



AVMSD REFIT OR REFORM?
AUDIO VISUAL MEDIA
SERVICES IN THE DIGITAL ERA

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FOREWORD

This paper was carried out in the framework of the European activities of I-Com and intends to analyse the key points of the proposed revision of the Audio Visual Media Services Directive by the European Commission.

The study inspects the strengths and weaknesses of the proposals, and makes some policy recommendations towards a regulatory scenario which will possibly consider the different stakeholders' positions.

The first part aims at examining the audiovisual media landscape in Europe focusing on how it is changing due to technological and market developments and media convergence.

The second part aims at exploring the proposal of the European Commission for amending Directive 2010/13/EU with a view to assessing the impact that it may have on the Italian legal order.



I-Com is an Italian think tank based in Rome and founded in 2005 by a group of scholars and managers to promote academic and policies-related debates and analyses on competitiveness. In March 2016, I-Com set up its Brussels office, in order to further develop its activities on a European stage.

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EXECUTIVE SUMMARY

The first part of this paper aims at examining the audiovisual media landscape in Europe focusing on how it is changing due to technological and market developments and media convergence.

TV viewing is essentially stable among the general public, whereas it has dropped among young adults since 2012: younger consumers are more and more asking for on-demand content and are migrating online.

In 2014, Internet video accounted for 64% of total consumer Internet traffic. This share is to increase up to 80% by 2019.

On-demand services increased the options available to the EU audience and compete directly with mainstream content: S-VOD is becoming more and more widespread across Europe. During the five-year period from 2010 to 2014, consumer revenues for S-VOD services grew from EUR 40.7 million to EUR 844.1 million in the 22 EU countries for which market data is available, with a compound annual growth rate of 113%.

On average, 31% of VOD services available in one EU country are established in another member state: Italy has the highest rate of foreign VOD services in the EU5 markets compared with total services available in the country.

The TV broadcasting is still the strongest part of the audiovisual market, accounting for EUR 66.5 billion, 63% of overall audiovisual revenues in 2014. Pay-TV recorded a 17% growth between 2010 and 2014 (CAGR +4%) while

advertising revenues have recovered little from the 2008 downturn.

Overall, the European advertising market modestly grew of 1.4% in 2014. This was due to an 11.8% growth in online advertising spending. Pay-TV increased revenues by almost 9% between 2010 and 2014 and may expand further thanks to the wide availability of on-demand services distributed through the Internet.

EU Member States transmitted an average 64.1% of European works in 2011 and 2012. The average for independent productions was 33.1% in 2011 and 34.1% in 2012. The EU-average compliance rates amounted to 80% for 2011 and 82% for 2012 and the EU average share of recent independent productions was 60.6% in 2011 and 61.1% in 2012.

Main broadcasters in the EU-15 countries invested EUR 15.6 billion in original programming in 2013, i.e. 24% of TV broadcasters revenues (EUR 65 billion), while the investment of on-demand in the production and the promotion of EU works providers was very little, if any, and stood at EUR 10 million, i.e. less than 1% of their total revenues (EUR 1.5 billion).

Non-European fiction represented 62% of the fiction broadcast on EU main channels and more than 50% of this comes from the US. Over half of the European fiction is produced nationally production. However, with a 45% of non-national European content, circulation of European fiction seems to work.

US films are, in general, made available on several VOD services across the EU whereas EU films have a better distribution in their home markets and a weaker distribution in other EU countries: for this reason EU films have a higher share of unique titles than US films (43% EU vs. 41% US) and experience a lower share in the catalogue offers (only 27% EU – 8% are national films – vs. 59% US).

In 2014, the European audiovisual market was more concentrated than in 2011, due to M&A operations among media operators and between telecommunication operators and broadcasters. As a result, despite the increasing penetration of OTT services, major traditional cable and satellite (and also IPTV) groups provide most of the paid services within EU households.

The second part of this paper aims at exploring the proposal of the European Commission for amending Directive 2010/13/EU with a view to assessing the impact that it may have on the Italian legal order.

Within the context of the AVMS Directive REFIT, the Commission has taken into account six objectives, namely (i.) ensuring a level playing field, (ii.) providing an optimal degree of consumer protection, (iii.) fostering competition in the European audiovisual industry, (iv.) strengthening the single market, (v.) promoting cultural and linguistic diversity and (vi.) safeguarding media freedom and media pluralism, access to information and accessibility to content for people with disabilities.

The proposal has thus taken into account the outcomes of the Impact Assessment run by the Commission in

2015 that has explored the various policy options and the respective expected impact.

The proposal introduces significant changes in the regulatory framework in order to support market players with a set of rules correspondent to 21st century conditions through minimum harmonization measures. First, the proposal confirms the country of origin principle, by introducing more simplification and transparency to the definition of the Member State having jurisdiction. The country of origin is maintained as the cornerstone of the audiovisual market and the proposal brings some clarifications to the possible exceptions in order to increase legal certainty for market players.

In response to any potential claim concerning lack of proper guarantees on pluralism and media freedom, the proposal establishes a detailed regulation of national regulatory authorities, in order to ensure their independence. The European Regulators Group for Audiovisual Media Services (ERGA) is formally provided with a legal reference within European Union law. In the Commission's view, cooperation between regulatory authorities, promoted by ERGA, is likely to support the uniform implementation of the AVMS Directive and the application, among others, of the country of origin principle.

The proposal also impacts some key points in the regulation of commercial communications: the transmission of film made for television, cinematographic works and news programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 20 minutes; the maximum amount of television advertising is amended by replacing the hourly limit of

20% with a daily threshold within the time window from 7.00 to 23.00; product placements are no longer *prima facie* prohibited, but are subject to certain limitations.

With a view to covering so called 'Over-The-Top' (OTT) players, a new category, online video-sharing platforms, has been introduced by the proposal. This notion is referred to providers which do not exercise editorial responsibility and host large amounts of programmes and user-generated videos. However, the only measures that apply to these platforms include preventing hate speech and protecting minors from harmful content. To reach these objectives, co-regulation is encouraged between providers and public authorities. With respect to video-sharing platforms, the proposal takes a peculiar approach as the relevant provisions encapsulate a maximum degree of harmonisation. Although the proposal acknowledges that these platforms do organise content, the liability exemptions provided by Directive 2000/31/EC are maintained and shall neither be affected by the obligations to prevent hate speech or content harmful to minors. The proposal raises a question as to whether these amendments are sufficient to pursue a level playing field in the audiovisual market.

As to the promotion of European works, the proposal imposes on-demand providers to comply with at least a share of 20% of EU works in their catalogue and to ensure prominence to these works. Furthermore, Member States may require on-demand providers under their jurisdiction or established in other Member States but targeting residents on their territories to make a financial contribution. Such a financial levy is raising

concerns among stakeholders that it may undermine the country of origin principle, create legal uncertainty and shift resources away from investments in creativity and innovation.

Last, the proposal addresses the asymmetry in the current text of the AVMS Directive between linear and non-linear services with regard to protection of minors from harmful content and reduces this gap by extending the provisions concerning on-demand services to television broadcasting on the assumption that users may obtain access to content in a similar manner.

The paper also considers how these amendments may be implemented within the Italian legal context in light of the current legislative and regulatory regime, and raises some proposals in order to guarantee protection of the various interests and subjects at stake according to a balanced approach that also takes into account the economic and technical issues that the legal framework may imply.

Among others, some clarifications or changes may be of help with regard to the obligations to promote European works: the legal regime applying to video-sharing platforms and the provisions relating to commercial communications.

Despite these necessary improvements, the quick adoption of a new legal framework that fits for the 21st century industry looks as an essential step, that Member States shall take by avoiding any *gold plating* strategy that may undermine the efforts of the European Union institutions to achieve a digital single market in the age of convergence.





PART

THE MARKET

HOW DID THE LANDSCAPE CHANGE?

Media convergence is significantly changing the audiovisual media landscape. Technological and market developments have resulted in the progressing merger of online and broadcast content, where online content is available on the TV screen and broadcast content is available on many other screens such as PC, laptop, mobile and tablet.

Since 1989, when the 'Television Without Frontiers' Directive came into force, television and the way we watch it has changed significantly. At the end of the eighties, non-national satellite commercial television was in its infancy and ICT-based fixed-line methods of service provision were not ready for the market. Some Member States still did not have their own commercial channels. After a decade, trans-frontier satellite and terrestrial commercial television had become very common in the audiovisual landscape. By 2005, trans-frontier satellite commercial television had become, to some extent, even more popular than local terrestrial broadcasting, and cable systems were able to re-transmit both.

From 2005 to now, the number of platforms and channels capacity has increased, also on a pan-European basis, by enhancing the choice available to consumers.

The evolution of the Internet has led to new ways of using content, thanks to the development of IPTV and other Internet-based methods of delivery. Moreover, the convergence of broadband, telephony, and video offers new triple (and quadruple) play services to users. However, in 2005, audiovisual revenues linked to the

development of Internet were still limited.

As the Internet penetration and the bandwidth were increasing, new ways of offering video content, such as video on demand (VOD), delivered by cable, fibre or Digital Subscriber Line (DSL), emerged. If ten years ago VOD still generated limited revenues (ca. USD 60 million in 2005), it is now a viable alternative to linear audiovisual channels. Regulatory framework cannot always keep pace with such a technological evolution. To enable Internet services to further develop in the EU, the AVMSD did not include any level playing field between TV broadcasting and on-demand media services. Some services, such as video-sharing platforms that claimed not to exercise editorial responsibility over the content or websites where the audiovisual content is not the main service, were deliberately left out of the scope of application of the Directive. However, it can be questioned (notably within the television industry) whether providers of on-demand audiovisual media services, including video-sharing platforms, now compete in a seamless fashion with linear services providers and should be subject, accordingly, to the same rules.

In view of these rapid changes, the European Commission is questioning whether the AVMSD objectives are still relevant or if it is necessary to revise the regulatory framework of the audiovisual sector in order to align with this new context. Based on these considerations, in May 2016 the European Commission issued a new proposal to amend the existing AVMSD.

AUDIOVISUAL MARKET IN EUROPE OVERVIEW

1. AUDIOVISUAL MEDIA LANDSCAPE

1.1. Viewing patterns

TV viewing is still the prevalent mode of consumption of audiovisual content, but younger consumers, in particular, increasingly view content on-demand and online: the audience measurement figures indicate that the time spent watching television is slightly decreasing among the total EU population, whereas it has dropped among young adults since 2012. This is especially true as time-shifted television viewing has been progressively included in television audience measurement (in most countries viewing is tracked during 6 or 7 days after the live transmission). While viewing is essentially stable among the general public, young viewers spend less and less time watching television. The gap between the average time spent watching television by the general audience and young people has increased from 1:22 hours in 2009 to almost two hours in 2014. Nowadays, young people watch only half as much television as the total population¹ (Fig. 1).

Viewing time varies greatly among the Member States. If traditional audiovisual media services are still relevant in some EU Member States such as Romania, where the daily time spent watching TV was 5:42 hours in 2014, they are less relevant in other States such as Sweden,

where people watched television for 2:33 hours per day in 2014.

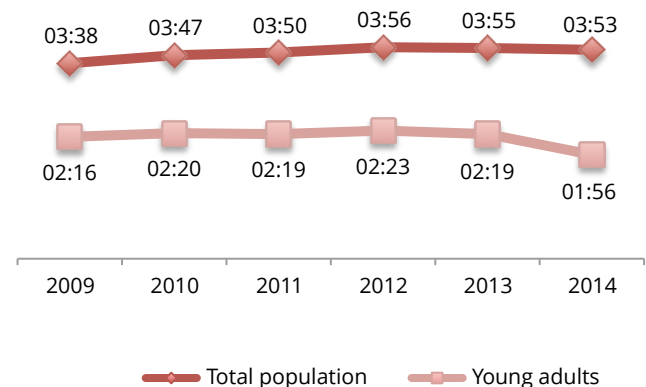
In 7 Member States people watch more than 4 hours of television per day. In the majority of Member States (15) viewing time is between 3 and 4 hours and in the remaining 4 States (the Nordic countries and Austria) people watch less than 3 hours of television per day.

The largest increase in viewing time was in Portugal (42% between 2009 and 2014) and Romania (31%). On the contrary, 9 Member States have reduced viewing time, especially Denmark (-8% between 2009 and 2014) and Sweden (-7%) (Fig. 2).

Young people are leading the change. Indeed, in all countries television viewing is significantly lower among young adults. The highest television consumption among young people is recorded in Portugal (03:45) and the lowest in Sweden (01:12). In 2 Member States young

Fig 1 EU average television viewing time, 2009-2014 – total population and young people

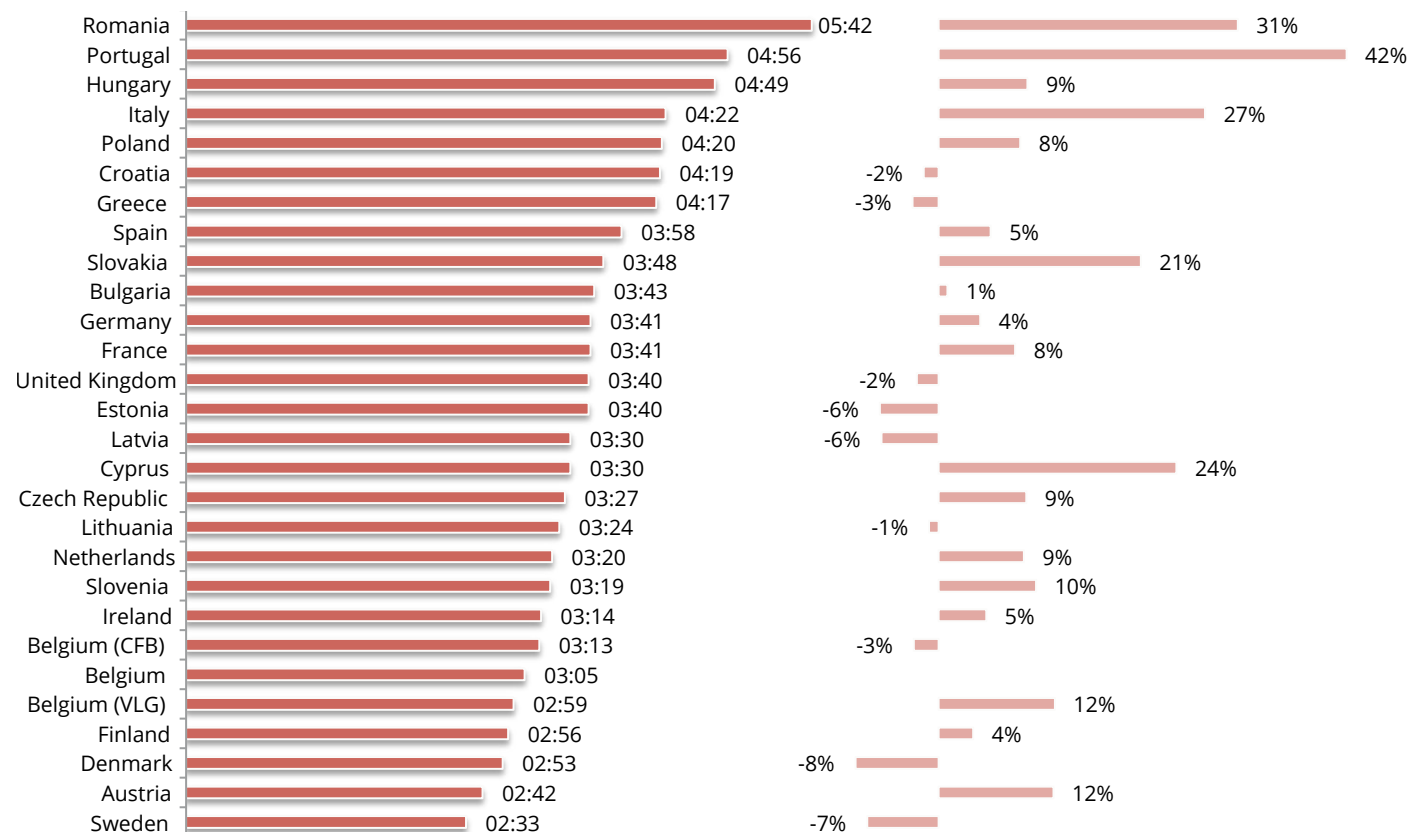
Source: European Audiovisual Observatory



¹ No data available for Luxembourg and Malta.

Fig 2 EU average television viewing time of total population by country, 2014, and growth, 2014 vs. 2009

Source: European Audiovisual Observatory



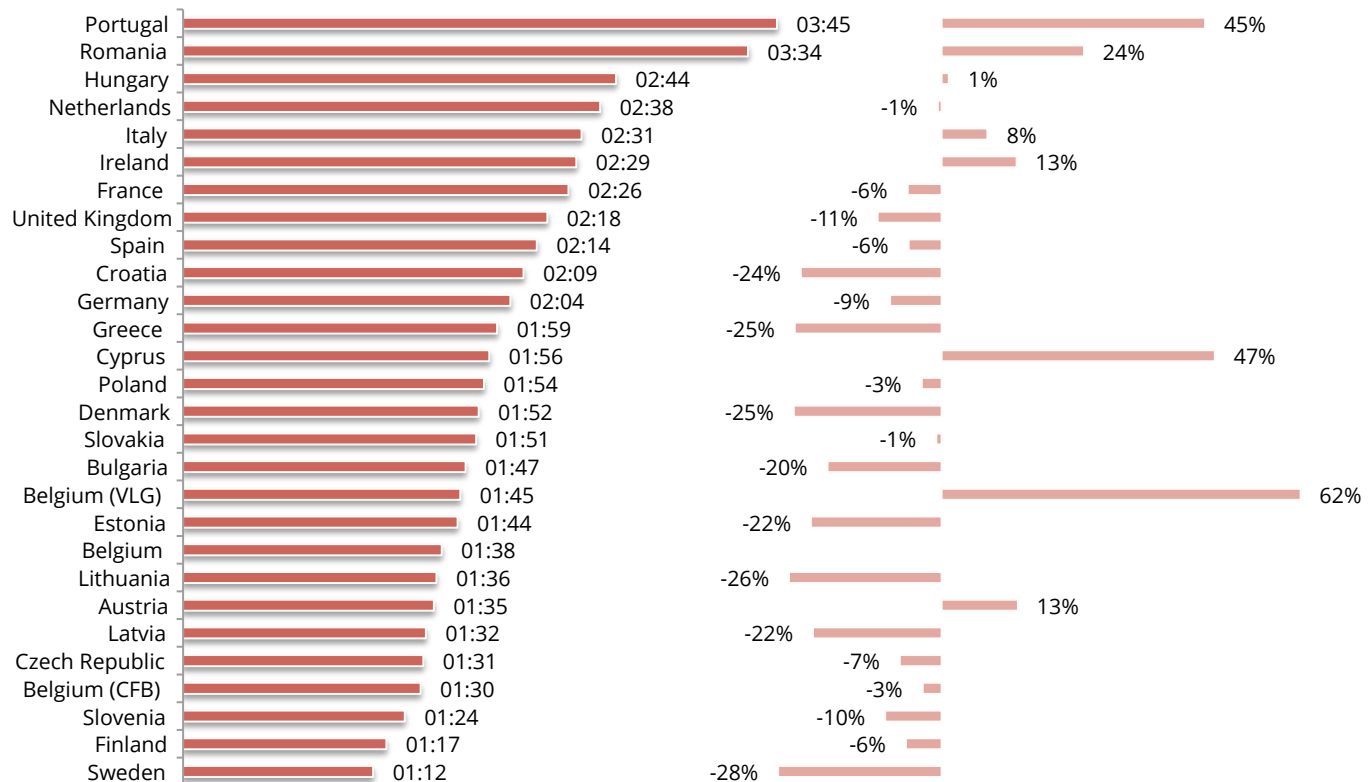
people watch more than 3 hours of television per day. In 9 Member States viewing time is between 2 and 3 hours and the remaining 15 States watch less than 2 hours of television per day.

Television consumption by young viewers in 18 out of 26 EU countries decreased from 2009 to 2014, especially in Sweden (-28%) and Lithuania (-26%) (Fig. 3).

According to some within the television industry, the millennials' online consumptions may be complementary to consumption of linear television and not entirely substitute for it. However, the themes of migration of some audiences from linear television to the Internet and of the different ways of watching audiovisual content are the subject of ongoing analysis to understand

Fig 3 EU average television viewing time of young people by country, 2014, and growth, 2014 vs. 2009

Source: European Audiovisual Observatory



how much and to what extent these phenomena are evolving, also taking into account the different stages of development of the various transmission platforms in various countries.

If the multiplication of channels has led to a fragmentation of the audience in the classical audiovisual world, the audience of online video is divided between a few big

players: according to comScore, the top ten companies have a share between 56% and 73% of all viewed videos and their market slice is increasing².

The consumption of videos offered by video-sharing platforms is on the rise: 400 hours of videos are uploaded

² European Audiovisual Observatory, *Yearbook 2015 – Key Trends*, 2016

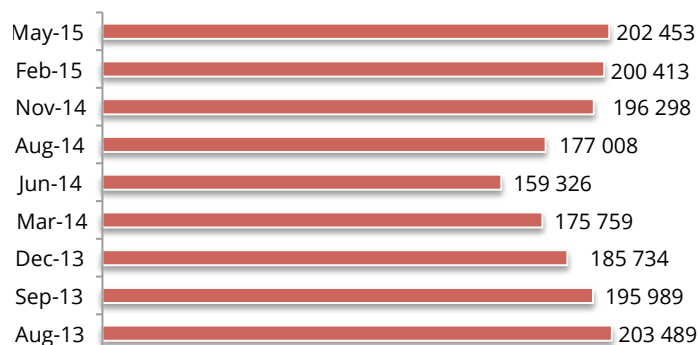
every minute on YouTube, the most popular video-sharing platform; they amount to 24,000 days' worth of content uploaded every minute and 65.7 years' worth of content uploaded every day³.

Mobile consumption is also on the rise due to the increasing use of smartphones, with this figure expected to double by 2020, reaching 800 million. As a result, more than 70% of mobile subscriptions will be for smartphones⁴. In 2014, Internet video stood for 64% of total consumer Internet traffic. This share is to increase up to 80% by 2019⁵. The consumption of videos offered by video-sharing platforms is also increasing⁶.

However, it should be recalled that time spent watching video online, depending on the country, still represents only between 5% and 10% of the total time spent

Fig 4 Total minutes of online video in EU6 (France, Germany, Italy, Netherlands, Spain, UK) – per month for total audience

Source: European Audiovisual Observatory, comScore Video Metrix



watching any kind of video (online or TV)⁷.

1.2. Linear audiovisual media services

Technological developments led to a proliferation of digital platforms and to the introduction of HD on television screens. As a result, the number of television channels has dramatically increased. In 2016, 6,154 linear services⁸ were established on the European territory (Fig. 5). This figure has grown by 70.2% since 2009.

