COMMISSION STAFF WORKING DOCUMENT
IMPACT ASSESSMENT

Accompanying the document

Directive XXX of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services
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1. CONTEXT

The objective of the Audiovisual Media Services Directive (AVMSD)\(^1\) is to create and ensure the proper functioning of a single European market for audiovisual media services, while contributing to the promotion of cultural diversity, providing an adequate level of consumer protection and safeguarding media pluralism.

The AVMSD is based on the 'country of origin principle' ("COO"). Under COO audio visual media service providers are subject only to the rules of the Member State where they are established. By abiding by these rules they can freely provide services across the EU. As such, the AVMSD has facilitated the cross-border transmission of TV channels and 'Video On-Demand' (VoD) services. The AVMSD sets some minimum harmonization standards, which implies that Member States are free to enact stricter rules at national level. The AVMSD contains some limited exceptions to the operation of COO.

The AVMSD applies to television broadcasts and on-demand services if all the following conditions are met (i) providers have editorial responsibility, (ii) providers have as their principal business purpose the provision of programmes to inform, entertain or educate the general public; and (iii) these programmes are comparable, in form and content, to television ("TV-like").

The AVMSD does not cover activities that are primarily non-economic such as the provision or distribution of audiovisual content generated by private users ("UGC").

The overall size of the European audiovisual sector in 2014 was around EUR 105.8 million\(^2\). It is mainly formed by large companies (for more details on the overall impact of AVMSD on SMEs, see ANNEX 3).

The audiovisual media landscape is changing at a rapid pace due to ever increasing convergence between television and services distributed via the Internet. Consumers increasingly access on-demand content via smart/connected TVs and portable devices. Consumers, in particular the young ones, watch videos, including UGC, on the Internet. Traditional broadcasting in the EU remains strong in terms of viewership, advertising revenues, and investment in content (around 30% of revenues). However, new business models are emerging. Broadcasters are extending their activities online and new players offering audiovisual content via the Internet (e.g. VoD providers and Internet platforms) are getting stronger and competing for the same audiences (for more details see ANNEX 6). However, TV broadcasting, VoD and UGC are subject to different rules and varying levels of consumer protection.

The Digital Single Market (DSM) strategy\(^3\) calls for a modernisation of the AVMSD to reflect market and technological developments. It requires the Commission to consider whether the scope of the AVMSD should be broadened to encompass new services and players currently excluded. In carrying out this review the Commission should bear in mind the objectives of the Directive, namely the protection of minors, consumers and promotion of European works. The overall vision of the DSM strategy is to create an internal market for digital content and services and ensure that Europe is a leader in the global digital economy.

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\(1\) Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)

\(2\) EAO Yearbook 2015

2. **WHAT IS THE PROBLEM AND WHY IS IT A PROBLEM?**

2.1 Conclusions of the ex-post evaluation of the AVMSD under REFIT

The Impact Assessment has been carried out in parallel to the AVMSD ex post evaluation under the Regulatory Fitness and Performance Programme (REFIT) (see ANNEX 4).

The overall conclusion is that the AVMSD objectives are still relevant. If the Directive were repealed the audio visual internal market would collapse since providers would no longer benefit from the COO, but would be subject to 28 different regimes and jurisdictions. This would increase their costs and undermine their propensity to provide cross border services, particularly into smaller Member States. Consumers would loose out because they would have less choice.

The REFIT evaluation concluded that there is scope for simplification, specifically of the procedures that support the application of the COO principle (i.e. the criteria determining jurisdiction over providers and the derogation and cooperation procedures limiting freedom of reception and retransmission in specific cases) and of some commercial communications rules. Some other rules are no longer fit to attain these objectives, primarily due to market developments and changes in viewing patterns.

The REFIT evaluation has identified two main sets of problems:

- Insufficient protection of minors and consumers when consuming videos on video-sharing platforms.

- Lack of a level playing field between traditional broadcasting and on-demand services, and internal market weaknesses stemming from the fact that some of the AVMSD rules are not sufficiently precise.

The REFIT evaluation has also shown that there is room for improving and updating the rules on commercial communications.

It has also emerged from REFIT that there are different accessibility requirements of audiovisual media services for people with disabilities. In December 2015, the Commission adopted a proposal for a European Accessibility Act, which sets accessibility requirements for a wide range of products and services including audiovisual media services. As such, this Impact Assessment will not address the issue of accessibility.

2.2 Description of the problems and their drivers

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4 The Regulatory Fitness and Performance Programme (REFIT) is the Commission's programme for ensuring that EU legislation remains fit for purpose and delivers the results intended by EU law makers.


6 Limitations – robustness of findings

The Commission has carried a thorough data collection and analysis actively involving all relevant stakeholders in different fora such as ERGA, online consultation (details provided in ANNEX 1 and ANNEX 2). The Commission has tried to mitigate to a maximum possible extent the following limitations

- Despite being prompted on a number of occasions by the Commission, the regulators and the contractors hired by the Commission, carrying out the public tender studies for this purpose, the industry has been reluctant or unable to deliver precise quantitative data on the compliance costs stemming from the AVMSD. It is hard for business to assess what costs stem from the Directive since legislation in this domain has been in place for a long time, it has been revised twice and codified once, and in some cases national legislation was already in place.

- Data provided by industry was often confidential, the Commission presented this data in aggregated or anonymised format. When this was not possible, data was taken into account in the evaluation but not provided (this is indicated when applicable);

- Some data simply does not exist because stakeholders do not generate or gather it. This is the case, for example, for figures on the number of viewers and on viewing patterns in on-demand audiovisual media services;

- Based on the elements above, this evaluation is based on the best available data. Whenever reliable quantitative data is lacking, this is mentioned in the relevant sections.
2.2.1 Insufficient protection of minors and consumers in video-sharing platforms

Video-sharing platforms -like Youtube- host professionally produced videos and UGC. UGC can be violent, gory and pornographic and likely to be harmful to children. Children identify video-sharing platforms as mostly linked with violent, pornographic and other content risks. Among the children who link risks to specific platforms, 32% mention video-sharing sites such as YouTube, followed by other websites (29%), social networking sites (13%) and games (10%). In the UK, ATVOD found that at least 44,000 primary school children accessed an adult website in one month alone. ATVOD has found that 23 of the top 25 adult websites visited by UK internet users provide instant, free and unrestricted access to hardcore pornographic videos.

Hate speech is also increasingly accessible via video-sharing platforms. Based on data provided by some national law enforcement or other public bodies, the Fundamental Rights Agency reported an increase in anti-Semitic incidents online in numerous Member States. In the same vein, 73% of respondents to an anti-Semitism survey thought that anti-Semitism online had increased over the past five years.

Video-sharing platforms employ tools like Autoplay (switched on by default for all videos in Youtube) which enable direct exposure to potentially harmful content and incitement to hatred. Exposure to harmful content or content inciting to hatred may also be fostered by new social media features such as streaming audiovisual content live on the Internet.

The AVMSD, and its rules on protection of minors and hate speech, do not apply to UGC offered on video-sharing platforms since these platforms often do not control the selection and organisation of the content. These platforms are subject to the e-Commerce Directive (ECD) which does not require them as intermediaries to monitor content hosted by them nor to take any other pro-active measure. The ECD, however, requires platforms to remove illegal content if they are notified of such content, for example through a court order. The rationale of this ex-post system called "notice and takedown" lies in the fact that intermediaries cannot in principle technically control the content before it is posted. The e-Commerce Directive is therefore focused on illegal content and does not deal with harmful content.

The main video-sharing platforms do take some pro-active steps to protect minors from such harmful content and consumers from hate speech, but assess content against their own standards, which may differ from those set in the AVMSD.

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7 2014 study/project "Net Children go mobile: risks and opportunities". This study, co-financed by the Commission, covers the following countries: DK, IT, RO, UK, BE, DE, IE, PO, ES.
8 EU kids On line: http://www.lse.ac.uk/media@lse/research/EU/KidsOnline/EU%20Kids%20III/Reports/Inftheirownwords02013.pdf
9 Ofcom has designated the Authority for Television On Demand (ATVOD) in 2010 as a co-regulator to take the lead in regulating editorial content for video-on-demand services.
10 2014 report "For adults only? Underage access to online porn".
11 Anti-Semitism: Overview of data available in the European Union 2004–2014. This study does not make the distinction between audiovisual and other types of online content. In AT, anti-Semitic verbal expressions (including on the Internet) or damage to property increased from 9 in 2009 to 57 in 2014 and that in 2014, the most common complaints the AT Inter Federal Centre received in relation to anti-Semitic incidents concerned complaints related to the internet (41). In CZ, media/web anti-Semitic incidents grew from 13 to 209 from 2004 to 2014. In IT, the Observatory of Contemporary Anti-Jewish Prejudice recorded incidents of anti-Semitism with a particular focus on the internet. In the UK, The Community Security Trust recorded 233 anti-Semitic incidents that involved the use of internet-based social media in 2014 (20 % of the 1,168 incidents), compared with 88 in 2013 and 81 in 2012. Of these 233 anti-Semitic incidents, 215 were in the category of ‘abusive behaviour’ and 18 were in the category of ‘threats’.
12 Promoting respect and diversity Combating intolerance and hate Contribution to the Annual Colloquium on Fundamental Rights.
13 In 2015, the video of two US journalists being murdered during a live broadcast spread quickly across social media. When the video was taken down after 10/15 minutes, it had already been shared 300 times on Facebook. Due to the Autoplay feature, many users saw the video unwillingly in their news feed. Since the feature debuted on Twitter in June 2015, many people reported that it auto-played all videos, including exceptionally violent ones (http://www.theatlantic.com/technology/archive/2015/08/snuff-film-unavoidable-twitter-facebook-autoplay-roanoke/404340/).
As a result of this different regulatory treatment consumers and minors are less protected when watching videos on these platforms. For example, the music video "College boy" of the group Indochine, containing graphic images of violent bullying of a school boy, is freely available on YouTube. However, the same video is subject to a watershed on TV in France under the application of the AVMSD. In another case, while YouTube removed a video of a woman being forced by her husband to walk naked in the street for violation of YouTube's Community guidelines, the same video still appears on the website Liveleak.com. By contrast, access to this type of videos is restricted under the AVMSD.

While a number of harmful activities are carried on the Internet, the specificity of video comes from its power to best capture the attention of initially passive users. Thus, seeing violent sexual images, violence or hate speech are online risks that are most likely to be driven by audiovisual images. It must be borne in mind that in 2014, in Europe, Internet video stood for 58% of total consumer internet traffic. This share is expected to increase up to 78% by 2019. The consumption of videos offered by video-sharing platforms is on the rise. Among minors, video viewing is one of the earliest Internet activities carried out by young children.

In the 2015 public consultation most consumer organisations said that the current rules do not deliver sufficient consumer protection as they do not take into account the increasing importance of video-sharing platforms. Most of the Member States and regulators who called for an extension of the AVMSD rules to video-sharing platforms expressed a similar opinion. This view is also confirmed by ERGA (the European Regulators Group for Audiovisual Media Services).

The impact of some self-regulatory initiatives in this field has so far been limited in particular in addressing certain types of harmful content, such as gory and violent videos, and hate speech. For example, the initiative You Rate It, the only one providing a rating tool for UGC, has not been taken up by YouTube. When it comes to protection of minors, ERGA acknowledged that self and co-regulation initiatives have an important role to play but said that existing initiatives have to be

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18 http://www.liveleak.com/
20 Today, 400 hours of videos are uploaded every minute on YouTube, equivalent to 24,000 days’ worth of content uploaded every minute and 65.7 years’ worth of content uploaded every day (http://www.tubefilter.com/2015/07/20/youtube-400-hours-content-every-minute/). The amount of people watching short video clips online in the UK has almost doubled over the period 2007 to 2014 (21% to 39%, the highest increase being among 35-44s with 28 percentage points increase). The popularity of multi-platform online video services, such as YouTube, as an information source has been evident in recent years – 32% of internet users now cite it as an important (very or fairly) source for information, rising to 46% of 16-24 year olds (Ofcom's Adults’ media use and attitudes, 2015 report (http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-lit-10years/2015.Adults_media_use_and_attitudes_report.pdf). One in three consumers believes it is very important to be able to watch UGC on their TV sets at home (http://www.ericsson.com/res/docs/2015/consumerlab/ericsson-consumerlab-tv-media-2015.pdf).
21 For example in the UK in 2014 children aged 12-15 spend more time online than watching television (17.2 vs. 15.7 hours per week (http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-use-attitudes-14/Childrens_2014_Report.pdf). Services such as YouTube are widely popular among children ("EU Kids Online 2014, Final recommendations for policy" http://www.isee.ac.uk/media/@ise/research/EU/KidsOnline/EU%20Kids%20II/Reports/D64Policy.pdf). For example, in the UK YouTube has also become increasingly important as a source of content. In 2015 66% of 11-13s and 73% of 12-15s who watch television say they watch YouTube. And 12-15s who watch both TV and YouTube content in 2015 are more likely to say that they prefer to watch YouTube videos than TV channels (29% vs. 25%) (OFCOM, Children and parents: Media use and attitudes report 2015. http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/children-parents-nov15/childrens_parents_nov2015.pdf). Connected devices such as mobile phones, tablets and games consoles are increasingly used by minors, often without adult supervision (Net Children Go Mobile Project).
22 ERGA brings together the heads of the national independent regulatory bodies in the field of audiovisual services, to advise the Commission on the implementation of the AVMSD.
23 While the majority of countries have self- or co-regulatory schemes in place for audiovisual commercial communications, in the field of the protection of minors from harmful audiovisual content, statutory regulation prevails. The majority of codes in the audiovisual field lack specified targets and objectives which makes their proper evaluation difficult or even impossible. Where monitoring processes are in place they are often not formalised and implemented systematically. Complaints are often used as an indicator to measure the performance of a self- or co-regulatory scheme; however they form a relatively ambiguous indicator. The existence of a legislative backdrop is an important success factor in promoting compliance with a self- or co-regulatory code. Graduated sanctions which maintain an element of proportionality are usually considered to be an effective approach in enforcing a scheme. See ANNEX 5.
24 http://www.yourateit.eu/
reinforced. There is no EU-wide code covering these issues. For more information on these initiatives and their limitations see ANNEXES 8 and 18.

2.2.2 Lack of a level playing field and internal market weaknesses

2.2.2.1 Lack of a level playing field

The AVMSD foresees stricter requirements for TV broadcasting than for on-demand audiovisual media services notably in the fields of promotion of European works and protection of minors.

Such a different treatment is no longer justified in view of changing consumer habits. An increasing number of consumers watch video on-demand. In the 28 Member States total on-demand consumer revenues soared from EUR 919 million in 2010 to EUR 2.5 billion in 2014, an increase of 272% and a CAGR in the 5 year period of 28%\(^{26}\). In 2014 there were more than 2 563 VoD services in Europe, including catch-up TV services of broadcasters (932 services), branded channels on open platforms\(^{27}\) (408 services), VoD services providing access to a catalogue of programmes (1 126 services), and news portals (97 services):

**Figure 1: Total on-demand Consumer Revenues – EUR (M) by year and country – 2010-2014**

![Graph showing total on-demand consumer revenues from 2010 to 2014 by country.](source)

The lighter rules applying to on-demand services undermine protection of minors and cultural diversity and distort competition.

**A. Unequal level of contribution to promotion of European works and lack of effectiveness of the rules applying to on-demand services**

The AVMSD foresees measures to encourage support to European audiovisual production and distribution. TV broadcasters must reserve a majority of their transmission time for European and/or independent works.

TV broadcasters must, where practicable, reserve a majority proportion of their transmission time to European works and at least 10% of their transmission time or of their programming budget for European works created by independent producers.

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\(^{26}\) Data provided in the context of the EAO contribution of data and information to the REFIT exercise (hereinafter EAO REFIT data) Note B.2: market revenues and investments - VoD revenues.

\(^{27}\) The AVMSD does apply to channels on video-sharing platforms (e.g. the YouTube Newswire channel) where an editing team verifies user generated content or YouTube channels managed by broadcasters.
The provisions applying to on-demand services are lighter and more flexible. This results in diverse implementation by Member States (see ANNEX 13) and in video on-demand service providers not contributing significantly to the objective of promoting European works.

The investment of the main TV groups in original programmes in 15 countries amounted to EUR 15.7 billion\(^{28}\) in 2013, i.e. roughly 20% of their turnover (EUR 85 billion)\(^{29}\). In comparison, on-demand providers made a minimal or even no contribution to the production and the promotion of EU works. They invested EUR 10 million in original content i.e. less than 1% of their total revenues (EUR 1.5 billion).

As a result, some Member States intend to make on-demand providers that are not under their jurisdiction contribute financially to European works if they target consumers in their territories. For example, Germany and France intend to apply levies to on-demand services coming from other Member States and targeting German or French audiences\(^{30}\). This uncoordinated approach calls into question the operation of the Directive.

Cultural diversity is also undermined by the limited contribution of on-demand services to the promotion of European works objectives.

B. Differing level of protection of minors

The AVMSD foresees that TV broadcasts shall not include seriously harmful programmes (pornography and strong violence) but may include potentially harmful programmes (erotic content and mild violence) provided measures are put in place to prevent children from hearing or seeing them. On-demand service providers are required to take appropriate measures so that minors would not normally hear or see seriously harmful content. No restriction applies to potentially harmful programmes provided on demand.

This difference in treatment is no longer justified since younger consumers watch about half less television than the average consumer\(^{31}\). Their average TV viewing in 2014 was 2:03 minutes per day. A key factor is the rapidly growing availability of portable screens like smartphones and tablets used to access on-demand services. In the UK\(^{32}\), in 2015, more than four in ten 5-15s (44%) watch on-demand television content, rising to half (51%) of 12-15s. One in five 5-15s (20%) who watch on-demand TV content, watch it daily, with around three in four (73%) watching at least weekly. Much of this is via portable devices.

The above-mentioned different regulatory treatment has led to a competitive disadvantage for TV broadcasting and to a lower level of consumer protection for on-demand services.

2.2.2.2 Threats to the integrity of the audiovisual internal market

A. Complex rules on COO and derogations

The rules underpinning the operation of the COO are too complex and difficult to apply. Most Member States and regulators responding to the 2015 Public consultation have experienced problems in determining which Member State has jurisdiction\(^{33}\). For example, it can be difficult and time consuming to find in which Member State a satellite up-link is used or to determine the country having jurisdiction when operators have broadcast licenses in more than one Member State. In

\(^{28}\) EAO REFIT data Note B1 Market revenues and investments – linear revenues

\(^{29}\) EAO REFIT data Note B3 Investment in original content: Broadcaster investment in programming; and data on investment in online only content

\(^{30}\) Both Member States have notified their schemes as state aid to the Commission: Germany: SA.38418 - 2014/C (ex 2014/N) - Filmförderungsgesetz [OJ 2014 C 437/57]; France: SA.39586 (2014/N) - Loi de finances rectificative pour 2013). The German case in pending and the French notification is suspended.

