

BSG response to European Commission Green Paper:

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

September 2013

Overview

The Broadband Stakeholder Group (BSG) welcomes the opportunity to respond to this consultation on the European Commission's Green Paper on convergence.

We appreciate that this is an initial call for input to a very wide-ranging piece of work. We believe that the broad set of questions put out for input are appropriate given the stage in the process.

However, we do believe that further clarity is required on the scope of this policy investigation. Whilst some issues raised within the Green Paper are central to the core consideration of whether policy and regulation remain fit for purpose in light of the current and future audiovisual media landscape, some issues do seem to be broader. Whilst such issues are important and can have an impact on audiovisual services, they are being examined through other policy and regulatory frameworks at national, European, and in some instances at an international level. As such we believe it important for the Commission to be clear on which policy considerations will be directly impacted by the process that this Green Paper is commencing and which are relevant but will be affected by policy decisions elsewhere.

On that vein, to answer the question at the core of this public discussion – are the policy and regulatory structures fit for purpose to support the ongoing development of the audiovisual media services market in an open, innovative and competitive market – it is important that the Commission understands what individual member states are doing in relation to specific aspects highlighted in this Green Paper. Accordingly our response draws on developments occurring in the UK which we hope is a useful input to the Commission.

Timing and understanding of consumer behaviour and consumer expectations in line with market developments are other key themes of our response. Whilst we support the approach here of putting out a broad selection of questions and themes regarding aspects of the converged media space and how they may develop, we would counsel against seeking a root and branch reform of the Audiovisual Media Services Directive (AVMSD) at this stage.

In our view it is too early to fully understand the impact of the current framework and whilst consumer and market trends are developing, for example through the availability and take-up of connected TV services, these services are still at a nascent stage. Our view is that the regulatory structure needs to remain flexible to changes in the market and consumer behaviour and that seeking to amend the regulatory structure in advance of these trends taking hold could result in negative and disruptive consequences. That is not to say that we do not believe that there is no theoretical risk from the regulatory framework not keeping pace with market trends and consumer behaviour, particularly where developments have led to market distortions and differing and at times onerous burdens of regulation for different platforms. However, at this stage we do not see the evidence for a *wholesale* revisit of the AVMS Directive. We believe that it is crucial for the Commission to test whether its objectives can be met under the current regulatory framework, alongside developments at a member state level, before considering more significant changes to the overriding regulatory structures. We believe this process will be a useful one in considering this question and a useful exercise to gather evidence and views about the ability of the overall regulatory framework to meet the needs of the audiovisual market in the short, medium and long term.

Our below response to the individual questions expands on these overall points in further detail. On specific issues where there is not a consensus across the stakeholders with whom we work we have either refrained from commenting on those issues or have explained the spectrum of views held by various companies and organisations on specific questions.

Questions:

- (1) What are the factors that enable US companies to establish a successful presence in the fragmented EU market despite language and cultural barriers, while many EU companies struggle? What are the factors hindering EU companies?
- (2) What are the factors affecting the availability of premium content? Are there currently practices relating to premium content at wholesale level which affect market access and sustainable business operations? If so, what is the impact on consumers? Is there a need for regulatory intervention beyond the application of existing competition rules?
- (3) Are there obstacles which require regulatory action on access to platforms?

The first question should perhaps be rephrased to understand what characteristics of the European regulatory framework may or may not be impacting on the ability of EU companies to succeed and operate to optimal effect. Market characteristics in the US do differ to Europe in terms of factors such as common language, access to finance and a broader and more homogenous market reach.. Accordingly the Commission should be careful to identify which general market conditions are drivers of scale, rather than simply conclude that European companies are failing. We believe that to progress this discussion the Commission will need to identify which issues are within its ability to address or otherwise. In this respect the Commission's efforts should be directed at ensuring that the regulation encourages innovation and investment and that the overall regulatory playing field does not discriminate against technologies or services offering comparable services

Although the issue falls out of scope of this discussion it is encouraging to see that this Green Paper acknowledges the critical importance of copyright in being able to effectively distribute audiovisual works online. The issue has also recently been acknowledged by the UK government in its strategy paper of July 2013, *Connectivity, Content and Consumers*, which commits to looking further at how best to further protect IP for PSBs online.