The number of linear services differs substantially from one EU country to another, because of the differentiated development of the various platforms (terrestrial, satellite, cable, IPTV): for example, in countries where the presence of the cable is stronger, terrestrial television

3 <http://www.tubefilter.com/2015/07/26/youtube-400-hours-content-every-minute>

4 Ericsson mobility report; <http://www.ericsson.com/res/docs/2014/emr-november2014-regional-appendices-europe.pdf>

5 Cisco Visual Networking Index: Forecast and Methodology, 2014–2019 (http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.pdf)

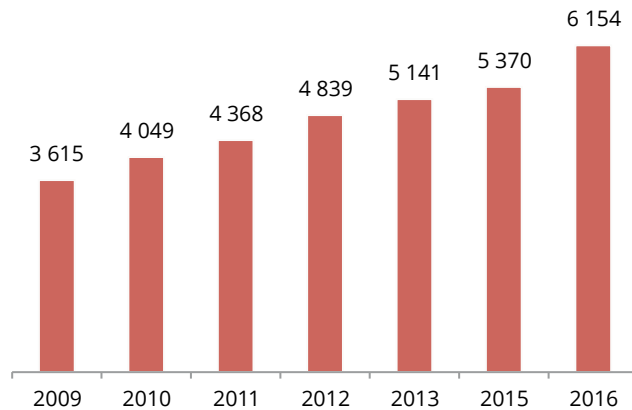
6 <http://www.tubefilter.com/2015/07/26/youtube-400-hours-content-every-minute>. The amount of people watching short video clips online in the UK has almost doubled over the period 2007 to 2014 (21% to 39%, the highest increase being among 35-44s with 28 percentage points increase). The popularity of 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>).

7 European Audiovisual Observatory, *Yearbook 2015 – Key Trends*, 2016

8 Windows and local channels not included.

Fig 5 Number of EU linear audiovisual media services

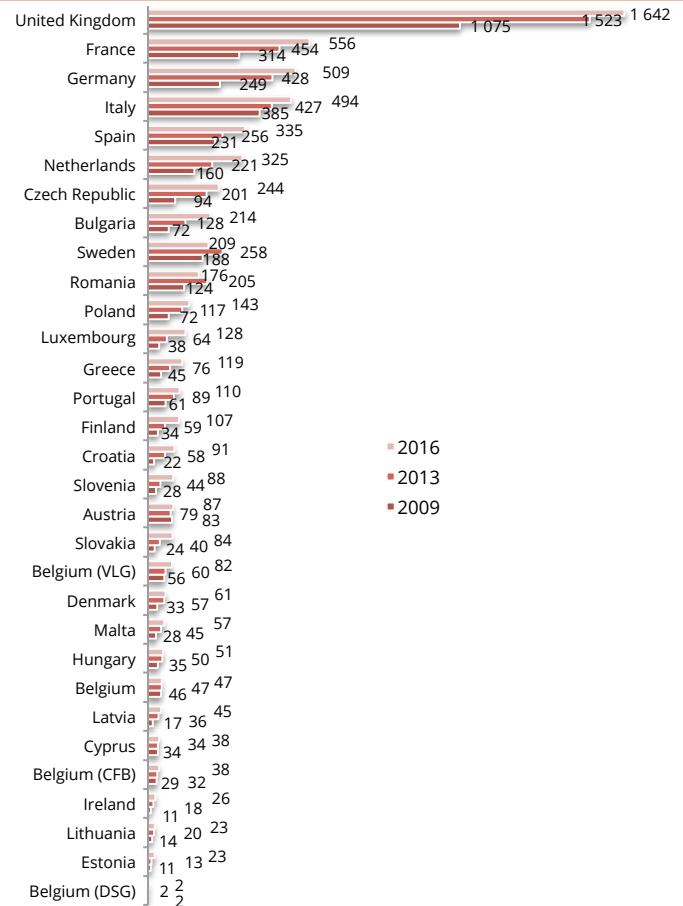
Source: European Audiovisual Observatory and Mavise database



grew less. 1,642 services (27% of total) are located in the United Kingdom. The United Kingdom, France (total channels 556), Germany (total 509) and Italy (total 494) represent the main audiovisual markets, although the main transmission platform is not the same. They collect over half the linear audiovisual services of the entire Union. Other countries with more than 200 channels established in their territories include Spain (total 335), the Netherlands (total 325), the Czech Republic (total 244), Bulgaria (total 214) and Sweden (total 209) (Fig. 6). All EU countries registered an increase in the total number of established channels from 2013 to 2016, except for Sweden and Romania, whose number of channels dropped by 19% and 14% respectively. Slovakia, Slovenia and Luxembourg registered the highest growth

Fig 6 Number of EU linear audiovisual media services by country of establishment

Source: European Audiovisual Observatory and Mavise database

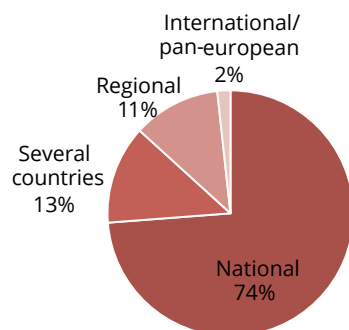


in numbers of TV channels in three years⁹.

⁹ These figures are strongly influenced by the Country of origin principle: indeed, a part of the services established in a country targets foreign countries, as specified below, in particular, in Fig. 12, where the number of linear audiovisual media services targeting foreign countries is compared with the total number of audiovisual media services by country.

Fig 7 Share of linear audiovisual media services by coverage (no local), 2016

Source: Mavise database



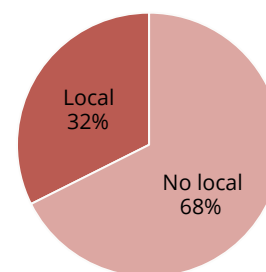
Three-quarters of the linear audiovisual media services have nationwide coverage. Channels covering several countries are slightly higher than those with a regional coverage, whilst channels available on a pan-European or international basis account for only 2% of the total (Fig. 7). Including the 2,949 local channels established in the EU 28 Member States, the linear audiovisual media services have increased from 6,154 to 9,103. The number of local television channels vary widely from one country to another¹⁰. However, they represent a third of the entire linear audiovisual market in Europe (Fig. 8).

The launch of HD channels has driven the growth in the number of linear channels available in Europe, also due to the duplication of HD vs. SD channels in the interim phase. In 2016, in the EU, almost one out of five channels established has HD resolution (19%). Sport channels have a share of 10%, entertainment 7%, film 6%, music, children and documentary channels 5%. The top 5 genres aggregated (HD, sport, entertainment, film and music) have a share of 48% of all television channels established in the 28 EU Member States (Fig. 9).

¹⁰ The census of local channels is complicated and in some cases (e.g. Italy, Spain) figures are based on estimates as no official lists exist

Fig 8 Share of linear audiovisual media services, local and no local, 2016

Source: Mavise database



channels have a share of 10%, entertainment 7%, film 6%, music, children and documentary channels 5%. The top 5 genres aggregated (HD, sport, entertainment, film and music) have a share of 48% of all television channels established in the 28 EU Member States (Fig. 9).

Fig 9 Share of linear audiovisual media services established in the EU by genre, 2016

Source: Mavise database

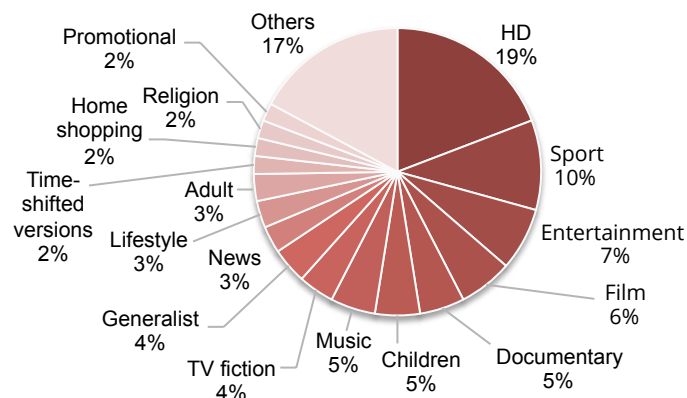
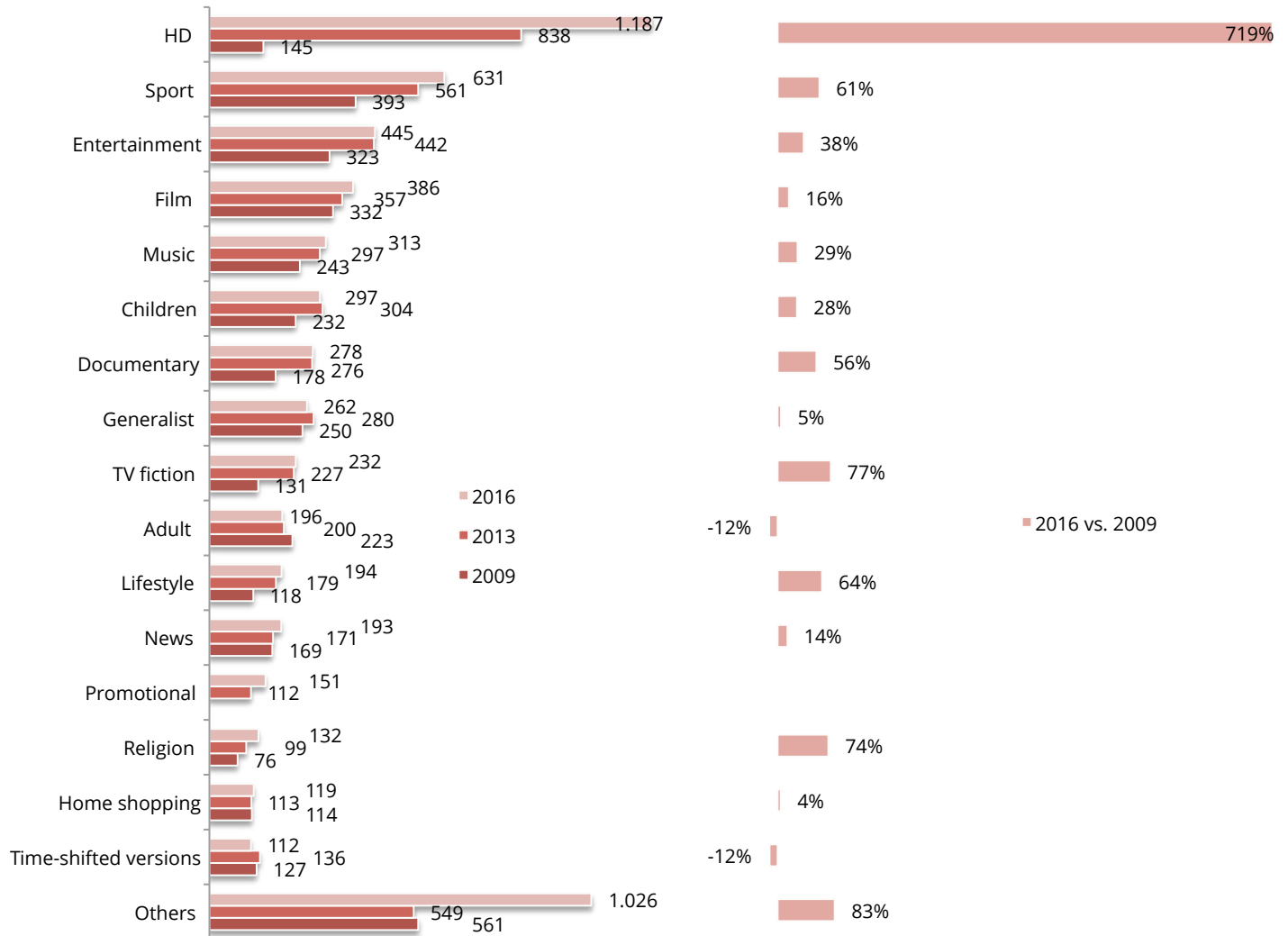


Fig 10 Number of linear audiovisual media services established in the EU by genre, 2009, 2013, and 2016, and growth, 2016 vs. 2009

Source: European Audiovisual Observatory



In 2016, there were 1,187 HD channels, eight times the figure of 2009¹¹. Sport channels (total 631) grew by 61% in seven years, and are followed by entertainment (total 445), film (total 386), and music's television channels (total 313). TV fiction and religion channels had also a significant growth rate of 77% and 74% respectively (Fig. 10).

Different economic as well as regulatory aspects can make some countries of establishment more attractive than others. Therefore, there are some linear audiovisual channels established in one EU country that target other EU or extra EU countries. In 2016 there were 1,964 linear channels targeting foreign countries, a decrease from 2013 (Fig. 11).

On average, 32% of the linear services available in the Member States are established in another EU country; these were 39% in 2013 and 28% in 2009.

The most important countries for the establishment of television channels in the EU that target other countries are the UK (1,045 services), France (153), the Czech Republic (128), the Netherlands (120) and Sweden (110). The UK accounts for more than half of the total.

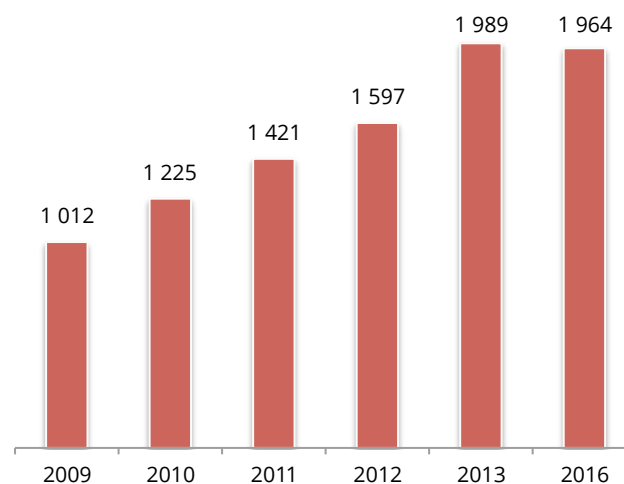
A total of 65% of channels established in the UK target territories abroad. France has the second highest number of channels that target other countries, as they represent almost a third (28%) of the total amount of channels established in France. The Czech Republic holds the third place of countries with the highest number of channels that target other markets: more

than half of the Czech linear channels target other countries, in particular Central and South Eastern Europe. The Netherlands has the fourth highest number of channels aimed at foreign markets whose share of the total is 37%. Sweden comes in fifth place with regard to the number of television channels that target other countries. More than half of the channels established in Sweden (53%) are aimed at other markets, mainly other Nordic and the Baltic states (Fig. 12).

Belgium, Luxembourg, Ireland and France have the highest number of foreign linear audiovisual media services in 2013. Over 90% of total channels available in Luxembourg, Ireland, Estonia, Lithuania are foreign channels (Fig. 13).

Fig 11 Number of linear audiovisual media services targeting foreign countries

Source: European Audiovisual Observatory and Mavise database



¹¹ Genre HD includes either channels that only exist in HD and HD simulcasts of channels in standard definition (SD). Hence, many HD channels have in reality a different genre.

Fig 12 Number of linear audiovisual media services targeting foreign countries vs. total and share of the total by country of establishment, 2016

Source: Mavise database

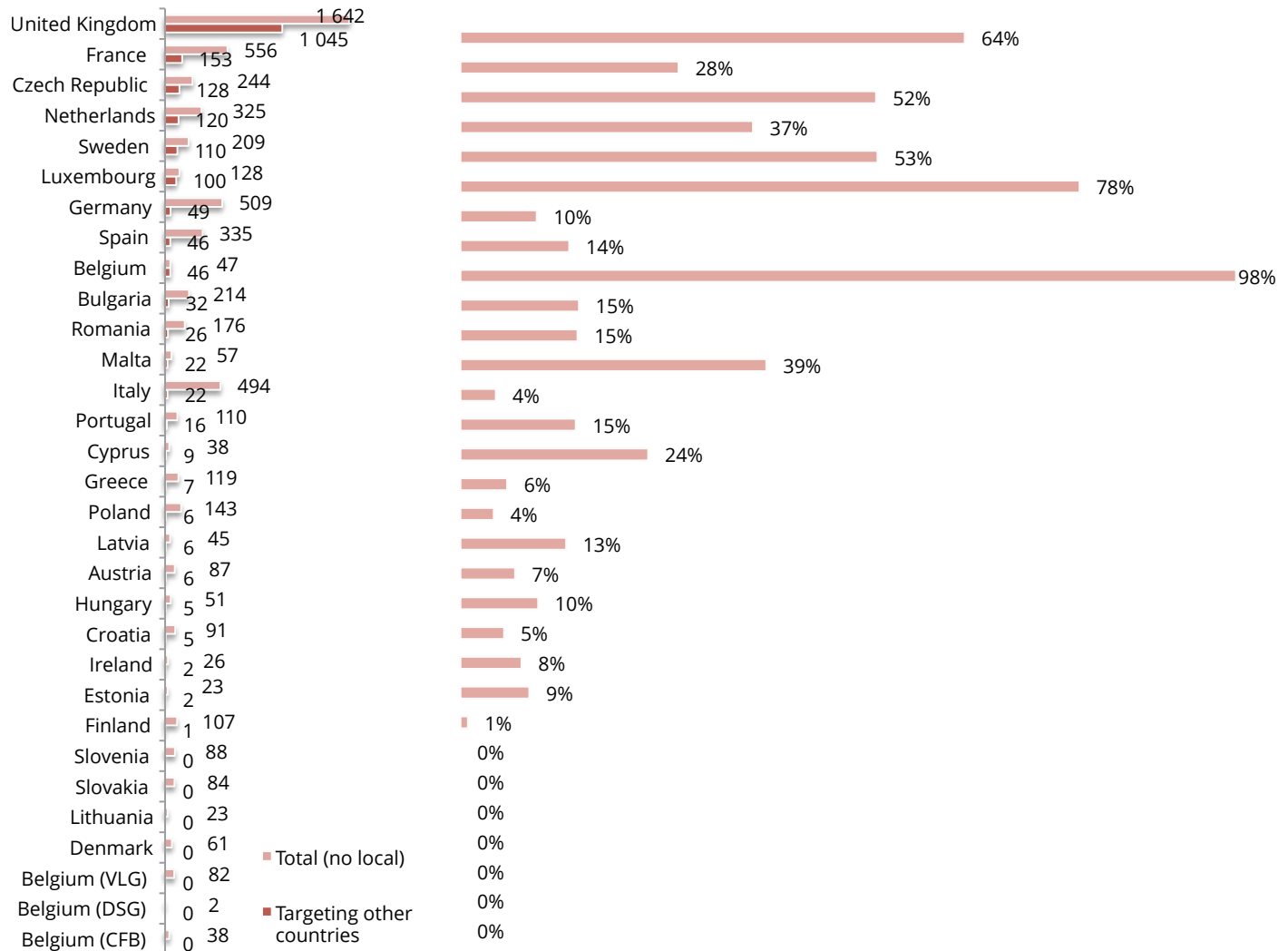
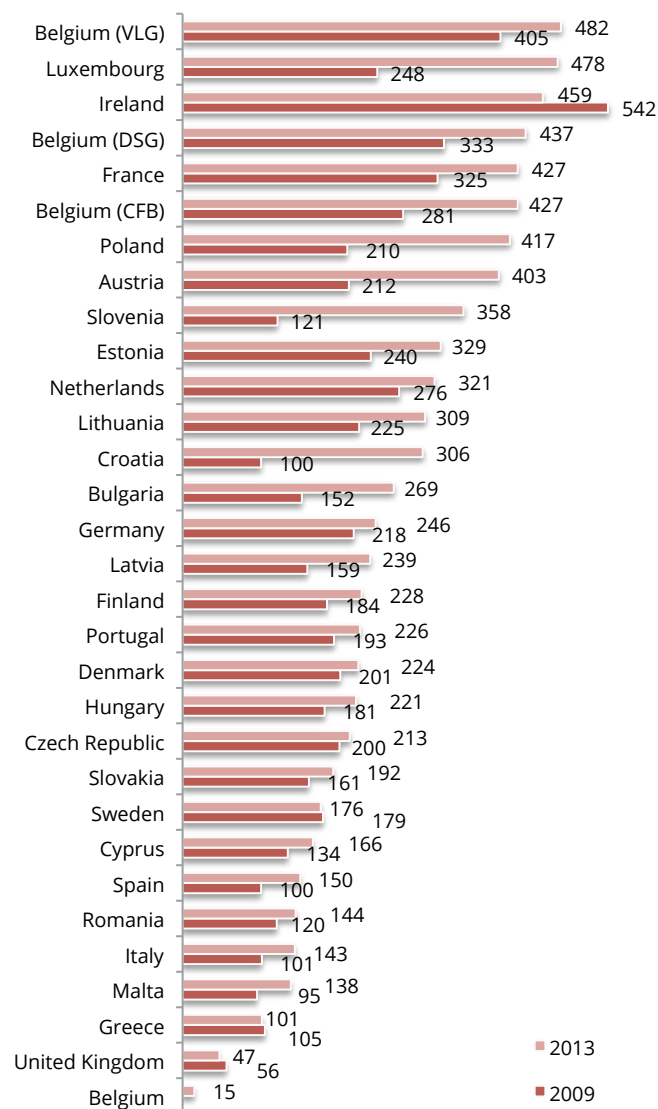


Fig 13 Number of foreign linear audiovisual media services available by country

Source: European Audiovisual Observatory



1.3. On demand audiovisual media services

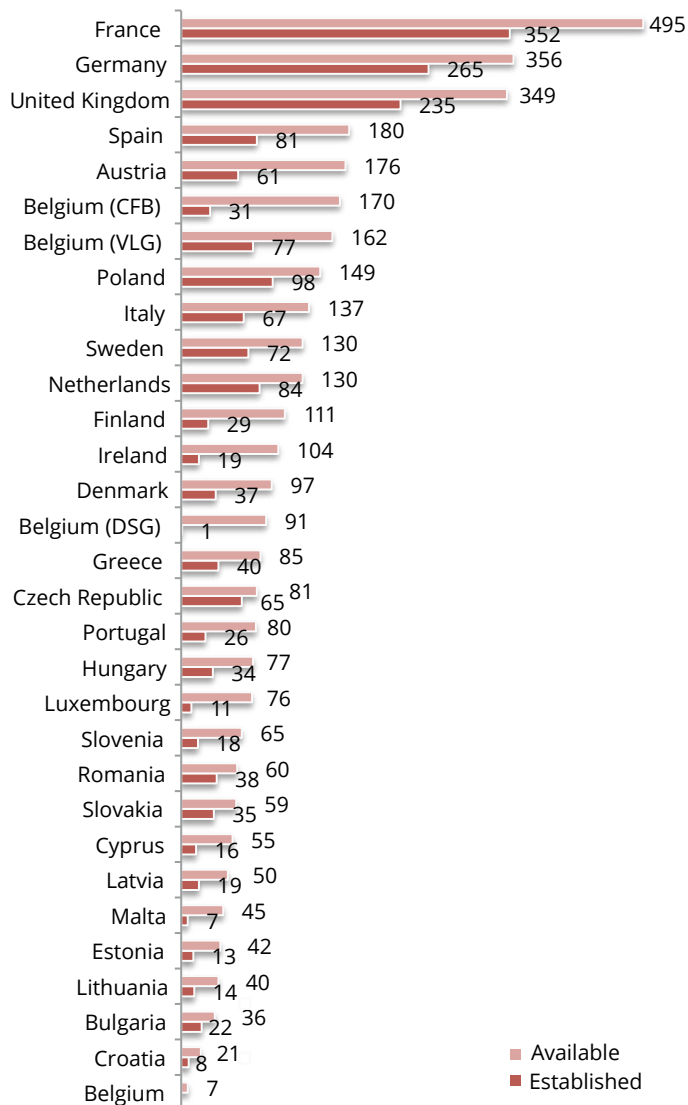
The offer of audiovisual services has developed in many areas as well as the consumption habits of the viewers. On-demand services provide a large variety of free and paid-for content, competing directly with mainstream content. As a result, people are gradually changing their viewing behavior and are consuming video content on different platforms and devices and spending less time watching linear television. As more and more devices (laptops, tablets, smartphones) are available to access the web, the consumption of videos is becoming a more individual experience.