\(^{31}\) EAO report on measurement of fragmented audiovisual audiences (2015 update)

practice, there have been issues of unclear jurisdiction regarding Greece/UK and Spain/UK. Moreover, in a recent case concerning the restriction of the retransmission of a Russian language channel in Lithuania\(^{34}\), the issue as to whether Sweden had jurisdiction over this channel was contentious.

The procedures allowing Member States to exceptionally derogating from the COO are imprecise and uncertain (e.g. they do not specify how the providers’ right of defence should be exercised). Different procedures apply to TV broadcasting and on-demand services without there being a justification for such a difference.

In the last years there has been an increasing number of situations where Member States were reluctant to allow the retransmission of certain broadcasts coming from abroad into their territories and resorted to these procedures. These cases concern several Russian language channels broadcast into Lithuania and Latvia and allegedly containing incitement to hatred. In addition, Sweden considered that certain channels broadcasting from the UK infringed its stricter national rules on alcohol advertising\(^{35}\). In other instances, concerns were raised regarding protection of minors\(^{36}\).

These ineffective and overly complex procedures pose a threat to the integrity of the internal market and create legal uncertainty and a lack of predictability (see ANNEX 9).

B. No EU requirement on regulatory independence

The AVMSD does not set any requirement for Member States to have an independent regulatory body. The absence of a formal obligation has contributed to diverse regulatory structures and varying degrees of independence (See Section 5.2.4). Yet, regulatory independence both from political bodies and commercial interests is essential to ensure effective market supervision, proper application of the rules of the Directive and guarantee media freedom and pluralism.

A captive regulator may treat differently the various players competing on the same market clearly distorting competition. This is why many EU regulatory frameworks in other domains (i.e. telecom, gas, electricity, postal services and personal data protection) mandate regulatory independence (see ANNEX 12). As examples in the audiovisual field, in the context of the Klubrádió case, the company sued the national regulator in Hungary for an economic loss resulting from an alleged unfair treatment which led to a delay in the granting of a license\(^{37}\). Liberty Global\(^{39}\) also lodged a complaint against the Hungarian Media regulator that led to the preliminary ruling by ECJ concluding that the Hungarian Regulator had illegally requested Liberty Global to obtain a license in order to operate in Hungary\(^{40}\). The association of commercial broadcasters (ACT) commented on the recent developments in Greece, pointing to the negative impact on the market of a transfer of powers from the Regulator to the Government\(^{41}\).

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\(^{34}\) This case gave rise to the COMMISSION DECISION (C2013) 4699 final of 10.7.2013 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services

\(^{35}\) Sweden submitted a notification to the Commission in this regard which was subsequently withdrawn.

\(^{36}\) For more details see Second application report (ANNEX to the REFIT document).

\(^{37}\) The National Media and Infocommunications Authority (Nemzeti Média- és Hírközlési Hatóság, NMHH) refused to renew a license for the use of frequencies for Klubrádió, one of the few remaining radio stations opposing the government. The office did not execute the legally binding judgment of the court obliging it to grant the frequencies. The Commission sent in this context two administrative letters (EU Pilot letter 3161/12/INSO and administrative letter Ares (2013) 336906). Klubrádió sued NMHH for a multi-billion compensation for the lost advertising income alleging that there was causation between the breach of law of NMHH and the fall in their advertising revenues. The case is pending (http://www.financialobserver.eu/e/economic-nos verts-on-the-hungarian-media-market/).

\(^{39}\) EU Pilot case 2026/11/INSO

\(^{40}\) The case was launched under 1971/11/INSO in Pilot following formal complaint CHAP(2011)00417), subsequently infringement procedure was initiated No 2011/4127.


\(^{41}\) http://www.ace.be/mediaroom/95/31/ACT-statement-on-new-Greek-legislation?type=press_release
There is also evidence that the independence of audiovisual regulatory authorities has an impact on the providers' willingness to establish in an EU Member State and serve audiences in several Member States\textsuperscript{42}. Moreover, in the audiovisual sector, regulatory authorities lacking independence are not in a position to guarantee media freedom and pluralism. In many countries where independence of national regulatory bodies is weak, challenges to media freedom and pluralism over the last years have been reported\textsuperscript{43}. This was the case for Romania in the period from 2007 to 2012, where the Commission identified problems with ensuring media freedoms and with the independence of the audiovisual regulatory body\textsuperscript{44}. The same happened in Hungary in 2010, where a number of provisions of a draft law raised concerns related to media pluralism. The Commission\textsuperscript{45}, the European Parliament\textsuperscript{46}, the OSCE Representative on Freedom of the Media\textsuperscript{47}, the Council of Europe\textsuperscript{48} and other international bodies and NGOs active in the area of human rights and civil liberties, and Member States have all raised concerns related to both media freedom and the independence of the regulator. The OSCE Representative also recently called for respect of regulator's independence in Latvia following the dismissal of the Regulator chairman\textsuperscript{49}.

2.2.3. Rules on commercial communications no longer fit for purpose

The REFIT evaluation confirmed that some of the rules on commercial communications are too rigid in the light of the evolution of the market.

The AVMSD contains rules that apply to all audiovisual media services (e.g. on product placement, sponsorship and alcohol advertising). However, it lays down more rules that apply only to TV broadcasting. They set a maximum of 12 minutes of advertising per hour on television (i.e. 20% per hour), define how often TV films, cinematographic works and news programmes can be interrupted by advertisement, and set the minimum duration of teleshopping windows.

Nowadays, the TV broadcasting specific rules are too rigid in a world where viewers are likely to switch to alternative offers, in particular without advertising. For example, in the USA where there are no minutage limitations, viewers overwhelmed with TV advertising, turned to other video offers (e.g. video on-demand) thereby disciplining the behaviour of TV broadcasters, who were forced to decrease the amount of advertising on their channels\textsuperscript{50}. In the EU, most broadcasters consider that the lack of flexibility of the 12 minute and insertion rules and the restrictive character of its exceptions prevent them from maximising their revenues around peak periods. The monitoring of advertising in Member States has indeed shown that this rule is regularly breached in a number of Member States.

The rigidity of the rules on product placement and sponsorship has prevented these advertising formats from delivering their full potential in terms of revenues. Some regulators and Member States confirmed that the rules create legal uncertainty for stakeholders, discouraging them to invest in product placement. As a benchmark, in the US, where there is no material regulation of product placement, this format represents almost 5% of the TV ad spend market. In the UK, it represents a share of only 0.1%.

\textsuperscript{42} Visionary Analytics, Preliminary Report, p. 46.
\textsuperscript{43} Culture Council Conclusions of 26 November 2013.
\textsuperscript{44} Progress Reports http://ec.europa.eu/cvm/docs/com_2013_47_en.pdf
\textsuperscript{45} The Commission noted that "the recently adopted Hungarian Media Act raises specific concerns regarding the respect for the fundamental media freedoms such as freedom of expression and media pluralism"; see press release: http://europa.eu/rapid/press-release_SPEECH-11-6_en.htm?locale=FR
\textsuperscript{47} Press release: http://www.osce.org/fom/90823 and http://www.osce.org/fom/14687
\textsuperscript{49} http://www.osce.org/fom/167586
\textsuperscript{50} http://television.telerama.fr/television/etats-unis-et-maintenant-moins-de-couperes-de-publicite,138319.php
2.3 What is the EU dimension of the problem?

The AVMSD is the regulatory framework underpinning the audiovisual single market.

Since the last revision of the Directive in 2007 this market has kept growing. At the end 2013, about 38% of TV channels established in the EU targeted foreign markets (either EU or extra EU). This is also the case for on-demand - 31% of the VoD services available in the Member States are established in another Member State - and other online services. The entry of video-sharing platforms and the corresponding changing viewing patterns and associated risks is a phenomenon, which affect all the Member States.

The upcoming revision of the AVMSD is deemed to comply with both subsidiarity and proportionality by preserving the harmonization approach and cooperation mechanisms allowing Member States to take national specificities into account.

2.4 How would the problem evolve, all things being equal?

The market for on-demand and online services will continue to increase and so the potential competitive disadvantage of TV broadcasting and the lower level of consumer protection.

From a static point of view, the TV broadcasting market is still the strongest audiovisual market. In 2013, the linear television revenues in the EU 28 were EUR 83.6 billion. In comparison, the total consumer revenues of VoD and SVoD services amounted to EUR 2.5 billion i.e. 3% of the TV broadcasters' revenues.

However, from a dynamic perspective, the domination of TV broadcast is less obvious. Their growth rate has decreased from an average annual rate of 2.8% from 2009 to 2013, to only 0.3% in 2013. In the meantime, the total on demand consumer revenues in the 28 Member States soared from EUR 919 million in 2010 to EUR 2.5 billion in 2014, an of 272% increase and a compound annual growth rate in the 5 year period of 28%. According to the 2015-2019 PWC media outlook, electronic home video revenue will nearly double over the forecast period worldwide. Global electronic home video revenue is set to rise from US$15.28 billion in 2014 to US$30.29 billion in 2019. Total electronic home video OTT/streaming revenue in particular is seeing a CAGR of 19.0% as online video and streaming services are beginning to attain a significant foothold in many markets.

Mobile consumption is deemed to increase in the near future. It is expected that, by the end of 2020, the number of smartphones in Europe will have doubled, reaching 800 million, meaning that more than 70% of mobile subscriptions will be for smartphones. By 2020 60% of all mobile data traffic worldwide will be from video (compared to 45% today). It will grow by 55% annually during this period.

If the status quo were maintained, the problems identified would evolve as follows:

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51 EAO REFIT data Note A1: linear audiovisual media services.
52 EAO Yearbook 2015.
53 Refit exercise: contribution of Data and Information by the European Audiovisual Observatory - Note B.1: market revenues and investments - linear revenues.
54 Refit exercise: contribution of data and information by the European Audiovisual Observatory - Note B.1 market revenues and investments - linear revenues.
- Consumers, in particular minors, would be increasingly exposed to harmful content and hate speech on video-sharing platforms.
- TV broadcasting would continue to be at an unfair competitive disadvantage to video on-demand services. The differences in regulation would hurt competition and promotion of European works.
- The integrity of the audiovisual internal market would suffer from the unclarity of some of the rules and procedures of the Directive. This would undermine the COO, which is the cornerstone of the AVMSD.
- Regulators in certain countries would continue lacking independence, which would undermine the internal market and media freedom and pluralism.
- Rules on commercial communications would remain inadapted to the market evolution.

3. **Why should the EU act?**

As indicated above, the DSM Strategy announces the review of the AVMSD with a view to creating an audiovisual media framework fit for purpose for the 21st century.

In the Council Conclusion of 25 November 2014 on European Audiovisual Policy in the Digital Era, the Council invited the Commission to "urgently complete the exercise of the review of the Audiovisual Media Service (AVMS) Directive in the light of the rapid technological and market changes resulting from the digital shift, and on the basis of the outcome of this review submit an appropriate proposal for the revision of this Directive as soon as possible, in respect of the principle of subsidiarity"\(^{58}\).

The EP resolution towards a DSM urges the Commission to revise the AVMSD\(^{59}\).

4. **What should be achieved?**

The goal of the revision is to address the problems identified in Section 2.2:

<table>
<thead>
<tr>
<th>General objectives</th>
<th>Specific objectives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enhance consumer and minors protection</td>
<td>• Enhance consumer and minors protection, in video sharing platforms</td>
</tr>
</tbody>
</table>
| Ensure a level playing field, preserve the integrity of the internal market and enhance legal certainty | • Establish more effective and fair rules on promotion of European works  
• Ensure more effective and fair rules on the protection of minors in on-demand services  
• Simplify and clarify the procedures to apply the COO rules  
• Ensure regulatory impartiality across the EU  
• Making more flexible and clear the rules on commercial communications |

5. **What are the various options to achieve the objectives and what are their impacts?**

The present Impact Assessment includes the description of the options and their impacts in the same Section.

The options are grouped according to the problem they intend to address:

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5.1 Options addressing the problem of insufficient minors and consumers protection in video-sharing platforms

5.1.1 Status quo option

The AVMSD does not apply to UGC in video-sharing platforms (e.g. YouTube). Video-sharing platforms are covered by the ECD, which warrants them limited liability for illegal content under certain conditions.

The AVMSD applies to television broadcasts and on-demand audiovisual media services for which providers have editorial responsibility. To be covered by the Directive:
(i) services must have as their principal purpose the provision of programmes to inform, entertain or educate the general public and
(ii) programmes should be comparable, in form and content, to television ("TV-like").
Most recently, the ECJ has clarified the "TV likeness" and "principal purpose" requirements in the "New Media Online GmbH" case60.

Economic outcome

60 Judgment of the Court (Second Chamber) of 21 October 2015, New Media Online GmbH v Bundeskommunikationsverwalt, Case C-347/14 (hereinafter, "New media online GmbH" case). Videos that are short in length can qualify as audiovisual media service under the AVMSD (when the content offered competes for the same audience as television broadcasting). In addition the AVMSD applies when the audiovisual media content is in content and form independent of the main service offered by a provider (whether it is messaging, UGC, press articles, etc.). This is the case even when the main service is of a different nature, e.g. text, and is not merely an indissociable complement to that activity, in particular as a result of the links between the audiovisual offer and the offer in text form.
Existing costs: Maintaining the status quo would not entail additional compliance costs\textsuperscript{61} or administrative\textsuperscript{62} costs.

Outcome on the Internal market: As a result of the ECJ judgment in the "New Media Online GmbH" case, more on-demand audiovisual media services (e.g. videos of short duration or self-standing video sections in a newspaper website) will be covered by the Directive. This will enhance legal certainty, the level playing field and consumer protection in the Internal Market. For these reasons, any revision of the AVMSD should include the codification of this judgment\textsuperscript{63}.

Outcome on competitiveness: Players being covered by the Directive are at a competitive disadvantage compared to video-sharing platforms because the latter are subject to a lighter regulatory regime (the ECD). This was confirmed in the 2015 public consultation where most respondents from the Member States, regulators, and consumer organisations, as well as around half of public service and commercial broadcasters, flagged that the current framework can lead to the lack of a level playing field.

Social outcome

Consumers and minors are not sufficiently protected in video-sharing platforms.

5.1.2 Option A: Self-regulation for protection of minors and consumers on video-sharing platforms

Member States and the Commission would encourage video-sharing platforms to adopt self-regulatory measures to restrict access to content harmful to minors or inciting to hatred. Video-sharing platforms would be defined as those that exercise a degree of control, short of editorial responsibility, over the presentation of audiovisual content (including UGC), and whose principal business purpose is the provision of audiovisual services\textsuperscript{64}.

The notions of content harmful to minors and incitement to hatred would be the same as the ones applying to audiovisual media services under the AVMSD.

The Commission would play a facilitating role in encouraging the development of European codes of conduct by providing examples of measures that could be adopted by video-sharing platforms (these could include some of the examples of on-going initiatives mentioned in ANNEX 8 and 18).

Economic impacts:

Substantive compliance costs: When it comes to encouraging video-sharing platforms to adopt self-regulatory measures, the impact of this Option should not be significant for the large platforms which have already in place community standards/guidelines (see ANNEX 8) along with some voluntary

\textsuperscript{61} Substantive compliance costs are the costs incurred by providers in changing the nature of their products and/or production or business processes
\textsuperscript{62} Administrative costs are the costs incurred by: 1) businesses in meeting legal requirements and provide information to the public sector in order to demonstrate compliance 2) the public sector in enforcing legislation.
\textsuperscript{63} Prior to the judgement, there were diverging interpretations as to what is an on-demand service, specifically as regards the following criteria:
  - "Principal purpose", with similar services being considered subject to the AVMSD in some countries but not in others.
  - "TV-likeness", also being subject to diverging interpretations
For example, in the UK OFCOM deemed BBC Top Gear on YouTube and BBC Food on YouTube not to be audiovisual media services as the clips were not comparable to TV programmes of the same "genre" due to the short duration and the style of editing. On the other hand, OFCOM deemed MTV VIVA TV to be an audiovisual media service despite the short duration because OFCOM acknowledged that some genres may be of a shorter nature and the video extracts were compared to a standard TV duration for these types of programmes. In Austria, the Verwaltungsgerichtshof (Administrative Court) referred to the ECJ the question of whether short clips (from 30 seconds to several minutes) in the video sub-section of an online newspaper (Tiroler Tageszeitung Online) were "TV-like".
\textsuperscript{64} As defined by Articles 56 and 57 TFEU.
monitoring and reporting systems\textsuperscript{65} not only for illegal but also for harmful content (e.g. self-harm). All large video-sharing platforms apply techniques which employ both software and human element to handle "content moderation". This means that normally users flag content deemed inappropriate. User complaints are then processed by an algorithm prior to sending it to a moderation team for verification.

However, if they decide to respond to the Directive call they would have to adapt their terms and conditions to the AVMSD notions of content harmful to minors and incitement to hatred and put in place more effective tools for restricting access to harmful content (particularly violent videos) and curb hate speech.

\textbf{Administrative costs:} Given the purely self-regulatory nature of this option the costs for the public authorities would be limited. To counter incitement to hatred, some Member States are already encouraging self-regulation\textsuperscript{66}.

\textbf{Impacts on the Internal market:} The impact on the Internal market would depend on the effectiveness of the self-regulatory measures and the number of players that would decide to adhere to the codes, including eventually EU codes. The risk is that this option may result in a patchy approach with varying levels of protection across the internal market.

\textbf{Impacts on competitiveness:} This Option would not provide an effective solution to the concerns regarding the level playing field as purely self-regulatory measures, without a regulatory backstop, have proven insufficient in the past (see Section 2.2.1). In addition, despite the ECD requirement to Member States and the Commission to encourage codes of conduct, despite an initial follow-up – which related primarily to codes of conduct related to trust mark schemes and labels – activities related to the promotion of codes of conduct have since then slowed down.

\textbf{Impact on SMEs:} Self-regulation for video-sharing platforms may entail compliance costs for SMEs but only if they decide to adhere to the codes. The Commission has estimated these costs as ranging between 100 000 (incurred by Mediaset when piloting the You Rate It initiative) and EUR 320 000 (incurred by a major Danish ISP to conduct parental control, website, education and information). However, much more developed systems of content moderation may imply significantly higher costs. For example, one third of a large platform total employees deal with content moderation\textsuperscript{67}.

\textbf{Social impacts:} When it comes to encouraging self-regulation for video-sharing platforms, the level of consumer protection would improve on large platforms if they decide to adapt and tighten their self-regulatory tools. In smaller platforms, the level of protection may improve considerably but only if they decide to participate. If the Commission manages to carry out its coordination role effectively, this may improve the present situation whereby there are no codes of conduct at EU level (ref. status quo). \textbf{Impact on fundamental rights:} As it would rely on voluntary measures, Option A would not guarantee a contribution to the protection of fundamental rights enshrined in the EU Charter, including children's right to protection and care as is necessary for their well-being (Art. 24).