As regards the broader questions relating to the availability of premium content and content providers access to platforms and vice versa, this is an issue which draws different views from players across the value chain. For these reasons, we have chosen not to respond to questions 2 and 3 and direct the commission to the responses of individual players from the UK market.¹

- (4) Do the current AVMSD requirements provide the best way to promote the creation, distribution, availability and market appeal of European works?
- (5) How will convergence and changing consumer behaviour influence the current system of content financing? How are different actors in the new value chain contributing to financing?

The starting point should be an assessment of what is happening in the market in terms of content creation to identify any need for further support and establish whether any change in regulatory requirements would be necessary, desirable or achievable.

In the UK, PSB investment in content remains high at over £3billion per year and is a driver of growth and investment across the UK creative industries. Other players have also increased their investment in original content in recent years, including BSkyB who have committed to spending £600m in 2014². The broader question of whether changes in content creation and consumption will effect a change in content financing is an interesting one. It certainly has potential but the willingness of newer technology players to invest in content creation seems untested at present.

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

At first sight the goal of achieving standardisation to ensure interoperability across borders seems compelling. However as the Green Paper acknowledges, different routes to market have already been followed by different Member States and have achieved successful outcomes in the market. As such the road to pure interoperability looks complex, unnecessary and expensive.

In our view, to justify the cost of that overall proposal, one would need to look very carefully at the real benefits that would ensue, for example what the tangible socioeconomic benefit

¹ For a full list of companies and organisation we work with please visit www.broadbanduk.org

² In 2011, £623m was spent on UK content in the form of in-house productions, external commissioning of originated content and co-productions. See COBA Economic Impact Report (2012).

would be of modifying settings to receive services from other Member States – both in terms of associated costs and consumer demand.

It might be more prudent to focus attentions on the evolution of standards going forward to see what future harmonisation might be practicable, cost-effective and beneficial.

- (7) How relevant are differences between individual platforms delivering content (e.g. terrestrial and satellite broadcasting, wired broadband including cable, mobile broadband) in terms of consumer experience and of public interest obligations?
- (8) What frequency allocation and sharing models can facilitate development opportunities for broadcasting, mobile broadband and other applications (such as programme-making equipment) carried in the same frequency bands?
- (9) What specific research needs with regards to spectrum have to be addressed to facilitate such development?

Infrastructure and spectrum issues are core priorities for the work of the BSG in the UK. Clearly, whilst the ability of infrastructure to support the delivery of content is crucial, we question whether a detailed assessment of technology capability and spectrum management is appropriate in this process given the amount of activity being undertaken on these important issues by the Commission itself, by individual Member States and in relation to spectrum management, on an international stage.

However, in brief, in relation to question (7) we believe that given consumer trends of choosing to be able to access the content of their choice on a multitude of devices linked to various types of technology, that it would be ill-advised to make distinctions between the differences of various platforms. Given the ongoing developments in technology capability and consumer take-up of different avenues to access content, we believe that all platforms have a role to play. It would, we also believe, go against the principle of technology neutrality to be more prescriptive about what platforms may or may not be suitable to deliver.

In relation to spectrum management, the core issue of relevance for this discussion is the current and future use of the 700MHz band in respect of broadcast and mobile broadband services, and the associated potential impacts such as signal interference. This issue is being considered in detail by the UK regulator, Ofcom, in parallel with international discussions and the UK government has recently announced its intention to develop and publish a 10-15 year spectrum strategy in 2014 to cover all UK spectrum use and put this in an international context. Given that issues such as DTT do not affect member states uniformly, there cannot be a one-size-fits-all approach to this area. At the European level the Radio Spectrum Policy Group (RSPG) will continue as the main vehicle for change in advising the Commission on the development of spectrum policy, with major decisions taken by the WRC.

In sum whilst we believe that these issues are of critical importance, we believe that they are being suitably assessed through other mechanisms which should provide enough resource and information to inform whether any issues from these debates affect the core purpose of

this Green Paper: whether the regulatory framework is fit for purpose for the audiovisual media services market.