The offer of on-demand audiovisual services is a complex reality which includes various types of actors: OTT operators or traditional broadcasters, telecom operators which distribute content, players from the production and distribution world, content aggregators or video sharing platforms. This complexity implies several new business models, new players and new roles, new services.

OTT players are pure Internet operators that deliver a wide range of video services over the web. Platforms like YouTube and Facebook are very popular among viewers of online content. They mostly deliver short videos and differ from S-VOD services, like Netflix, which instead have a more limited audience base who spend an average of 30 minutes per day watching video content. The boom years of viewing short videos on a PC have passed, both in terms of number of viewers and of total time spent watching videos. Most of the growth now comes from mobile, in particular after Facebook has integrated the “autoplay” of video.

Fig 14 Number of VOD services available and established in the EU by country, 2016

Source: Mavise database



France is the most advanced market for VOD services: in 2016, 495 VOD services are available, 325 of them are established in the country. Other markets where VOD services are advanced include Germany (356 VOD services available and 265 established) and UK (349 VOD services available and 235 established) (Fig. 14).

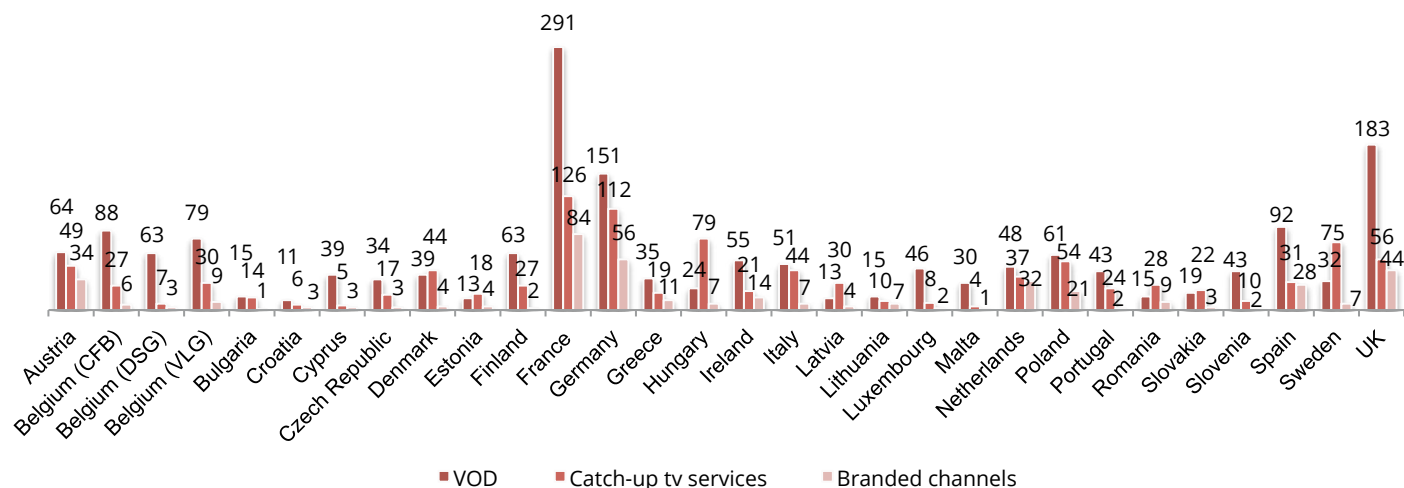
In recent times, audiovisual or telecommunication OTT players have launched many types of audiovisual on-demand services, adopting different business models (e.g. subscription, transactional or advertising-based), over Europe, enlarging the options available to the European audience. Netflix, among others, is now available across Europe; Amazon has its Prime Instant Video service; the Spanish VOD service wuaki.tv, owned by Japanese e-commerce giant Rakuten, has been launched in 4 additional EU countries (Germany France, UK, Italy) as has the Italian transactional VOD service Chili.tv (Austria, Germany, UK, Poland).

Several TV players have launched their catch-up TV services, making their content available for time-shifted viewing, for an average 7-day period after the initial broadcast with the aim of further monetising their content and extending their reach to an audience untouched by linear broadcasts (Fig. 15).

In order to increase their audience, several on-demand players aim to expand their services into new markets. Since most of them have a pan-European or at least pan-regional coverage, most EU countries have a high share of non-national VOD services. Hungary has the highest share of non-national EU VOD services, followed by the German-speaking Community of Belgium, Latvia and

Fig 15 Number of available VOD services, catch-up TV services and branded channels of broadcasters available by country, 2015

Source: European Audiovisual Observatory, Mavise database



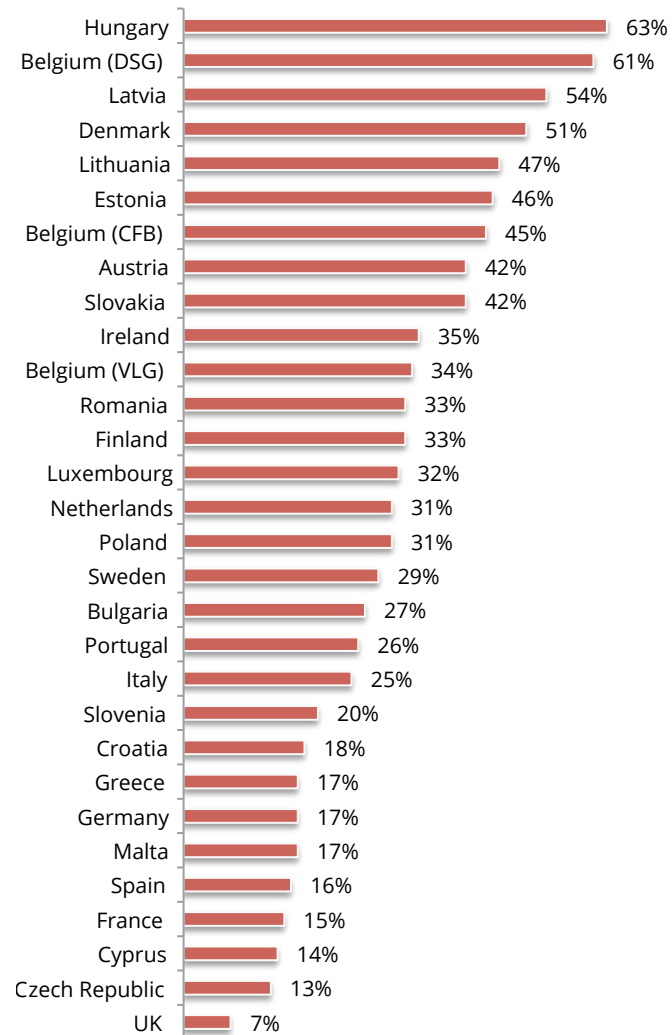
Denmark. In all these countries the share of non-national EU VOD is over 50%. The UK has just a 7% share of non-national EU VOD services (Fig. 16). According to the European Audiovisual Observatory, on average, 31% of VOD services available in one EU country are established in another Member State.

Although their number is increasing, VOD services

remain very concentrated, with a small number of players taking larger shares and establishing dominant positions. Looking at the UK, the EAO Yearbook 2015 estimates that Netflix offers 71.1% of the S-VOD services, iTunes and Amazon provide respectively 57% and 19% of the total digital retail services, while Sky offers 54.5% of the total digital rental services.

Fig 16 Share of non-national EU VOD services among available VOD services, 2015

Source: European Audiovisual Observatory, MAVISE database



VOD services for Belgium (Flemish, French and German) can be counted twice or three times due to availability throughout Belgium.

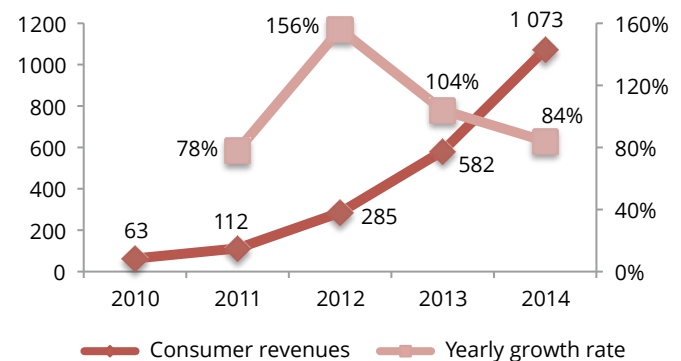
1.4. S-VOD services

VOD services have developed in many ways. If transactional VOD (T-VOD) services users pay for each individual piece of video on demand content, subscription-VOD (S-VOD) users are charged a modest monthly fee (most of the time less than EUR 10 per month) to access unlimited programs. S-VOD includes Netflix, Hulu Plus, Amazon Video etc., and it is becoming increasingly widespread across Europe.

During the five-year period from 2010 to 2014, consumer revenues for S-VOD services grew from EUR 40.7 million to EUR 844.1 million in the 22 EU countries for which market data are available, with a compound annual growth rate of 113%. Due to earlier launches and quicker consumer adoption, the most developed countries for S-VOD are the United Kingdom (EUR 393.3

Fig 17 EU26 consumer revenues S-VOD services, EUR million and share

Source: European Audiovisual Observatory on IHS



EU 28 minus CY, EE, HU, MT, LT, LV, plus CH, NO, RU and TR.

million), Norway (EUR 108.9 million) and Sweden (EUR 95.1 million).

A research from the EBU's Media Intelligence Service¹² shows that European S-VOD subscribers grew by 56% between 2014 and 2015, and are expected to reach 50 million homes by 2020.

According to the EBU report, the current penetration of S-VOD subscription is still low at nearly 11% of all European households. This figure is expected to double by 2020 but it is unlikely to reach the US level. The impact of S-VOD on overall audiovisual consumption is still quite modest. In the UK, S-VOD viewing represents just 4% of total daily viewing or 11 minutes on average a day. In the Czech Republic it's only 1%. Free catch-up services, such as the BBC iPlayer and RAI Replay, remain the preferred way to access on demand content.

However the competition in the S-VOD EU marketplace is quite heated: if Netflix leads with a share of 52% and Amazon is mounting a strong challenge, many European groups, such as Vivendi (CanalPlay), Sky Plc (Now Tv), ProSiebenSat.1 (Maxdome) and Mediaset (Infinity), are gaining ground.

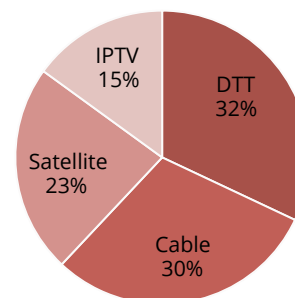
2. PENETRATION OF DIGITAL AUDIOVISUAL SERVICES

The European Union has been almost fully digitalised by 2014: digital television reaches 89.2% of EU households. The transition from analogue terrestrial TV to DTT has been completed as well and satellite and IPTV are fully digital. By contrast, the digitisation rate of cable households is very slow and it was still 54.5% in 2014. Cable television is widespread at a very low cost in countries where, for linguistic reasons, consumers have an interest in foreign channels (e.g. Scandinavia, Austria, Belgium, etc.) and the migration to digital is difficult and risky: not only are network upgrades very expensive, but consumers would also be asked to pay more for TV services. As a result, they may choose to discontinue their cable subscriptions and access television by one of the many available alternatives.

Taking into account the main TV set, DTT is the favoured

Fig 18 Share of television networks by access to television on the main TV set, 2014

Source: European Audiovisual Observatory on IHS



¹² EBU, *Market Insights: SVoD in Europe*, 2016

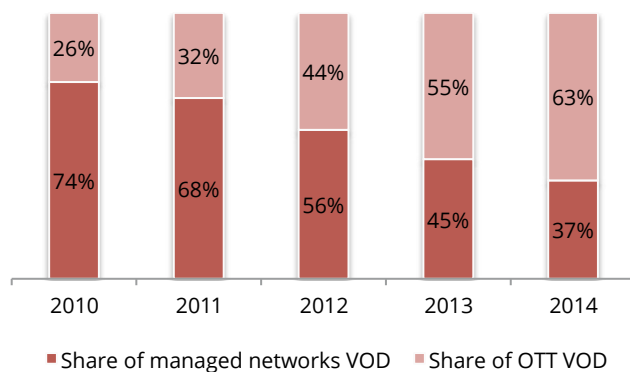
choice of 32% of EU households, followed by cable (30%), satellite (23%) and IPTV (15%) (Fig. 18).

EU households are becoming more and more connected through various devices, such as smart TVs, video game consoles, media players and HDMI dongles. Therefore, watching online videos is simpler and more convenient for all citizens. As old TV sets are replaced by smart TVs, OTT videos will further strengthen their popularity among EU citizens. In the EU28, connectable TV households were 51 million in 2014, which accounted for a 2.9% increase in 5 years. According to IHS, half of the households in France, Germany and the United Kingdom will watch content through smart TVs by 2019.

Mobile devices also represent an essential factor in the rise of OTT video, as they easily allow video consumption whenever and wherever the user wants.

Fig 19 Share of OTT VOD and managed networks VOD consumer revenues

Source: European Audiovisual Observatory on IHS



No data for Bulgaria, the Czech Republic, Croatia and Romania.

OTT videos are quickly changing the mix of consumer revenues generated from video on-demand (VOD) in Europe. If in 2010 consumers watched VOD through managed networks under the control of audiovisual players and OTT represented only a quarter of VOD revenues, by 2014 OTT video represented almost 2/3 of consumer revenues (Fig. 19).

3. THE SIZE OF AUDIOVISUAL MARKET

The overall size of the EU audiovisual market was EUR 105.8 billion in 2014, according to the European Audiovisual Observatory¹³. Global revenues increased by 2.8% compared to 2013, after two years of stagnation. The growth was only due to the pay-services segment, whose revenues increased by almost 9% compared to 2010 (primarily on-demand audiovisual media services, whereas physical video registered a significant decrease), whilst advertising revenues slightly raised, after two difficult years, and public funding is stable.

The share of pay-TV has grown by 2% in 5 years, while the share of advertising and public funding has decreased by 1% each. However, in 2014 the structure of the audiovisual sector's revenues remained stable compared to 2013: 44% comes from consumer direct expenses, 32% from advertising and 24% from public funding (Fig. 20).

¹³ European Audiovisual Observatory, *Yearbook 2015 – Key Trends, 2016*

The economic crisis has inevitably hit the audiovisual market contributing to the reduction of revenues from advertising and public funding. However revenues have been affected by increased competition due to the decrease of tariffs and prices and – according to a part of the television industry – a lack of level playing field. According to the European Audiovisual Observatory, some factors may contribute to the regeneration of the audiovisual market. On the one hand, it could regain

Fig 20 Audiovisual market in the EU, EUR million and share

Source: European Audiovisual Observatory, from company reports, IHS, Médiamétrie/Eurodata TV, EBU/MIS, WARC, LUMIERE

- Public funding of TV and radio services
- Advertising (TV and radio)
- Pay-revenues (cinemas, physical video, pay-TV and pay-on-demand)

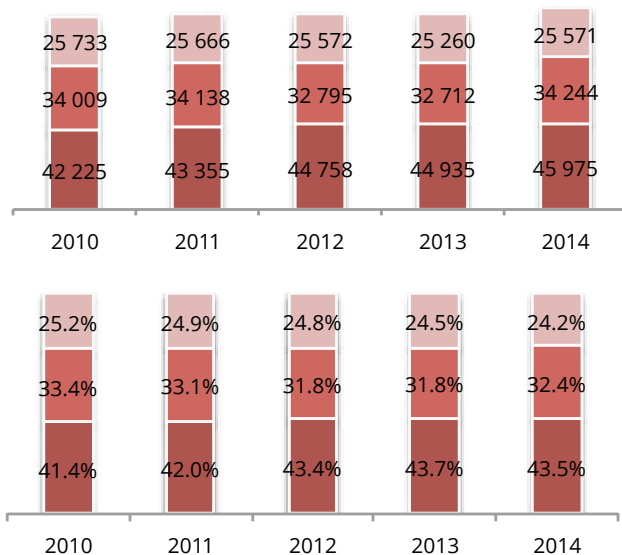
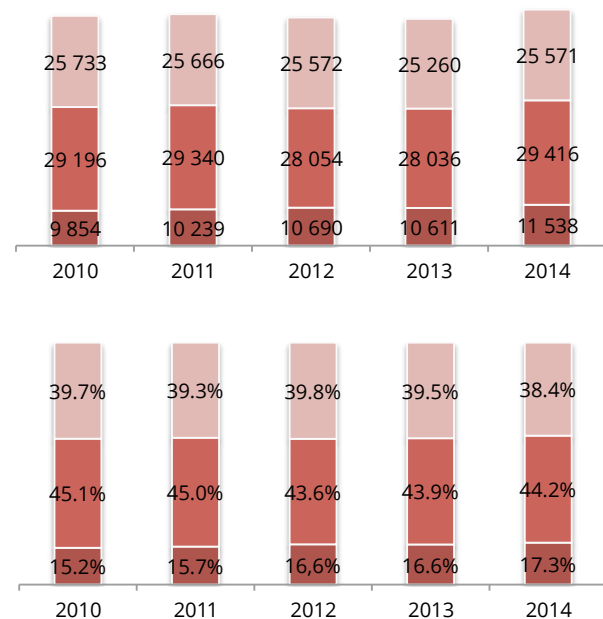


Fig 21 Broadcasters' revenues in the European Union, EUR million and share

Source: European Audiovisual Observatory estimates, WARC, EBU/MIS, Company reports

- Public funding
- Advertising TV
- TV channels share of pay-revenues



competitiveness thanks to targeted advertising; on the other hand, global pay services could expand thanks to low-cost pay-services. TV broadcasting is still the strongest part of the audiovisual market, accounting for EUR 66.5 billion, 63% of overall audiovisual revenues in 2014. From a static standpoint, the share of advertising is 44.2%, whilst pay revenues reach only a percentage of 17,3% (Fig.

21). However, if we compare these figures with those of 2010, pay-TV records a 17% growth (CAGR +4%), whereas advertising revenues have recovered little from the 2008 downturn. In 2015, though, early signs show that pay-TV may also face soon the end of its long growth period. Public funding is under pressure due to the States' budgetary constraints, but it still remains an important source of revenues for broadcasters.

In the EU 28, total on-demand services are worth EUR 2.5 billion in 2014, an increase of 272% from EUR 919 million in 2010 corresponding to a compound annual growth rate (CAGR) in the 5 year period of 28%¹⁴.

It is estimated that by 2020 more than 20% of European households will have a specific paid account with a S-VOD

provider. As a result of this, the projected turnover of all VOD services in Europe should increase by 15% annually to 2020, reaching EUR 6 billion¹⁵.

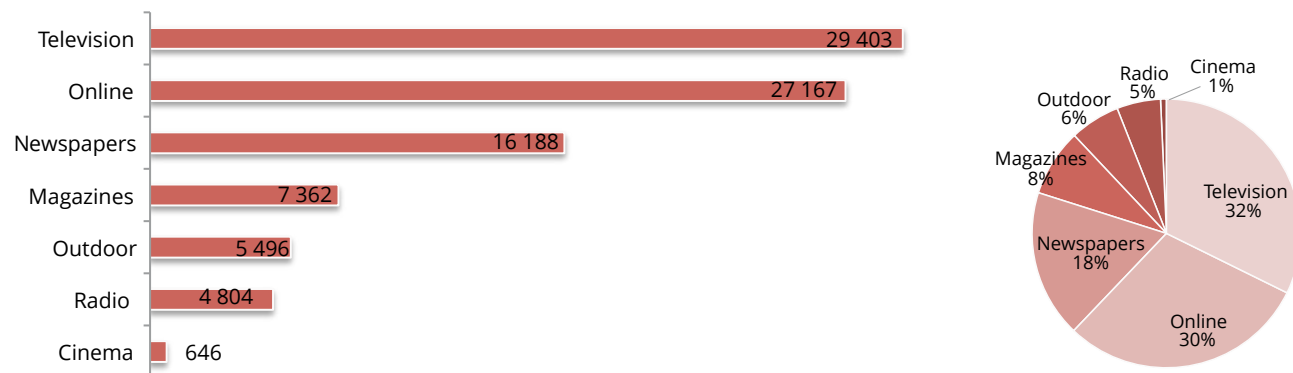
3.1. Advertising

Television is the most important advertising market. It accounts for 32% of overall ad expenditure in the EU and it is followed by online, which is now very close, with 30% of market share. If the share of advertising going to television remained quite stable, the impressive growth of online advertising took place mainly at the expense of advertising in the press or in magazines (Fig. 22).

The economic downturn that hit Europe in 2008 has not spared the advertising market. However, according to IAB

Fig 22 Ad spend by category in Europe, 2014, EUR million and share

Source: European Audiovisual Observatory on Warc 2015



¹⁴ Study on data and information on the costs and benefits of the Audiovisual Media Service Directive (AVMSD), http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=14351

¹⁵ Promoting growth, pluralism and choice: The Country of Origin principle and Europe's audiovisual sector, <http://coba.org.uk/about-coba/coba-latest/2016/coba-launches-country-of-origin-report>

analysis, online advertising has not dropped if compared to other markets. Instead, it has mitigated the decline in spending in the other advertising sectors. Overall, the European advertising market grew modestly by 1.4% in 2014, thanks to the 11.8% growth of the online advertising spending; without it, it would have decreased by -2.4%. In Western Europe, the total advertising market experienced a 2.6% growth in 2014, but it would have decreased if online (which grew by 11.5%) had not been included. The overall advertising market in Central and Eastern Europe¹⁶ decreased by 5% in 2014; the losses would have doubled if online ad spend had been excluded (Fig. 23).

TV advertising decreased by 17% between 2007 and 2009 as a consequence of the economic downturn. A partial recovery took place in 2010 followed by a period of stagnation. Since 2014, it has started to grow again, but its

Fig 23 Total advertising growth, 2014/2013, %

Source: European Audiovisual Observatory on IAB Europe Adex Benchmark 2014/IHS

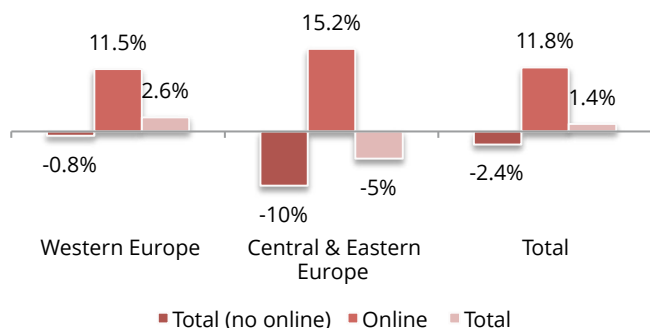
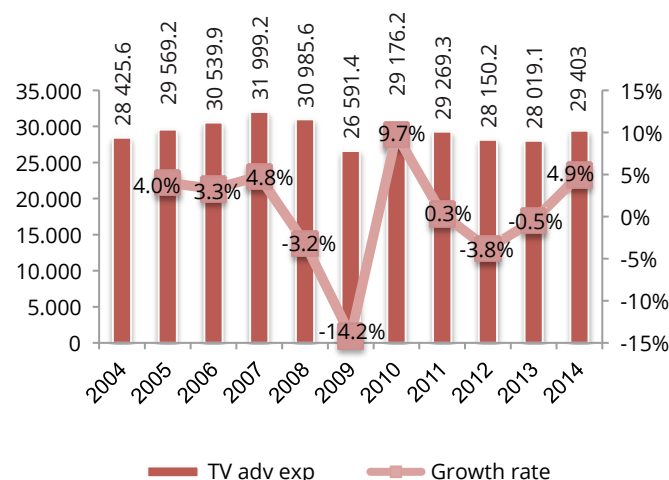


Fig 24 TV advertising expenses in the European Union, EUR million and growth rate

Source: European Audiovisual Observatory, WARC



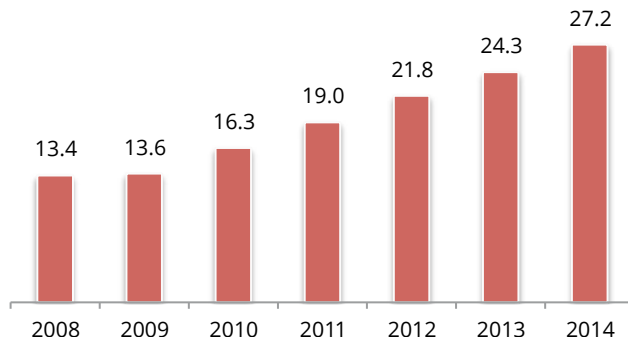
revenues are still lower than in the pre-crisis years. (Fig. 24) The online media consumption is on the rise, with people consuming more media content (video, newspapers, social networks) online and on mobile devices. As a result, the total size of the online advertising segment in the EU was EUR 27.2 billion in 2014, corresponding to a 11.6% growth compared to the total of EUR 24.3 billion in 2013 (Fig. 25). The compound annual growth rate of Internet advertising in the EU is 12.5%¹⁷, over the 2008-2014 period.