\textbf{5.1.3 Option B: An obligation of means imposed on video-sharing platforms for protection of minors and hate speech, implemented through co-regulation}

\textit{Member States would have to ensure that video-sharing platforms put in place appropriate measures to:}

- Protect minors from harmful content; access to which would have to be restricted;

\textsuperscript{65} For example, the minimum age to join is 18 (13 with parental consent) for YouTube and 17 for Vine, while "community standards" detail how the platforms handle “abusive" content. See https://www.facebook.com/communitystandards\#:\# http://www.youtube.com/yt/policyandsafety/en-GB/communityguidelines.html https://support.twitter.com/articles/18311\#:\# http://www.dailymotion.com/legal/prohibited

\textsuperscript{66} Used in AT, DE, EL, HU, IT, PL, FI, DK, BE and NL.

\textsuperscript{67} http://www.whoishostingthis.com/blog/2015/04/15/moderating-facebook/
Video-sharing platforms would be defined as those that exercise a degree of control, short of editorial responsibility, over the presentation of audiovisual content (including UGC), and whose principal business purpose is the provision of audiovisual services.\(^{68}\)

The notions of content harmful to minors and incitement to hatred would be the same as the ones applying to audiovisual media services under the AVMSD. The terms and conditions of the platforms would have to be brought in line if necessary with these notions and other relevant rules of the Directive.

Member States should not impose on providers any general obligation to monitor content ex ante.

Member States would require video-sharing platforms to develop self-regulation providing mechanisms (e.g. age-verification systems, content description, age rating systems) to achieve these objectives. These mechanisms would have to be chosen by the industry which would be subject to an obligation of means (i.e. to use all reasonable means to achieve the desired results). The AVMSD would not mandate adoption of specific technologies or tools. The terms and conditions of the platforms should contain an appropriate reference to these mechanisms.

The Commission and ERGA would facilitate exchanges of best practices on co-regulatory systems across the EU. If considered appropriate, the Commission would facilitate the development of EU codes on which ERGA might be requested to give an opinion.

A complaint mechanism for consumers and minors should also be foreseen at national level in case of non-compliance. Any sanction should be proportionate and take into account as mitigating factor the fact that video sharing platforms lack proper editorial responsibility.

For the specific purpose of this provision, video-sharing platforms which are not established – for example through their parent company – in the EU\(^{69}\) but target consumers in the EU would be required to register in a Member State.

**Economic impacts**

**Substantive compliance costs:**
Large video-sharing platforms, pursuant to their corporate policies, already take steps (see ANNEX 8) to protect minors and all users,\(^ {70}\) not only from illegal but also from harmful content (e.g. pornography and self-harm). Filtering and fingerprinting\(^ {71}\) mechanisms are widely used by major video-sharing platforms and they could be used also to comply with the new requirements under Option B without having to incur substantial additional costs. For example, there are several age verification systems on the market, which are widely used online by VoD service providers.

Assessing whether content is harmful is generally more complex than assessing whether it is illegal because the notion of harmful content is broader than that of illegal content. It can however be expected that by putting in place mechanisms to protect minors, platforms would gain in brand power.

68 As defined by Articles 56 and 57 TFEU.
69 The main video-sharing platforms are established in the EU. For example Dailymotion is established in France and Google, Youtube parent company, is based in Ireland.
70 For example, the minimum age to join services is 18 (13 with parental consent) for YouTube and 17 for Vine, while “community standards” detail how the platforms handle “abusive” content. See https://www.facebook.com/communitystandards/#; http://www.youtube.com/yt/policyandsafety/en-GB/communityguidelines.html; https://support.twitter.com/articles/18311#; http://www.dailymotion.com/legal/prohibited
71 Fingerprint is software that generates a unique signature (a fingerprint) for digital videos by calculating the essential features of the video (known as “hash”). The evaluation and identification of potentially harmful video content is then performed by comparing the extracted video fingerprints.
No precise indications of the costs to implement this provision can be provided. They would depend on the size of the company and on the specific mechanisms that the company will decide to put in place. These mechanisms are also likely to evolve over time due to technology advancements. The costs incurred at present by the industry to enact measures to protect citizens either according to corporate policies or to other arrangements can be used as a benchmark for possible substantive compliance costs.

As indicated above, the costs for putting in place rating mechanisms may range between EUR 100 000 and EUR 320 000. More developed systems of content moderation may entail higher costs.

As another benchmark, the following table provides the data collected for Vodafone Kabel Deutschland GmbH, for the protection mechanisms put in place for their internet offering.

<table>
<thead>
<tr>
<th>Type of protection mechanism</th>
<th>Cost, Euro</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child Protection App (Android) in 23 markets</td>
<td>430 000 initial costs</td>
</tr>
<tr>
<td>F-Secure Security Software (Parental Control) on DSL networks – licensing fees</td>
<td>116 250 monthly</td>
</tr>
<tr>
<td>Development costs of family features on mobile and WiFi-networks</td>
<td>290 000 to date</td>
</tr>
<tr>
<td>Membership in self- and co-regulation</td>
<td>40 000 yearly</td>
</tr>
<tr>
<td>Membership fees to associations for the protection of minors (search engines, white lists, blacklists)</td>
<td>150 000 yearly</td>
</tr>
<tr>
<td>Staff costs</td>
<td>120 000 yearly</td>
</tr>
</tbody>
</table>

**Administrative costs:** If the monitoring of video-sharing platforms is done via a complaint based mechanism, the related administrative costs for all EU regulators have been estimated at EUR 600 000.\(^2\)

If the Member States decide to put in place co-regulatory mechanisms, figures regarding existing self-regulatory mechanism can be taken as a reference to estimate the associated costs for the industry. For example, the self-regulatory systems in place in the majority of Member States on commercial communications are either funded by membership fees or a levy system from the industry and their cost ranges from EUR 250 000 to EUR 1 million.\(^3\)

**Impacts on the Internal market:** Option B would prevent fragmentation resulting from potential diverging national rules.

**Impacts on competitiveness:** Option B would improve the conditions of competition between TV broadcasting, video on-demand providers and video-sharing platforms. This option lays down flexible and future-proof rules allowing companies scope for innovation and ensuring the continued relevance of the rules over time. **Impacts on SMEs:** SMEs platforms that do not have already mechanisms in place to moderate harmful content either proactively or upon notification would incur important compliance costs. The others will have to adapt their standard terms and conditions and become more effective. In particular, SMEs may need to make new investments in filtering and fingerprinting.

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\(^2\) Visionary Analytics/SQW. The methodology is based on extracting from the MAVISE database the number of platforms that would be covered by the AVMDS following the extension of the material scope i.e. 15. For those where the number of unique viewers per month was available the methodology extrapolates the 184 requests from EU regulators to Youtube in one year, i.e in total for all the platforms in the EU 312 complaints. Multiplying this number by an average number of days to process a complaint results in a cost of EUR 0.6 million.

\(^3\) Sources EASA (European Advertising Standards Alliance).
technologies which, on the other hand, major companies have already available. Yet, by putting in place mechanisms to protect minors, SMEs could gain in branding power.

**Social impacts:**

Option B would help overcome some of the limitations of existing industry-led and self-regulatory initiatives (See Section 2.2.1) and meet the AVMSD objective of protecting consumers, including minors. Option B is likely to address the concerns on the level of protection voiced in the 2015 Public consultation by most of those who called for an extension of the rules, i.e. a majority of Member States and regulators who replied to this question, most consumer organisations and approximately half of all broadcasters who replied. These stakeholders want to apply to additional services (including platforms) at least the rules on protection of minors and hate speech which are seen as a basic level of protection online. On the other hand, a small number of Member States, some regulators as well as the Internet, ICT, the press publishing sector, telecom, cable, satellite and advertising industries believe that the AVMSD rules on material scope ensure sufficient consumer protection also in light of the broader EU regulatory framework. Option B will level up the standard of protection from harmful content in video-sharing platforms with the one applicable to on-demand services (see Section 5.2.2).

Moreover, it is likely that any improvement of the level of protection for audiovisual content pursuant to Option B will have a positive spillover effect on other types of content (such as text/comments functionalities accompanying video content). **Impacts on fundamental rights:** Option B would have a direct positive impact on the protection of fundamental rights enshrined in the EU Charter, such as: human dignity (Article 1); right to the physical and mental integrity of persons (Article 3); non-discrimination (Article 21); children's right to protection and care as is necessary for their well-being (Article 24); general consumer protection (Article 38). Given that Option B provides for a regulatory backstop, it would ultimately be up to the Member States (and not to private operators) to assess the legitimacy of possible decisions to restrict access to content in specific cases.

Given that the Member States are bound by the EU Charter of Fundamental rights when implementing EU law, there would be a guarantee that: any limitation to the exercise of freedom of expression and information as enshrined in Article 11 of the Charter is provided by law; respects the essence of this freedom; is proportionate; and only takes place when it is necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. As a consequence, the fundamental right to conduct a business (Article 16 of the Charter) would be respected.

5.1.4 Comparison of options

<table>
<thead>
<tr>
<th>Costs and savings</th>
<th>Status quo</th>
<th>Option A</th>
<th>Option B</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No administrative costs or compliance costs</td>
<td>Compliance costs: Depending on the nature of the mechanisms, the costs can vary from EUR 100 000 for the EU (cost of a user generated rating system) to EUR 3.1 million per year for the EU</td>
<td>Administrative costs: EUR 600 000 per year for all EU Regulators (complaint based mechanism)</td>
</tr>
</tbody>
</table>

74 On traditional TV content potentially harmful to minors is only shown after 10pm and seriously harmful content such as pornography and gratuitous violence is banned. In on-demand services, 4 MS forbid seriously impairing content; and 16 MS mandate forms of protection such as PIN codes or content filtering for content for which the AVMSD does not require restrictions i.e. content which is likely to impair the development of minors.

75 Article 51 of the Charter provides that the Charter is binding for the Member States only when they implement Union law.

76 Facebook has 300 people moderating. Average FTE cost in EU is 51,630 EUR (cost of a working hour on average in the EU is EUR 30 and the average number of hours worked in the EU is 1712: [http://www.coe-rexecode.fr/public/Indicateurs-et-Graphiques/Indicateurs-du-cout-de-l-heure-de-travail-en-Europe](http://www.coe-rexecode.fr/public/Indicateurs-et-Graphiques/Indicateurs-du-cout-de-l-heure-de-travail-en-Europe) and [http://www.jobat.be/fr/articles/ou-travaille-t-on-le-plus-en-europe/](http://www.jobat.be/fr/articles/ou-travaille-t-on-le-plus-en-europe/)
The share of the EU audience in Facebook worldwide audience is 20 %: [http://www.internetworldstats.com/stats4.htm](http://www.internetworldstats.com/stats4.htm). Calculation: 51,630*300*0.2=EUR 3.1 million
Option B most effectively delivers on the objective of protecting consumers including minors by setting out co-regulation. This would be done at a limited additional cost given the fact that most platforms have already in place similar mechanisms. In a co-regulatory system, the costs are shared between the industry and regulators.

The added value of Option B in terms of consumer protection lies in the obligation to protect minors from harmful content on video-sharing platforms. For hate speech, while this is already covered as illegal content by the ECD system of notice and action, Option B would introduce an obligation to adopt proactive measures.

From a political viewpoint, Option B is the one that most effectively strikes a balance between the call from a number of Member States and the European Parliament for enhancing the protection of minors and viewers online and the need to preserve and promote freedom of speech, freedom to conduct a business and the ability for companies to innovate.

EU intervention under this option remains proportionate and is mainly based on co-regulation, allowing for national specificities to be taken into account. Option B it also proportionate as it would leave to the industry leeway to implement a regulatory obligation on a best effort basis.

Option B is the preferred option.

**5.2 Options addressing the problem of the lack of a level playing field and internal market weaknesses**

**5.2.1 Promotion of European works**

**5.2.1.1 Status quo option**

*Under the AVMSD, TV broadcasters must, where practicable, reserve a majority proportion of their transmission time to European works and at least 10 % of their transmission time or of their programming budget to European works created by independent producers. An adequate proportion of this quota has to be reserved to "recent" independent works.*
On-demand service providers, where practicable, must promote the production of and access to European works. The Directive gives the following examples of how this can be done but leaves the choice of the measures to Member States: i) financial contribution to the production and rights acquisition of European works; ii) a share of European works in the catalogues; and/or iii) prominence of European works in the catalogues.

**Economic outcome**

**Existing costs:** Maintaining the status quo would result in no additional compliance or administrative costs for regulatory authorities or media services providers.

As regards existing compliance costs, most commercial broadcasters estimate that compliance with the requirement on the majority proportion of transmission time generates medium/high costs for their business. Some thematic and small channels bear higher costs to comply with quotas. For on-demand services, the costs vary depending on how Member States have implemented Article 13 AVMSD (see ANNEX 13).

The existing administrative costs for regulators to monitor TV broadcasting services have been estimated at 220 000 for all EU Regulators. In the case of monitoring compliance of on-demand services, only some Member States have put in place a legal obligation for on-demand service providers to communicate data on compliance to national regulators. The cost of monitoring has been estimated at 10 000 for all EU Regulators.

Broadcasters and VoD service providers have reported medium to high existing administrative costs in relation to reporting obligations on the promotion of European works. In the case of TV broadcasters these administrative costs mainly depend on the number of channels covered by the reporting obligations. In practice, estimations show that annual administrative costs for all TV broadcasters in the EU are likely to vary among Member States and would approximately amount to EUR 200 000 annually. For all EU on-demand services, administrative costs has been estimated at EUR 111 000 annually.

**Outcome Internal market:**

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77 The Second Report on the application of Articles 16 and 17 of Directive 2010/13/EU for the period 2011-2012 (ANNEX 17) details the main difficulties with compliance identified by broadcasters. The difficulties faced by thematic and small channels in complying with quotas could be addressed through a closer cooperation between national regulators by means of, for example, applying exemptions in a flexible and harmonized manner.

78 According to ICF International analysis as a result of the contract “Survey and Data gathering to support the Impact Assessment of a possible new legislative proposal concerning Directive 2010/13/EU (AVMSD) and in particular the provisions on cultural diversity” (SMART 2015/0051), these costs vary substantially depending on the methods used to monitor compliance. To monitor compliance of TV broadcasters, most regulators obtain data directly from operators but often do not carry out a thorough verification of the data. In these cases, administrative costs for regulators are limited, and amount to around EUR 500 per year depending on the number of TV broadcasters and the hourly wages and time devoted. For those regulators that carry out a thorough verification, annual costs range from EUR 3 000 (e.g. in IE) and EUR 15 000 (e.g. in ES). For those carrying out internal monitoring, annual costs are between EUR 2 000 (in some Member States such as EE) and EUR 91 000 (in others such as FR). Finally, some Member States use specific software for the collection and transmission of data and/or the services of independent research companies for verification, which can lead to higher costs. (see ANNEX 16)

79 ICF International assumed the hypothesis that all Member States impose a legal obligation on on-demand service providers to communicate data on compliance to national regulators and that the latter had no monitoring or verification system in place. Since this is not currently the case the figures presented are rather an overestimation. See ANNEX 16.

80 Supervising on-demand services is a costly exercise due to (i) the high number of on-demand service providers, at least in certain countries: almost 2 563 video-on-demand (VOD) established in the MS (in some countries, this figure could go up to 515); and (ii) catalogues of on demand players evolve on a daily basis. A common problem across the Member States is the lack of relevant data. Most Member States rely on data supplied by the operators without further control/systematic cross-checking and/or random controls. The frequency of requesting such data also differs: many foresee yearly reporting obligations for the providers while others rely on longer reporting periods, e.g. coinciding with the reporting obligation laid down by the Directive i.e. all four years. Random checks are only carried out in few Member States. Several countries indicated that they are discussing or planning to develop a specific software system for monitoring. (Study on “Promotion of European works in practice – 2014”)

81 According to ICF International estimations administrative costs for TV broadcasters range from less that EUR 1 000 (such as in LV and LT) to more than EUR 20 000 (such as in DE and UK). See ANNEX 16.

82 According to ICF International estimations administrative costs for on-demand service providers would range from less that EUR 1 000 (such as in LV and EE) to more than EUR 20 000 (such as in DE and FR). See ANNEX 16.
TV broadcasters devote widely the majority of qualifying time to European content. In 2012, European works enjoyed an average of 64.1% of the total qualifying transmission hours.

For on-demand services, as the Directive simply gives examples of how on demand services may promote European works, only 19 Member States have imposed obligations and they have done so in varied ways, i.e. through financial contribution, share and/or prominence in their catalogues, contributing to a high level of fragmentation (see ANNEX 13).

**Outcome on competitiveness:** The different treatment between TV broadcasting and on-demand services has resulted in TV services operating under more constraints than on-demand services. Looking at the fast-development of on-demand services\(^83\) in Europe as well as the worldwide medium term growth prospect\(^84\), this different treatment can be expected to increase. Ultimately, the existence of larger constrains for TV broadcasting could reduce their flexibility to adapt to the viewers demands therefore undermining their attractiveness and thus their competitiveness.

On-demand services also have a greater flexibility and incentives to benefit from the internal market by establishing themselves in a particular country and distribute across Europe\(^85\). The existence of lower constraints on their editorial policy may have an impact in their choice of establishment, which may reinforce their competitive advantage compared to TV broadcasters\(^86\).

The results of the 2015 Public consultation confirm a perceived lack of fair treatment between TV broadcasting and on-demand services: 61% of the contributors who expressed an opinion believe that the current rules are not fair. 5 Member States\(^87\) and 4 national regulators\(^88\) pointed out that the asymmetry in TV broadcasters and on-demand services regulation is unjustified.

In their contributions to the 2015 Public consultation 3 Member States\(^89\) and 5 national regulators\(^90\) supported maintaining the status quo. On the industry side, most VOD providers and members of the digital/Internet industry (9 out of 17 contributions) would also prefer to maintain the status quo.

On the contrary, some commercial broadcasters (7 out of 30) called for repealing all current rules on promotion of European works, which would be then only subject to national rules. As for public service broadcasters, the majority (10 out of 16) would favour other options and mainly to reinforce rules on on-demand services.

**Social outcome:**

The current rules aim to ensure that consumers have access to European content. As mentioned above, the current rule for TV broadcasters resulted in European citizens being exposed to a significant amount of European works. This was particularly important in a context where viewer hours for European works have declined (down from 74 % in 2007 to 69 % in 2010).

As regards on-demand services, the low level of requirements imposed by some Member States has created gaps in the supply and promotion of European content on those services. Even if, given the

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\(^83\) EAO refit contract – Note B.2: market revenues and investments – VoD revenues: “according to HIS research firm, total on-demand consumer revenues in the 28 European countries soared from EUR 919 million in 2010 to EUR 2.5 billion in 2014, an of 272 % increase and a compound annual growth rate in the 5 year period of 28 %.

\(^84\) By 2020, it is projected that more than 20% of European households will have a specific, paid account with an SVoD provider, and at a conservative projection of 15% CAGR, the sector will turnover more than EUR 6 billion that year. Source to be checked with COBA

\(^85\) EAO Refit Exercise Note A2 (November 2015): “hubs” for VoD services established in one Member State but mainly targeting a different Member State are emerging across the EU. The main ones being the UK (69 VoD services targeting other Member States), LT (29), CZ (24) and FR (20).