- (10) Given convergence between media, is there evidence of market distortion caused by the regulatory differentiation between linear and non-linear services? If yes, what would be the best way to tackle these distortions while protecting the values underpinning the EU regulatory framework for audiovisual media services?
- (11) Is there a need to adapt the definition of AVMS providers and/or the scope of the AVMSD, in order to make those currently outside subject to part or all of the obligations of the AVMSD or are there other ways to protect values? In which areas could emphasis be given to self/co-regulation?
- (12) What would be the impact of a change to the audiovisual regulatory approach on the country of origin principle and therefore on the single market?
- (13) Does increased convergence in the audiovisual 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 examples of that?
- (14) What initiatives at European level could contribute to improve the level of media literacy across Europe?

Our overall message in response to these set of questions is that further and careful consideration is required before considering significant changes or adaptations to the AVMSD.

The BSG was involved in the implementation of the AVMSD in the UK and in establishing a new co-regulatory structure to manage the new requirements for VoD services. This was a complex and time-intensive process. Further regulatory change incurs cost to industry and as such any further amendments to the regulatory structure should be carefully considered to ensure that the benefits outweigh the costs of implementation.

There could be scope to give further prominence to related self-regulatory codes that correspond to the core provisions of AVMSD but the Commission would need to provide further clarity on where it believed that self-regulation could achieve specific objectives, how these relate to the core requirements of AVMSD and ensure that the sufficient support for self-regulation

In relation to regulatory differentiation between the provision of linear and non-linear services, we would urge the Commission to remain open to the concept of minimising regulatory requirements for linear as well as the option to raise regulatory requirements for non-linear. Our overall view is that regulatory standards should be informed by consumer expectations. It would be interesting, for example, to review consumer reactions to aspects of on-demand programming that have more liberalised restrictions than broadcast such as relating to advertising to gauge whether this demonstrates a level of consumer expectation and tolerance for different presentations of media on broadcast (e.g. through IPTV, live streaming, VoD and so on). Indeed there is significant commercial risk that in not liberalising

rules on commercial communications, that opportunities for funders of content to get close to that content are diminished to the overall detriment of the European audiovisual sector.

Whilst our overall view is that there is no evidence to suggest the immediate need for a wholesale review of the AVMSD, we do believe that this Green Paper does allow for a period of informed and structured evidence gathering over the next year or two to inform the way forward in the medium to longer term.

One useful approach would be to focus on evidence gathering of the impact of convergence across markets, in terms of consumer take-up of those services to develop a range of market scenarios and what they might mean for regulation for further debate and exploration with stakeholders.

- (15) Should the possibility of pre-defining choice through filtering mechanisms, including in search facilities, be subject to public intervention at EU level?
- (16) What should be the scope of existing regulation on access (art. 6 Access Directive) and universal service (art. 31 Universal Service Directive) in view of increasing convergence of linear and non-linear services on common platforms? In a convergent broadcast/broadband environment, are there specific needs to ensure the accessibility and the convenience to find and enjoy 'general interest content'?

Ensuring media plurality is an important public policy objective. However in order to justify an intervention in respect of the use of filtering mechanisms, there would need to be a compelling evidence base for the need for that. In the UK, recent figures have demonstrated the importance consumers place on news content from PSBs, whilst the principals of impartiality are also held by commercial players in the new market such as BSkyB.

In respect to question (16) there are a range of views on how one balances the objectives of PSBs to gain appropriate prominence on Electronic Programme Guides (EPGs) as the user interfaces to navigate content on new and evolving platforms develop and the objectives of platform operators to link their consumers to the wide array of content players they involve on their platform.

The Commission should note that the UK government has recently announced that it will consult on proposals to ensure PSB prominence through legislation and that the views aired in this process and the agreed outcome from it should be pertinent to the Commission's own investigation into these issues.³

³ See 'Connectivity, Content and Consumers: Britain's digital platform for growth' at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225783/Connectivity_Content_and_Consumers_2013.pdf

- (17) Will the current rules of the AVMSD regarding commercial communications still be appropriate when a converged experience progressively becomes reality? Could you provide some concrete examples?
- (18) What regulatory instruments would be most appropriate to address the rapidly changing advertising techniques? Is there more scope for self/co regulation?
- (19) Who should have the final say whether or not to accept commercial overlays or other novel techniques on screen?

