



## **Cable Europe Response to the Commission's Green Paper on Converged Audiovisual Worlds**

30 September 2013

### **INTRODUCTION**

Cable Europe welcomes the Commission's Green Paper on a Fully Converged Audiovisual World. The on-going transformation of the audiovisual media landscape is bringing convergence and with this, increasing competition between a fast growing number of distribution platforms and devices and more opportunity for consumers.

The development encompasses numerous interrelated aspects, such as the display of user generated content as well as Video on Demand and "catch-up" services on the TV screen. Moreover, these services can also be accessed on a number of other devices, such as a tablet PC, a laptop, a connected game console or set-top box.

Viewed in this context, what is called "Connected TV" is not a new phenomenon. Cable and other operators have been offering enhanced, interactive services for many years that combine traditional broadcast streams with on-demand and other intelligent functionalities. Certain Cable operators have also in the last few years launched services that further integrate those combined products with services and applications delivered via the internet.

The fully converged audiovisual world should not be viewed as simply enabling the delivery of internet content to television sets. It should be regarded as a means by which multiple sources of audiovisual content, services and applications can be delivered to, and consumed via, a multitude of different devices and platforms, in many different ways.

The further development of converged audiovisual services has great potential to deliver additional benefits to citizens and consumers and indeed to the economy as a whole. However, if this potential is to be realised, regulation and policy must allow a competitive, market-driven approach to prevail and should avoid the promotion of a single technology or platform. Factors, such as the availability of content across multiple devices/platforms and the fostering of privately funded platforms as well as distribution infrastructures must also be recognised and addressed. Suitable tools must be created in order to prevent the abuse of content monopolies.

Cable Europe advocates for a lowering of the barriers to all market players to allow European providers to effectively compete with external players. The main prospective of the European lawmaker should be, to prevent the discrimination of European players compared to international OTT players. Deregulation should be complemented by self regulation measures for certain specific aspects like children protection for example.



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## 1. *Consumer experience of the future – portability of content:*

Cable Europe believes that the ability to distribute content across multiple devices and platforms must be ensured and the portability of content within and across borders must be facilitated. This means enabling subscribers to benefit from the content they have already paid for at any time on any screen or device of their choice regardless of their location.

Our understanding is that from the perspective of a cable operator the concept of “content portability” at least encompasses two different situations. In the first place, the subscriber may wish to download content from his TV provider (e.g. via the set-top box) into a portable device (e.g. an i-Pad) which allows him to watch that content in other locations. In the second place, the subscriber may wish to access his local TV provider’s content from any location where he has an internet connection. We observe that both types of content portability are going to be increasingly demanded by Cable TV subscribers and offer a high potential for market development to cable service providers.

Cable operators are trying hard to innovate to provide consumers with choice and diversity. Portability of cable products is being developed in a number of Member States and is therefore entirely technically possible, but those efforts are substantially frustrated by restrictions in clearing Copyrights. Being able to answer this demand is also paramount to embracing the emerging competition from online offers.

It should be noted that cable operators negotiate content rights for their television services with content owners, mainly broadcasters. The multi-screen strategy extends the existing cable television service and is an integral part of the service. Rights therefore have to be negotiated for multi-screen viewing as well. This has not proven to be an easy task. In this regard we are keen to see improvement in the overall efficiency of the rights clearance system.

We believe that once the rights are cleared for a subscriber, the latter should be able to benefit from his subscription regardless of their location, on any screen or device of their choice. For communication of content to the public, broadcasters clear the rights on a territorial basis or, if so desired, on a multi-territorial basis; Operators of distribution platforms clear the rights, if need be on a country by country basis, for their service areas where their subscribers have their residence. This is current practice.

However, once the rights have been cleared in this way and the target audiences of the broadcasters or the subscribers of the distribution platforms are known, these national consumers should be granted a portability right (to other territories and to other devices of their choice).