\(^86\) EAO report on the development of the European market for on-demand audiovisual services (page 48). According to the European Audiovisual Observatory there are 195 VoD services established in EU countries which on top of their country of establishment target primarily another EU country. The UK (69), LU (29), CZ (24), FR (20), SE (18) and NL (13) are the countries in Europe which harbour VoD services primarily targeting other EU countries. Those services are either pan-European and international VoD services which have established their centre of operations in a EU country (as in the case of the UK, LU, CZ and NL) or national services are targeting countries in which the language/culture is similar (FR, SE)

\(^87\) EL, EE, PT and LV

\(^88\) BE-Fr R, ES-R, FI-R and PL-R

\(^89\) SK, SL and UK

size of the VoD market, this impact is not yet very high, the growth prospect on this market may imply that the negative impact on cultural diversity will be higher in the future.

5.2.1.2 Option A: giving more flexibility to providers in the way they implement the obligations to promote European works

Member States would allow TV broadcasters either to reserve the majority of their broadcasting time to European works or to invest at least 50% of their programming budget in European works. Providers would be obliged to choose at least one option.

In addition, Member States would allow on-demand services to promote European works either through a share of European works, their prominence in the catalogues or through a financial contribution. On-demand service providers would be obliged to choose at least one option. It will be up to Member States to decide on the level of requirement for each measure.

Substantive compliance costs: Option A would generate no additional costs for TV broadcasters who would be able to decide to move from a share of their broadcasting time to direct investment only if they are able to recoup the costs.

For on-demand services, the costs of complying with the new rules are difficult to assess as it will depend on the level of requirements set at national level. In those Member States where a share of European works in catalogues is currently in place, the minimum share of European works in the catalogues varies from 10% to 60% (see ANNEX 13). On average in the EU, the share of EU films in 75 big EU VoD catalogues was 27% in 2015. As regards prominence, there are not such quantitative thresholds in the Member States. Recently, the European Audiovisual Observatory tried to identify the promotional spaces for each of the services of a sample of on-demand service providers in DE, FR, UK. According to this study, “European films were allocated between 21% (in the UK) and 33% (in France) of promotional spots”. As for financial contributions, 9 Member States have included such obligations for on-demand services and they vary from 1% to 12% (see ANNEX 13).

Consequently, this option would create zero or low additional costs for on-demand services established in those Member States where there are obligations in place. On the contrary, on-demand services established in the 10 Member States where there is no obligation would have to face the cost of complying with at least one of the promotion measures (shares, prominence or financial contributions). However, the costs are expected to be limited since on-demand services would opt for the less costly measure.

Administrative costs: The additional administrative costs for regulators when implementing option A as regards TV broadcasters would be zero. The costs of supervising on-demand services would depend on the choice made by on-demand service providers and on the monitoring system applied by the regulators. In this context it is not possible to estimate precisely the related costs but they are likely to be close to the costs incurred under the status quo.

The additional administrative costs for TV broadcasters, if any, would be marginal as they would have to report on their programming budget instead of reporting on broadcasting time if they decide to

91 Public service media organizations in Europe invest around EUR 16.6 billion in content (Source EBU-MIS based on Member States' data.) and EUR 15 billion are invested, per year, in content by Europe’s largest commercial broadcasters (http://www.acte.be) i.e. 31 million in total. As mentioned in Section 2.2.2.1 A the investment of the main TV groups in 15 countries in original content, deemed to be European, amounted to EUR 15.7 billion in 2013. By setting a share at 50% at least, we align the situation across the EU on the average.
92 EAO Origin of Films in VoD catalogues in the EU - Region of Origin and Age of films in selected VoD and SVoD catalogues.
93 EAO The visibility of films on on-demand platforms.
94 In Germany, national films and European non-national films accounted for approximately the same share, whereas, in France in the UK, national films represented approximately two thirds of European films and European non-national films one third.
Invest a share of their programming budget in European works. In countries where such systems are already in place, there would not be any additional costs.

For on-demand services, due to the existing significant differences in national legislation and the variety of implementation measures in force, the monitoring costs for regulators would vary. In the 10 Members States where there are no requirements for on-demand service providers (see ANNEX 13), administrative costs would increase.

**Impacts on the Internal market:** Option A is unlikely to result in a wider circulation of European works across Europe. It is questionable whether a flexible requirement for on-demand services (in particular, to opt either for a share or prominence of European works in their catalogues) would be effective. A share in the catalogue alone would not necessarily lead to more consumption of European works. This would only make sense if a diverse catalogue would be available in the first place (by combining a minimum share and prominence).

**Impacts on competitiveness:** Option A is not expected to significantly impact TV broadcasting. As mentioned in the status quo option in 2012, European works enjoyed an average of 64.1% of the total qualifying transmission hours and the average compliance rate was 68.6%. Broadcasters are expected to stick to this requirement they already comply with. Under Option A the impact on competitiveness of on-demand services would be limited since they would choose the less costly measure to fulfil their promotion obligations.

Option A would, based on the way providers choose to implement these measures, address the competitive disadvantages of TV broadcasters compared to on-demand services. In their contributions to the 2015 Public consultation 5 Member States and 4 national regulators pointed out that the asymmetry in TV broadcasters and on-demand services regulation is unjustified and rends the current rules unfair. This view was also supported by 4 of the 9 public broadcasters that commented on the issue of fairness. **Impacts on SMEs:** More flexibility would have a positive impact on small channels, including eventually SMEs and micro enterprises that would be able to implement the promotion measures most appropriate for their business strategies. In any event, TV broadcasts that are intended for local audiences and do not form part of a national network (which generally are not very large companies) are often exempted (see ANNEX 3).

**Social impacts:**

Under Option A consumers are not likely to be more exposed to European works than they are today. If TV broadcasters were to choose to invest a proportion of their programming budget in European content, there would be no assurance that it would be shown in peak hours. This would be particularly the case if this proportion is low. For on-demand services, as explained above a choice between a share and prominence of European works in their catalogues is not expected to lead to greater diversity. **Impacts on cultural diversity:** Given the amount of flexibility given to providers, the impact on access to information and culture (Article 22 of the Charter) would be negligible.

5.2.1.3 Option B: Maintaining the status quo for TV broadcasters and reinforce the rules for on-demand service providers

For TV broadcasters the status quo would be maintained.

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95 EL, EE, PT and LV
96 BE-FR, ES-R, FI-R and PL-R
For on-demand service providers, Member States should require them to secure at least a 20% share of European works in their catalogue and give prominence to those works. In addition, on-demand service providers would be required to report to the Commission on their compliance with these obligations.

A Member State would be allowed to require a contribution (e.g. levies and/or direct investment in content) to the production of European content from video on-demand service providers established in other Member States if:

- they target consumers in its territory,
- the contribution applies only to the revenues generated in that Member State and
- these revenues are not already subject to an equivalent contribution in the Member States of establishment.

Member States would be required to introduce exceptions for thematic or low audience audiovisual media services.

Economic impacts:

Substantive compliance costs: Compliance costs for on-demand services would vary across the Member States. In the 10 Member States where there is no obligation, they would have to face the cost of complying with the obligations to reserve at least 20% share in the catalogue and to ensure prominence.

As indicated above, the average share of EU films in 75 big EU VoD catalogues was 27% in 2015. However, there are great disparities among catalogues of pan-European VOD providers (with iTunes catalogue carrying an average of 21% of EU films and SF Anytime of 29%) and Member States. Taking into account these disparities, a share of 20% would ensure some level of cultural diversity while avoiding excessive compliance costs for on-demand providers.

For on-demand service providers targeting other Member States which impose a financial contribution extra-territorially, the cost would vary across the EU. Currently, 9 Member States have financial contributions (i.e. direct contribution to production) in place and only 4 Member States apply levies nationally (i.e. contributions made to a film fund). All things being equal, we estimate that the costs for Netflix and i-Tunes to roll out their services in the five biggest EU markets would be respectively EUR 5.8 and 8.2 million per year and per provider (see ANNEX 10). This would stand for respectively 2% and 0.4% of their turnover. However, this compliance costs would translate into investment in content that service providers may be able to recoup. Another estimation where Member States would impose levies extraterritorially would result in costs between EUR 4.7 million (in the lower bound) and EUR 11.7 million (in the upper bound) for all providers of on demand services in the EU.

97 According the EAO - On-demand markets in the European Union – 2014 and 2015 developments - the average share of EU films in 75 big EU VoD catalogues was 27% in 2015. In order to take into account SMEs which may have less European works in their catalogues, the share is set to 20%.
98 Levies are contributions that companies exploiting audiovisual content must pay to audiovisual Funds. The Funds use the contributions to finance funding measures. Direct investment is a investment from companies exploiting audiovisual content into audiovisual content production.
99 This could be done on the basis of the current Contact Committee Guidelines.
100 In some Member States - BG, CY, EE and EL - EU films only account to 11% of iTunes catalogue while in others - AT and FR - EU films account for 68% of Flimmun and Universciné France respectively.
101 This might in turn alter their ability to invest in innovation, content, promotion or deployment into new markets at a moment when the SVoD and VoD market in Europe is still in a growing phase compared to TV broadcasting.
102 See ANNEX 13.
103 Netflix turnover in Europe in 2014 amounted to EUR 295 million (http://www.usine-digitale.fr/article/ce-que-pese-deja-netflix-en-europe-N282676) and i-Tunes turnover to EUR 2 billion (http://lexpansion.lexpress.fr/high-tech/itunes-europe-2-milliards-d-euros-21-salaries_1576228.html). However, in the case of i-Tunes a substantial share of the turnover is deemed to derive from the music activity.
104 Report carried out by ICF International (see ANNEX 16).
**Administrative costs:** Regulators may incur additional costs depending on how Member States have implemented the current AVMSD provisions so far. In France, where on-demand services must comply with requirements in terms of share and prominence of EU works, the cost of monitoring these two obligations has been estimated at EUR 91 000 (see ANNEX 16).

The new requirements on on-demand services will be accompanied with reporting obligations. For providers of on-demand services established in Member States where they are not subject to such obligations, the new requirement would increase their administrative burden. It should be noted, however, that reporting obligations would to some extent foster transparency in the on-demand services' business which would be a pre-requisite for assessing what role those players can play in the financing of content.

In Member States imposing financial contributions extraterritorially, there might be limited additional costs for businesses to declare, pay and audit financial contributions if turnover is used as a fiscal base.\(^{105}\)

In their contributions to the 2015 Public consultation, the majority of the Cinema, Film and TV industry contributions (17 out of 30); all consumers organizations that expressed an opinion (8); all employees organizations and trade unions that expressed an opinion (5); and the majority of right holders (10 out of 16) favor reinforcing current rules for on-demand services. 6 Member States\(^ {106}\) and 3 national regulators\(^ {107}\) call for reinforcing current rules on promotion of European works.

**Impacts on the Internal market:** The combined obligation for on-demand services to reserve a share for European works in on-demand services catalogues and to give prominence to those works would reduce the current fragmentation resulting from the very diverse approaches adopted by Member States (see ANNEX 13).

As regards the possibility for Member States to impose financial contributions services providers may have to comply with different legislations. The level of fragmentation would depend on the number of Member States implementing financial contributions as well as on the number of service providers potentially concerned.\(^ {108}\) Allowing flexibility for Member States to impose financial contributions is considered as a justified and balanced way to limit forum shopping practices without undermining the COO principle and the objectives of the DSM.

**Impacts on competitiveness:** For on-demand services established in the 15 Members States where there is already either an obligatory share of European works or prominence requirements in place, option B would lead to more level playing field. The flexibility for Members States to impose financial contributions on VoD providers located outside their territory would result in a more level playing field between on-demand services competing on the same market. According to many of the contributions to the 2015 Public consultation the strict application of the COO principle and the fragmentation on the transposition of Article 13 may have led to "forum shopping" practices (i.e. on-demand services establishing themselves in Member States with light regulation on promotion of European works). This has in turn created competition distortions and has undermined the

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\(^{105}\) If turnover is used as a taxation base, the application of the country of destination principle to telecommunications and broadcasting services for VAT as from January 1st 2015 might simplify to some extent the process. As mentioned below, financing obligations for VoD providers generated € 17.4 million in Germany (2013) and € 16 million in France (2011).

\(^{106}\) BE-Fr, IT, LV, PL and FR only for on-demand services.

\(^{107}\) BE-R, HU-R and PT-R.

\(^{108}\) 195 VoD players are currently established in a Member States and targets audience in another Member States. As mentioned above, currently 4 Member States have imposed levies for on-demand services established in their territory and 5 Member States have imposed direct investment obligations.
effectiveness of the current rules. This is the position of 5 Member States and 1 national regulator; a few public broadcasters (4); some members of the Cinema, Film and TV industry (5); and the majority of telecom operators and right holders who expressed and opinion (5 out of 9 and 5 out of 7, respectively). **Impacts on SMEs:** Option B may have a negative impact on small on demand players, including SMEs, in particular if they wish to provide services across borders. However, this negative impact would be compensated by the requirement for Member States to apply exemptions.

**Social impacts:**

The combination of share and prominence obligations on on-demand services would lead to consumers of on-demand services being more exposed to European works than they are today. In 2013, the Belgian CSA analysed two major VoD catalogues: out of the top 50 works, 19 were EU works of which all but 3 had been promoted. The imposition of financial contributions would have a positive impact on the creation of European audiovisual content as on-demand services providers may be required to increase their current contribution to content creation.

The imposition of financial contributions extraterritorially may have a negative impact on the provision of cross-border on-demand services in some territories where some providers - most probably smaller ones - may not be able to recoup the financial contributions and the related administrative costs. Option B would have a positive impact on small independent producers. **Impacts on cultural diversity:** The imposition of mandatory obligations on on-demand services providers would have a positive impact on cultural diversity (Article 22 of the EU Charter of Fundamental Rights) as on-demand services providers may be required to increase their current contribution to content creation.

**5.2.1.4 Discarded option: introduction of sub-quotas for non-national European works**

82% of the respondents (that is, 104 out of 126 of the contributions across different categories of stakeholders) to the public consultation who expressed an opinion on this issue are interested in watching more content produced in another Member State.

However, there was very limited support to increase diversity by introducing sub-quotas for non-national European works. Indeed out of the 25.8% of respondents from various categories of stakeholders which chose the option to reinforce the rules on the promotion of EU works, only a very marginal part – one Member State, one regulator and two content distributors – supported the introduction of these sub-quotas.

In addition, there is no evidence that the industry would be able to recoup the cost of adapting their offer to the new sub-quotas in the absence of audience. Some Member States have flagged their opposition to this approach. This could even reinforce the existing deficit of competitiveness of TV broadcasters vis-à-vis on demand services.

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109 In some countries, the current approach has had a detrimental effect on the financing of European audiovisual content. For example, in the 1990s certain operator established in Poland co-financed substantially Polish films under an agreement with the Polish government. This continued until a different operator established in Hungary started to broadcast targeting Polish audiences but without any contribution to Polish cinema. This resulted in a competitive disadvantage as a consequence of which investment in Polish films was considerably reduced. Source: EFAD's reply to the Public Consultation.

110 BE-FR, FR, IE, IT, PL

111 DE-R

112 European films accounted to about one-third of films promoted in catalogues of the main VoD providers in Germany, France and UK in October 2015 while the share of US films among films promoted was in the range of 55%. Also, European films were allocated around 28% of all promotional sports available and 60% were allocated to US films (EAO – The visibility of films on on-demand platforms – November 2015).


114 As a benchmark, according to the EAO Yearbook 2014, cinema admissions for non-national European films only amounted to 13% for EU-23 in 2010.

115 In the context of the 43rd Meeting of the Contact Committee (Brussels, 18th January 2016), DE, EE, FR and LV expressly manifested their opposition to a sub-quota of non-national European works, with DE pointing out that it would constitute discrimination on the grounds of nationality.
This option has therefore not been impact assessed.

### 5.2.1.5 Comparison of options

<table>
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<tr>
<th>Costs and savings</th>
<th>Status quo</th>
<th>Option A</th>
<th>Option B</th>
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<tbody>
<tr>
<td><strong>Compliance costs:</strong></td>
<td>nc</td>
<td>nc</td>
<td>Costs related to the application of contributions extra territorially: between EUR 5.8 and 8.2 million per year for one major EU provider. For levies only costs can vary between EUR 4.7 and 11.7 million per year for all EU providers.</td>
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<tr>
<td><strong>Administrative costs:</strong></td>
<td>- Regulators: for monitoring TV broadcasting services: around EUR 220 000 per year for all EU Regulators. The cost of supervising on-demand services is not possible to estimate precisely but is likely to be close to status quo. - Service providers: cost of reporting would be EUR 200 000 for all EU TV broadcasting services and EUR 111 000 for all EU on-demand services.</td>
<td>- Regulators: for monitoring TV broadcasting services: EUR 220 000 per year for all EU Regulators.</td>
<td>- Regulators: for monitoring TV broadcasting services: EUR 220 000 per year for all EU Regulators.</td>
</tr>
<tr>
<td><strong>Option effectiveness test</strong></td>
<td>The status quo for TV broadcasters proposed under option B has proven to be efficient to promote cultural diversity while preserving their capacity to innovate.</td>
<td>By reinforcing the mandatory character related to the share and prominence of European works in catalogue, option B will ensure that Member States take measures. In turn this would increase the level of harmonisation while still leaving flexibility to Member States. This would entail limited administrative and compliance costs.</td>
<td>The most significant costs result from option B and the possibility to apply financial contribution extra-territorially. However, financial contributions to audiovisual content creation are very close to cultural policy, which is a subsidiarity field. Option B seeks to bring this prerogative back to Member States, as intervention at EU level had not resulted in increased harmonization. This option is therefore in full compliance with the subsidiarity principle. In addition, allowing Member States imposing financial contributions on on-demand service providers where their turnover is generated is the most efficient way to secure the contribution of those services to cultural diversity while increasing the level playing field in each national market.</td>
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<tr>
<td><strong>Option B is the preferred option.</strong></td>
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<tr>
<th>Options</th>
<th>General objectives and related impacts</th>
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<tr>
<td>Status quo</td>
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<td>High</td>
<td>Medium</td>
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### Option

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<tr>
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<th>Low</th>
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<th>Medium</th>
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<tr>
<td>Option B</td>
<td>+</td>
<td>++</td>
<td>Medium</td>
<td>High</td>
<td>Medium</td>
<td>High</td>
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#### 5.2.2 Protection of minors in on-demand services

##### 5.2.2.1 Status quo option

**TV broadcasts must not include seriously harmful programmes (pornography and strong violence). They may include potentially harmful programmes (erotic content and mild violence), but should do it in a way which prevents minors from hearing or seeing them. On-demand service providers are also required to take appropriate measures so that minors would not normally hear or see seriously harmful content. There are no restrictions for potentially harmful content for on-demand services.**

**Economic outcome:**

**Existing costs:** Maintaining the status quo would result in no additional administrative or compliance costs for regulatory authorities or media service providers. Existing administrative costs incurred by the regulators in most Member States relate to monitoring and enforcing compliance with these requirements. For TV broadcasting, this is done on the basis of complaints or on a systematic recording of all television programmes. For on-demand services, the majority of regulators do not regularly monitor compliance with the rules. Most of them act on the basis of complaints. Some regulators monitor these rules through spot checks. The cost for reviewing and enforcing the provisions on the protection of minors amounts to approximately up to EUR 800 000 per year per regulator.