Again, building on our responses to other sections of the paper we would recommend that any changes are driven by an understanding of consumer expectations and indeed consumer reaction to the commercial communications permitted under AVMSD.

- (20) Are the current rules of the AVMSD appropriate to address the challenges of protecting minors in a converging media world?
- (21) Although being increasingly available on devices and platforms used to access content, take-up of parental controls appear limited so far. Which mechanisms would be desirable to make parents aware of such tools?
- (22) What measures would be appropriate for the effective age verification of users of online audiovisual content?
- (23) Should the AVMSD be modified to address, in particular, content rating, content classification and parental controls across transmission channels?
- (24) Should users be better informed and empowered as to where and how they can comment or complain concerning different types of content? Are current complaints handling mechanisms appropriate?
- (25) Are the means by which complaints are handled (funding, regulatory or other means) appropriate to provide adequate feedback following reports about harmful or illegal content, in particular involving children? What should be the respective roles/responsibilities of public authorities, NGOs and providers of products and services in making sure that adequate feedback is properly delivered to people reporting harmful or illegal content?

In considering what approach to take here we would advise that consideration is given to two related key points. One, what action individual Member States are pursuing in this area. And secondly that whilst the nature of ensuring child protection online will in practice involve cooperation across national borders, Member States should be allowed to pursue individual approaches specific to identified needs. Whilst it is proper that some binding basic principles are set at a European level, in our view this is already achieved by the current text of the AVMSD. The experience in drafting the original AVMSD highlighted the challenges in trying to achieve pan-European solutions through trying to legislate for solutions rather than creating a suitable and flexible regulatory framework that will support welcome outcomes. Our view is that the current AVMSD is very clear on the objectives that should be achieved on this important issue, whilst allowing individual Member States to develop an approach that is suitable for them. We believe that this is the correct approach and that progress and

developments in the UK show that the AVMSD provides an effective framework for Member State-led action.

To recap on UK developments, government, industry and regulators continue to work together on various matters including:

- The world-leading work of the Internet Watch Foundation, backed and financed by industry⁴, with a bolstered role in searching for and removing child abuse images
- The adoption of splash pages where child abuse sites have been identified and taken down
- Campaign work to deter people from searching for child abuse images
- Action by search engines to ensure searches are routed to legitimate sites
- Linking up of police databases
- Exploring mechanisms to signpost different types of content on connected TVs
- Legislation to ensure R18 material is put behind access controls on VOD services and to ban material from regulated on demand services that would be illegal in licensed sex shops
- Closing the loophole in the Criminal Justice and Immigration Act so that it will be a criminal offence to possess extreme pornography that depicts rape
- Progress work on filters across all types of internet access products – including a comprehensive plan involving industry including retailers, device manufacturers, mobile operators and ISPs working collaboratively to ensure a set of family friendly tools for citizens. In addition, on public Wi-Fi, the 6 main UK providers have committed to apply family friendly filters wherever children are likely to be present.

It should also be noted that in the UK context there is significant work being undertaken by companies and policymakers alike, on a collaborative basis and not mandated by regulation. What has been achieved has not been brought about via a need to comply but by industry-lead efforts.

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

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

Again, we would urge the Commission to look at activity in individual Member States before considering where any additional regulatory requirements are needed. The UK is a world-leader in the provision of access services so further regulatory requirements could therefore be unnecessary and burdensome.

For example, PSBs have a voluntary agreement to provide audio description on 20% of programmes aired and work is ongoing to build on the levels of audio description services offered by non-PSBs. Furthermore ongoing work is being done to improve access for EPGs and to increase levels of subtitles and audio-description for on-demand services.

⁴ see membership at <http://www.iwf.org.uk/members/current-members>

There are also ongoing efforts to build on the success of text relay services provided by the likes of BT. Next generation text relay services are due to launch next year and video relay services have also gained ground with BT, Lloyds TSB, Halifax and the Bank of Scotland having already implemented these.