For making content available to the public (eg subscription based VOD), the same principle should apply. Once rights have been cleared by the distribution platform, the subscribers should be in a position to enjoy his subscription anywhere and on any device of their choice.



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We believe that it is extremely important for policy makers not to pick winners in a given market. The regulatory framework should therefore have the same operational and cost impact irrespective of the exploitation form (satellite, cable, IPTV, internet, mobile). One should recognize though that some exploitation forms are national by nature, others are international by nature and some can be both ("TV everywhere" experience of national services).

On the content rights acquisition side, Cable Europe believes that as long as commercial agreements allow for portability of content there is no need for specific regulation. A "subscriber based access code" is indeed the way forward and such authentication systems are already being developed. If, however, commercial agreements are not feasible, some intervention from the Commission might be necessary.

## 2. *Exclusivity/access to content*

**Question 2: What are the factors affecting the availability of premium content? Are there currently practices relating to premium content at wholesale level which affect market access and sustainable business operations? If so, what is the impact on consumers? Is there a need for regulatory intervention beyond the application of existing competition rules?**

As outlets for media content and especially premium content multiply with the emergence of new operators and/or OTT platforms, premium content tends to become of even greater importance for network operators and platform providers to compete. Broadcasting organizations must therefore be prevented from exploiting their position of power and preventing network operators from offering this content to the end users. This would contradict with the basic principle of pluralism enshrined in media law.

For this purpose, suitable tools must be created in order to prevent the abuse of content monopolies. A "Must-Offer" obligation must be created: any television operator or content owner that has premium content available or a premium brand must allow network operators interested to transmit the program to enter into negotiation on equivalent conditions whoever finally gets the contract at the end of negotiations process.

Moreover, Cable Europe fully endorses the Green Paper's analysis contained in section 2.1 when it refers to the fact that whereas exclusive deals between premium content providers and some market players are not per se anticompetitive, in occasions they restrict the possibilities of third parties to provide such content to their audiences. More specifically, in the last decade, access to premium content has proved highly contentious from a Competition Law perspective in some jurisdictions. This has been the case in the UK and also in Spain, where a vertically integrated operator, with a dominant or highly significant presence in the pay TV retail market, has the means and incentives to restrict access by its retail competitors in the upstream market to premium content with the goal of foreclosing the market.



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Therefore, in 2002 for example, the European Commission concluded that a merger between the two main pay-TV platforms in Spain raised competition concerns (case COMP/M.2845 SOGECABLE / CANAL SATELITE DIGITAL / VIA DIGITAL) and, on that basis, the Spanish competition authorities accepted a number of remedies proposed by the parties limiting the lengths of contracts signed by the merged company with football clubs and American majors and setting-up access condition to third-party operators. However, this did not stop the competition proceedings concerning access conditions to premium football rights in the Spanish market. On the contrary, these have continued and rose ever since.

Under the circumstances described above, we think that the Commission should undertake a fact finding exercise showing how diverse the rules are across the EU as this would help to bring more transparency to the system. A specific problem could be solved by competition law or other regulatory way if competition cannot help. Regulators could have competences over competition rules and produce a report on the state of competition on the market.

## **Question 3: Are there obstacles which require regulatory action on access to platforms?**

No, platforms are not the bottleneck. There is strong and increasing competition among platforms like cable, satellite, DTT, IPTV and OTT, while Content is in dominant players' hands as the viewing share of main broadcasters across Europe has remained stable over the last years.

### *3. Financing models*

## **Question 4: Do the current AVMSD requirements provide the best way to promote the creation, distribution, availability and market appeal of European works?**

## **Question 5: How will convergence and changing consumer behaviour influence the current system of content financing? How are different actors in the new value chain contributing to financing?**

The Commission's Green Paper rightly points out that whereas the current framework (the AVMSD) envisages that broadcasters are responsible for editorial content and on-demand service providers should contribute to support the production of European works, internet-based new players directly involved in the exploitation of the same content seem to be exempted from the obligation.