17 Other figures available for the European online advertising market are published by IAB Europe in the IAB Adex Benchmark and are established by IHS. IAB estimates a €30.7 billion total online ad market for the 26 European countries (21 EU countries+5 extra EU countries) participating in its study, an increase of 12% compared to the total of €27.4 billion in 2013.

16 Russia and Turkey included.

Fig 25 Size of European online advertising, EUR billion

Source: European Audiovisual Observatory on Warc, 2015



The largest online advertising market is the UK, where advertisers spend almost EUR 9 billion on the Internet. The other countries are far behind: Germany spent 5 billion, France 3.7 billion, Italy 1.9 billion and the Netherlands 1.5 billion.

A third of online advertising spending comes from the UK. Germany and France account for another third. The top 3 countries in the EU account for 66% of total ad spending (Fig. 26).

As previously said, Internet has become the second medium in Europe for ad spend just behind TV advertising. However, since 2009 the growth rate of

Fig 26 Online advertising in EU countries, 2014, EUR million and share

Source: European Audiovisual Observatory on Warc, 2015

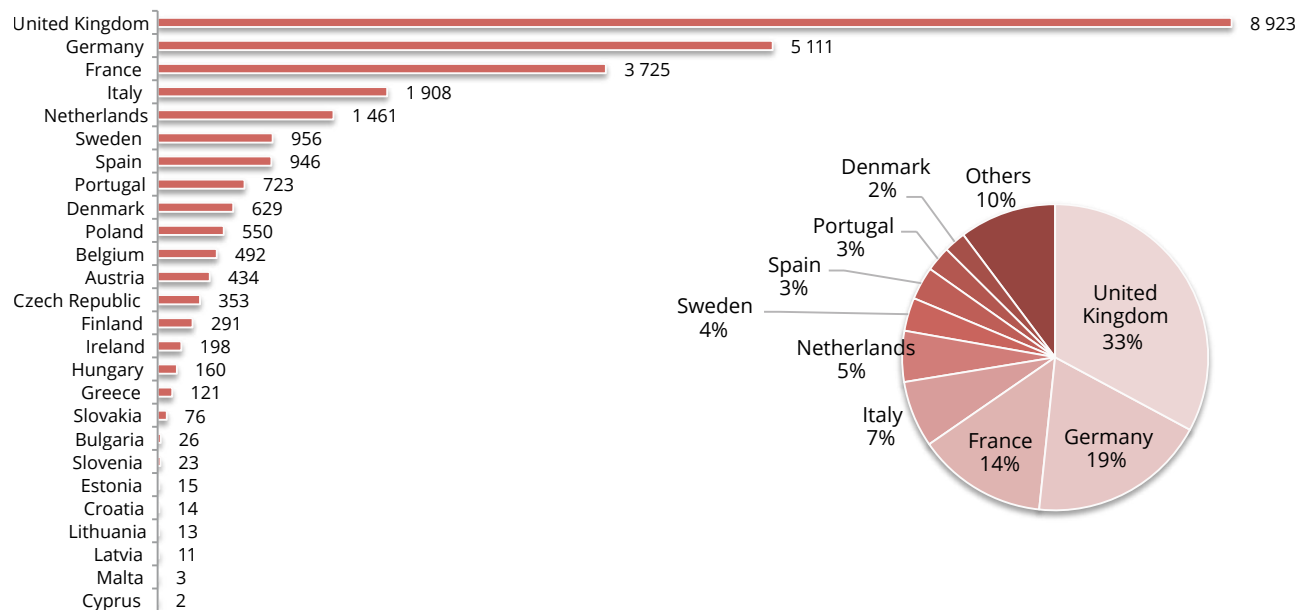
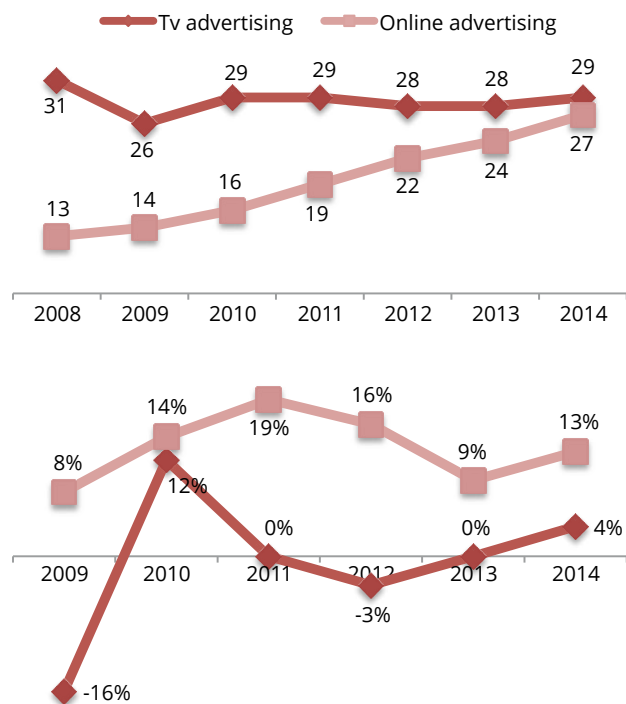


Fig 27 TV and Internet advertising, EUR billion and growth rate

Source: European Audiovisual Observatory on Warc



Internet advertising has been systematically higher than the growth rate of TV advertising. As a result, the two figures are very close as of 2014 (Fig. 27).

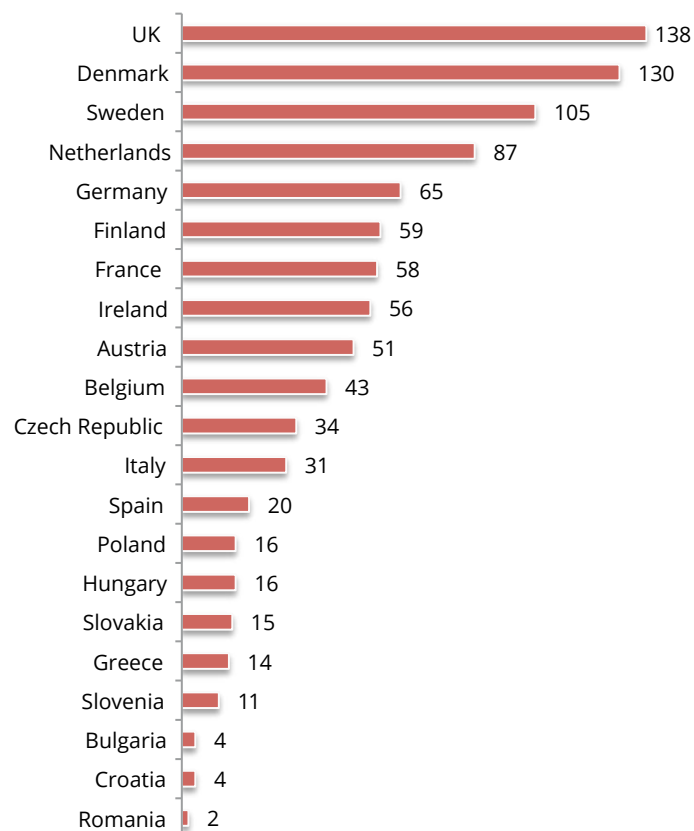
There is a strong variation of online ad spend per capita from one country to another. In 2014, the most mature market in the EU was the UK, where it was spent online an average of EUR 138 per capita. Denmark and Sweden have also a high rate of per capita expenditure (EUR 130 and EUR 105 respectively). The lowest expenditure comes from Romania (just EUR 2 per person), followed

by Croatia and Bulgaria (EUR 4) (Fig. 28).

However, the share of advertising revenue for on-demand services covered by the AVMSD remains modest. For example advertising revenues of free-to-view UK online TV services such as ITV Player and All 4 amounted to just GBP 240 million in 2014, which represents 5.6%

Fig 28 Online ad spend pro capita, 2014, EUR

Source: European Audiovisual Observatory on IAB Europe Adex Benchmark 2014/IHS



of total TV advertising and sponsorship revenues in the UK market. In France, advertising on catch-up TV services generated EUR 80 million,¹⁸ a sum equivalent to 0.7% of the revenues generated by French TV broadcasters.

Online video advertising revenues are expected to grow by more than 75% between 2015 and 2018, up to EUR 4.1 billion according to the European Audiovisual Observatory, with a share of almost 60% for Facebook and YouTube.

3.2. Pay-TV

Pay-TV has experienced a strong growth: it increased revenues by almost 9% between 2010 and 2014. In Europe pay-TV originated from two different models: on the one hand, countries with a large roll-out of cable, on the other hand countries with mainly high-end premium pay-television serving a limited proportion of consumers and where the majority of the viewers use free TV. The evolution of pay-TV also depends on the development of free-television services.

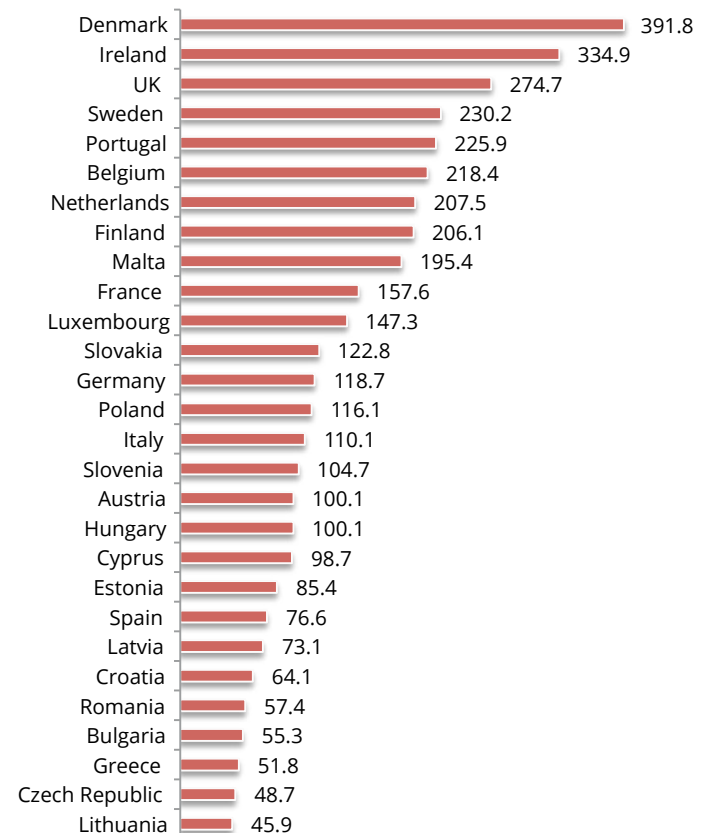
Pay-TV is also internationally characterised by what has been called the “cord-cutting” phenomenon, which describes consumers leaving their traditional cable, IPTV or satellite pay-television provider to access television and video either fully from the Internet, or by combining digital terrestrial or satellite free television and Internet services.

Finally, pay-TV could expand due to the wide availability of on-demand services distributed through the Internet.

The level of development of pay-TV in Europe strongly varies between countries: in 2014 the amount spent per household per annum ranged from EUR 46 of Lithuania to EUR 392 in Denmark (Fig. 29).

Fig 29 Annual pay-TV revenues per household in the EU, 2014, EUR

Source: European Audiovisual Observatory, IHS, Eurostat



¹⁸ Etude CNC l'économie de la télévision de rattrapage en 2014

4. EUROPEAN VS. US CONTENT

As we said above, the audiovisual market in Europe is growing due to the launch of linear HD services and new on-demand services. This has led to increased competition between linear and new players for the acquisition of fresh content. As a result, investments in original programming have increased. This is especially true in the US, where more than 400 different TV series are being produced during the 2015-2016 TV season¹⁹ (Fig. 30).

With regards to the promotion of European works, the latest reports show that the provisions of Articles 16 and 17 of the AVMSD have been correctly implemented by Member States. According to the AVMSD, TV broadcasters must,

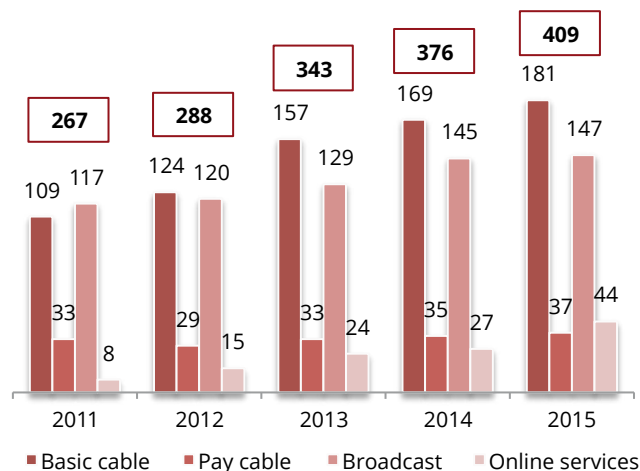
where practicable, reserve a majority of their transmission time to European works and, in fact, EU Member States transmitted an average 64.1% of European works in 2011 and 2012²⁰. The average of independent productions was 33.1% in 2011 and 34.1% in 2012, significantly above the required 10% laid down by Article 17, even with different levels of compliance among Member States. Within the EU, compliance rates averaged at 80% for 2011 and 82% for 2012 and the EU average share of recent independent productions was 60.6% in 2011 and 61.1% in 2012²¹.

The AVMSD stipulates that on-demand services too, where practicable, must promote the production of and access to European works, giving the Member States freedom to choose the implementation. This has been different among States, ranging from relatively loose requirements to a complex set of obligations sometimes combining all three mentioned examples.

Whether this is the result of different rules or of different market dynamics, the level of contribution to promotion of European works has been unequal: main TV groups in 15 countries invested EUR 15.6 billion²² in original programming in 2013, i.e. 24% of TV broadcasters revenues (EUR 65 billion)²³, while the investment of on-demand in the production and the promotion of EU

Fig 30 Number of scripted original series produced in the US

Source: European Audiovisual Observatory



¹⁹ European Audiovisual Observatory, *On-demand services and the material scope of the AVMSD*, IRIS Plus 2016-1

²⁰ In 2007, European works stood for 62.4 % of TV broadcasting service transmission time.

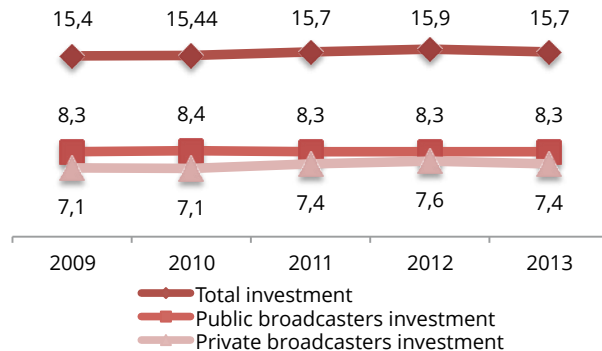
²¹ Second Report on the application of Articles 16 and 17 of Directive 2010/13/EU for the period 2011-2012.

²² Study on data and information on the costs and benefits of the Audiovisual Media Service Directive (AVMSD) - Trends in linear television revenues

²³ Study on data and information on the costs and benefits of the Audiovisual Media Service Directive (AVMSD) - Investments in original content by audiovisual services

Fig 31 Investment in original programming: total, public, private broadcasters, EUR billion

Source: European Audiovisual Observatory, IHS



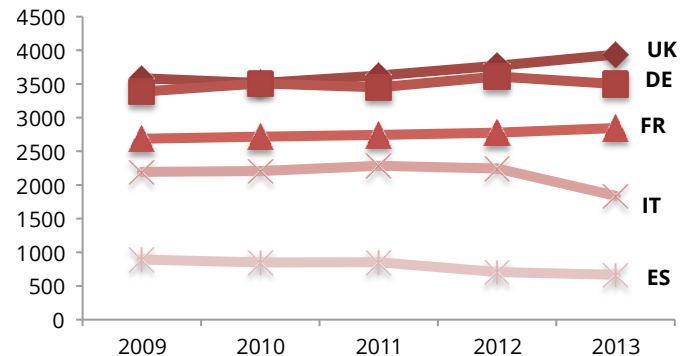
works was very little, if any, and stood at EUR 10 million, i.e. less than 1% of their total revenues (EUR 1.5 billion)²⁴. Recently the European Audiovisual Observatory analysed the investment in original programming of the main TV groups in 15 countries²⁵ between 2009 and 2013 revealing that the total investment in original programming has remained stable at more than EUR 15 billion. In 2012, the rate of investment peaked at EUR 15.9 billion and dropped to EUR 15.7 billion in 2013. Public broadcasters invested 53% of the total amount spent in original programming (Fig. 31). French, Italian and UK private broadcasters also had higher levels of investment than the average private broadcasting group. The country by country analysis has

²⁴ *Ibid*

²⁵ The 15 countries include: Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal, Spain, Sweden and the United Kingdom. IHS provided data of 86 TV groups and 22 of these groups were public service broadcasters.

Fig 32 Main EU countries levels of investment in original programming by 86 TV groups, EUR billion

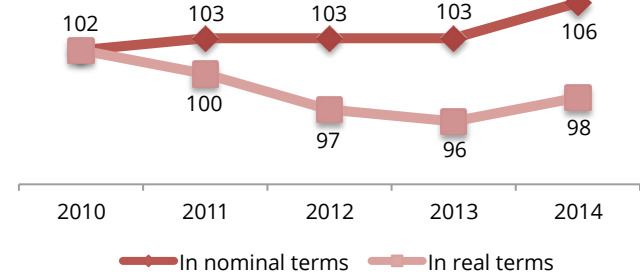
Source: European Audiovisual Observatory, IHS



revealed significant decreases in Spain (-25%) and Italy (-16%) between 2009 and 2013, despite recent significant investments especially in the pay-TV segment in the same period, due to the economic downturn (Fig. 32). EU film and audiovisual market is slightly declining in real terms (Fig. 33).

Fig 33 Cumulative film and audiovisual market revenues in the EU, EUR billion

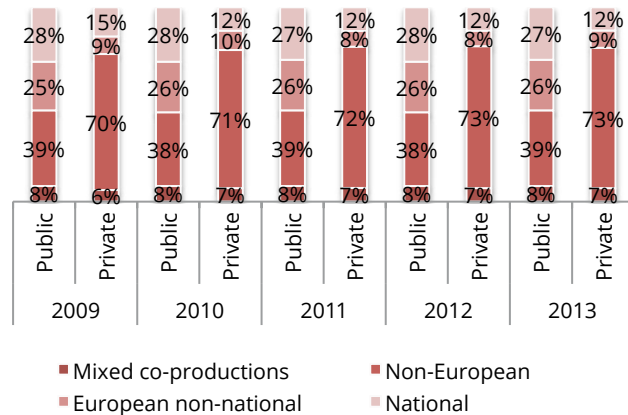
Source: OBS



Estimates; adjusted for inflation.

Fig 34 Public and private channels: origin of fiction in 14 European markets*

Source: European Audiovisual Observatory, ROVI International



* The 14 markets include: AT, BE (CFB), BE (VLG), DE, DK, ES, FI, FR, GB, IE, IT, LU, NL and SE

Concerning the origin of fiction, the European Audiovisual Observatory analysed 96 TV channels in 14 European markets over 5 years. The findings show that non-European fiction represents 62% of the fiction on EU main channels and more than 50% of this comes from the US. Over half of the European fiction is national production. However, with 45% of non-national European content, circulation of European fiction appears to work (Fig. 34). An European Audiovisual Observatory study on the composition of the catalogues of VOD services in the EU²⁶ examined 75 VOD and 16 SVOD services across the EU.

²⁶ European Audiovisual Observatory, *On-demand Audiovisual Markets In The European Union - Developments 2014 and 2015*, November 2015

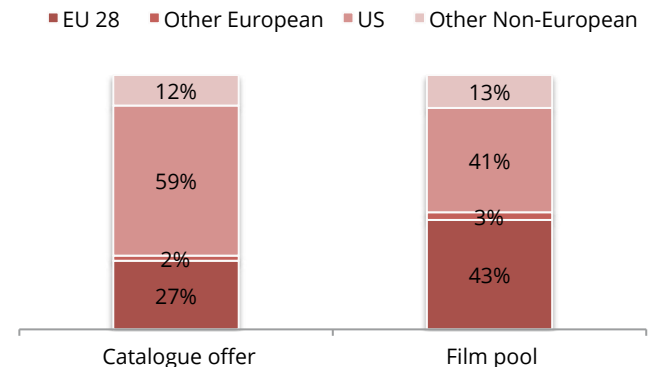
The study outlines that US films are, in general, made available on several VOD services across the EU whereas EU films have a better distribution in their home markets and a weaker distribution in other EU countries: this is why EU films have a higher share of unique titles than US films (43% EU vs. 41% US) and experience a lower share in the catalogue offers (only 27% EU – 8% are national films – vs. 59% US) (Fig. 35).

VOD catalogues analysis shows strong differences across the 28 countries: non-national EU films are key to ensuring a sufficient share of EU films in VOD catalogues in countries that produce a lower number of films per year.

A part of the EAO study includes the monitoring of the homepages of VOD services in the United Kingdom,

Fig 35 Share of EU films in 75 VOD services across the EU, Oct. 2015²⁷

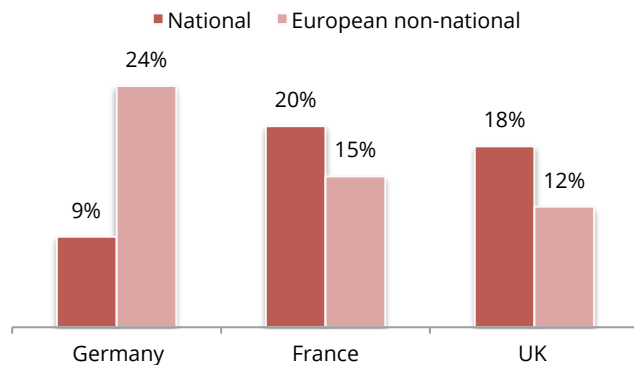
Source: European Audiovisual Observatory



²⁷ In "Catalogue offer", all films are counted on every VOD service, in "film pool", films are only counted once for all VOD services in order to highlight the variety of films across the EU and thus representing the diversity of the "potential" film offering.