Compliance costs for providers (this includes telecom, cable, satellite, broadcasters and on-demand services) can be divided into two categories: i) direct costs, such as the costs of classifying audiovisual content as harmful to minors (i.e. the costs of applying for a rating as well as the time spent managing the process) or of implementing technical control measures and ii) indirect costs e.g. lost revenues which would otherwise be obtained in the absence of classification.

For TV broadcasting, the majority of Member States impose the use of techniques based on the time at which the content is transmitted, i.e. watershed-based restrictions. As regards on-demand services, the majority of Member States require the use of technical measures to ensure that minors will not see or hear harmful material. The use of a PIN access code is one of the most common measures.

Direct costs are difficult to estimate as they are usually absorbed by the provider. Both Pay TV and on-demand service providers reported significant costs for the provision of technical solutions to control the access and to provide information on harmful content. Costs related to control measures increase in relation to the number of new devices on the market such as tablets, smartphones or HDMI keys, which usually require ad hoc developments and investments. A German service provider reported a cost for age verification mechanisms for 16+ on TV platforms of EUR 1.25 million yearly. It also reports a cost for a strict post-ID system for adult content of EUR 1.1 million in total for the period 2010-2015.

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116 2nd report from the EC on the application of Directive 2010/13/EU AVMSD.
117 Information from audiovisual regulators of 3 Member States (NL, DE, IT). Survey and data gathering to support the Impact Assessment of a possible new legislative proposal concerning directive 2010/13/EU (AVMSD) and in particular the provisions on the protection of minors. Although for the German regulator this figure covers both protection of minors and commercial communications. For AGCOM it covers reviewing and enforcing rules related to protection of minors.
118 Such measures are accompanied by on-screen icons, content rating/classification measures and in some cases special warnings for viewers. Some countries have also put in place technical means or parental control measures to restrict access to harmful content (see ANNEX 14)
119 Some Member States also use age verification mechanisms and separate catalogues with parental control systems. These mechanisms are often complemented by content rating and content classification schemes. The watershed technique is also used for specific services (see ANNEX 14)
Some indirect costs can emerge when classifying content as potentially harmful to minors, as it can narrow the targeted audience and have an impact on the number of transactions and subscriptions (VoD and SVoD) or on the attractiveness of the programmes for advertisers (catch-up TV). In principle, indirect costs for on-demand services could be expected to be lower, because the access to potentially harmful content is not restricted by the AVMSD. However, a majority of Member States have adopted stricter measures and require some form of protection (e.g. PIN codes, content filtering) for potentially harmful content.\textsuperscript{121}

In the public consultation, some TV broadcasters reported a range of direct and/or indirect costs from EUR 100,000 to EUR 2 million\textsuperscript{122}.

**Outcome on the Internal market:** The lack of full harmonisation of the concept of harmful content and the lack of a harmonised age rating system has not been a reason not to provide cross border access given its limited cost.

**Outcome on competitiveness:** Because of the different levels of requirements of the AVMSD, TV broadcasting is under more constraints than on-demand services. This situation creates an undue competitive advantage for on-demand services, in particular with respect to Pay TV operators, with which they share similarities.

The results of the public consultation indicate that, with the exception of some telecom operators and VoD providers, the majority of the respondents believe that this distinction is no longer relevant, effective or fair. Conversely, a high number of TV commercial broadcasters consider this distinction still relevant. However, some Pay TV operators consider the distinction as no longer relevant.

**Social outcome:**

The changes in viewing patterns, especially of younger generations, highlighted in Section 2.2.2.1 B and the growing convergence between TV broadcasting and on-demand services has led to a situation where minors are less protected online than watching the same content on TV.

**5.2.2.2 Option A: increasing the level of protection of minors for on-demand audiovisual media services and encouraging of EU co-regulation on content descriptors**

The rules on protection of minors applicable to on-demand audiovisual media services would be strengthened by requiring them to restrict access to "potentially harmful content" (i.e. erotic and mildly violent content)\textsuperscript{123}.

*In addition Member States would have to ensure that all audiovisual media service providers provide sufficient information to consumers about the possible harmful nature of the content in programmes by means of co-regulatory systems\textsuperscript{124}.*

\textsuperscript{120} Even if almost all member states use rating systems and apply watershed rules in the framework of the implementation of the Directive, fewer of them mention which kind of technical measures should be applied by service providers: 7 Member States specify technical measures which should be applied by linear service providers: Austria, Belgium – French-speaking Community, Spain, Finland, France, United Kingdom and Slovenia. 15 member states specify technical measures which should be applied by non-linear services: Austria, Belgium – French-speaking Community, Cyprus, Germany, Estonia, France, United Kingdom, Greece, Croatia, Hungary, Italy, Luxembourg, Latvia and Slovenia. The technical measures mentioned are mostly about various types of conditional access, which can usually be activated via a parental code, which either blocks the reception of certain types of programmes, or filters them (i.e. the programme is not visible on the electronic programme guide). EAO-Analysis of the implementation of the provisions contained in the AVMSD concerning the protection of minors (see ANNEX 14).

\textsuperscript{121} EAO Iris bonus – The protection of minors in audiovisual media services (see ANNEX 14).

\textsuperscript{122} EUR 100,000 – MEDIASET, EUR 2 million – RTL.

\textsuperscript{123} Article 12 AVMSD: "Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services.”

\textsuperscript{124} The actual age rating systems will continue to be defined at Member State level, according to the different national sensitivities but it will be complemented by content descriptors (words or symbol) which provide guidance to consumers on the harmful nature of the content (for example bad language, sex, violence, drugs, discrimination, etc.). The Commission would facilitate the adoption of codes of conduct at EU level (possibly being supported by ERGA). Age rating systems as such would not be harmonised.
The Commission and ERGA would facilitate exchanges of best practices on co-regulatory systems across the EU. If considered appropriate, the Commission would facilitate the development of EU codes on which ERGA might be requested to give an opinion.

Economic impacts

Substantive compliance costs: On-demand service providers would need to assess and classify all offered programmes to see whether they fall within the scope of "potentially harmful" programmes. There are on average 5 764 titles available in VoD catalogues. A broadcaster reported a EUR 550 000 cost per year to implement classification and ratings for TV broadcasting and on-demand, and a VoD operator a EUR 1.2 million cost for launching in a new country based on a catalogue of 5 000 titles. There could be also additional compliance costs as regards technical control mechanisms. However, these compliance costs would be mitigated as at national level, Member States already require some form of protection (e.g. PIN codes, content filtering) for seriously harmful content and most of them also for "potentially harmful" content.

Media service providers would have to comply with the new information requirements. The associated costs would be mitigated in those Member States where similar mechanisms, such as age rating, are in place (see ANNEX 14). The studies available provide information on the costs of rating content according to different age groups, but no specific information on the cost of describing the harmful nature of the content. However, age rating costs can be used as benchmark as, once the content is classified and labelled (as in the majority of the Member States), the additional cost of providing a description of the content is minimal.

Most Member States use rating systems (all except Denmark, Estonia, Italy and Sweden) and in most countries five age groups are defined. Although the age groups may vary, the different classifications are all generally based on similar criteria: presence of discrimination, drugs, imitative behavior, coarse language, nudity, sex, threatening content and violence.

Only in two countries, Finland and the Netherlands, the system is a combination of legally binding age rating and content descriptors indicating different categories of content (violence, sex, anxiety, drug in Finland; violence, fear, sex, discrimination, drug and alcohol abuse, coarse language in Netherlands).

Despite the costs incurred, some media service providers reported, in the 2015 Public consultation and the survey on costs and benefits, that a reliable system for the protection of minors can create a competitive advantage. Being identified as a family-friendly provider can be a strong marketing argument and contributes to the positive branding of the operator. Indeed according to BBFC, 86% of parents in the UK would encourage/ensure their children to watch online channels with clear age ratings.

Administrative costs: There would be additional administrative costs for regulators for monitoring compliance with the new rules by providers of on-demand services, in particular in the 9 countries where there are no stricter rules in place (see ANNEX 14). Regulators already supervise the implementation of appropriate measures by on-demand services to protect minors from seriously harmful content. They would need to go beyond and verify that those measures are applied to potentially harmful programmes. Depending on the compliance procedures in place at national level, this may imply an increase in the number of checks and/or of complaints to deal with. For example, a voluntary self-monitoring body in a Member State reported a cost of EUR 126 000 for handling

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125 According to the 2014 EAO report on the development of the European market for on-demand audiovisual services.
126 Cost for a EU board submission process, for 5000 titles, including costs per viewable, staffer/contractor overhead and yearly licence fee.
127 EAO Iris bonus – The protection of minors in audiovisual media services.
complaints (2 612) in 2014. For on-demand service providers, there would be some administrative costs in relation to a potential increase of complaints due to the wider scope of application of the provision on the protection of minors.

Regulators and media service providers would face administrative costs related to the implementation of the information requirements, via co-regulation, in those Member States where similar mechanisms are not in place. The administrative costs related to the implementation of co-regulation will depend on the approach adopted. In an ambitious scenario, this could imply setting up a system based on the creation of a specific organisation, rules and processes. The PEGI\textsuperscript{128} system can give an idea of the administrative costs linked to such an approach at EU level\textsuperscript{129}.

**Impacts on the Internal market:** requiring information on content would have a positive impact on the internal market by providing more harmonization across Member States and TV broadcasting and on-demand services. This would be facilitated by the Commission and ERGA intervention.

**Impacts on competitiveness:** Harmonising the level of requirements between TV broadcasting and on demand services will increase the level playing field. For on-demand services, the extension of the existing requirements to potentially harmful content is likely to have an impact in terms of their revenues in particular in the countries where there are no stricter rules in place. Less content would be accessible to their widest possible audience. On-demand service providers may therefore incur a loss of revenues be it in terms of number of transactions and subscription (VoD and SVoD) or of advertising (catch up TV). **Impacts on SMEs:** Option A may generate additional costs for SMEs providers. However, only a marginal number of SMEs would be affected given that the on-demand services affected would primarily be provided by broadcasters or international companies providing EU wide services, which mainly comprise large companies (see ANNEX 3).

**Social impacts:**

In a context where children consume significant quantities of on-demand content (see Section 2.2.2.1 B), Option A would ensure a higher level of protection. Several surveys have found that consumers expect seamless protection in online video services\textsuperscript{130}. This is why in the majority of Member States, industry has already adopted self-regulatory measures to protect minors also from potentially harmful content even in the cases where no regulatory measures are in place regarding this type of content.

Requirements on the provision of information would have a positive impact on consumer protection by ensuring transparency on the potential harm of content. **Impacts on fundamental rights:** Option A may be perceived as an undue limitation to the right of freedom of expression and access to information on on-demand services. Yet it still remains more limited than for TV broadcasters. Moreover, by way of analogy, in the context of Article 3 of the AVMSD, the legislator made an express choice in Directive 2010/13/EU to limit the freedom of expression of audiovisual media services in two specific circumstances, namely for the protection of minors and the incitement to

\textsuperscript{128} Pan European Game Information (PEGI) is a European video game content rating system established to help European consumers make informed decisions on buying computer games with logos on games' boxes. PEGI self-regulation is composed by 5 age categories and 8 content descriptors that advise the suitability and content of a game for a certain age range based on the games content.

\textsuperscript{129} The governance and management consist of a Management Board (made up of 16 representatives of games publishers, the game console manufacture and national trade associations), a Council (made up of 19 members recruited from the authorities countries, working as civil servants, psychologists, media specialists and legal advisers versed in the protection of minors in Europe. They meet at least once a year) an Experts Group (involving 8 specialists and academics in the fields of media, psychology, classification, legal matters, technology, digital environment) and a Complaints Board (it comprises a pool of independent experts from different countries recruited for their skill, experience and field of activity. These are parent/consumer bodies, child psychologists, media specialists, academics and legal advisers versed in the protection of minors in Europe). PEGI generates own resources via the rating fee paid by games publishers and possible fines.

\textsuperscript{130} In 2013, 74% of the French population considered regulation should apply on video content on the internet in order to protect young people against inappropriate content (source: CSA, Baromètre de perception de la qualité des programmes). In the UK, the majority of audiences expect comprehensive and broadly homogenous rules on protection of minors across all AV platforms (broadcast TV, catch-up, on-demand, and other internet services). (source: Protecting audiences in an online world, Deliberative research report. Prepared for OFCOM by Kantar Media. Fieldwork took place in July and August 2014.)
hatred based on race, sex, religion or nationality\textsuperscript{131}. Setting requirements on content information would have a limited impact on freedom of expression as it does not imply age rating but only transparency measures.

### 5.2.2.3 Comparison of options

<table>
<thead>
<tr>
<th>Costs and savings</th>
<th>Status quo</th>
<th>Option A</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Administrative costs: EUR 800 000 per year and per regulator (NL, DE, IT). Compliance costs: costs can range from EUR 100 000 to EUR 2 million per year and per TV broadcasting service.</td>
<td>Administrative costs: not substantial Maximum compliance costs: Cost of self-regulatory schemes for content information up to EUR 2 million per year for the EU (proxy= NICAM and PEGI budgets are EUR 2 million). For on demand services the costs can be around EUR 550 000 per year and per service provider.</td>
</tr>
</tbody>
</table>

| Effectiveness and subsidiarity test | Option A would tackle the current deficit of fair treatment between TV broadcasters and on-demand services and would improve the level playing field. | Option A would also have a positive impact on the internal market through an increased level of availability of information at a limited cost (co-regulatory mechanisms). This approach through co-regulation would also be more effective in terms of protection of minors and would be achieved without impinging on Member States subsidiarity and in line with the minimum level of harmonisation feature of the AVMSD. |

<table>
<thead>
<tr>
<th>Options</th>
<th>General objectives and related impacts</th>
<th>Costs (administrative and compliance)</th>
<th>Effectiveness</th>
<th>Coherence</th>
<th>Feasibility (technical and political)</th>
<th>Preferred option</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Establish the conditions to ensure competitiveness (impacts on the competitiveness)</td>
<td></td>
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<td></td>
<td>Safeguard the protection of minors and consumer protection (social impacts)</td>
<td></td>
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</tr>
<tr>
<td>Status quo</td>
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<td>0</td>
<td>Low</td>
<td>Low</td>
<td>High</td>
<td>Medium</td>
</tr>
<tr>
<td>Option A</td>
<td>++</td>
<td>++</td>
<td>Medium</td>
<td>Medium</td>
<td>High</td>
<td>Medium</td>
</tr>
</tbody>
</table>

| 5.2.3 Country of origin principle |

#### 5.2.3.1 Status quo option

The AVMSD is based on the COO. In order to determine which Member State has jurisdiction over an audiovisual media service provider, the AVMSD focuses on a number of criteria (place where editorial decisions are taken, head office, etc.).

The AVMSD foresees limited derogations (derogation procedure) to the COO principle. For TV broadcasting, derogations should be based on grounds of incitement to hatred or protection of minors. For on-demand services, there are more grounds, including public policy, public security (including the safeguarding of national security and defence) the protection of public health and the protection of consumers. An emergency procedure is foreseen only for on demand services. For situations where

\textsuperscript{131} COMMISSION DECISION C(2015) 4609 final of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.
there might be circumvention of the stricter rules of another Member State a procedure is in place (circumvention procedure). The above-mentioned procedures will be hereafter collectively referred to as "cooperation procedures".

**Economic outcome:**

**Existing costs:** Maintaining the status quo would result in no additional costs. The COO avoids regulatory inefficiencies which would result from subjecting one service to multiple jurisdictions. Media service providers incur low compliance costs as a consequence of being subject to the legislation of the country of establishment only.

However, given the complexity of the current rules, some Regulators have recently been subject to a heavy administrative burden. For example, in a recent Lithuanian case (ANNEX 9), extensive consultations and written exchanges between the Swedish and the Lithuanian regulators took place. Those exchanges could be equaled to a workload of 50-100 hours shared by the two regulators.

The increased use of the complex cooperation procedures\(^\text{132}\) has led to costs to regulators and to the Commission. As a benchmark, the Lithuanian case referred to above represented a workload of roughly 400 hours over three months for the case handler, and a total additional workload of approximately 200 hours for supervisors and other Commission services involved\(^\text{133}\). Based on recent experience, it would seem reasonable to reckon the number of cases with up to 5 per year.

**Outcome Internal market:** The COO principle is the cornerstone of the Directive. It has facilitated the growth and proliferation of audiovisual media providers offering services across borders. As of end 2013, 5 141 TV channels (no local and windows) were established in the EU. Almost 1 989 of them targeted foreign markets (either EU or extra EU). This share has increased from 28 % in 2009 - year of implementation - to 38 % in 2013. As far as VoD services are concerned, in 2015, on average in Member States, 31 % of the VoD services available are established in another EU country (see Section 2.3).

A majority of Member States, regulators and industry participating in the 2015 consultation stressed that the COO approach has been effective. It also emerges from the comments made by Member States that there is broad support for the continued relevance of the COO principle\(^\text{134}\). However, they acknowledge a need for addressing actual problems in the application of the principle. In particular, they refer to the complexity of the jurisdiction criteria and the ineffectiveness of the cooperation procedures (see ANNEX 9). Maintaining the status quo would mean leaving these application issues unaddressed which would fuel opposition to the COO principle as such. A minority of Member States, plead for limited departures to a country of destination principle.

**Outcome on competitiveness:** The COO principle provides legal certainty by subjecting media service providers in the EU to the legislation of one Member State only. By keeping administrative and compliance costs for providers low and allowing for economies of scale, the COO principle in

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\(^{132}\) In addition to the cases mentioned in section 2.2.2.2 A there have been 3 cases in 2014 that have not led to a notification but which could have triggered jurisdictional issues.

\(^{133}\) Based on the cost of a working hour on average in the EU (EUR 30 - [http://www.coe-rexecode.fr/public/Indicateurs-et-Graphiques/Indicateurs-du-cout-de-l-heure-de-travail-en-Europe](http://www.coe-rexecode.fr/public/Indicateurs-et-Graphiques/Indicateurs-du-cout-de-l-heure-de-travail-en-Europe)), the total cost for the Commission would be EUR 18 000

\(^{134}\) DE, UK, ES, IE, FI, EL, LV, SK, BE-VLG, EE, PT, AT, SE, LU, NL. A minority of Member States, however, plead for limited departures to a country of destination principle, for instance as regards the promotion of European Works. In spite of their principled support for the COO, FR and PL also support a move to country of destination, on an exceptional basis, where services are targeted at a market different from the place of establishment of their provider.
turn facilitates investment in the media sector.\textsuperscript{135} The complexity of jurisdiction rules and derogation procedures can undermine the positive impact of the COO principle on the competitiveness of media service providers.

