIN codes may lead to higher effectiveness, but as well come at the downside with lower usability for the customer. This might seriously hamper the take-up of such systems and lead to increasing usage of circumvention techniques or of an alternative, not always legal, service for adult content. In particular, the application of age verification systems that require the user to switch between mediums, i.e. to leave the online environment for being verified offline, should be avoided. The development and legal recognition of technical solutions that enable age verification while using the same media should be encouraged.

For example, German content providers can install on their websites software (a so-called “age file”)[7] which is approved by the highest German authority for the protection of minors. The software interacts with minor protection programmes which parents can install on the PCs used by their children. The minor protection programme can read the age-file and then block certain websites, according to the age setting for the relevant website.

Finally, we would like to underline that at present there is no need for further regulatory measures. By focusing on the objective of effective age verification, industry has been and will come up with appropriate solutions that keep pace with technological development and suit best to the type of service offered.

Q23 Should the AVMSD be modified to address, in particular, content rating, content classification and parental control across transmission channels?

Legal certainty and a more harmonised classification of content and age-groups would facilitate cross-border content provision. Within the established legal frameworks, we believe that self-regulation is an effective approach to detail rules in this respect. Innovative industry solutions can only flourish where flexible and general regulatory provisions are in place, rather than a form of micro regulation. A modification of the AVMSD provisions is therefore not deemed necessary. As set out above, the FSM and FSF systems are examples of successful self-regulatory systems, which to varying degrees, operate age and/or content classification in Germany. A closer cooperation of self-regulatory bodies across the EU could ensure harmonisation of age and/or content classification systems.

[7] Age-file was developed for classifying professional website content.

Q24 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?

Responsible content and access providers ensure that complaint mechanisms are built-in in their services, where appropriate. The kind of complaint mechanism offered and the way in which complaints are effectively dealt with vary between the wide range of products and services. They should be transparent and easy to use. Reporting mechanisms are particularly important with regard to social media services which involve, by definition, a high degree of interaction with users.

Transparent and simple complaint mechanisms have already been successfully established at national level. In particular, Inhope Hotlines and InSafe awareness nodes exist in all European states. Internet service providers strongly support the work of these institutions by integrating links and buttons that refer to their service. A great variety of customer information by companies, NGOs and hotlines empower users in the EU to find support, if it is required.

In our view self-regulatory systems are particularly well-placed to integrate complaint mechanisms. For example, in Germany there is a very well-functioning complaint centre set up in the context of the self-regulatory FSM system.

Since the definition of what kind of content should be considered as inappropriate differs between cultures and Member States, close cooperation between regulators, self-regulatory bodies and industry as well as exchanges of best practices can help to achieve a comparable and effective level of protection of minors across the EU. In this context we must note, that inappropriate content needs to be clearly distinguished from illegal content. For the latter, the eCommerce Directive provides rules for take down.

Q25 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?

Harmful content and illegal content clearly have to be distinguished, since they are subject to different regulations and demand different consequences. Particularly, the definition of harmful content differs between cultures and Member States. With regard to illegal content, in particular concerning the sexual abuse of children, law enforcement authorities are responsible for prosecution. Private entities, such as EU-wide networks with support of the industry, can help but must not be charged with prosecution. Since procedures in this context may affect fundamental rights, we strongly support a closer cooperation between competent authorities and such private entities when deciding on the illegality of content.

The processing and feedback system of complaints in the EU-wide INHOPE network turned out as very efficient and effective. The national hotlines are very well linked with the ICT industry and even receive funding from ICT companies. The Commission should ensure the future public funding for INHOPE and na-

tional hotlines after the expiration of the Safer Internet Programme. Budget constraints should not threat the important and independent work of these hotlines. The successful development of compliant offices for child abuse content and child endangering content should be continued in the future.

As regards complaint-handling and reporting mechanisms of individual companies, we would like to stress that these must be in place in accordance with their own services. If a provider offers feedback to those users who send a report, the user cannot stay anonymous but needs to provide his or her contact details. Depending on the number of received reports, individual feedback delivery may not be feasible. Nonetheless, transparent information on the handling of reports should be easily accessible for the reporting user.

10 Accessibility for persons with disabilities

Q26 Do you think that additional standardisation efforts are needed in this field?

The digital world constantly generates innovation. For example, speech recognition software was made a standard part of operating systems for computers and mobile phones in the past months. Similarly, text-to-speech applications have been available, mostly at no additional cost, for some years. Certain video-streaming platforms have already introduced automatic subtitles.

In our view, technical standardisation to ensure the accessibility for persons with disabilities is not deemed necessary. Regulatory standards might even impede technological evolution and limit solutions to the smallest common denominator.

As regards broadcasters, the accessibility for persons with disabilities to programmes is already adequately covered within the AVMSD. Further regulation is not needed. In our opinion self-regulatory initiatives would be more effective in this area; additional measures to make more content accessible should be undertaken on a voluntary basis, whilst taking account of the programming autonomy of the broadcaster. In this context attention should be paid to the financial and technical burdens such measures may impose on broadcasters, especially on smaller ones.

Q27 What incentives could be offered to encourage investment in innovative services for people with disabilities?

The ICT industry (including equipment manufacturers as well as service and application providers) already partake in a number of initiatives, often in collaboration with public administrations and associations of disabled people, with the aim of adapting terminals, products and services to disabled people's needs. These initiatives bring benefits to all parties: companies increase their customer bases and stimulate their innovation skills; at the same time many disabled people obtain services that facilitate their integration in the information society.

In light of technological development, it is our view that public intervention in this field should be limited to the minimum and by no means restrict the ability of platforms to innovate. As a general rule, investments in services for people with disabilities should seek the most efficient solution in each situation. For example, for deaf people it is cheaper to make a single application that translates voice-to-

text, than subtitling thousands of audiovisual content broadcast through various networks in Europe. Several voice-to-text solutions have been developed recently, which are often available free of charge.

Additional personal, technical and financial resources are the main obstacle for companies to make more content accessible for persons with disabilities. Incentives therefore should primarily be focused on economic objectives.

Where market forces alone do not provide solutions for accessibility, public measures such as subsidies or tax incentives could encourage private investment. To this end, it is interesting to mention some already existing examples: in Sweden, Finland or Switzerland improvements in accessibility to services have been achieved thanks to government funds.

In addition, a modification of the current copyright regime may also encourage investment in developing innovative services for people with disabilities. Adjustments for disabled people may interfere with rights of right holders with regard to a certain audiovisual work. Therefore a special authorisation right, granted by the right holder for third parties to adjust the content or develop applications only for the purposes of accessibility, scould prove helpful.