Fig 36 Breakdown by origin of films promoted by VOD services

Source: European Audiovisual Observatory



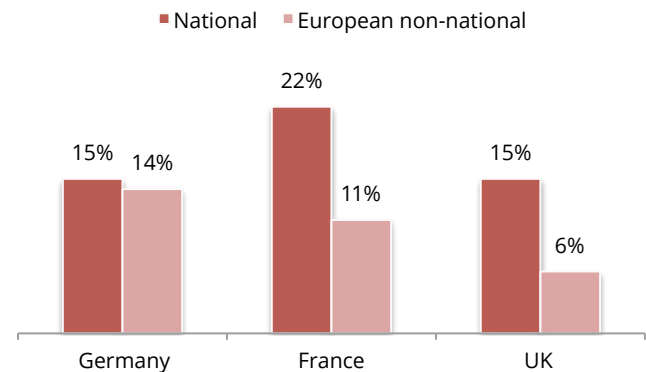
France and Germany for one month in order to identify the origin of films promoted. The analysis has shown that only a limited number of films are promoted on the landing page: on average, less than 270 films per month are promoted by the services, with the 10 most promoted films (8 of US origin) taking 40% of all promotional spots. 86% of the promotional spots were given to recent films, released in 2014 or later.

European films seem to be less promoted than US films, accounting for 30% (UK) and 35% (FR) of the films promoted on the landing page. Specifically, Germany promotes a higher share of European non-national films than national films (24% vs. 9%), while the share of national films promoted in France and UK is higher than that of European non-national films (Fig. 36).

On average, 28% of the promotional spots were given to EU films and 60% to US films, making EU films

Fig 37 Breakdown by origin of films in VOD services promotional spots

Source: European Audiovisual Observatory



less visible than US films. In Germany, national and European non-national films have similar shares and got 29% share of VOD services promotional spots. National films are more promoted than European non-national films in France and UK (Fig. 37).

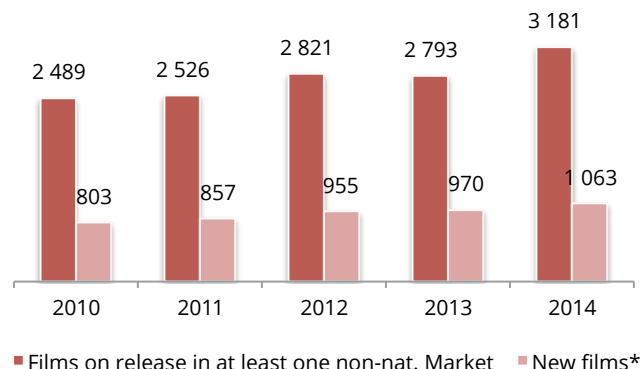
4.1. Film exports

Concerning exports, the number of European film exports is increasing. This is especially true for newly released film, which increased from around 800 (in 2010) to over 1000 (in 2014) per year (Fig. 38).

European films sell over 40% of their total admissions abroad, almost half of which generated outside Europe (426 million admissions worldwide). Top 100 films take almost 90% of total non-national admissions, and only 26 European films sell more than 1 million tickets abroad out of around 1,500 films produced per year (Fig. 39).

Fig 38 Number of European film exports

Source: European Audiovisual Observatory, comScore



*Films produced in calendar year (t) and preceding year (t-1).

The vast majority of non-national admissions are generated by English language films: these are 87% outside Europe and 66% in Europe. More than one out of five films in Europe is a French language film (Fig. 40).

Fig 39 Tickets sold abroad

Source: European Audiovisual Observatory, comScore

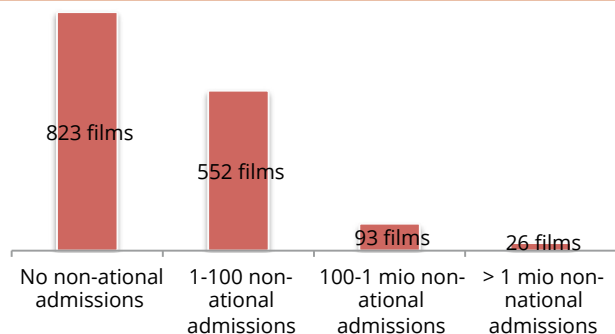
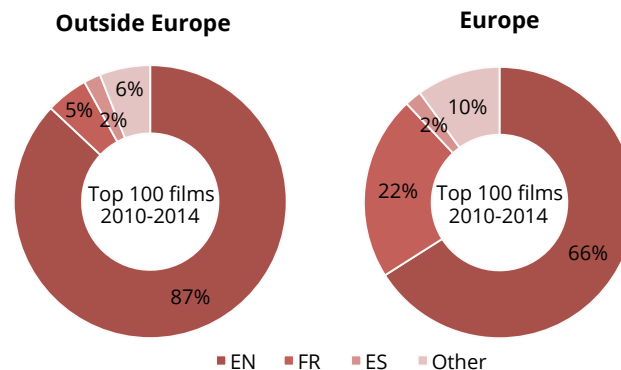


Fig 40 Share of non-national admissions by language

Source: European Audiovisual Observatory, comScore

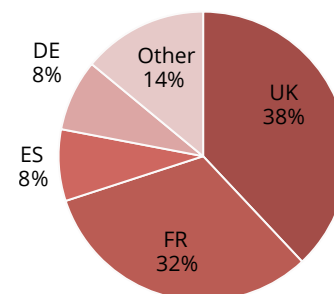


Concerning the country of origin, almost 3 out of 4 tickets to foreign European films are sold to French or UK films: in fact, Great Britain and France collect 70% of non-national admissions (Fig. 41).

In 2010-2014, 62 of the top 100 film exports are produced as co-productions.

Fig 41 Worldwide share of non-national admissions by market, 2010-2014

Source: European Audiovisual Observatory, comScore



4.2. Funding for film and TV content

There were 250 film funds between 2010 and 2014, according to the European Audiovisual Observatory²⁸. Over this period 20 new funds were created and 21 shut down. The yearly average income of film and AV funds in Europe was EUR 2.53 billion (this figure include: national/federal funds, sub-national – regional and local funds – and supranational funds).

29.7% of the funds in Europe were national/federal (58.2), accounting for 74.9% of the total incoming resources (a yearly average of EUR 1,895 million for purely national funds). Thanks to massive mandatory contributions from broadcasters to the CNC, France alone accounted for 42% of the incoming resources for film and audiovisual funds in Europe. The other 4 big markets in the EU were far behind.

The two main sources of financing for film and audiovisual funds in Europe were contributions from the national/federal government and broadcasting levies, while contributions from the administration at all geographical levels have hardly compensated for the steady decline of income from levies on broadcasters. The average yearly spend for film and AV funds in Europe was EUR 2.29 billion. Funding for film and TV content in Europe rocketed by 13.4% over the time frame covered. In 2014, 28% of the funds in Europe were national accounting for a 82% spend; 62% of the fund were community/regional, accounting for a 17.6% spend (Fig. 42).

²⁸ European Audiovisual Observatory, *Public financing for film and television content – the state of soft money in Europe*, 2016

The number of fiscal incentive (tax credits, rebates and tax shelter) schemes more than doubled between 2008 and 2014 rising from 12 to 26 (Fig. 43).

Fig 42 Estimated share of the number of funds and spend by geographical level, 2014, %

Source: European Audiovisual Observatory

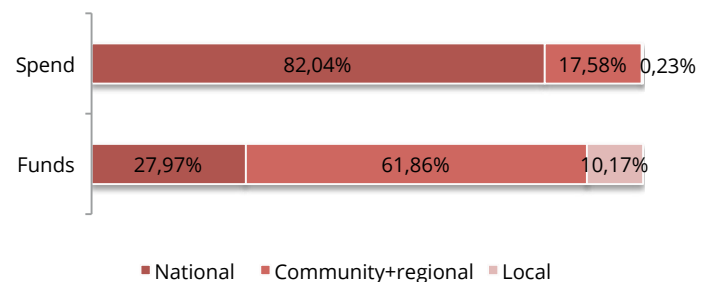
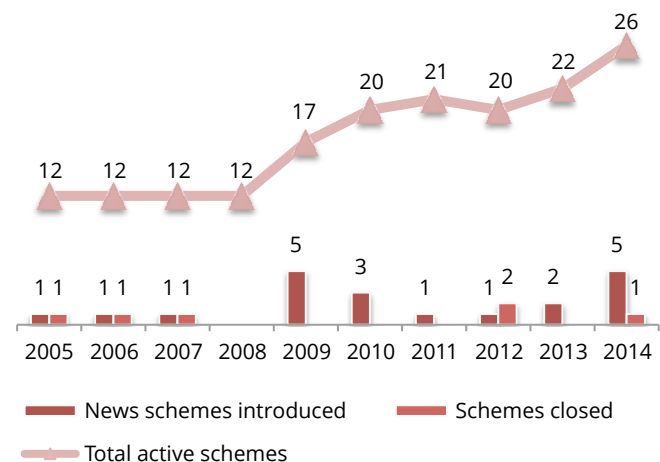


Fig 43 Timeline of fiscal incentive schemes becoming operational in Europe

Source: Olsberg SPI



5. A MORE CONCENTRATED MARKET

A European Audiovisual Observatory report on pan-European media groups²⁹, which analyzed 15 major pan-European audiovisual distribution groups³⁰, shows that in 2014 the European audiovisual market was more concentrated than in 2011. This is due – according to the Observatory – to acquisition and merger operations among media operators and between telecommunications operators and broadcasters. As a result, despite the increasing penetration of OTT services, major traditional cable and satellite (and also IPTV) groups provide most of the paid services in EU households.

In particular, 15 major pan-European audiovisual distribution groups serve 68% of pay-TV households and half of the EU households has a subscription to one of the following 6 groups: Deutsche Telekom, Liberty Global, Orange, Sky, Viasat e Vivendi, that are widely available throughout the EU territory (Fig. 44).

Despite the higher concentration of audiovisual operators, audiences are slightly more fragmented than in the past: on a sample of 30 countries, the two main broadcasting groups gather on average 51% of the audience, and the 3 main groups 64%, with strong variations between countries.

As concerns the ownership operations, the pan-European

brand channel groups and the major pay-TV channels (cinema and sport) are owned by 13 major groups and their subsidiaries (21st Century Fox, AMC Networks, Bonnier, Discovery Communications, NBC Universal, Scripps Networks, Sony Corporation, Time Warner Inc., United Media Group, Viacom Inc., Viasat, Vivendi, e Walt Disney Inc.). 9 of these companies are subsidiaries of the major US media groups.

Fig 44 6 pan-European distribution groups and their geographical footprint

Source: European Audiovisual Observatory



29 European Audiovisual Observatory, Media ownership: towards Pan-European groups?, June 2016

30 These include groups which serve at least 3 member states: Altice, Deutsche Telekom AG, Liberty Global Group, M7 Group, Orange (France Telecom), RCS/RDS, Sky Plc, Telefonica, Telekom Austria Group, Telenor, Teliasonera, United Media Group, VIASAT/ Modern Times Group, Vivendi, and Vodafone Group plc.

AUDIOVISUAL MARKET IN ITALY: KEY DATA

1. SIZE AND VALUE OF THE AUDIOVISUAL MARKET IN ITALY

Italy is one of the EU big 5 audiovisual markets. Since the 1980s, it has experienced significant growth due to advertising investment and, in the early 2000s, to pay offers. The economic downturn started in 2008 has halted this growth.

E-Media Institute estimates a value of about EUR 10.2 billion in 2014 for the “classical” audiovisual market, meaning a decrease of 1% if compared with 2013. Resources attracted by television amount to EUR 9.2 billion, that is 90% of the global market. Specifically, the loss of resources in TV and home video markets has

Fig 45 Audiovisual market in the EU, EUR million

Source: e-Media Institute

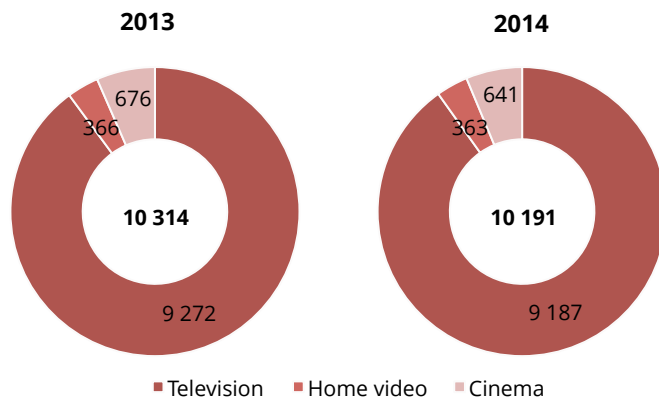
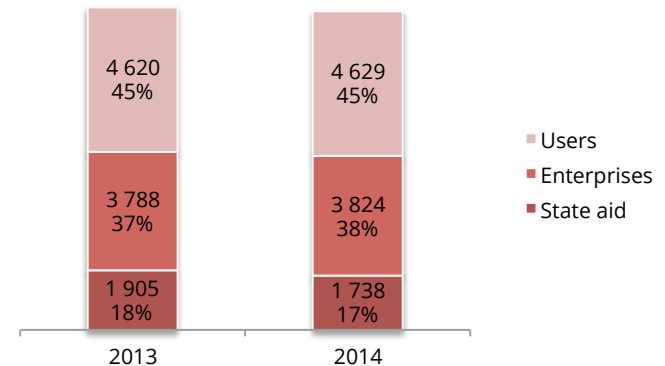


Fig 46 Origin of revenues on “classical” media, EUR million and share

Source: e-Media Institute



been moderate (-0.9% e -0.8% respectively) while cinema has suffered the greatest loss (-5.2%)³¹ between 2013 and 2014 (Fig. 45).

The users spending represents around 45% of overall resources, as it was in 2013, prevailing over the spending of enterprises (38%) and state aid (17%) (Fig. 46).

In recent years, the changes affecting these three sectors have been mainly due to Internet convergence and, in certain countries, the proliferation of a free thematic offering. In particular, TV is updating formats to adapt them to online consumption and home video is changing in VOD. Broadcasters are more and more offering new content for the web or replicating online their mainstream content in order to attract audiences

³¹ Ernst & Young estimates a total value of EUR 12,213 million for TV and Home Entertainment which include direct revenues (9,308 million) and revenues arising from the sale of audio and video devices (2,905 million).

unaccustomed to the rigid schedules, while pure online operators are offering their on-demand libraries (S-VOD or T-VOD).

The ways in which traditional media attract resources are also changing. Broadcasters are offering bundled mainstream + Internet content or commercials on TV and Internet.

In the first case, pay operators bundle their channel bouquets with online offers or standalone Internet services: Mediaset's OTT Infinity and Sky Online are two Italian examples which compete directly with pure OTT. They answer the audiences' request of a customised non-linear and on-the move consumption, which is more and more accompanied by contextual use of second screens (smartphone, tablet, etc.).

Regarding commercials, e-Media estimates that overall Internet offers of traditional broadcasters is worth between EUR 60 and 80 million in 2014. This merger between offline and online offers should increase in the coming years while the role of resources attracted by traditional home video should gradually shrink as broadband offers increase.

Despite the proliferation of screens, Italian people love television. TV viewing time in Italy is one of the highest in Europe, almost half an hour above EU average (Fig. 47). Thus, stable figures were registered between 2013 and 2014, if the analysis is limited to television (Fig. 48). As said above, TV market experienced a strong growth in the pre-crisis years firstly due to advertising revenues and since the 1990s, to the pay offers. The crisis has affected the advertising industry first, causing a decline

Fig 47 Average television viewing times in the EU5 vs. EU28, 2014

Source: European Audiovisual Observatory

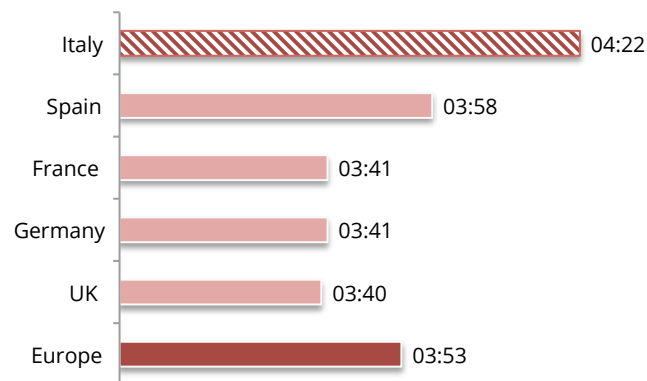
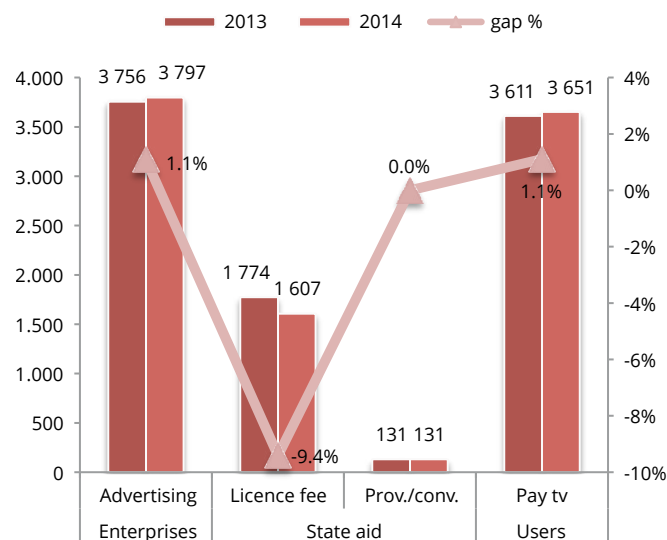


Fig 48 Resources attracted by television in Italy, EUR million and share

Source: e-Media Institute



in investment (and shifting it to the Internet), and only later the pay component, which had stagnated.

In percentage terms, advertising is worth just slightly more than pay-TV (41% and 40% respectively). Since 2010, pay-TV gained 5 percentage points: this growth has not been due to more subscribers, but to the shrinking of advertising investment. The license fee share has also lost 2 percentage points from 19% to 17%.

Italian TV market three main operators, Rai, Mediaset and Sky, attract 90% of the resources. Cairo and Discovery

Fig 49 Main broadcasters' revenues, EUR million

Source: e-Media Institute

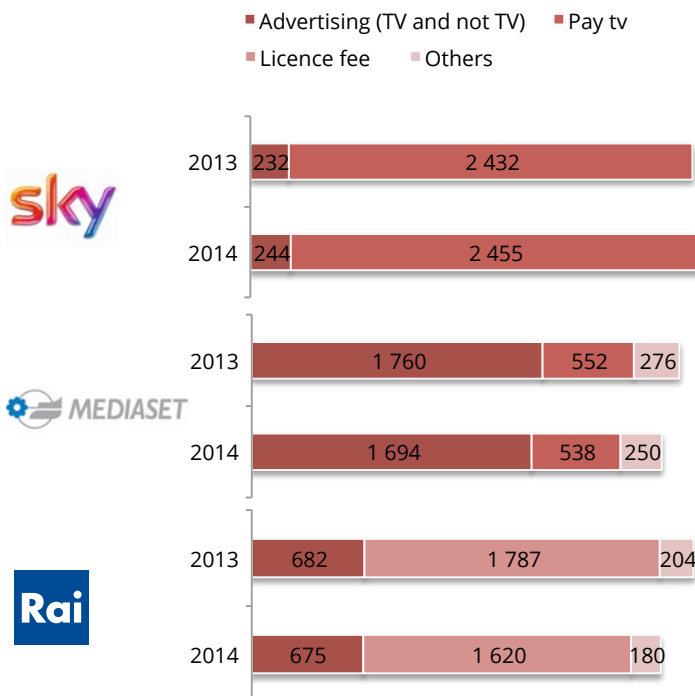
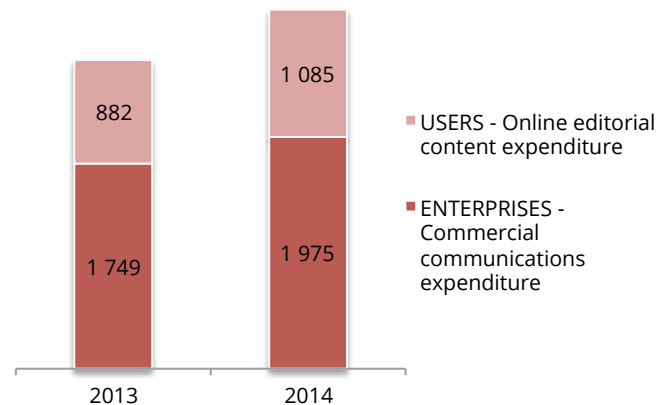


Fig 50 Origin of revenues on the Internet, EUR million

Source: e-Media Institute



have about 4% and the rest of the market is divided into several smaller operators and local TV stations. Sky slightly increased revenues between 2013 and 2014, while Mediaset and Rai saw a reduction (Fig. 49).

In 2014, EUR 3 billion revenues derive from the Internet, accounting for a 16% growth compared with 2013. Consumer spending is worth EUR 1 billion (+23% in one year) (Fig. 50).

Despite a strong growth, Italian online film and TV-series are not yet mature (Italy has a lower broadband penetration than the rest of Europe) and is worth, according to e-Media, about EUR 50 million.

2. NEW CONSUMPTION HABITS

The consumption of audiovisual content on the Internet is growing overall in the EU countries. Italy has the second highest percentage of users after the UK, a 20-percentage point growth in three years (Fig. 51). Specifically, Italy and Spain have the highest consumption of TV shows and films on the web (about 70%) (Fig. 52). This might be due to high piracy rates not necessarily reflecting a lack of legal offer online (on the contrary increasing and more various), but also, according to some within the television industry, to some reluctance to pay for content that is otherwise available for free on the web, even if the content is illegal.

Fig 51 Users of video on the Internet (long form) per week, EU5 and US, %

Source: Ofcom

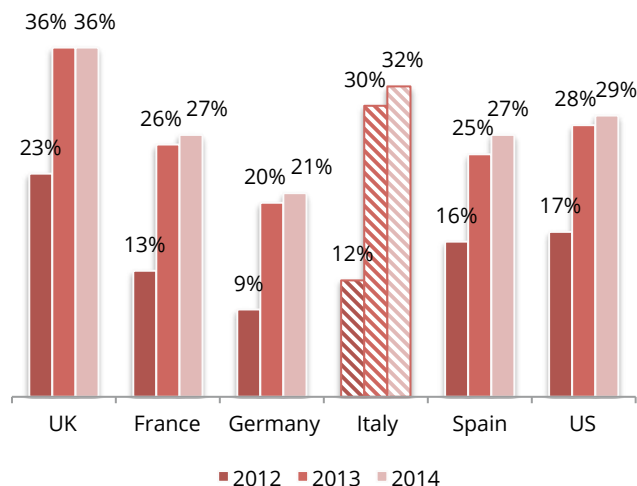
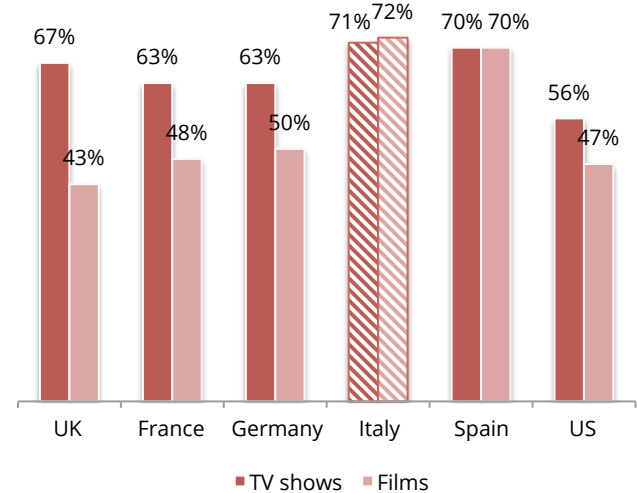


Fig 52 Users of TV shows / films via Internet per week, EU5 and US, %

Source: Ofcom



Consumption habits have also changed due to the increasing availability of any kind of connected devices that allow users to watch content while they are on the move. The use of online audiovisual content via mobile, such as tablet and smartphone, is growing significantly, while the desktop remains stable but relevant. Tablets penetration rate in the UK is over 40% in 2014; it is followed by France and Germany with an over 30% rate. Italy has the lowest rate among the big 5 (23% in 2014) (Fig. 53). By contrast, the penetration of smart TVs, even if still low across Europe, has risen in Italy and Germany more than in the other EU5 countries. France has just 12% penetration: this is mainly due to the spread of IPTV offers (Fig. 54).