\textbf{Social outcome:}

The COO ensures diversity and has fostered the availability of content by facilitating the cross border provision of audiovisual programmes. This is particularly true in smaller markets where service providers would otherwise not be interested in rolling out their services and incurring the cost of compliance with a specific legislation. In some cases, the number of services provided from other Member States is higher than the number of domestic services\textsuperscript{136}.

While the COO might potentially lead to different degrees of consumer protection, consumers have only exceptionally complained about the application of the COO principle.\textsuperscript{137} This can be explained by the fact that consumers are protected by the consumer protection rules of the Directive. The Directive moreover foresees cooperation procedures in case services from other Member States infringe common key values (derogation/circumvention procedure - see ANNEX 9). For instance the derogation procedure allows Member States to take measures against incitement to hatred and infringement of the protection of minors rules on TV broadcasting. However, to the extent that the cooperation procedures are ineffective, this could affect the level of protection of consumers, including minors.

5.2.3.2 Option A: Simplifying and improving the jurisdiction rules and the cooperation procedures

This option would entail (i) simplifying the criteria to determine jurisdiction; (ii) ensuring transparency and legal certainty via the implementation of a database of service providers under Member States jurisdiction; and (iii) revising the cooperation procedures to make them more effective. In case of disagreement over which Member State has jurisdiction (in particular when applying the cooperation procedures foreseen by the Directive), the Commission would settle the matter after requesting an opinion from ERGA.

The same derogation procedure and grounds for derogating from COO would apply to TV broadcasting and on-demand services (i.e. incitement to hatred, protection of minors and public security). The urgency procedure currently available for on-demand services only would also apply to TV broadcasting services. The cooperation procedure would clarify the right to be heard of audiovisual media service providers in relation to measures restricting their freedom to broadcast.

\textbf{Economic impacts:}

\textbf{Substantive compliance costs:} Option A would generate no additional compliance costs.

\textbf{Administrative costs:} This option is likely to contribute to an easier application of the Directive and hence reduce the current administrative costs.

Operating a database of all existing providers and sharing relevant information (e.g. where the majority of the workforce is established) would entail administrative costs for regulators. The database

\textsuperscript{135} In the public consultation, this aspect has been highlighted by DE, LU, SE and the UK, as well as by the satellite industry, public service broadcasters, commercial broadcasters, platform operators and publishers.

\textsuperscript{136} EAO REFIT data Note A2 On Demand Audiovisual Media Services (November 2015).

\textsuperscript{137} The notification by Sweden in the framework of the circumvention procedure (see ANNEX 9) was triggered by concerns raised with the Swedish authorities by a consumer association.
could be built on the existing MAVISE database and fed through contributions from the Member States, through their independent regulators. One full time equivalent could be necessary to maintain the database. The costs of setting up the necessary infrastructure to receive relevant information from the Member States would be offset if the existing MAVISE database, currently financed by the Commission, were to be used.

There would be administrative costs for ERGA which would have to be able to give opinions on conflicts of jurisdiction. Part of those costs would be borne by the Commission, including the organisation of the meetings, travel and subsistence costs. National regulators would bear the cost of working time spent by national officials when working for ERGA. It is difficult to anticipate the number of jurisdictional disputes which would require settlement if the current lack of transparency regarding jurisdiction, in particular in relation to VoD providers, would be remedied by an up to date database.

At the same time, operating a database and empowering ERGA to provide opinions on jurisdiction, together with the simplification of jurisdiction rules, are expected to lead to cost savings. These cost savings would stem from the easier and more reliable identification of the COO which means that complex and time-consuming negotiations between regulators regarding jurisdiction (including on the factual circumstances on which jurisdiction is based) can be minimised. In the absence of relevant data, these cost savings are difficult to quantify.

Cost savings are also expected for audiovisual media service providers. As far as they are concerned, they would benefit from greater legal certainty resulting from a simplification of jurisdiction rules. They would equally benefit from greater transparency and thus a greater predictability of regulators' decisions on jurisdiction.

Compared to the status quo option, option A would add one ground of derogation for TV broadcasting and remove a number of grounds for on-demand services. Option A therefore would be a measured response to Member State concerns. The alignment of the derogation procedure for TV broadcasting and on-demand services would lead to a simpler application which could result in cost savings for Member States and regulators. There is no available data allowing for a reliable quantification of those savings. The procedural safeguards, in particular the codification of the rights of defence of the providers concerned, would contribute to legal certainty and would ensure that providers can effectively present their views. They could therefore bring down providers' legal costs triggered by taking legal action against decisions of national regulators.

**Impacts on the Internal market:** Option A would increase legal certainty and transparency. The alignment of the grounds of derogation would create a more level playing field without restricting free circulation of services across borders. It should be noted that regarding incitement to hatred and protection of minors, the threshold is very high (manifest, serious and grave infringement). Moreover, the Court of Justice has consistently interpreted the notion of 'public security' narrowly and strictly. Option A would thus have a positive impact on the functioning of the internal market.

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138 MAVISE is a database on television channels and companies in the European Union and candidate countries. The database consists of a complete survey of over 10 000 pan-European, national, regional or local television channels broadcast in Europe and of over 3 000 on-demand audiovisual services. The main aims of MAVISE are to provide better knowledge of the audiovisual market and more transparency.

139 Estimation based on confidential information .

140 Note that in the given context the notion of "jurisdictional disputes" is not to be understood in the meaning of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

141 In the public consultation, most Member States (DE, IE, FI, EE, EL, LV, UK, SK, BE-VLG, PT) and 14 regulators (UK, DE, ES, FI, NL, SK, PL, HU, RO) supported strengthening existing cooperation practices and/or revising the rules on the cooperation procedures. Also public service broadcasters, the satellite industry and platform operators called for strengthening existing cooperation practices and revising the coordination procedures. Commercial broadcasters mainly called for maintaining the status quo.

Impacts on competitiveness: Option A would have positive effect on competitiveness, given the increased legal certainty.

Impacts on SMEs: Clarification of jurisdiction rules and increased transparency would have a negligible impact on SMEs given that the obligation is imposed on Member States. However, there could be an indirect negative impact on SMEs if Member States decided to increase the level of notification or identification requirements in order to establish jurisdiction.

Social impacts:

Simplifying and improving the jurisdiction rules and cooperation procedures would allow for a better application of the COO. The accrued legal certainty would avoid situations where Member States decline jurisdiction over audiovisual media service providers in spite of jurisdictional links with them. This option would result in a more effective application of the Directive, including the rules on the protection of minors. Aligning the grounds of derogation could lead to an increased level of consumer protection in TV broadcasting. Nothing would change for on-demand services since the derogation grounds which would be scrapped off have not been invoked or applied. Impacts on fundamental rights: Simplifying jurisdiction rules and ensuring transparency would have no impact on fundamental rights although an increase in transparency has an indirect impact on the fundamental right of information. Improving the cooperation procedures would have a positive impact on the rights of the defence and indirectly on the freedom to conduct a business.

5.2.3.3 Discarded option: extension of the AVMSD to audiovisual media services established in third countries

In the public consultation, a significant number of Member States and regulators refer to the absence of a level playing field and distortions of competition. This would result from the fact that foreign providers targeting EU audiences are currently not covered by the scope of the AVMSD. It must be borne in mind that Member States are already allowed to apply the provisions of the Directive to foreign providers targeting consumers in their territory. This notwithstanding, the majority of contributors to the public consultation also argued that an extension of the rules on the geographical scope to certain foreign providers is necessary.

Despite these results, no significant negative impacts of the current rules could be identified. Leading foreign providers of on-demand services (Netflix, iTunes, Amazon EU Sarl) have set up subsidiaries in the EU. Indeed, only 50 paying VoD services (including different linguistic versions of the same provider) established in the United States target one or more Member States. Given the lack of transparency of the VoD market, the exact market share of these foreign providers is not known. However, at present there seems to be only one important player, i.e. Google Play, with no establishment in the EU. It follows that there is a lack of evidence as to the existence of a real problem.

In addition, the extension of the geographical scope would be difficult to enforce. Member States can already apply the provisions of the Directive to foreign providers targeting consumers in their

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143 5 Member States (AT, BE-Fr, EL, PL, SK) and 1 regulator (UK-ATVOD) underlined the importance of creating a level playing field through a comprehensive legal framework.
144 Including 9 Member States (AT, BE, EE, EL, IT, PL, PT, FR, SK) and 12 regulators (e.g. UK-ATVOD, BE-CSA, FR, IT, PL, ES, RO) and some public service and commercial broadcasters.
145 Google Play movies and TV was rolled out in the UK, France, Germany, Italy and Spain at the end of 2012 only. By contrast, iTunes movies started in the UK in 2008, and in France and Germany in 2009. Google Play entered the VoD market significantly later and has still a low or no presence in most Member States. The comparatively late roll-out of Google Play in the EU, evolving usage patterns of mobile devices in particular with the younger generation and the high penetration rate of Android could offer significant growth potential for Google Play. The impact of Google Play not being covered by the geographical scope of the Directive, even if currently not so important, could therefore become increasingly more in the future if they decide to remain outside the EU. It will thus remain important for the Commission to keep an eye on the evolution of the market in implementing a revised AVMSD.
territory. However, there is no evidence that they have made use of this possibility. By contrast, if foreign providers were to be required to register/appoint a representative, this obligation would have to be monitored and enforced. If the registration/appointment of a representative turns out not to be sufficiently effective and real (e.g. a letterbox company), the rules would have to be enforced in a third country which could be complicated. Firstly, by analogy to international cooperation in the field of competition, enforcement by the Commission in a third country may require bilateral international agreements ("dedicated agreements") or AVSMD provisions included in general agreements (e.g. Trade Agreements). However, this is likely to be complicated as providers located in the US constitute the major part of the market share of foreign providers targeting the EU and audiovisual services remain excluded from the ongoing TTIP negotiations. Secondly, any decision from a regulator imposing a fine or seeking a change in the behaviour of a service provider would be difficult to enforce as there would normally be no assets in the EU. In case a foreign provider targets more than one Member State, the need for coordination between regulators so as to avoid conflicts of jurisdiction would trigger further administrative costs.

Extending the geographical scope would thus be disproportionate and would not represent a clear added value.

### 5.2.3.4 Comparison of the options

<table>
<thead>
<tr>
<th>Costs and savings</th>
<th>Status quo</th>
<th>Option A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative costs: staff costs related to case handling EUR 18 000 per case for the Commission and EUR 3 000 for the Regulators involved in the case. Compliance costs: 0</td>
<td>Administrative costs: - Costs of ERGA opinions: nc - Around EUR 51 630 to run the MAVISE database for the EU Cost savings: not quantifiable Compliance costs: 0</td>
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</table>

**Effectiveness and subsidiarity test**

Option A would facilitate the identification of the country of origin and therefore improve the functioning of the internal market with cost savings for the regulators, the Commission and audiovisual media service providers.

Option A would increase the protection of consumers and allows quick intervention in case of public security threats. In addition, option A would reply to a strong political demand to allow Member States to do so. The approval by the Commission would nevertheless act as a safeguard against any possible misuse of this possibility mitigating potential impacts on the internal market.

The cooperation procedures have the objective of allowing for subsidiarity considerations and national specificities in the application of the COO principle. Improving their functioning is therefore contributing to further abide by the subsidiarity principle.

Option A is the preferred option.

<table>
<thead>
<tr>
<th>Options</th>
<th>General objectives and related impacts</th>
<th>Internal market (impacts on the internal market)</th>
<th>Establish the conditions to ensure competitiveness (impacts on the competitiveness)</th>
<th>Costs (administrative and compliance)</th>
<th>Effectiveness</th>
<th>Coherence</th>
<th>Feasibility (technical and political)</th>
<th>Preferred option</th>
</tr>
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<tbody>
<tr>
<td>Status quo</td>
<td>0</td>
<td>0</td>
<td>Low</td>
<td>Medium</td>
<td>High</td>
<td>Low</td>
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<tr>
<td>Option A</td>
<td>++</td>
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<td>Medium</td>
<td>High</td>
<td>High</td>
<td>High</td>
<td>X</td>
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</tbody>
</table>

### 5.2.4 Independence of Regulators

#### 5.2.4.1 Status quo option:
The AVMSD does not impose an obligation on Member States to create or maintain an independent regulatory body. Member States are only required to take appropriate measures to provide each other and the Commission with the information necessary for the purposes of establishing jurisdiction and applying the cooperation mechanisms.

Economic outcome:

Existing costs: Maintaining the status quo would not entail substantive compliance costs for audiovisual media service providers or additional administrative and enforcement costs for regulatory authorities.

The existing costs deriving from setting up an independent authority are not as such, a legal consequence of the AVMSD which does not impose such an obligation. In any case, the Member State's regulatory structures needed to implement the AVMSD at national level have resulted in moderate to high administrative costs. The average staff dedicated per channel monitored by regulators across the EU ranges between 0.6-0.8 person147.

Outcome Internal market: When regulatory bodies are not efficient or lack independence, this has a direct impact on the effective transposition and application of EU legislation and consequently on the functioning of the internal market. The Council of Europe Recommendation (2000)23 148 on the independence and functions of regulatory authorities for the broadcasting sector as well as a number of studies and reports149, consider that the following set of criteria would ensure an effective and independent implementation of legislation:

i) independence from third parties or from external influence;
ii) transparent decision-making processes and accountability to relevant stakeholders;
iii) open and transparent procedures for the nomination, appointment and removal of Board Members;
iv) knowledge and expertise of human resources;
v) financial150, operational and decision making autonomy;
vi) effective enforcement powers;
vii) the possibility only for judicial power to review the regulatory bodies' decisions.

The situation of national regulatory bodies in the light of these criteria is as follows:
- 5 national regulatory authorities151 are not fully separated from ministerial bodies or government.
- 4 Member States do not have any transparency provisions152 and 2 Member States153 do not require regulators to motivate their decisions.
- A number of countries do not follow sufficiently open and transparent procedures for the nomination, appointment and removal of board members154. 6 countries lack rules on conflict of interest for appointments155. There are no rules against conflict of interest with government156 in 6 countries, and 9 do not have rules on conflict of interest with Parliament and political parties.157

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147 Final Report of AVMS-RADAR- Update on recent changes and developments in Member States and Candidate Countries that are relevant for the analysis of independence and functioning of audiovisual media services regulatory bodies (SMART 2013/0083): https://ec.europa.eu/digital-agenda/news-redirect/27269
149 In line with the INDIREG study, financial autonomy means "that the regulator is equipped with sufficient financial resources".
150 CY, EE, FI, LV, LT. Source: ERGA Report.
152 Estonia and Luxembourg. Source: Final Report of AVMS-RADAR
154 AT, BG, DE (some Länder), DK, RO, UK. Source: Final Report of AVMS-RADAR
155 DE (some Länder and ZDF), ES, FI, RO, SI, UK. Source: Final Report of AVMS-RADAR
156 BE (all communities), EE, ES, FR, DE, NL, PT, RO, SI.
small number of countries neither have rules on the possible conflict of interest with industry (5)\(^{158}\). In a few countries, no specific rules exist to protect Board members against arbitrary dismissal (5)\(^{159}\).

- Some commercial broadcasters pointed out to a lack of the requisite knowledge and expertise by the staff of several audiovisual regulators in the 2015 public consultation.
- Large budgetary\(^{160}\) differences exist between national regulatory authorities across the EU. The regulatory bodies of 10 countries have less than EUR 1 million of budget per year. However, this amount can be much higher in other countries\(^{161}\). The same can be said as regards staffing\(^{162}\). In this context, the RADAR study also concluded that the level of staff has been considered to be problematic for several regulators\(^{163}\). A more qualitative assessment by ERGA gave a close conclusion\(^{164}\). As regards decision making process, the regulatory powers of some regulators are limited by the power of other bodies to overturn their decisions as well as by the power of other bodies to give instructions\(^{165}\) to regulators.

- Five regulators report that they do not have powers to enforce their decisions autonomously\(^{166}\).

Failure to fully align to each of these criteria does not necessarily imply a lack of independence. However, they provide a formal framework to ensure the highest possible level of independence and hence better ensure an efficient implementation of the AVMSD.

Some commercial broadcasters replying to the 2015 public consultation mentioned recent decisions by several regulators which, according to them, were problematic for their own independence. They affected negatively Public Service Broadcasters (PSB), commercial broadcasters and sometimes all players\(^{167}\).

The absence of independence can undermine the predictability of regulation which, according to service providers, is a necessary condition for them to establish and serve audiences in other Member States\(^{168}\).

**Outcome on competitiveness:** The independence of regulatory authorities both from political bodies and from commercial interests is essential to ensure an objective supervision of markets\(^{169}\). A lack of independence can result in an unfair treatment between players competing on the same market and have a negative economic impact on service providers (see Section 2.2.2.2 B).

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158 BE, DE (only RBB), EE, ES and FR.
159 BE (VRM), DK, EE, LU, SE. Source: Final Report of AVMS-RADAR
160 Final Report of AVMS-RADAR
161 France (€ 35 million), several German regional regulators such as the BLM (€ 28 million in 2014) and the LFK (10 million in 2014), Netherlands (€ 6 840 million in 2013) or Ireland and Poland (more than € 5 million in 2014). In some Member States, the budget for regulators is even higher, but - as they are converged regulators - , it is difficult to establish which part of the budget is assigned to audiovisual (e.g. in UK: OPCOM: € 160 million in 2014-2015. In Spain - CNMC: € 53 million in 2014).
162 Final Report of AVMS-RADAR Staff ranges from 2 persons in Iceland to 306 persons in France or 790 in the UK
163 German speaking community of BE, CY, CZ, EL, HR, IE and RO.
164 ERGA members considered that in 10 NRAs human resources were not adequate (Belgium-Wallonia, Belgium-MEDIENRAT, Bulgaria, Croatia, Czech Republic, Greece, Iceland, Ireland, Latvia, Luxembourg and Portugal).
165 The regulatory power of CvDM of the Netherlands is only limited by the power of other bodies to overturn its decisions, but no other body has the possibility to give instructions to the regulator. The decisions of the regulator from the Flemish-speaking Community of Belgium, from Denmark and the Netherlands can be overturned by a Ministry, while the decisions of the French-speaking Community and the German-speaking Community of Belgium can be overturned by the Government. Limitations to that power to overturn the decisions of the regulator exist only in the German-speaking and French-speaking Community of Belgium and in Denmark. The regulatory powers of 11 regulators are only limited by the power of other bodies to give instruction, but no other body has the power to overturn their decisions. (Bulgaria, Cyprus, Finland, France, Ireland, Italy, Luxembourg, Malta, Romania, Sweden, United Kingdom). 6 regulatory authorities get instructions by a ministry (Cyprus, Denmark, Finland, Ireland, Sweden, and United Kingdom). 5 regulators can be subjected to instructions from the Government. Belgium (all Communities), Sweden, United Kingdom. 3 regulators receive instructions from the Parliament, (Italy, Malta, Romania).
166 Bulgaria, Luxembourg, Poland, Slovakia and Sweden report that they do not have powers to enforce its decisions autonomously; see ERGA report
168 SQW study on a survey and data gathering to support the Impact Assessment in particular the provisions on media freedom, public interest and access for disabled people.
169 ERGA statement on the independence of NRAs in the audiovisual sector:
**Social outcome:**

The current rules aim to ensure the effective implementation of the AVMSD in cross-border cases where cooperation between the regulatory authorities is required. In this sense, they provide the general public with the assurance that the audiovisual rules, protecting their interests, are observed. However, since the way regulatory authorities function can differ significantly from one Member State to the other, it can translate into different levels of user protection across the EU. In markets with weak regulators, consumer rights risk not to be sufficiently protected.170

Moreover, regulatory authorities lacking independence are not in a position to guarantee media freedom and pluralism171 (see Section 2.2.2.2 B).