Fig 53 Dissemination and use of tablets, EU5, %

Source: Emarketer

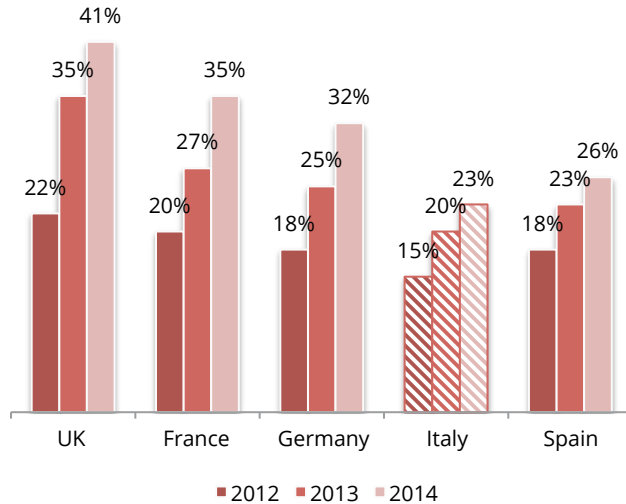
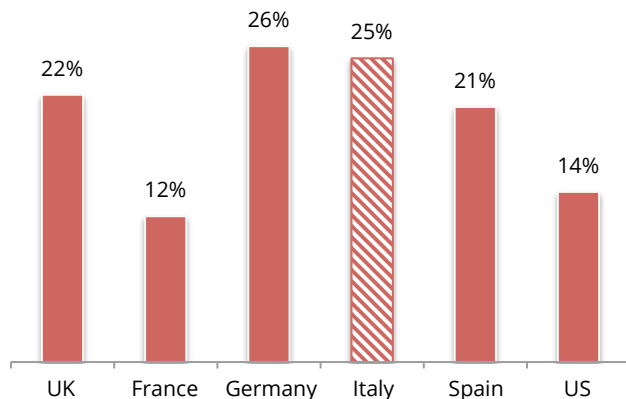


Fig 54 Smart TVs penetration, EU5 and US, 2014, %

Source: Ofcom



3. LINEAR AND ON-DEMAND AUDIOVISUAL MEDIA SERVICES

The UK has 1,642 audiovisual linear services and is the most advanced market in the EU. This figure is influenced by the Country of origin principle, which has enabled several channels targeting other countries to settle in the UK. Linear services established in the UK are 3 times as high as those established in France and even higher than the other “big” Member States such as Italy, which has 494 audiovisual linear services.

France is the most advanced market for VOD and has 325 VOD services established, while Italy, with 67 services, is very far from the main other markets (Fig. 55).

Fig 55 Number of linear and on-demand services established in the EU5, 2016

Source: MAVISE database

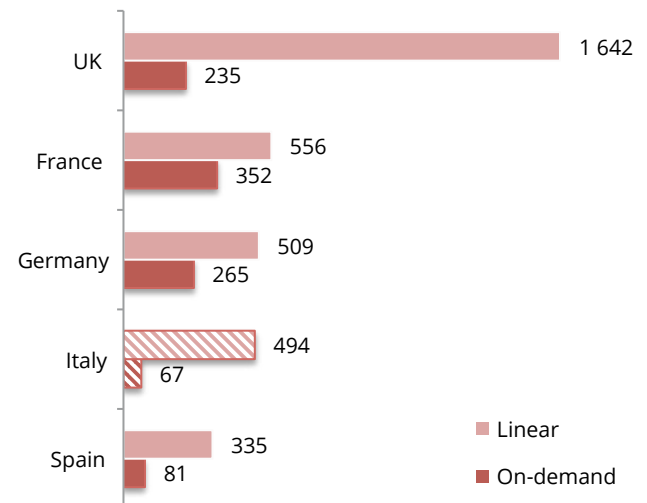
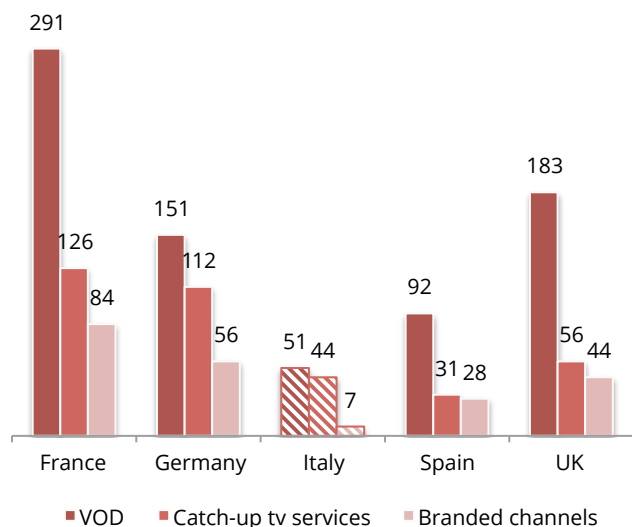


Fig 56 Number of available VOD, catch-up TV services and branded channels of broadcasters in the EU5, 2015

Source: European Audiovisual Observatory, MAVISE database

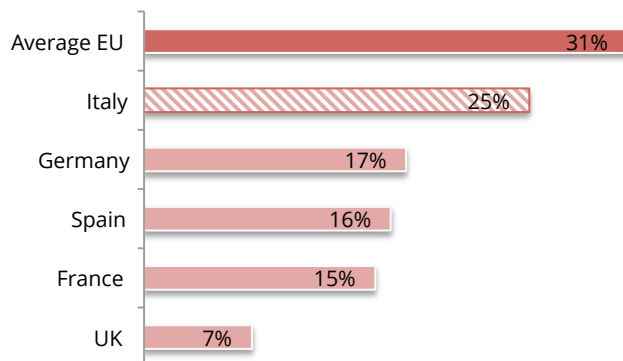


In Italy there are very few VOD services available if compared with the other main markets (Fig. 56).

Italy has the highest rate of foreign VOD services compared with total services available in the country. Italy's figure is below the EU average (31%) but much higher than the EU5 average, in particular when considering that the UK has just 7% share of non-national VOD services (Fig. 57).

Fig 57 Share of non-national VOD services available in the EU5, 2015

Source: European Audiovisual Observatory, MAVISE database



4. INVESTMENTS IN INDEPENDENT PRODUCTION

Italian broadcasters invested almost EUR 682 million in independent production in 2013, a 13% share of total investments. Of this 13%, free-to-air generalist broadcasters invested about 83%, while pay channels share was 14.7% and other free channels share was just 2.6% (Fig. 58). Fiction and entertainment register the best results with respectively EUR 216 and EUR 215 million invested (Fig. 59).

The analysis of investments by type of works shows that production represents 40% of the total expenditure. Production is mainly used for entertainment and documentary works. Broadcasters purchase 27% of works, mainly fiction, movies, animation and, to a lesser

Fig 58 Investments in independent production in Italy, 2013, EUR million and share

Source: AGCOM and main companies data

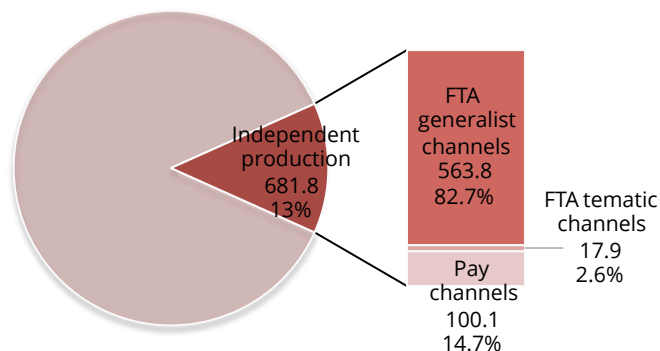
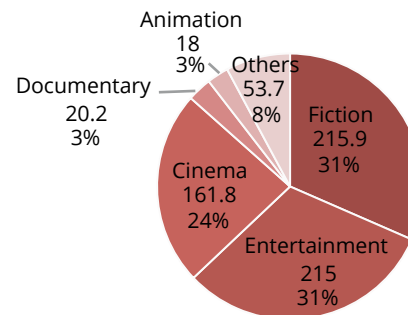


Fig 59 Investments in independent production by genre in Italy, 2013, EUR million and share

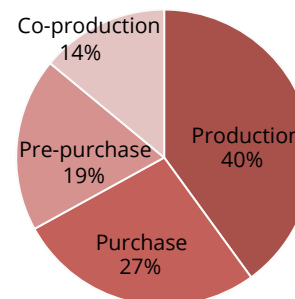
Source: AGCOM and main companies data



extent, documentaries. Pre-purchase³², that is used to invest in cinema works, has a share of 19%, while co-production concerns 14% of works, mainly fiction and animation (Fig. 60).

Fig 60 Share of expenditure by type, 2014

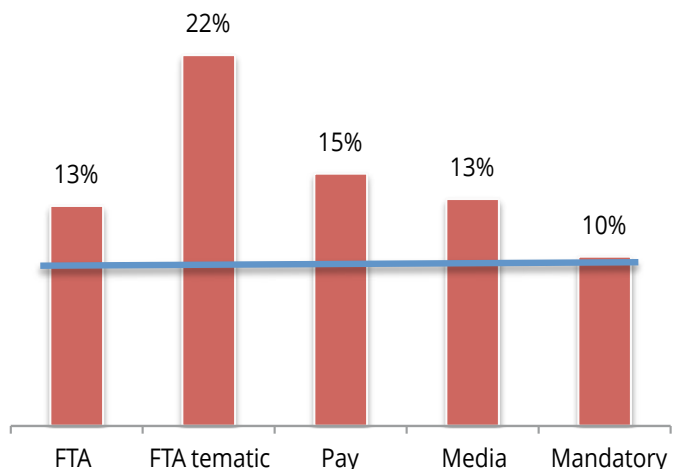
Source: AGCOM



³² Pre-purchase is a type of contract that allows to license audiovisual content at an early stage of production.

Fig 61 Investment quotas in Italy, 2013, %

Source: AGCOM and main companies data



The transmission of independent productions by any kind of TV player was significantly above the 10% required by Article 17 AVMSD (Fig. 61).

5. PROGRAMMING QUOTAS

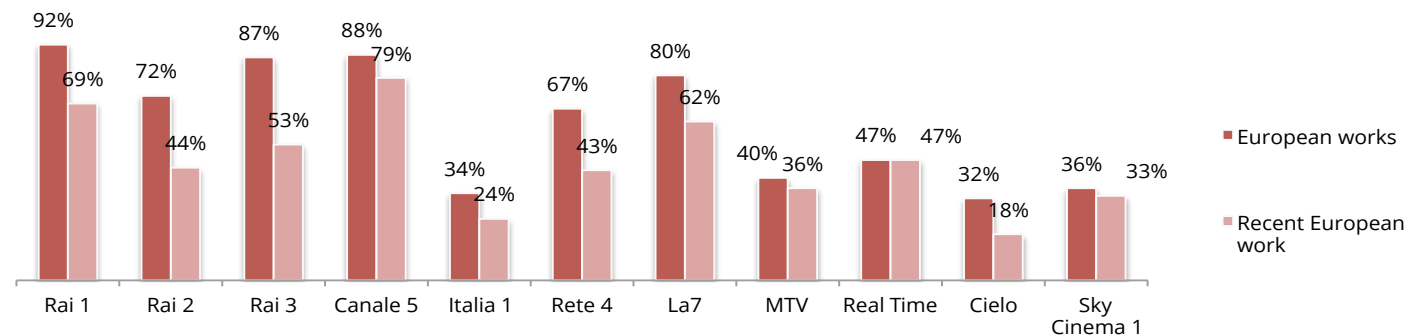
With regards to the reserve for European works, all operators respected the programming quota obligations. They transmitted an average of 61%, significantly more than “a majority proportion of their transmission time” as prescribed in the AVMSD. The average of recent European works is 39%.

The minimum threshold of 20% of European works for individual channels, as laid down in the AGCOM decision no. 66/09/CONS, was also respected. The average 61% varies from the lowest extreme of 32% achieved by Cielo to the highest value of 92% claimed by Rai 1. In general, the broadcasting of European works is thus preferred by generalist channels.

The average percentage of recent European works is 46%, with significant differences among different channels (Fig. 62).

Fig 62 Programming quotas of European works by channel, 2014

Source: AGCOM





PART

THE DIRECTIVE

INTRODUCTION

On May 25, 2016 the proposal of the European Commission for a Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of the changing market realities was delivered. The Directive falls within the scope of the 'Environment' pillar of the European Union strategy for the Digital Single Market (hereinafter the 'AVMS Directive').

The purpose of the REFIT (Regulatory Fitness and Performance Programme) that the AVMS Directive has undergone lies in creating a legal framework that supports market players with a set of rules that fits for the 21st century and the evolution of the technology behind the provision of audiovisual services.

Although the Directive in force dates back to 2010, several technological changes have emerged and urged for a review of this legal framework, which takes its roots in the 1997 and 2005 amendments to the Television Without Frontiers' Directive, adopted in 1989.

The proposal of the European Commission (hereinafter, also 'Proposal') does constitute the outcome of the convergence reached in the audiovisual market which led the Commission to launch a public consultation through the publication of a Green Paper titled 'Preparing for a Fully Converged Audio-visual World: Growth, Creation and Values' in 2013.

The Proposal focuses in particular on the characteristics

of the new digital market where the Internet has become a vehicle for the circulation of audiovisual services also through new platforms. In this regard, the Commission has paid specific attention to the problem of maintaining a level playing field between the different players which, regulated or not, are providing audiovisual services. To this end, the Proposal partially revisits the definition of audiovisual media services.

In addition, the Proposal takes into account the differences in the legal framework concerning linear and non-linear services and aims at reducing the existing gap where differences, in light of the current market scenario, are no longer justified.

While undertaking the REFIT, the Commission has taken into account six objectives, namely (i.) ensuring a level playing field, (ii.) providing an optimal degree of consumer protection, (iii.) fostering competition in the European audiovisual industry, (iv.) strengthening the single market, (v.) promoting cultural and linguistic diversity, and (vi.) safeguarding media freedom and media pluralism, access to information and accessibility to content for people with disabilities.

In order to achieve these goals, the Proposal introduces significant amendments, with respect to the following issues:

- Country of origin principle
- Independence of regulators
- Commercial communications
- Video-sharing platforms
- Promotion of European works
- Protection of minors.

The Proposal has taken into account the outcomes of the Impact Assessment that has explored the various policy options and the respective expected impact as well as of a public consultation launched with a view to implementing the Preparatory Works.

As said above, the Proposal introduces significant changes in the regulatory framework. Among others, the following will be specifically explored in the next pages: the principle of country of origin will continue to be the cornerstone of the European audiovisual framework, while Member States will guarantee simplification and transparency also for the definition of the relevant jurisdiction; independence of national audiovisual regulators will be enshrined into EU law, while there is no formal obligation for Member States to establish any regulatory body under the current AVMS Directive; for the sake of a level playing field in the audiovisual market, the scope of the AVMS Directive will be aligned between linear and non-linear services; more simplification has been introduced in order to remove the asymmetry in the rules governing minors protection in linear and non-linear services; a new category covering video-sharing platforms is regulated *ex novo* in order to ensure protection of minors and prevention of harmful content on the Internet; more flexibility will be introduced with respect to commercial communications, especially for product placement.

The Proposal has been adopted by the European Commission on the basis of Article 53(1) and Article 62 of the Treaty on the Functioning of the European Union (TFEU), in the exercise of the competences to harmonise

the free circulation of audiovisual media services.

According to Article 5 of Protocol no. 2 to the Lisbon Treaty, draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality.

The Proposal does not raise concerns with respect to the principle of subsidiarity, as it fulfils the requirements set forth under Protocol no. 2³³ and Article 5(3) of the Treaty on the European Union (TEU)³⁴. The transnational and cross-border nature of these services and the European dimension of this market strengthen the need for a regulation enshrined into EU law.

Some critical points have been brought forward in respect of the principle of proportionality. Generally speaking, the Proposal essentially aims to reach a minimum harmonisation (e.g. for linear and non-linear services providers). It has been pointed out that, however, the Proposal will likely create a different regime

33 Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

34 Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

for operators that are supposed to compete in the same market: broadcasters and on-demand providers would be subject to a minimum harmonisation, according to a policy option that leaves room for Member States to introduce stricter rules; on the other hand, the

regulation of video-sharing platform providers is subject to a 'gold plating' prohibition (i.e. Member States would be prevented from introducing more severe provisions) but nevertheless turns out to be less detailed, as several aspects shall be defined through co-regulation.

THE REFIT OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE: SOME CRITICAL POINTS AND THE ADDED VALUE OF A NEW FRAME

1. COUNTRY OF ORIGIN: A STEP FORWARD OR A STEP BACK?

The country of origin principle is the cornerstone of the AVMS Directive, that provides only for a limited set of exceptions.

Among stakeholders it is a rather common view that the principle of the country of origin should be preserved. The Proposal does not diverge from this view and aims at strengthening its legal grounds through a simplification of jurisdiction rules and establishing a mechanism to determine the relevant jurisdiction. The Proposal also makes a clarification on the conditions that may constitute the basis for derogation from the country of origin.

More in details, pursuant to Article 2(5-*bis*), Member States shall provide the Commission with a list of the audiovisual media service providers under their jurisdiction. The Commission shall receive notice without undue delay of any changes to that list and ensure that the competent independent authorities have access to this database.

In case Member States disagree on the country having jurisdiction, the matter shall be brought before the Commission, which may request the European Regulators Group for Audiovisual Media Services (ERGA) to issue an opinion.

Article 3 of the Proposal deals with the possible exceptions to the country of origin. While the current version of Article 3 of the AVMS Directive refers only to television broadcasting the exceptions relating to hate speech and protection of minors, the Proposal allows Member States to derogate on this basis from the country of origin with respect to both linear and non-linear services.

Accordingly, Member States are entitled to restrict retransmission on their territory of audiovisual media services from other Member States, first of all, when a service 'manifestly, seriously and gravely' infringes the provisions relating to the prevention of hate speech (Article 6) or the protection of minors (Article 12), or both. Additionally, this derogation is possible when a service '*prejudices or presents a serious and grave risk of prejudice to public security, including the safeguarding of national security and defence*' (para. 2(b)) or '*prejudices or presents a serious and grave risk of prejudice to public health*' (para. 2(c)).

Furthermore, the Proposal improves the derogation mechanism based on the notification by the Member States concerned to the media service provider, the Member State having jurisdiction on the latter and the Commission on the alleged contraventions (on at least two occasions before the notification) and the measures it intends to take, in case these violations should occur again. The time for the consultation between Member States and the Commission to produce an amicable settlement is extended from 15 days to one month. As in the AVMS Directive, Member States have the power to derogate from the country of origin in urgent cases.

Finally, Article 4 of the Proposal authorises Member

States to require media service providers under their jurisdiction to comply with more detailed or stricter rules with respect to certain matters (including commercial communications, promotion of European works, advertising and regulatory authorities).

The Commission, as a general rule, encourages co-regulation and self-regulation through code of conduct adopted at national level. Article 4(7) specifies that *'The codes of conduct shall clearly and unambiguously set out their objectives. They shall provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at'*.

Moreover, while providing for effective enforcement, they shall also establish *'appropriate, effective and proportionate sanctions'*.

Article 4 also provides legal grounds for the specific codes of conduct to be adopted at European level in some matters, namely on information to viewers about content that may be harmful for minors (Article 6-bis) and commercial communications (Article 9): their draft, as well as any amendment or extension, shall be submitted to the Commission by the signatories and ERGA may be asked to give an opinion on such drafts.

The amendments introduced by the Proposal are deemed to increase transparency and legal certainty, and to positively affect investments. The definition of a level playing field is supposed to benefit from the clarification of the rules on the country of origin, as well. Generally speaking, the Commission assumes that the application of the AVMS Directive would be more effective and consistent across Member States, by strengthening this

principle and simplifying the relevant rules.

By strengthening the application of the country of origin principle, the Proposal supports the view that more legal certainty will benefit media service providers that deliver their services across Member States. The opposite policy option (applying the country of destination principle) or a broader room for derogation from the country of origin than that carved out by the Proposal would most likely discourage providers from supplying their services across Europe

It has been pointed out that the changes that the Proposal introduces in Article 3 extends the derogations procedure from the country of origin also to the cases of prejudice to public security or public health, which do not fall within the matters subject to harmonisation pursuant to the AVMS Directive. In the current text of the AVMS Directive, these derogations can be implemented without a prior consultation procedure. Accordingly, this amendment is likely to make it more difficult for service providers to apply the country of destination rules for the sake of public security or health. Therefore, it has been claimed that the regime in force, which keeps the derogation procedure regarding protection of minors and prevention of hate speech separate from the derogations concerning other matters, is more desirable and consistent with the mission of the AVMS Directive REFIT.

Institutional bodies have brought forward some critical remarks with respect to the country of origin principle: some of them complain that such a principle would trigger *home-shopping* by audiovisual media service providers. Operators are supposed to find in the country

of origin an argument to set their establishment in the Member State with a more favourable legal regime. These concerns have been raised because of the growing use of the Internet to deliver programmes across Member States by certain platforms.

However, the Proposal seems to keep sufficient room for the country of destination to prevail over the country of origin when it comes to the matters where *forum shopping* may be practiced by service providers (prevention of hate speech and protection of minors). Moreover, where the Proposal carves out the space for derogating from the country of origin, a too strong application of the country of destination may have uncertain effects. This may happen, for instance, having regard to the Proposal amendments that allow Member States to impose financial contribution to providers established in another Member State that nevertheless target residents in their territories. Such measures may create regulatory uncertainty (as these obligations may apply together with any financial contribution imposed by the Member State of establishment) and discourage providers from delivering their services in certain Member States. And also in this case (like in the matters where the country of origin cannot be derogated), a difference in the approach taken by Member States while implementing the Directive would likely to result in regulatory *arbitrage*. Nonetheless, it is debated whether these effects might be to a certain degree counterbalanced by the increase of investments to promote the European works and of the cross-border delivery of the same, which seem to be the reasons behind the provision of a financial levy.

2. REGULATORS INDEPENDENCE. THE ROLE OF ERGA. NEW GROUNDS TO FOSTER MEDIA FREEDOM?

Also in response to any potential claims concerning lack of proper guarantees on pluralism and media freedom, the Proposal entirely amends Article 30 by providing a detailed regulation of national regulatory authorities, in order to ensure the independence of the same. While the current text of the AVMS Directive refers to these bodies as one of the possible channels through which Member States and the Commission may provide each other any information for the application of the Directive, the Proposal takes these authorities seriously and introduces a specific legal regime.

According to Article 30(1), *'Each Member State shall designate one or more independent national regulatory authorities. Member States shall ensure that they are legally distinct and functionally independent of any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors'*.

The Proposal requires Member States to ensure that national regulatory authorities exercise their powers 'impartially and transparently' and 'in accordance with the objectives of the Directive'. Additionally, *'National regulatory authorities shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them'*. Their competences and powers shall be clearly defined by law and they shall be vested with the necessary enforcement powers to carry out their functions effectively.

The Proposal also sets out detailed rules governing the dismissal of the member of these bodies and the financial and human resources to be assigned to authorities.

A very significant point lies with the provision that obliges Member States to ensure that audiovisual media service providers and online video-sharing platform providers who are affected by a decision of a national regulatory authority have the right to appeal against the decision to an appellate body, independent of the parties. The Proposal does specify that the appellate body, that may even be a court, shall have the appropriate expertise.

In addition to the detailed regulation of national regulatory authorities, Article 30-bis of the Proposal provides the European Regulators Group for Audiovisual Media Services (ERGA) with a legal reference within European Union law.

The text of Article 30-*bis* reproduces most of the content of the Commission Decision of 3 February 2014 on establishing the European Regulatory Group for Audiovisual Media Services.

The rules on membership and tasks of ERGA are merely transposed by the said Decision to Article 30-bis of the Proposal. Further to the tasks already assigned to this body, the Proposal authorises ERGA to give opinions, when requested by the Commission, on specific matters (including the definition of the relevant jurisdiction and the exchange of best practices on information to consumers and commercial communications) or any matter that relates to audiovisual media services.

The new piece of European legislation concerning the role of regulators and ERGA is deemed by the Commission

to enhance the effectiveness of the transposition of the AVMS Directive by Member States, by reason of the significant functions exercised by national authorities in this respect. Then, the role of regulators and ERGA supports harmonisation and then, the definition of a level playing field. The definition of specific independence requirements as well as the requirement that these bodies have the necessary competence and expertise should foster media pluralism and media freedom, preventing any political source of interference in the regulation of this sector. Moreover, consumers protection may benefit from the role of these subjects. Additionally, should ERGA be in a condition to actively promote coordination among national regulatory authorities, with a view to raising harmonisation in the implementation of the AVMS Directive, this would of course lead to strengthen the country of origin principle and its enforcement.

Although national regulatory authorities in the field of audiovisual media services are already common to Member States, the existence of a specific and detailed regulation may thus be beneficial for the harmonisation process. Especially in light of the enlargement of the European Union, the requirement that each of the Member States has its own independent regulatory authority appears to be a guarantee of media pluralism and media freedom. This way, also countries that nowadays do not have such an authority shall have to set up one when joining the European Union.

However, article 30 does go far beyond the approach of a 'light' or 'minimum' harmonisation. The nature, the

powers and the tasks of national regulatory authorities are clearly outlined and Member States have a more limited room for the implementation of this provision compared to other ones.

It has to be pointed out that in some Member States independent authorities may also comply with constitutionally mandated requirements as to various aspects of their legal status³⁵.

Hence, it would be desirable that the regulation of national regulatory authorities, apart from the general definition of mandatory requirements of independence and competence, should prevent inconsistencies with those provisions, unrelated to the issue of independence, that govern composition and tasks of existing regulators in the Member States.

3. TV ADVERTISING, SPONSORSHIP AND PRODUCT PLACEMENT

The Proposal also aims at amending some provisions in the context of commercial communications.

More in details, first of all the Proposal amends Article 20 and Article 23 of the AVMS Directive which relate to the *minutage* of television advertising.

On one hand, the transmission of film made for television, cinematographic works and news programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 20 minutes instead of the threshold of 30 minutes that is provided by the current text of Article 20 of the AVMS Directive.

On the other hand, the Proposal amends Article 23 on the limits to television advertising. Instead of the hourly limit of 20% (i.e. 12 minutes per hour), the Proposal establishes a daily threshold (20%) within the sole time window from 7.00 to 23.00. Cross-promotion for programmes from other entities of the same media group, sponsorship announcements and product placements are excluded from the 20% limit.

In addition to amending the limits for television advertising, the Proposal impacts the legal regime of product placement.

In the current text of the AVMS Directive, product placement is prohibited (Article 11(2)); yet, it can be admissible in some cases (unless a Member State decided otherwise) by way of derogation. The Proposal reverses this approach: product placement is admissible in all audiovisual media services except for news

³⁵ For instance, in Germany Article 36 of the *Grundgesetz* regulates the personnel of federal authorities. These circumstances may raise some issues in terms of implementation.

and current affairs programmes, consumer affairs programmes, religious programmes and programmes with a significant children's audience.

Programmes containing product placement shall meet only two (their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider; they shall not directly encourage the purchase or rental of goods and services) of the three requirements set forth by the AVSM Directive. The requirement that the programmes shall not give undue prominence to the product concerned has been removed by the Proposal. Finally, the Proposal amends Article 10 with a view to permitting promotional references to goods and services in programmes that are sponsored.

In the view of the Commission, these amendments will bring more fragmentation to the internal market but are likely to support a level playing field. Moreover, the Proposal aims at increasing content investments and availability.

The changes introduced by the Proposal have been welcomed by most of operators, except for some critical points, which concern detailed and very specific aspects. Generally speaking, the provisions mainly relating to product placement and sponsorship are likely to mark a new and more flexible approach.

It has been noted that allowing the transmission of films made for television, cinematographic works to be interrupted for each scheduled period of at least 20 minutes (instead of 30) would likely be outdated

and counters the very logic of scheduling in the least disruptive mode. Generally speaking, the existence of such limits within the context of the media convergence is frequently challenged. Indeed, these limits may turn out to be old-fashioned and inappropriate, as they bring a competitive advantage for the over-the-top vis-à-vis broadcasters. It is therefore a rather common view in the audiovisual industry that insertion rules should be removed.

The amendments concerning the quantitative limit for television advertising may also bring unintended consequences, to the extent the relevant time on which the 20% limit is calculated will be changed from the entire duration of 24 hours (one day) to the 7.00-23.00 window. Some stakeholders maintain that this new measure could lead to media service providers transmitting most of the advertising within the relevant time frame.

In any case, others stakeholders within the television industry have pointed out that in the age of convergence broadcasters should be held free from any regulatory burden in this respect. They may compete also on the basis of their ability to try and maximise advertising revenues, e.g. by placing advertisements also during prime time. However there are no particular concerns that cross promotion for programmes provided by entities of the same group will not be counted within the said 20% threshold.

With respect to product placement, some clarifications may be needed when it comes to the exclusion that concerns programmes with a significant children's audience. This element may bring uncertainties among

audiovisual media service providers, as it lacks any criteria in order to determine upon which conditions programmes do have a *significant* audience composed of children and whether the assessment of this qualification should be carried out *a priori* (on the basis of the target of the relevant programmes) or *a posteriori* (having regard to other key factors: e.g. time of transmission).

4. THE ONLINE VIDEO-SHARING PLATFORMS: SOMETHING NEW UNDER THE SUN?

To pursue the goal of ensuring a level playing field, the Proposal specifically takes into account the appearance of new actors, known as ‘over-the-top’ (OTT), which have relied on the use of the Internet to deliver audiovisual content so far without being subject to the relevant EU law provisions. At the outset, it has to be highlighted that the Proposal does not tackle copyright enforcement, a matter that the European institutions will deal with in a separate act, by the release of a proposal of a new specific directive next September.

To this end, the Proposal introduces, in addition to that of ‘audiovisual media service’, the notion of ‘video-sharing platform service’, that *‘means a service, as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, which meets all of the following requirements: (i) the service consists of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility; (ii) the organisation of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing; (iii) the principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate; (iv) the service is made available by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC’* (Article 1(aa)).

For the sake of consistency, the Proposal accordingly amends the definition of 'programme', entrusted to Article 1(b), that does no longer relies on the TV-likeness criterion. In fact, while the current definition includes any item the form and content of which 'are comparable to the form and content of television broadcasting', the Proposal does not contain this reference and includes, among the examples, *'videos of short duration'*.

Also, Article 1(bb) of the Proposal provides legal grounds to the notion of 'user-generated video', meaning *'a set of moving images with or without sound constituting an individual item that is created and/or uploaded to a video-sharing platform by one or more users'*. Accordingly, Article 1(da) of the Proposal 'video-sharing platform provider' is *'the natural or legal person who provides a video-sharing platform service'*³⁶.

Some significant differences emerge when comparing the definitions of 'audiovisual media service' and 'video-sharing platform service': unlike the former, in the latter the provider does not have editorial responsibility on the programmes or user-generated videos. However, according to Article 1(aa)(ii), *'the organization of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing'*. Both services consist of the provision of programmes (in addition,

video-sharing platform services also perform functions of 'storage'; and storage and provision services also cover user-generated videos) and are made available by electronic communications network. Article 28-bis and Article 28-ter of the Proposal set out the specific provisions applicable to video-sharing platforms.

According to Article 28-bis(1), Member States shall ensure that, without prejudice to Articles 14 and 15 of Directive 2000/31/EC, video-sharing platform providers *'take appropriate measures to: (a) protect minors from content which may impair their physical, mental or moral development; (b) protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such group defined by reference to sex, race, colour, religion, descent or national or ethnic origin'*. First of all, the Proposal does highlight that the liability exemptions established by Directive 2000/31/EC shall not be affected by the obligations to protect minors and prevent hate speech. For the implementation of these measures, Member States shall encourage co-regulation and establish mechanisms to assess the appropriateness of the same. With respect to co-regulation, the Commission and ERGA shall encourage the exchange of best practices on co-regulatory systems across the European Union. Such measures have already been implemented through co-regulation by some of the leading IT companies (Facebook, Twitter, YouTube and Microsoft) by the adoption of a Code of conduct on illegal online hate speech last May³⁷.

³⁶ The definition of 'audiovisual media service' has been amended, as well. The Proposal, under Article 1(a)(i) does refer to a service *'where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, in order to inform, entertain or educate, to the general public by electronic communications networks'*.

³⁷ See more at: http://europa.eu/rapid/press-release_IP-16-1937_en.htm.

Article 28(5) clarifies that Member States shall not impose on video-sharing platform providers measures that are stricter than the appropriate ones to protect minors from harmful content and to protect citizens from hate speech: therefore, video-sharing platforms are subject to maximum harmonisation. Stricter measures are permitted only when it comes to illegal content, without prejudice to Articles 14 and 15 of Directive 2000/31/EC. Also, Member States are required to define complaint and redress mechanisms for the settlement of disputes between users and video-sharing platform providers with regard to the application of the measures directed to protect minors and to contrast hate speech.

Article 28-ter lays down the criteria for defining the conditions upon which a video-sharing platform is deemed established in the territory of the European Union, in order for Member States to determine the relevant jurisdiction.

The introduction of the notion of video-sharing platforms and the definition of the respective legal framework constitute the reaction of the European Union institutions to a enduring claim concerning the lack of any legal reference with regard to over-the-top. The Proposal takes a first step in order to acknowledge that, in addition to the well-established category of audiovisual media services, some services with peculiar features have emerged as potential competitors through the use of the Internet.

Moreover, an overall extension of the scope of the AVMS Directive to the services provided via the Internet would unlikely be a policy option compatible with the status of

these operators. It would entail, in fact, a *sic et simpliciter* application to video-sharing platforms of the rules set forth by the AVMS Directive.

Some broadcasters maintain that the measures laid down by the Proposal are unsatisfactory, as they do not set forth any binding requirements for video-sharing platform providers. It is argued that the only provisions establishing obligations, even though in a *soft* form which leaves room for co-regulation, whereby it is not clear neither who sets the rules nor the implementation and sanction procedures, deal only with the protection of minors and the prevention of hate speech. Moreover, providers of user-generated content platforms are familiar with means aimed at avoiding any claim by users in respect of harmful content. The adoption of systems preventing minors from accessing inappropriate content or to forbid the uploading by third parties of content that consists of hatred or incitement to violence is very common among these operators.

Generally speaking, co-regulation may positively impact the legal framework in force, as private actors are supposed to enjoy more flexibility when it comes to determining which measures should be taken with a view to protecting users from any harmful content. The choice of co-regulation, also, may enhance the agreements entered into by video-sharing platforms and members of the audiovisual industry.

It is worth highlighting that the notion of video-sharing platforms may be read against the background of a huge debate in Europe and in Italy on the role of user-generated content platforms and their liability with

respect to illegal content or information. Directive 2000/31/EC, in fact, states that Internet service providers enjoy liability exemptions for any illegal content or information stored or transmitted on the assumption that they act in a purely neutral and passive manner (as *passive* providers). In this regard, *service* providers have to be kept separate from *content* providers, which exercise an editorial responsibility and have control on content.

A number of judgments of the Court of Justice of the European Union³⁸ and of domestic courts have faced the problem of defining upon which circumstances service providers may lose the benefit of such liability exemptions, as they no longer act in a purely passive and neutral manner. Supranational and domestic case law have found some factors (e.g., among others, the payment of a sum as remuneration of the service provided by the intermediary, the exercise of an editorial responsibility, the organisation of the material hosted by the platform in a manner that maximizes accessibility to content by users, the placement of advertising messages whose content is connected to users' preferences) to amount to evidence of the existence of an editorial responsibility.

It has to be stressed that, on one hand, the Proposal establishes a bridge between the E-Commerce Directive and the new legal framework on audiovisual media services. On the other one, nevertheless, the Commission

takes expressly the view that the principles governing ISP liability shall not be affected at all.

Article 28-*bis*, first of all, clarifies that online video-sharing platforms do not have any editorial responsibility. However, according to this provision, '*the organization of the stored content is determined by the provider of the service*'³⁹. Then, the existence of such an organisational activity does not amount to an editorial responsibility.

As it has been pointed out, 'The Commission considers that an important share of the content stored on VSPs is not under the editorial responsibility of the VSP provider. However, it acknowledges that these providers intervene in some way in the organisation of the content, programmes or user-generated video, and that this intervention is not merely the result of automatic means or algorithms'⁴⁰. Then, the Proposal does acknowledge that there is a difference in the way Internet service providers deal with the respective content. However, even though the Proposal includes within its scope of application *active* providers as video-sharing platforms, it does not draw any specific consequences in terms of liability.

That said, three categories of services can be singled out having regard to the Proposal: audiovisual media services providing programmes, for which a provider has

38 See Court of Justice of the European Union, 23 March 2010, C-236/08 to C-238/08, *Google v. Louis Vuitton*; see also Court of Justice of the European Union, 12 luglio 2011, C-324/09, *L'Oréal v. eBay*.

39 It has to be remarked, however, that the Explanatory Memorandum, quite contradictorily, points out that 'providers of video-sharing platforms services *often* do not have editorial responsibility for the content stored on those platforms' (emphasis added). In light of this remarks, video-sharing platforms are supposed to include also content on which providers do exercise an editorial responsibility, in respect of which the liability exemptions set forth by Directive 2000/31/EC shall not apply.

40 European Audiovisual Observatory, *On-demand services and the material scope of the AVMSD*, Iris PLUS 2016-1, at 64.

editorial responsibility; video-sharing platforms hosting large amounts of programmes and user-generated videos, for which the responsibility is splitted between providers and users; providers offering a small amount of audiovisual content, whose legal regime is laid down by the E-Commerce Directive. It has been noted, in this regard, that ‘How this matrix will work in practice will depend on how far the concept of editorial responsibility will be stretched, considering that this concept remains the cornerstone for media regulation’⁴¹.

These provisions have to be coupled with the safe harbour clause encapsulated in Article 28-bis(1), that specifies that the obligations to take measures to protect minors and to contrast hate speech apply without prejudice to the liability exemptions set forth by Article 14 and Article 15 of Directive 2000/31/EC. Then, the only source of liability pursuant to the AVMS Directive for video-sharing platform providers derives from the breach of the obligation to take appropriate measures to protect minors or prevent hate speech. These operators shall not bear any liability, instead, based on the illegal nature of the content stored.

In fact, Article 28(5) authorises Member States to impose stricter measures vis-à-vis video-sharing platform providers where it comes to illegal content; but the illegal nature of the content is likely to derive from the failure to comply with the measures to prevent hate speech and content harmful to minors. However, the wording ‘illegal content’ appears too vague and, if subject to a broad

interpretation, might even provide Member States with room to introduce rules concerning copyright enforcement that the European institutions are to laid down in a separate act, within the broader context of the copyright reform.

By this approach, the Proposal seems to take position in the debate concerning whether certain features (such as an organisational activity of the hosted content) are liable to exclude that an Internet service provider acts in a merely neutral and passive way so as to enjoy the liability exemptions. The Proposal, therefore, accepts that the existence of a content organisation activity does not amount to a form of editorial responsibility and does not deprive Internet operators of the liability exemptions with regard to illegal content or information. This way, the Proposal places video-sharing platforms and audiovisual media services on different levels, depending on the exercise of an editorial responsibility and regardless of the fact that these subjects may *de facto* compete with each other.

In addition to the above, another remark can be brought forward, looking at the type of content hosted by video-sharing platforms. Indeed, the latter often host both user-generated content and content of other broadcasters. However, due to the evolved nature of hosting providers, also other kinds of content (neither self-uploaded nor broadcast by other providers) may be available, in respect of which only an editorial responsibility is exercised. This scenario raises a broader question, i.e. whether it is reasonable that hosting providers, which amount to the category mostly affected by the digital

41 *Ibid.*, at 67.

transformations, are subject to the same legal regime applying, e.g., to access providers nowadays.

Generally speaking, with respect to video-sharing platforms, the Proposal impacts the existing AVMS Directive according to a 'sectorial, problem-driven approach to regulation' mentioned in the Communication 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' issued on May 25th, 2016.

This way, the Commission has set aside the alternative based on a "holistic approach" to regulation of digital platforms, in order to highlight the specific features of the audiovisual sector.

However, it has to be underlined that the legal status of video-sharing platforms is bringing consequences even from an economic standpoint. When it comes to active intermediaries, i.e. Internet service providers which are supposed to exercise a degree of control over content, the economic reasons behind the liability regime of E-Commerce Directive should be taken into account. Accordingly, it has also to be questioned which degree of compliance, from a technical perspective, can be actually guaranteed by Internet operators. Among others, a very debated issue deals with the *ex novo* uploading of content once the same has been removed the first time. An obligation to prevent copyright infringements from occurring again would most likely affect another of the pillars of the legal regime of ISP, i.e. the absence of a general obligation to monitor content, regardless of the *active* or *passive* nature of the provider.

5. THE PROMOTION OF EUROPEAN WORKS: ALL THAT GLITTERS AIN'T GOLD!

With respect to the promotion of European works, the main development brought about by the Proposal impacts the provisions applicable only to on-demand audiovisual media services, namely Article 13.

While the text of this provision reflects a flexible approach and leaves room to Member States in order to determine to which extent providers of on-demand audiovisual media services shall promote protection of and access to European works, the Proposal introduces a stricter and more binding obligation. Notably, providers of on-demand services shall *'secure at least a 20% share of European works in their catalogue and ensure prominence of these works'*.

Additionally, Article 13(2) enables Member States to *'require providers of on-demand audiovisual media services under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contributions to national funds. Member States may require providers of on-demand audiovisual media services, targeting audiences in their territories, but established in other Member States to make such financial contribution. In this case, the financial contribution shall be based only on the revenues earned in the targeted Member States. If the Member States where the provider is established imposes a financial contribution, it shall take into account any financial contributions imposed by targeted Member States. Any financial contribution shall comply with Union law, in particular with State aid rules'*.

However, Article 13(5) allows Member State to waive the requirements above *'for providers with a low turnover or low audience or if they are small and micro enterprises'* as well as in the case they *'would be impracticable or unjustified by reason of the nature or theme of the on-demand audiovisual media services'*.

The Proposal does not bring any amendment, however, with regard to broadcasters, which will maintain their legal status under the current text of the AVMS Directive. In the view of the European Commission, the expected impacts of these amendments would include a reduction of market fragmentation and forum shopping, and the establishment of a level playing field. Looking at the social impact, the expected lowering of cross border provision of content would be counterbalanced by a growing exposition to European works and an increase in the creation of European content and cultural diversity. At the outset, the provision of a 20% threshold, coupled with the obligation to give prominence to European works, does convert the flexible obligation encapsulated in the text in force of Article 13 (promotion of European works was required *'where practicable and by appropriate means'*) into a more binding one. There have been different reactions to the introduction of the 20% quota.

Among others, it has been pointed out that in several Member States this obligation is already fulfilled by providers of on-demand services either *de facto* or by provision of law. Based on this, producers argue that a higher share should be more desirable, as the European average is 27% for transaction-based video on-demand

services and 30% for subscription video on-demand services.

Some broadcasters maintain that even for larger providers, investments that have so far guaranteed an important share of independent productions are the results of market-driven decisions, whereas the strengthening of regulatory obligations might introduce distortions by restricting editorial/entrepreneurial choices, reducing incentives to innovate, thus hampering the very purpose of such obligations, namely the growth of a sustainable, competitive and creative independent production industry.

The obligation of giving prominence to European works has to be examined together with the threshold introduced by the Proposal. In the view of the Commission, the imposition of both these requirements shall prevent providers from a purely formal fulfilment of the obligation to promote European works. Giving prominence to these works, thus, shall avoid that the same constitute a residual, low-quality part only of the catalogue.

One could observe that the requirement to give European works prominence in the catalogue would discourage on-demand service providers to make investments in works of low quality. This holds true with respect to providers with a medium/large business.

A critical point of the amendments made by the Proposal lies with the power of Member States to impose a financial levy to on-demand providers under their jurisdiction or established in other Member States but targeting audiences on their territories. It is actually

unclear whether the imposition of such financial levy may be extended by Member States to other providers. Member States that may decide to impose a financial levy can consider the experience of Germany and France, where this policy option has been implemented in the absence of any legal grounds at EU level. It is likely that with its Proposal the Commission has recognized these models as viable and practicable even on a larger scale. There are at least two aspects to be considered in taking this policy option.

First, a possible impact on the principle of the country of origin when financial contribution is required to providers established in other Member States: this principle is the cornerstone of the AVMS Directive and the Proposal aims at strengthening it by simplifying its application. Also, this mechanism could, when the provider is targeting more territories, raise complexities in so far as a Member State wishing to impose a financial levy to providers under its jurisdiction shall have to assess whether each operator has already been subject to contribution in other Member States where it delivers its services. Also, some operators believe that even for larger providers, such measures may reduce incentives to innovation and undermine the growth of a sustainable, competitive and creative independent production industry.

Secondly, since the power to impose contribution rests in the hands of each Member State, the difference in the implementation of Article 13(2) might lead to a certain degree of legal uncertainty. These measures, once correctly applied on the basis of cooperation among the concerned Member States as exceptions to the country

of origin principle, may nevertheless reduce the risk of *forum shopping*.

Even though Article 13(2) specifies that, while imposing financial contribution to providers under its jurisdiction, a Member State shall *take into account* the contribution imposed by targeted Member States, this provision is unlikely to bring to the adoption of a uniform approach among Member States.

The last critical point lies with Article 13(5), which authorises Member States to derogate from the requirement of a 20% share and prominence, on one hand, and from the imposition of financial levy when it comes to providers with a low turnover or low audience or small or micro enterprises, on the other hand. The same may occur when the imposition of those obligations would be impracticable or unjustified.