5.2.4.2 Option A: The AVMSD would require Member States to have an independent regulatory authority and set a number of requirements to support their independence and effectiveness. ERGA coordination and advisory role would be reinforced and embedded in the AVMSD

**The AVMSD would set minimum mandatory requirements for regulatory bodies. Such requirements could include:** i) independence from third parties; ii) transparent decision-making processes and accountability to relevant stakeholders; iii) open and transparent procedures for the removal of Board Members; iv) knowledge and expertise of human resources; v) financial172, operational and decision making autonomy; vi) effective enforcement powers; vii) the possibility only for judicial power to review the NRAs’ decisions.

**These are based on the Council of Europe Recommendation (2000)23 173, a number of studies and reports (see Section 5.2.4.1) and the requirements set by EU law in other legislative frameworks (see ANNEX 12)**

The AVMSD would also require that the regulators have competences in all the areas covered by the AVMSD. They should exercise these competences impartially and transparently and in accordance with the AVMSD objectives (media pluralism, cultural diversity, consumer protection, internal market, distortion of competition).

**This option shall not prevent supervision in accordance with national constitutional law.**

The role of ERGA, currently set by a Commission Decision174, would be embedded in the AVMSD and include new tasks deriving from the review of the Directive (see Sections 5.1.3, 5.2.2 and 5.2.3). This would not imply the creation of an Agency. Existing financing mechanisms would be maintained.

**Economic impacts:**

**Substantive compliance costs** would not increase.

**Administrative costs:** Option A would entail moderate to high administrative costs for Member States, depending on whether their regulatory authorities already fulfill the criteria of independence and effectiveness, especially the criteria on adequate financial and human resources. For these

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170 E.g. reply to the 2015 public consultation by UK Government or FOX International channels.
171 Recital 94 AVMSD “In accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.”
172 In line with the INDIREG study, financial autonomy means “that the regulator is equipped with sufficient financial resources”.
173 https://wcd.coe.int/ViewDoc.jsp?id=393649&
174 C(2014) 462 final
Member States, this would imply administrative costs related to adapting the legislation and, if necessary, the structure of the Regulator, its staff and budget. The maximum increase in staff costs has been estimated at maximum 6%\textsuperscript{175} (based on an increase by 200 FTEs) for the most understaffed regulators. However, the reliability of this forecast is limited given that the independence and efficiency of a regulatory authority derives from a complex combination of the requirements mentioned in the status quo.

**Impacts on the Internal market:** Option A would contribute to raising the level of regulatory independence in the audiovisual sector. This in turn would enhance the effectiveness of the AVMSD transposition across the EU in particular in the areas of audiovisual commercial communications, jurisdiction and protection of minors\textsuperscript{176}. Moreover, by indicating the minimum requirements for independence, option A would achieve a higher level of harmonisation as regards the structures of regulatory authorities. This view is shared by 74 out of 86 respondents to the 2013 consultation and by most of the commercial TV broadcasters who replied to the 2015 public consultation. By strengthening ERGA’s role, there would be more exchanges among regulators on the implementation of the AVMSD. This would bring closer Member States’ positions as regards the interpretation and application of the AVMSD. This would indirectly increase the level of harmonization in the application of the AVMSD.

**Impacts on competitiveness:** The introduction of proper independence requirements applicable across all the EU countries would contribute to guaranteeing legal certainty and a level playing field for all market players in the EU\textsuperscript{177}. Representatives of service providers that serve more than one Member State argued that the willingness to establish in a Member State and serve audiences in several Member States is mostly determined by the high quality and consistency of regulation, and by the independence of regulators\textsuperscript{178}. The formalisation of ERGA would enhance cooperation between the regulatory authorities in the EU and thus enhance legal certainty and level playing field between audiovisual media service providers\textsuperscript{179}. The replies to the 2015 public consultation by some of the broadcasters\textsuperscript{180} indicate that the existence and opinions/statements of ERGA are highly valued.

**Impacts on SMEs:** An increase of legal certainty and a level playing field for all market players in the EU and would have a positive impact on SMEs.

**Social impacts:**

Due to the improved effectiveness of the AVMSD transposition, option A is likely to increase viewers' protection in the audiovisual sector. It could also contribute to attracting more players to offer services in specific markets, contributing thereby to an increased content choice for consumers. The reinforcement of ERGA would enhance the existing cooperation between regulatory authorities. This would have a positive impact on the cross-border protection of consumers for example in case of cross-border infringement cases. **Impacts on fundamental rights:** Option A should contribute to ensuring freedom of expression and information. This view is shared by the majority of the Member States and regulators who believe that audiovisual regulatory bodies have a key role to play in safeguarding free and pluralistic media throughout Europe. In order for them to be able to undertake this role properly and without unwarranted interference, it is vital that they are independent.\textsuperscript{181}

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\textsuperscript{175} Visionary Analytics, Preliminary Report


\textsuperscript{177} This has been underlined by some broadcasters replying to 2015 public consultation (e.g. COBA, FOX, VOEP).

\textsuperscript{178} Visionary Analytics/SQW. The other criteria are taxation levels, availability of a skilled workforce, good infrastructure.

\textsuperscript{179} Closer cooperation between regulatory authorities in the EU could be an effective tool to address some issues flagged by operators (such as difficulties faced by thematic channels to comply with quotas obligations regarding promotion of European works) by way of, for example, coordinating the application of exemptions.

\textsuperscript{180} E.g. Fox, VPR.

\textsuperscript{181} 78 out of 86 respondents to the 2013 public consultation on independence considered that independence of audiovisual regulatory bodies is relevant for the preservation of free and pluralistic media. This view was also shared by the respondents to the 2015 public consultation (some Member States, e.g.
5.2.4.3 Comparison of options

<table>
<thead>
<tr>
<th>Costs and savings</th>
<th>Status quo</th>
<th>Option A</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Administrative costs: 0.6-0.8 person per channel monitored by regulators across the EU</td>
<td>Administrative costs: not available. A rough possibly overestimated extrapolation results in a maximum increase of 200-250 FTEs for the more understaffed Regulators</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Effectiveness and subsidiarity test</th>
<th>Options A contributes to a thorough implementation of the AVMSD while ensuring media freedom and pluralism. The budget of the most understaffed Regulators would increase.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Option A would give enforcement powers to the Commission. It would therefore be effective in achieving the objective of ensuring regulatory independence and hence improve the internal market.</td>
</tr>
<tr>
<td></td>
<td>As shown in the last review of the AVMSD, option A is likely to be politically challenging. While it is widely supported by the industry and civil society, a number of Member States consider that option A would impinge on the subsidiarity principle.</td>
</tr>
<tr>
<td></td>
<td>Option A foresees minimum requirements and remains proportional since it clarifies that Member States would maintain their prerogatives to ensure regulators’ accountability in accordance with their national constitutional law.</td>
</tr>
<tr>
<td></td>
<td>Option A is the preferred option.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Options</th>
<th>General objectives and related impacts</th>
<th>Costs (administrative and compliance)</th>
<th>Effectiveness</th>
<th>Coherence</th>
<th>Feasibility (technical and political)</th>
<th>Preferred option</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Internal market (impacts on the internal market) Establish the conditions to ensure competitiveness (impacts on the competitiveness)</td>
<td>Low</td>
<td>Low</td>
<td>High</td>
<td>Medium</td>
<td></td>
</tr>
<tr>
<td>Status quo</td>
<td>0</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Option A</td>
<td>++</td>
<td>++</td>
<td>High</td>
<td>High</td>
<td>High</td>
<td>Low</td>
</tr>
</tbody>
</table>

5.3 Option addressing the problem of the rules on commercial communications no longer fit for purpose

5.3.1 Status quo option:

The AVMSD contains rules on commercial communications that apply to all audiovisual media services. These are the rules on the use of sponsorship and product placement and on certain qualitative aspects of commercial communications.\(^{182}\).

The AVMSD also lays down more detailed rules that apply only to television broadcasting. They set a maximum of 12 minutes of advertising per hour on television (i.e. 20% per hour), define how often TV films, cinematographic works and news programmes can be interrupted by advertisement, set the minimum duration of teleshopping windows and set some requirements on the content of alcohol advertising spots.

Economic outcome

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Ireland and Latvia; regulators: Spanish CNMC and CAA, FR CSA, Dutch CdvM, Romanian NAC, GermanVS; Public service (EBU, RAI, Circom Regional) and commercial broadcasters (CMFE); as well as other respondents (NGOs, citizens or digital companies).

\(^{182}\) See Article 9 AVMSD
Existing costs: Maintaining the status quo would result in no additional administrative or compliance costs.

According to regulators, the existing requirements have resulted in administrative costs up to EUR 1.2 million per year per regulatory authority\textsuperscript{183}.

In the majority of Member States, self- and co-regulation systems are in place in the field of advertising in general. These systems are either funded by membership fees or by a levy system from the industry and their cost ranges from EUR 250 000 to EUR 1 million\textsuperscript{184}.

Outcome Internal market: The minimum harmonisation provided by the AVMSD has resulted in fragmentation and has not brought legal certainty in the areas of sponsorship, self-promotion and product placement. For sponsorship announcements and product placement, the main issue concerns the interpretation of the concepts of "potential undue promotional character"\textsuperscript{185} and "undue prominence"\textsuperscript{186}. For self-promotion, the difficulty lies in distinguishing it from advertising for the purposes of applying the 20% rule.

Outcome on competitiveness: At a moment where online advertising is overtaking TV advertising as the preferred media for advertisers, TV broadcasting is subject to rules that are no longer justified (see Section 2.2.3 and ANNEX 6).

In their replies to the 2015 public consultation, advertisers, some broadcasters and several Member States and regulators claim that there is no level playing field between TV broadcasting and other media services, and in particular between TV broadcasters and on-demand service providers. However, a few broadcasters, mainly from the UK, prefer the status quo option.

Social outcome:

Consumer organisations (including those from the health sector) recognise the relevance of the rules but think that they are neither fair nor effective. Consumer organisations underline that the level of consumer protection should not be lowered\textsuperscript{187}. Even if new offers in the market have progressively given consumers the opportunity to switch to services without advertising (see Section 2.2.3), they still have some concerns about excessive advertising on TV\textsuperscript{188}. They also consider that self- and co-regulation systems take too long to review complaints while advertising campaigns are fast-paced.

Advertising revenues directly contribute to (commercial) TV broadcasters' capacity to invest in audiovisual content. A decrease of TV advertising revenues linked to the limitations imposed by the current regulation will have a negative impact on creative industries and cultural diversity.

5.3.2 Option A: Making the AVCC rules more flexible

\textsuperscript{183} Depending on the size of the audiovisual market in the country, the staff costs, the use of external services for monitoring. SQW/Ramboll study
\textsuperscript{184} Sources EASA (European Advertising Standards Alliance)
\textsuperscript{185} For example, in Austria, a specific case of a logo wall in a sports broadcast was deemed unduly prominent (BKS decision of 14 December 2011, GZ 611.009/0007-BKS/2011). In the Flemish Community of Belgium, different praises of a restaurant and a new shop were considered as undue prominence (VRM, 2010/026 and VRM, 2010/027). In Germany, a decision highlighted that there is undue prominence only if the product placement is the single dominating element to the extent that the actual programme content is no longer recognizable (case no.5 K 1128/11.NW).
\textsuperscript{186} In some Member States, these sponsorship announcements are frequently shorter forms of advertising spots. There may also be a lack of or unclear identification of the sponsorship agreement.
\textsuperscript{187} BEUC’s contribution to the public consultation. In addition EURALVA underlines that the quantitative rules are not satisfactory if not respected by stakeholders.
\textsuperscript{188} In 2014, for example, 57% of UK viewers agreed with the statement “there are already more minutes of advertising in an hour than I am really happy with”. However, viewers also appear to understand the relationship which exists between advertising and the funding of content: 72% of UK viewers questioned in 2014 identified without prompting that advertising represented the primary source of funding for the UK’s three main free-to-air commercial television services (ITV/STV/UTV, Channel 4 and Channel 5) which between them account for 24% of UK adult television viewing and just under £1.5bn (£2.1bn) in programme spend. Source: Ofcom's report on UK audience attitudes to the broadcast media 2014 (slides 42 and 43), http://stakeholders.ofcom.org.uk/binaries/research/tv-research/attitudes-to-media/Annex_1.pdf
For both TV broadcasters and on-demand services, sponsorship rules would be made more flexible by focusing on the principles of editorial independence, transparency (clear indication that the programme has been sponsored) and no sponsorship for banned products such as tobacco. Similarly, product placement would be explicitly allowed and the rules would be relaxed by deleting the "undue prominence" criterion and focusing on the principles of editorial independence, transparency (clear indication that the programme contains product placement) and no product placement for banned products (such as tobacco or medicines on prescription). The prohibition of product placement in children's programmes would remain.

For TV broadcasters, films could be interrupted more often (once for each period of 20 minutes) except for children's programmes for which the current rule would remain.

As regards quantitative limitations for advertising, TV broadcasters would be allowed more flexibility by transforming the 20 % per hour limitation into a daily limitation (or other variations such as a double cap per day and per hour).

More types of commercial messages would be excluded from the advertising limit (e.g. cross-promotion including announcements for programmes of other broadcasters or other media within the same group).

As regards qualitative rules, the status quo would remain189.

Economic impacts:

Substantive compliance costs: The incremental costs for TV broadcasting and on-demand service providers of the new provisions would be zero190.

Administrative costs: There would not be any incremental administrative cost for regulators. Currently, regulators' monitoring and enforcement activities with respect to the 20% limitation amount to up to EUR 1 million191. As regards product placement and sponsorship rules, these costs amount respectively up to EUR 2.2 million and EUR 2.1 million per year at EU level192.

As an important share of these costs derive from the application of subjective criteria, such as the undue prominence of product placement, regulators will certainly lower their current costs. It is however not possible to quantify precisely these cost savings.

Impacts on the Internal market: Option A would address the issue of fragmentation brought by the lack of certainty about the interpretation of some of the AVMSD concepts in the areas of sponsorship and product placement. This being said, the AVMSD is a minimum harmonisation Directive. Member States remain free to adopt stricter and more detailed rules for providers under their jurisdiction. Several Member States indeed have stricter rules already in place as regards quantitative rules, mostly on PSB channels193. It is therefore possible that some Member States would maintain stricter rules in this field.

189 See Article 9 AVMSD.
190 SQW/Ramboll study. Advertising scheduling is a core component of broadcast programming and the quantitative rules imposed by the AVMSD are only a small part of a large number of parameters taken into account in TV scheduling strategies aiming at optimising audience and revenue. The costs associated with broadcast programming, including IT costs, are “business as usual”, i.e. costs endured even in the absence of the AVMSD.
191 SQW/Ramboll study, based on the current average value for the monitoring of 1 linear provider established in the EU (PPP adjusted) which is derived from a sample of the regulatory costs in 7 MS which can be considered as a representative sample of different approaches to fulfilling regulatory responsibilities with regard to the monitoring and enforcement of the quantitative rules. It is further assumed that regulators focus their regulatory activities on linear services which have more than 0.5 % of the audience share.
192 SQW/Ramboll study.
193 14 Member States have stricter rules than the 12-minute limitation, mostly on PSB channels (11 MS).
11 of the Member States that replied to this question support more flexibility but to various degrees. Some refer in particular to sponsorship and product placement rules. Other call also for a deletion of the 20% limitation.

**Impacts on competitiveness:** Most broadcasters agree that product placement and sponsorship rules should be clarified and simplified. A simplified set of rules on product placement could result in an increase of approximately 10% to 15% of product placement revenues, or in a 4% increase of total advertising revenues in the EU (i.e. potentially additional revenue of EUR 1.2 million). Allowing more flexibility in sponsorship rules would allow broadcasters to generate from 15% to 50% of additional sponsorship revenues. This could result in more than EUR 441 million increase of total TV advertising spend in the EU (i.e. around 1.5% of current total TV advertising market value). It must in any case be noted that it is difficult to foresee whether advertisers would increase their advertising budgets or spend their existing budget differently.

Most broadcasters consider that the insertion rules are no longer relevant nor effective. Some argue that because of these rules, schedules are not built around viewers' comfort or advertisers' demand, which is counter-productive. According to the industry, by making the interruption rules more flexible, revenues could increase between 1 and 10%. The only other estimate available is based on the scenario of abolishing interruption rules. In this case, the overall potential revenue gains could amount to 1.35% of advertising revenues coming from cinematographic works and news programmes. This is however a conservative estimate since the parameters for calculation do not take into account different target groups, time slots etc.

As regards the 20% limitation, the impact of introducing more flexibility would differ depending on the characteristics of each advertising market and on the extent to which Member States would apply the new rules or maintain the status quo in this area. In the most flexible option of transforming the 20% per hour limitation into a daily limitation, broadcasters would be allowed to broadcast as much advertising as they want during peak times i.e. when they can best maximise their revenues (live shows, major events etc.). They could thus optimise their advertising schedules and viewers flow.