This provision lacks clarity, as it is creating a large room for Member States to carve out a safe harbour with respect to the scope of application of Article 13 but lays down in a very general way the conditions upon which these exemptions may be granted by Member States.

Also in this respect, a gradual approach (e.g. by imposing lower thresholds or shares, or fixing a deadline for the provider to achieve the relevant share) should be more desirable. Alternatively, Member States should agree, on a more precise basis, the grounds upon which the said exemptions may apply. The option to follow a gradual approach may satisfactorily counterbalance the risk of circumventing obligations with the need not to excessively burden providers with the requirement of a rigid quota.

6. PROTECTION OF MINORS: REDUCING ASYMMETRIES?

Another objective of the Proposal is to remedy the lack of adequate protection of minors.

This goal is pursued, first of all, through the elimination of the regulatory asymmetry between on-demand audiovisual media service providers and broadcasters: in the AMVS Directive, programmes which may seriously impair the development of minors are prohibited in TV broadcasting (Article 27) while are allowed in on-demand services, provided that are made available in such a way that minors will not normally see or hear them (Article 12).

The Proposal extends the provisions concerning on-demand services to television broadcasting: then, the same rules apply, regardless of whether linear or non-linear services are concerned.

Pursuant to Article 12 of the Proposal, Member States shall take appropriate measures to ensure that programmes offered by any audiovisual media service providers (both on-demand providers and broadcasters) which may 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 them. Article 27, accordingly, is deleted.

In the text of the Proposal, Article 12 also specifies that *'such measures may include selecting the time of the broadcast, age verification tools or other technical measures. They shall be proportionate to the potential harm of the programme'*.

Further to creating a level playing field between broadcasters and on-demand audiovisual media service providers, the Proposal aims at strengthening the level of protection with regard to the most harmful content: in such a case, according to Article 12, which mentions *'gratuitous violence and pornography'* as examples, the content shall be subject to the strictest measures, which include encryption and parental control systems (e.g. pin codes).

Finally, Article 6-bis of the Proposal introduces a new provision that establishes an obligation for audiovisual media service providers *'to provide information to viewers about content which may impair the physical, mental or moral development of minors. For this purpose, Member States may use a system of descriptors indicating the nature of the content of an audiovisual media service'*.

According to the Proposal, Member States shall encourage co-regulation and media service providers shall be spurred to exchange best practices and co-regulatory systems across the European Union.

The expected impact of these amendments is to raise the level of harmonisation and to create better conditions for a level playing field. The Commission argues that there could be fewer revenues for on-demand providers. From a social perspective, these amendments are supposed to raise the protection of minors while keeping unaltered the degree of freedom of expression in the audiovisual market.

In order to evaluate whether the amendments concerning protection of minors may enhance the legal framework, it should be questioned whether there are

legal grounds supporting the more restrictive regime applying to television broadcasting.

One could note that the way consumers (including minors) normally access content is different depending on whether it comes to on-demand or broadcasting services.

A second, although indirect, effect of extending the legal regime of broadcasting television to on-demand services lies with the elimination of the prohibition to deliver programmes that might seriously impair the physical, mental or moral development of minors, such as those including pornography or gratuitous violence.

This is of course a matter of policy. However, since Article 27 is repealed and broadcasters are subject to Article 12, also this kind of programmes may be broadcast through linear services.

The prohibition provided for by Article 27 of the AVMS Directive is based on the assumption that minors can more easily have access to programmes supplied by broadcasters than on-demand service providers. Then, the choice to place on the same level audiovisual media service providers seems to show that according to the Commission consumers obtain access to programmes in a rather similar way and that the measures to be adopted in order to prevent minors to access the same should be similar if not identical, as well.

As in the case of online video-sharing platforms, co-regulation is defined as the proper regulatory approach by which private and public actors may reach a balanced definition of the relevant measures to safeguard the interests at stake.

Co-regulation may work under condition that it leaves an appropriate flexibility to private actors, and some binding *ex-ante* rules are set forth in order to ensure that the relevant objective provided by law is effectively pursued and any violation of the relevant provisions is appropriately sanctioned. According to a part of television industry, in particular, a set of basic *ex ante* rules should apply to all types of providers of audiovisual content.

THE ITALIAN POSITION

1. A GLOBAL STRATEGY FOR A DIGITAL SINGLE MARKET

Italy has been a driving force among Member States to support the REFIT of the AVMS Directive within the context of the Digital Single Market strategy. The output of this process depends also on the efforts made by Italy along with other Member States that more actively have felt the need to modernize the legal framework encapsulated in the AVMS Directive.

The Council conclusions on European Audiovisual Policy in the Digital Era adopted on 25th November 2014 under the Italian Presidency 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'*. In particular Italy reminds the Conclusions reached by the above mentioned EU Council, reiterating that:

- a) media convergence offers new distribution possibilities of audiovisual contents and this requires an adjustment of the business, contractual (licences) and regulatory context;*
- b) consumers, especially young ones, demand and expect immediate access to the new contents in any moment and any place and with any device, even though in Europe*

the legal supply of contents does not always match this cross-border demand;

- c) we should promote full cross-border circulation of European audiovisual works and their presence on all distribution platforms; d) the single market must ensure equal conditions for audiovisual media service providers to compete.⁴²*

The position taken by Italy, as specified by the Department for European Policies, deems the pursuit of a global strategy for a Digital Single Market as of utmost importance. In the view of the Italian Government, a particular effort should be paid to envision fundamental pillars through an integrated approach.

Among others, the review of copyright rules in the digital era constitutes a fundamental step to be taken in connection to the REFIT of the AVMS Directive. Copyright is seen as crucial to promote cultural diversity, creativity and freedom of expression. Italy is aware of the need to balance consumers' access to content and the interests of copyright holders.

With regard to the territoriality issue, Italy finds that fragmentation of the European market is due to the existence of a high number of practices and regulations at national level. The licensing system is a key instrument for users to access content throughout the European Union. Also, the position of Italy is supportive of harmonisation of the scope of exceptions and limitations, which is still too much fragmented across Member States. No particular exception should be set out, according to this view, for

⁴² http://www.mise.gov.it/images/stories/pubblicazioni/Position_paper_on_DSM_ITALY_EN.pdf

user-generated content. Italy has also called Internet service providers and intermediaries to cooperate for a better functioning of the system of licenses.

Another point that is connected to the regulation of audiovisual media services lies with copyright enforcement. Also in this respect, Italy has called for a more responsible and proactive cooperation by Internet service providers with a view to contrasting piracy and massive copyright infringements, without prejudice to the liability regime established by Directive 2000/31/EC. Looking at user-generated content platforms, it should be questioned whether the traditional mechanisms of copyright enforcement fit for these platforms. Attention should be drawn, e.g., on the way a given platform provides its service/content. It should be taken into account the position of Italy on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy: *"we should consider however, that there are substantial differences between the different types of platform, for example with reference to the business or non-business character of their transactions, to the characteristics of the different market sides, or to what regulation is to be applied to traditional operators competing with (or for) the services offered by platforms. For this reason, the existing framework (Directive 2000/31/CE on electronic commerce, 2001/29/CE on copyright and 2004/48/CE on the enforcement of intellectual property rights) should be revised bearing in mind such differences - for example through a classification by "type" -, that takes into account both the dynamic evolution and technological developments occurred in the*

services market, and the variety of behaviours and roles of intermediaries. For example, for the user generated content (that is produced and loaded independently by users), we should verify the suitability of the existing forms of copyright and, possibly, of privacy protection. We cannot imagine a differentiation according to the manner in which a platform finances itself; the difference lies rather in the kind of the service/content that the platform offers and the way it does it, as well as in its accessibility."

Furthermore, Italy has proposed the establishment of an European register of digital audiovisual works and the enhancement (also from a technical standpoint) of the notice-and-take down procedures (notably to prevent content from being uploaded once it has been removed due to copyright infringements). According to the position of Italy, the adoption of an European registry is felt as a key tool also with respect to copyright enforcement and should follow interoperable models that have been implemented so far (e.g. the systems of Entertainment ID Registry and the International Standard Audiovisual Number International Agency). Additionally, the adoption of automatic means for the purpose of combating copyright infringement is encouraged by Italy. In this respect, self-regulation and the adoption of codes of conducts may be encouraged in order to ensure, among other things, that content subject to removal are not uploaded again. The measures provided by such codes of conduct or adopted through co-regulation will not require Internet providers a general monitoring activity that is prohibited by Article 15 of Directive 2000/31/EC.

While debating on these possible measures to be implemented, institutions shall also consider the existence of a considerable gap between the revenues of *content* providers and *service* providers.

2. THE IMPLEMENTATION OF THE PROPOSAL

In order to evaluate the impact that the Proposal and any forthcoming amendments may have in respect of the domestic legal system, it is worth providing an overview on how the relevant provisions of the AVMS Directive have been implemented in Italy so far.

a) At the outset, the definition of the scope of application (both territorial and material) of the AVMS Directive is unlikely to raise particular concerns.

Article 1-*bis* of the Legislative Decree 31 July 2005, no. 177 ('Testo Unico dei servizi di media audiovisivi e radiofonici', hereinafter the 'TUSMAR') states that the audiovisual media service providers subject to the Italian jurisdiction are those established in the Italian territory.

The criteria on the basis of which an audiovisual media service provider is deemed to be established on the Italian territory, laid down by Article 1-*bis*(3) of the TUSMAR, are consistent with Article 2 of the AVMS Directive, that according to the Proposal will be subject only to a few minor amendments. This scenario would lead the Italian legislator to amend Article 1-*bis* accordingly and to implement the necessary mechanism in order for a database enlisting the audiovisual media service providers established in the Italian territory to be held.

With respect to the material scope of application, the TUSMAR covers both linear and non-linear services but does not include online platforms, which are expressly excluded from the notion of audiovisual

media services. More in details, Article 2(1)(a) specifies that this notion does not include private Internet websites or services consisting of the provision or delivery of audiovisual content generated by private users with a view to sharing and exchanging the same within the respective communities.

Against this background, the amendments introduced by the Proposal do not seem to clash with the content of Article 2 of TUSMAR. Indeed, the Proposal does not extend the notion of audiovisual media services (which continues to cover both linear and non-linear services) but, in addition to that, creates a new category, namely the 'video-sharing platform services'. Video-sharing platforms are treated in a different way and kept separate from broadcasters and on-demand service providers. Then, no change in the definition of audiovisual media service is expected, should the Proposal be approved in the version under examination.

- b)** When it comes to the promotion of European audiovisual works, Italy seems to be already in line with the scenario of the Proposal. With particular regard to on-demand services, the Regulation of the Italian Communication Authority (AGCOM) adopted by Resolution no. 66/09/CONS, as amended, provides that on-demand audiovisual media service providers may reserve, alternatively, 20% of the catalogue to European works (calculated on the overall amount of hours per year) or a financial contribution that amounts to at least 5% of the revenues to the production or acquisition of European works.

This requirement may be met gradually and depending on market conditions. By Resolution no. 526/14/CONS, AGCOM has introduced a specific obligation to give prominence to European works (either to the European works of the catalogue or to those which have received the financial contribution). It emerges that Italy is already complying with the provisions that may be introduced should the Commission Proposal be passed into law. However, the critical point lies with the power of Member States to impose financial contribution vis-à-vis on-demand providers. The Italian experience shows how this measure could bring about detrimental effects, as the payment of a financial contribution is already provided by the Regulation in force as an alternative to reserving a share in the catalogue to European works. This background could lead the Italian legislator to increase the amount of the financial contribution that is required (as an alternative to reserving a share of the catalogue) to on-demand audiovisual providers or, in the worst-case scenario, to impose a financial levy in addition to the existing obligation to contribute to the production or acquisition of European works.

- c)** Article 34 of the TUSMAR regulates protection of minors with regard to both linear and non-linear services. Italy has implemented Article 27 and Article 12 respectively of the AVMS Directive without introducing any significant change.

On one hand, Article 34(1) prohibits the broadcasting of programmes which might *seriously* impair the physical, mental or moral development of minors,

in particular programmes that involve pornography or gratuitous, repeated and cruel violence. The same prohibition applies to films that have been denied the necessary authorisation (*nulla osta*) by the competent body or films prohibited for minors under the age of 18. The broadcasting of programmes that might impair the physical, mental or moral development of minors and films prohibited to minors under the age of 14 is allowed only during the time window 23.00-7.00 or if the provider has taken any technical measure to exclude that minors in the area of transmission may normally hear or see them.

On the other hand, according to Article 34(3), on-demand audiovisual service providers, programmes which might *seriously* impair the physical, mental or moral development of minors, including programmes that involve pornography or gratuitous content, may be made available only by any means excluding that minors in the area of transmission may normally hear or see them.

In order to allow media service providers to implement these rules, AGCOM has issued two separate regulations, Resolution no. 52/13/CONS and Resolution no. 51/13/CONS, which set out, respectively, the criteria for the classification of programmes which might *seriously* impair the physical, mental or moral development of minors and the technical measures to be taken to exclude that minors may see or hear programmes made available by on-demand media service providers which might *seriously* impair their physical, mental or moral development.

The approach taken by the Italian legislator is consistent with the content of the AVMS Directive. The Proposal is supposed to set out a legal regime that applies to all audiovisual media service providers regardless of the linear and non-linear nature of the services.

When it comes to the most harmful content (e.g. gratuitous violence and pornography), this scenario will result in applying measures that are more severe for on-demand providers (which may be required to adopt the strictest measures as encryption, parental control, PIN codes).⁴³

Generally speaking, this background raises concerns to the extent the broadcasting of the most harmful content will be allowed on linear services. However, with particular regard to the Italian legal system, this amendment should not bring specific issues. The Constitutional Court⁴⁴ has highlighted that when it comes to obscene or indecent content, the circulation of the same shall not be relevant from a criminal point of view, under the following circumstances: when their circulation is limited to the private sphere or when, being public, may nevertheless be prevented by the adoption of means that exclude minors from the access to the same. As a consequence, the implementation of the text of the Proposal shall not cause any particular problem.

⁴³ It being clarified that the broadcasting of these content is not prohibited but only subject to technical measures: see again Article 34 of the TUSMAR and the aforesaid Resolutions nos. 52/13/CONS and 51/13/CONS.

⁴⁴ Italian Constitutional Court, 27 June 1992, no. 368.

d) The country of origin, as cornerstone of the AVMS Directive, has been implemented in the Italian legal order by Article 1-*ter*. This provision, on one hand, provides that Italy ensures freedom of reception and shall not restrict retransmissions on its territory of audiovisual media services from other Member States. On the other one, Article 1-*ter*(2), vests AGCOM with the power to provisionally suspend reception or retransmission of programmes from other Member States in the cases set forth under Article 3 of the AVMS Directive.

The amendments introduced by the Proposal would lead AGCOM to extend the procedure enforceable where manifest, serious and grave violations of the prohibitions relating to protection of minors and hate speech occur to the cases of prejudice or serious risk of prejudice to public security and public health.

e) The amendments to the AVMS Directive regarding national regulatory authorities, which aim at strengthening their independence, are not supposed to raise implementation issues in the Italian legal order.

It is worth noting that Article 10 of the TUSMAR expressly vests AGCOM with the regulatory tasks and powers which are set forth by the TUSMAR itself as well as by any other provision.

AGCOM has been established by the Law 31 July 1997, no. 249 as an autonomous and independent body. The competences of this authority are defined by Article 1(6) of the Law no. 249/1997.

Also the requirement that providers affected by

measures taken by AGCOM may bring appeal against the latter before an appellate body is already met by the Italian legal order.

f) With respect to commercial communications, the TUSMAR contains a detailed regulation that will be impacted by the Proposal.

Article 38 of the TUSMAR provides for different limits to television advertising depending on whether a free-to-air or pay-tv broadcaster is concerned. In the first case, the limit is set in 15% of the daily programming time and 18% of each hour. In the latter, instead, the threshold is 12% of each hour.

Following the intense litigation on these rules, raised by Sky, it remains to be seen whether and to what extent the Italian legislature will seize the opportunity for relaxing national rules (for all business models, or by maintaining a different treatment for pay-TV and free-to-air TV).

Italy, pursuant to Article 37(4) of the TUSMAR, has implemented Article 20(2) of the AVMS Directive by reproducing the limits of 30 minutes for the transmission of films made for television, cinematographic works and news programmes to be interrupted.

Finally, Article 40-*bis* of the TUSMAR regulates product placement according to an approach rather similar to that adopted by the Proposal: product placement is permitted, but subject to some limitations. The content of this provision, regardless of the absence of a formal general prohibition like the one established by Article 11 of the AVMS Directive, does indeed

reflect the restrictions posed by it.

It is useful to remember that the VIII Permanent Committee of the Senate of the Republic (Public Works, Communications) has approved on July 27th 2016 a resolution that does not constitute a binding act but provides a position that shall be taken into account by the Executive⁴⁵.

In this resolution, the Committee has found that both the subsidiarity and proportionality requirements are met by the Proposal. On the merits, the resolution calls for more symmetry with a view to defining a level playing field. In particular, the resolution focuses on the legal regime applying to video-sharing platforms. First, differences still exist with respect to commercial communications, where video-sharing platform are not subject to the relevant obligations at all. Also, the Committee wonders whether stronger measures could be taken for the prevention of hate speech and protection of minors. It is questioned, notably, if Member States may take strictest measures such as

the implementation of preventing filtering systems or preliminary notice systems.

As to the promotion of European audiovisual works, the resolution calls for an extension of the power of Member States to impose financial levy also vis-à-vis video-sharing platforms.

The Committee finds that the amendments regarding television advertising should not negatively affect users ability to enjoy audiovisual works, whose integrity is safeguarded by the Proposal. Some concerns, instead, are pointed out with regard to the definition of the time window 7.00-23.00 to assess the respect of the relevant daily advertising threshold: this could trigger a higher share of advertising during 'peak hours' that may be detrimental for consumers.

Last, the Committee highlights that Article 28-ter is likely to allow video-sharing platforms to circumvent the strictest measures provided by certain Member States and to benefit from forum shopping practices.

45 See the full text here: <http://www.senato.it/service/PDF/PDFServer/DF/323517.pdf>.



CONCLUSIONS

Since 2010, when the AVMS Directive came into force, the audiovisual market in Europe has changed significantly. This is due to new technologies and to the way user habits have changed, shifting more and more to the web. New ways of offering video content, far from the rigidity of traditional scheduled television, are developing as the Internet penetration and the bandwidth are attracting in increasing numbers, in particular among young adults. Nowadays, audiovisual revenues linked to the development of the Internet seem to have overcome the obstacles related to poor Internet penetration and a lack of consumer awareness and acceptance of non-linear content as an alternative to traditional audiovisual channels.

The Internet is attracting more and more resources: since 2009 the growth rate of Internet advertising has been systematically higher than the growth rate of TV advertising; on-demand business models of distribution of audiovisual content are becoming very popular.

The launch of linear HD and on-demand services has also led to increased competition between linear and new players for the acquisition of fresh content. As a result, investments in original programming have increased.

In view of these rapid changes, the European Commission is questioning whether the AVMSD objectives are still relevant or whether it is necessary to revise the regulatory framework of the audiovisual sector in order to be aligned to this new context.

Moving from the overview provided in the preceding paragraphs, some points have to be taken into account in order to effectively achieve the goals behind the REFIT

with a view to balancing societal costs and advantages. The Proposal, in the current text, has two different effects: on one hand, it draws attention on co-regulatory measures for the protection of minors and prevention of hate speech; on the other one, it prevents the application of stricter rules that, in light of the evolution of market, may be relevant for the status of platform providers. In this regard, the Proposal does specify that an activity consisting of the organisation of content does not entail any editorial responsibility and does not preclude the application of the liability exemptions set forth under the E-Commerce Directive. Furthermore, the Proposal keeps the notion of video-sharing platform providers separate from the scope of audiovisual media service providers: in this way, the obligations which apply to both linear and non-linear service providers cannot be extended to video-sharing platforms (among others, the imposition of financial contribution for the promotion of European works, in the text of the Proposal, is limited to on-demand service providers).

Some stakeholders in the audiovisual industry deem that the Proposal has taken only a partial step, as they wished the Proposal could more broadly impact the legal status of video-sharing platforms in order to impose even more severe obligations upon the latter.

A key issue lies in the Member States' power to impose financial contributions to support European audiovisual works. Financial contributions may work as an alternative tool to reserving shares in the catalogue of audiovisual media service providers. Thus, this kind of measure might potentially replace the obligation to

securing a given share but not be imposed in addition to the same. Also, some broadcasters observe that financial contributions may shift resources away from investments in creativity and innovation that providers will be eager to make.

While authorising Member States to impose such financial levy even to vis-à-vis providers established in other Member States but targeting residents on their territories, the Proposal may impact the application of the country of origin principle, also in light of the different implementation that Member States can give to these provisions.

The Commission has attached a special consideration to the Proposal for the protection of minors. In this respect, the regime applicable to non-linear services is extended to linear services and co-regulation is viewed as the best regulatory option with regard to information that providers must supply to viewers. Operators may thus enjoy more flexibility, although clarity and precision are required when setting forth the relevant definitions through co-regulation.

Another common remark concerns the removal of Article 7, regarding accessibility. According to a large majority of stakeholders, this provision should be kept within the AVMS Directive and perhaps broadened in order to secure an ad hoc regulation of accessibility to audiovisual media services (to be carved out from the 'European Accessibility Act).'

As to the country of origin, the Proposal seeks to strengthen its application, even though the derogations that are authorised, especially in the field of promotion

of audiovisual works, are likely to largely undermine this principle. The Commission shall take into account whether subjecting the exceptions deriving from a prejudice or a risk of prejudice to public security and public health to the notification procedure is an option consistent with the *ratio* behind these derogations.

Generally speaking, the more in-depth legal basis provided by the Proposal for the role and competences of national regulatory authorities and ERGA respectively may bring several benefits. However, it has been pointed out that a too much strict regulation of national authorities may more likely generate inconsistencies with the provisions encapsulated into national legal orders (also at Constitutional level) in this respect. A crucial point, though, should be to ensure that the requirement of independence is actually respected and enforced vis-à-vis national jurisdictions that may not match this standard to date.

These improvements may be coupled with the attribution to the European Audiovisual Observatory of the task of supporting EU institutions by carrying out an in-depth impact assessment on the overall achievement of a level playing field and an appropriate implementation in the European audiovisual landscape.

Lastly, some detailed aspects may be reconsidered or fine-tuned when it comes to television advertising and product placement, even though the general view taken by the Commission appears to be appropriate.

The Proposal, therefore, displays some critical points but does constitute of course only a first step in order to provide audiovisual media services with a regulatory

framework that fits to the evolving needs of this market. Once the current text of the AVMS Directive is implemented, it will be possible to discuss further enhancements without incurring any risk that the industry is left in 'limbo' and no progress is made with a view to reacting to the digital context where these services are nowadays provided.

For these reasons, the Proposal should be approved with the necessary changes as soon as possible and implemented by Italy and the other Member States very quickly.

It would be desirable that Member States avoid any

gold plating strategy while transposing the provisions of the new version of the AVMS Directive into national law. Certain national legislators are eager to adopt more restrictive measures when European Union law pursues minimum harmonisation and does provide for only general rules where domestic law retains room to adopt stricter standards. This strategy would undermine the objectives of strengthening the digital single market and creating a level playing field. Member States are therefore expected to refrain from the implementation of stricter measures that may encourage some operators, among others, to *forum shopping* practices.



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