A shift to a daily limit could generate between a 2% and 15% increase of revenues. For example, over the last six months of 2015, the gross price of a 30-second advertising spot during prime time

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194 NL, UK, PL, FI and ES.
195 FI and its regulator, DE and its regulators and EE.
196 EGTA's report on the costs and benefits of compliance with the Audiovisual Media Services Directive.
197 SQW/Ramboll study, based on the assumption that current revenues on product placement in Europe capture around 0.1% of total ad revenues and only in some cases might go above 1%, while in countries such as US where the regulations on product placement are very loose or virtually non-existing at all, the market share captured by product placement is around 5%. Such significant direct increase can however hardly be expected in reality (at least short to medium time perspective), mainly due to inherent differences between the EU and the US markets.
198 EGTA's report on the costs and benefits compliance with the Audiovisual Media Services Directive.
199 SQW/Ramboll study, based on an average assumption that of a given range (30%) of an expected increase in revenues from sponsorship activities, as compared to the current estimation that sponsorship captures around 5% (net value) of total TV revenues in their national markets.
200 EGTA's report on the costs and benefits compliance with the Audiovisual Media Services Directive.
201 SQW/Ramboll study.
202 Advertising sell-out rates vary widely across Member States, meaning that in some countries, broadcasters do not sell their entire advertising inventory while in others; they do and could benefit from additional advertising space. Advertising pressure varies across Member States. Between 2010 and 2013, during selected monitoring periods on certain channels, it ranged between 4.9% and 14.1% on average. For commercial broadcasters, this varied between 15% and 64%. In DE, advertising spots represented on average 8.6% of the daily broadcasting time, varying between 14.2% on SAT1 and 1.1% on ARD. In the UK, advertising spots represented on average 11.9% of the daily broadcasting, varying between 15% on ITV2, 14.2% on Cartoon Networks and 10% on ITV1. In the NL, advertising spots represented on average 9% of the daily transmission time, varying between 12% for SBS6 and Nett5 and 5% on Nederland3. In MT, advertising spots represented on average 4.9% of the daily transmission time, varying between 6.4% on ONE and 4.2% on NET. In FR, advertising spots represented on average 5.6% of the daily transmission time, varying between 10.4% on TF1 and 2.4% for Canal+. In IT, advertising spots represented on average 8.7% of the daily transmission time, varying between 15% on Canale5, 12.6% on La7 and 3% on RA12. In AT, advertising spots represented on average 7.7% of the daily transmission time, varying between 12.1% on ATV and 2.4% on ORF2. In RO, advertising spots represented on average 9.4% of the daily transmission time, varying between 11% on ProTV and Antenal1 and 5.1% on TVR1. In DK, advertising spots represented on average 14.1% of the daily transmission time, varying between 14.9% on TV3 and 12.9% on TV2.
203 EGTA's report on the costs and benefits of compliance with the Audiovisual Media Services Directive. [non-confidential version], confirmed by a broadcaster from a small Member State who replied to the public consultation (MTV Oy), this could mean "an increase of advertising income of about 2 million euro annually".
204 http://www.tf1pub.fr/office/tf1/grille-tarifs/
on TF1 was EUR 67 330. It is estimated that during important events or programmes, European broadcasters could increase their advertising pressure by a few minutes, from 12 minutes to 14-15 minutes, taking into account European viewers' lesser propensity to stand long advertising breaks. This would mean an increase of around 2.5 minutes of advertising, i.e. 5 more advertising spots of 30 seconds, which, all things being equal, could translate for a channel such as TF1 in an increased revenue of 336 650 EUR i.e. theoretically EUR 122 million annually i.e. 10 % of the turnover of the channel in 2014. However, the potential benefits of more flexibility need to be balanced with the fact that the scarcity of advertising spots, in particular at peak time, has a positive impact on their value. The exact effects on market players will largely depend on the elasticity of demand in each market. By introducing flexibility, broadcasters would be able to take business decisions adapted to the reality of each market in order to balance advertising demand, advertising spot prices and viewers' comfort.

The impact of excluding cross-promotion from the 20% limitation would depend on each media service provider’s business model. In general, the exclusion would mainly benefit broadcasters who are part of larger integrated media groups.

Most commercial broadcasters advocate more flexible advertising rules. However, a few broadcasters (mainly from the UK) deem that rules should remain in their current form in order to keep the advertising market stable. They are supported by some Member States.

The printed press industry claims that more opportunities to advertise on TV could imply changes in advertisers' media mix, which may be to their detriment.

**Impacts on SMEs:** There will be no significant impact on SMEs (See ANNEX 3).

**Social impacts:**

Overall, viewers would be potentially exposed to more advertising during peak time. Due to a relaxation of the interruption rules, there could be more frequent and longer advertising breaks. This may thus affect the integrity of cinematographic works. Several right holders' associations have underlined this in their contributions to the public consultation.

However, market developments have led to an increased amount of offerings to which viewers can easily switch, in particular to advertising-free subscription video-on-demand services. This tendency has been clearly observed in the US market where, despite the fact that there are no limitations as to the amount of advertising, broadcasters recently use self-restraint in fear of losing audiences.

The deletion of a criterion such as "undue prominence" for product placement would expose viewers to more commercial messages in programmes.

This being said, if broadcasters manage to retain the value of advertising spots by marginally increasing their number around value-generating programmes at peak-time, an increase in advertising revenues would increase the capacity of TV broadcasters to invest in audiovisual content. This would have a positive impact on the availability of content for consumers and would be beneficial to EU producers, especially when coupled with requirements on investment in European works, including the

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207 UK and FR.
208 See for example the contributions of EPC, EMMA, ENPA, BDZV, MLE, NMA, VOEZ and ANSO to the 2015 public consultation.
209 See for example the contributions of SACD, VS, SAA, VdFS.
210 http://television.telerama.fr/television/etats-unis-et-maintenant-moins-de-coupures-de-publicite,138319.php
8 000 EU independent producers with positive consequences for employment. **Impacts on fundamental rights:** Due to an increased capacity to invest in audiovisual content, more flexibility in advertising rules would contribute to reinforcing freedom of expression and information (Article 10 of the Charter). The possibility to broadcast TV advertising with fewer constraints would contribute as well as to the freedom to conduct a business (Article 16).

### 5.3.3 Comparison of options

<table>
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<tr>
<th>Costs and savings</th>
<th>Status quo</th>
<th>Option A</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Status quo</strong></td>
<td>Maximum administrative costs: EUR 1.2 million per Regulators, per year</td>
<td>Maximum savings on administrative costs:</td>
</tr>
<tr>
<td></td>
<td>Compliance costs: nc</td>
<td>- 20% limitation: EUR 1 million per year for the EU</td>
</tr>
<tr>
<td>Effectiveness and subsidiarity test</td>
<td>Option A would increase the competitiveness of TV broadcasters and increase their benefits. TV broadcasters will probably increase the amount of advertising at peak time only to a limited extent so as to avoid any major fall in the prices of advertising slots.</td>
<td>- Product placement: EUR 2.2 million per year for the EU</td>
</tr>
<tr>
<td></td>
<td>By giving additional flexibility in this field and maintaining the possibility for Member States to adopt stricter measures, this option is proportionate and fully compliant with the subsidiarity principle.</td>
<td>- Sponsorship: EUR 2.1 million per year for the EU</td>
</tr>
<tr>
<td></td>
<td>Maximum economic benefits:</td>
<td>Additional Compliance costs: 0</td>
</tr>
<tr>
<td></td>
<td>- Flexibility of 12 minute rule: EUR 122 million per year for one major TV broadcaster</td>
<td>Maximum economic benefits:</td>
</tr>
<tr>
<td></td>
<td>- Flexibility product placement: EUR 2.2 million for the EU</td>
<td>- Flexibility sponsorship: EUR 2.1 million for the EU</td>
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<tr>
<th>Options</th>
<th>General objective and related impacts</th>
<th>Costs (administrative and compliance)</th>
<th>Effectiveness</th>
<th>Coherence</th>
<th>Feasibility (technical and political)</th>
<th>Preferred option</th>
</tr>
</thead>
<tbody>
<tr>
<td>Status quo</td>
<td>Establish the conditions to ensure competitiveness (impacts on the competitiveness)</td>
<td>0</td>
<td>High</td>
<td>Medium</td>
<td>Medium</td>
<td>Medium</td>
</tr>
<tr>
<td>Option A</td>
<td>0+ + +</td>
<td>Low</td>
<td>Medium</td>
<td>Medium</td>
<td>Medium</td>
<td>X</td>
</tr>
</tbody>
</table>

### 5.4 Discarded option: Prominence of content of general interest

The prominence of content of general interest has been identified as an issue in the frame of the public consultation. However, the option of including any related provision in the AVMSD has been discarded at an early stage as no clear consensus on how this issue should be tackled has emerged.\(^{211}\)

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\(^{211}\) 4 out of 20 MS responding to the public consultation asked for introducing findability rules and the large majority of regulators; the industry in their large majority opposes introducing findability rules (see below). Introduction of findability rules is supported by the public service broadcasters with the objective to ensure their visibility on the new screens. It is also supported by the Associations representing persons with disabilities which are seeking for improvement of the accessibility/usage of devices for the disabled (deaf/blind).
Most recent market and technological developments (new distribution channels, the proliferation of audiovisual content, etc.) have generated calls to reflect on whether rules would be required to facilitate prominence of content of general interest, i.e. ensuring its findability/discoverability.

The provision of general interest content constitutes the core element of the mission of public service broadcasters in Member States\(^{212}\). It also has a potential impact on commercial broadcasters operating (partly or fully) under defined general interest objectives such as media pluralism, freedom of speech and cultural diversity.

Beyond the specific aspect of promotion of access to European works\(^{213}\), the AVMSD contains no general provision ensuring prominence of content considered by Member States as being of general interest. As far as linear broadcasting services provided via electronic communication networks or services are concerned, some Member States provide e.g. for requirements regarding the order of channel listings.

Article 6(4) of the Access Directive 2002/19/EC merely refers to but does not regulate (“without prejudice”) the ability of Member States to impose obligations in relation to the presentational aspect of electronic programme guides (EPGs)\(^{214}\) and similar listing and navigation facilities. The Access Directive does not mention any particular requirement or limitation in this sense, and in any event applies only to the extent that electronic programme guides display linear broadcasting channels provided via electronic communication networks or services and information about such channels.

Even if not stated by any legal instruments, Member States have the possibility under national legislation to introduce prominence obligations on online service providers. Such interventions are subject to the Treaty, including competition rules, the freedom of establishment and the freedom to provide services.

Currently, some platforms reach commercial agreements with content providers including public service broadcasters concerning the prominence of their content.

The added value of action at EU level would be to set up and harmonise the limits to what the Member States can do in regard of prominence of general interest content\(^{215}\).

Such limitation could be conceived along the lines of current limitations for must-carry-obligations under Article 31 USD\(^{216}\) where MS may only impose "proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Union [Community] law and should be proportionate, transparent and subject to periodical review…”\(^{217}\)

\(^{212}\) Protocol No 29 on the system of public broadcasting in the Member States attached to the TEU and TFEU provides that “The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.”

\(^{213}\) See Art 13(1) of the Audiovisual Media Services Directive 2010/13/EC.

\(^{214}\) EPGs are menu-based systems that provide users of television, radio and other media applications with continuously updated menus displaying broadcast programming or scheduling information for current and upcoming programming.

\(^{215}\) Regulations on findability/ EPG is in place in AT, BE (FR and NL), BG, CY, DE, FR, HR, HU, IE, IT, NL, PL, PT, UK, See study Visionary Analytics, table 5.2. EPG-regulation in Member States (forthcoming).

\(^{216}\) As regards the provision of content of general interest (“must carry” obligations), Article 31 of the Universal Service Directive 2002/21/EC (USD) allows Member States to impose must carry obligations on undertakings, under their jurisdiction, providing electronic communications networks used for the distribution of television broadcasts. Member States are allowed to impose such obligations where a significant number of end-users use the networks as their principal means to receive television broadcasts. Moreover, the obligations should be necessary to meet clearly defined general interest objectives and shall be proportionate and transparent.

\(^{217}\) See Recital 43 of the Universal Service Directive 2002/21/EC (USD).
However, in order to be effective, the inclusion of such provision in the AVMSD would require a major adjustment in terms of its scope. The AVMSD would need to apply beyond television broadcasts and specific on-demand audiovisual media services to encompass players aggregating programmes of different media service providers on interfaces allowing users to search, find, organise and select individual elements of audiovisual content for viewing and/or recording. Such players could include transmission networks, content platforms, service providers, ISPs/software producers and manufacturers. For many of these providers, the only applicable rule of the Directive would be the one on access to general interest content (i.e. device manufacturers).

Moreover, introducing a provision in the AVMSD would entail that transmission networks, content platforms, service providers or manufacturers would apply the rules of the country where they are established.

In the case of a player established in one Member State rolling out its services in other Member States, the content available in the targeted country would have to abide by the provision on prominence of content of general interest from that country. In a context where OTT services are developing at a rapid pace and have a great flexibility for establishing themselves in a particular country while distributing services across Europe, the effectiveness of such a provision would be very low. Indeed the notion and the scope of general interest applied in one Member State would be defined according to the standards of another Member State.

Therefore, the AVMSD is not the right legal instrument to deal with this issue.

5.5 Impact of the combination of the preferred options:

There are multiple potential combinations of the different options. The combination of the preferred options is deemed to strike the best balance between the need to introduce flexibility with respect to the current level of regulation and ensuring adequate consumer protection:

<table>
<thead>
<tr>
<th>Options</th>
<th>General objectives and related impacts</th>
<th>Costs (administrative and compliance)</th>
<th>Effectiveness</th>
<th>Coherence</th>
<th>Feasibility (technical and political)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1. Internal market (impacts on the internal market)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2. Establish the conditions to ensure competitiveness (impacts on the competitiveness)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>3. Safeguard the protection of minors and consumer protection (social impacts)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>4. Support European cultural diversity (social impacts)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>5. Strengthen access to information and media pluralism (social impacts)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Medium</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>High</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Medium</td>
</tr>
</tbody>
</table>

5.2.1 Promotion of European works

| Option B | N/A | N/A | N/A | N/A | Medium | High | Medium | Medium | High |

5.2.2 Protection of minors in on-demand services

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218 According to the Study Visionary Analytics (forthcoming), p. 81,82, this option is likely - to entitle MS to secure appropriate prominence for public interest content for on-demand and further services currently not covered by the AVMSD. Regulation could focus either on due prominence of content (for e.g. requiring specific content to be shown on top of search or recommendations pages) or apps. – is likely to oblige MS to ensure that prominence obligations shall only be imposed on fair, reasonable and non-discriminatory terms. Such regulation would apply to broadcast and IPTV platforms as well as OTT content aggregators. In addition to prominence on “traditional” EPGs, discoverability clauses could also include: prominence on the default mode of “new generation” EPGs that can be customised by the consumer; favouring of public interest content in filtering, search and recommendations engines, etc., platforms run by connected TVs and other devices that deliver audiovisual content and services. Prominence legislation could also include obligations to pre-install designated apps on newly sold devices.

219 Typical examples for platforms include general internet search engines (e.g. Google, Bing), specialised search tools (e.g. Google Shopping, Kelkoo, Twenga, Google Local, TripAdvisor, Yelp), location-based business directories or some maps (e.g. Google or Bing Maps), news aggregators (e.g. Google News), online market places (e.g. Amazon, eBay, Allegro, Booking.com), audiovisual and music platforms (e.g. Deezer, Spotify, Netflix, Canal play, Apple TV), video-sharing platforms (e.g. YouTube, DailyMotion), payment systems (e.g. PayPal, Apple Pay), social networks (e.g. Facebook, LinkedIn, Twitter, Tuenti), app stores (e.g. Apple App Store, Google Play) or collaborative economy platforms (e.g. Airbnb, Uber, Taskrabbit, Bla-bla car). Internet access providers fall outside the scope of this definition. Not all of these are relevant with regard to the provision of audiovisual content.
On the one hand, the industry will benefit from more flexible quantitative rules on commercial communications. The increased efficiency of the country of origin principle and the requirements for the independence of Regulators would improve the business environment in which audiovisual players operate.

On the other hand, consumers will be guaranteed a high level of protection through the limited extension of the AVMSD to video-sharing platforms and the reinforcement of the requirements applicable to on-demand services in terms of the protection of minors. Consumers will also benefit from a greater access to European works in on-demand services.

All options take into account, when appropriate, the need of flexibility for the industry by considering possible implementation via self and/or co-regulation (scope of application, information on harmful content).

Most of the options complement each other. For example, independence of regulators will be of the utmost importance if Members States decide to entrust them with the application of the new rules regarding video-sharing platforms. Also the potential increase in audiovisual media service providers' revenues deriving from the greater flexibility of quantitative rules on advertising will release a potential for an increased contribution to the production of European works.

The combination of options achieves a more level playing field between the different players in the audiovisual media market. This is for instance realized by leveling up certain requirements for on-demand services and video-sharing platforms in relation to the protection of consumer or promotion of European works while providing more flexibility to TV broadcasting services on certain rules on commercial communications.

6. **HOW WOULD ACTUAL IMPACTS BE EVALUATED OR MONITORED?**

Monitoring of the implementation will continue to be assured by the European Commission on the basis of:

- Application reports by the Commission, on the Directive as a whole two years after the adoption of the Directive and every three years thereafter;
- Reports on the application of the provisions related to the promotion of European works every 2 years (for TV broadcasting and on-demand services);
- Monitoring of the implementation of the provisions on video-sharing platforms on the basis of an independent study carried out after the transposition;
- Monitoring of the implementation of the provision on content descriptors for protection of minors.

The following list of impact indicators could be used to monitor progress towards meeting the general objectives:
<table>
<thead>
<tr>
<th>General objectives</th>
<th>Potential indicators</th>
<th>Baseline</th>
<th>Potential sources of information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enhanced consumer and minors protection</td>
<td>Number of complaints related to harmful/hate speech on video sharing platforms handled by MS appointed authority</td>
<td>0 (2015)</td>
<td>Ad hoc studies</td>
</tr>
<tr>
<td></td>
<td>Turnover in the audio-visual sector in the EU</td>
<td>EUR 105.8 billion (2014)</td>
<td>EAO report on the development of the European market for on-demand audiovisual services and EAO Yearbook IHS database ComScore database Nielsen ERGA Report from the MS Ad hoc studies</td>
</tr>
<tr>
<td></td>
<td>Number of TV broadcasting services in the EU</td>
<td>5 141 (2013)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Number and on-demand services</td>
<td>2 563 (2014)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Share of cross border provision of TV broadcasting services</td>
<td>38% (2013)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Share of cross border provision of on-demand services</td>
<td>31% (2014)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Number of derogation/circumvention procedure opened/closed</td>
<td>0 (2015) and 2 (2015)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Number of on demand services established outside the EU and targeting the EU</td>
<td>50 in the US (2015)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Average TV viewing time in the EU</td>
<td>3h43</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Video viewing time</td>
<td>N/A&lt;sup&gt;220&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>TV broadcasters advertising revenues</td>
<td>EUR 28 billion (2013)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Online advertising revenues</td>
<td>EUR 27 billion (2014)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Advertising revenues from online video</td>
<td>EUR 2.2 billion (2015)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Share of European works on TV broadcasting services</td>
<td>64.1% (2012)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Viewing time for European works on TV broadcasting</td>
<td>69% (2010)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Share of EU works in VoD catalogues</td>
<td>27% (75 VoD catalogues – october 2015)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Share of EU films promoted on on-demand services</td>
<td>33% (2015 in DE, FR and UK)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Share of turnover invested by TV broadcasting services in EU original content</td>
<td>19% (2013)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Share of turnover invested by on-demand services in European/independent works</td>
<td>0.6%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Average staff of NRAs per channel</td>
<td>0.56</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Number of ERGA opinions</td>
<td>3 (2015)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Number of EU codes conduct</td>
<td>0 (2015)</td>
<td></td>
</tr>
</tbody>
</table>

<sup>220</sup>The main difficulty currently is to get unduplicated reporting i.e. that visitors to a website aren’t counted more than once across multiple devices and thus overestimate viewing figures. For instance, a single user may visit a page while at work, on smartphone during commute, and then again on laptop when getting home. Both Comscore and Nielsen are about to find adequate solution.