At the same time, in some member states (e.g. Spain and Germany) the authorities impose the obligation to contribute to the production of national films to operators that do not have editorial responsibility over content (e.g. cable operators), which can be understood as a misinterpretation of the aims and purpose of the AVMSD.

Cable Europe encourages therefore the Commission to avoid discrimination among platforms in terms of contribution to the production of content. National measures that would go into this direction and put a burden on the wrong platform should not be allowed.



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Windowing is also key to finance content. Windows based on exploitation models and business cases (cinema exhibition, followed by pay TV, on demand, free to air broadcasting etc.) could continue to be justified. However, Cable Europe encourages the Commission to put an end to the territoriality of release windows and harmonise the various national rules in that matter. Release windows go some way to help explain the piracy issue. If the release windows question could be addressed, piracy would likely drop considerably.

## 4. *Interoperability of connected TV*

### **Question 6: Is there a need for EU action to overcome actual or potential fragmentation and ensure interoperability across borders? Is there a need to develop new or updated standards in the market?**

Cable Europe supports openness and transparency but this should not be counterproductive to innovation. There should not be competition in excess that kills innovation. This is one of the reasons why the US is so successful. Look at Apple and how they compete with Samsung.

Cable operators are innovating and making increasing use of the internet as a delivery and access mechanism for content and they should be encouraged to continue and invest in their platform further. This would allow for more competition between platforms to the benefit of the consumers.

Cable Europe's members do not foresee any interoperability issue across borders and therefore do not see a need for EU action. The consumer electronic industry constantly brings up new devices that include new functionality. Cable operators are embracing this diverse ecosystem chosen by consumers providing appealing services that are supported by a variety of devices such as television or tablets. Full interoperability is ensured via the use of HDMI audio and video interface connected to cable operators set top boxes or via the DVB CI plus interface as appropriate. Standards respond to market demand and as such should be embraced by the industry on their own merits. Cable Europe is aware of the emerging debate about HbbTV as a technology and standard for interactive services. As is rightly pointed out by the European Commission in the Green paper there are already other technologies in the market for the distribution of interactive services such as YouView, MHP and the CI+\_technology. Market parties have already invested in several ecosystems for interactive television.

It would be inappropriate, therefore, to mandate any particular standard or technical specification – not to mention to oblige platforms to implement such. It would also contradict the principle of technology neutrality.

## 5. *Spectrum*

### **Question 7: How relevant are differences between individual platforms delivering content (e.g. terrestrial and satellite broadcasting, wired**



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## **broadband including cable, mobile broadband) in terms of consumer experience and of public interest obligations?**

Consumers are increasingly seeking to access the services and content of their choice via a multitude of devices, in different places and at different times. A choice of different content delivery platforms and the ability to select the most appropriate product based on preferences or particular needs is therefore an important aspect of the consumer experience.

Taking the convergence of mobile and fixed networks into consideration and the uptake of IP technology for the distribution of content, the public interest perspective is even more safeguarded than before. This is for instance also taken into account by the Dutch government that recently has decided that the Must-Carry obligation that over the last years only applied to cable TV operators should be extended to all television distribution platforms including satellite, terrestrial and IPTV platforms. This also supports the principle of technology neutrality that is of crucial importance for European legislation.

Moreover, differences in characteristics, capability and delivery methods/technology foster competition and innovation. The continued existence of a range of different content delivery platforms is therefore critical to the development and sustainability of the digital ecosystem. With this in mind regulators and policy makers must strive to maintain that choice and diversity and should avoid favouring one type of platform over another.

For their part, Cable operators have a history of progressive investment and innovation. Successive upgrades and innovative product launches across a wide range of services, particularly in content delivery (for example the Horizon and TiVo services offered by many European Cable operators), have delivered choice and value to consumers and have acted as a catalyst for investment by competing operators.

The Cable platform remains fully adequate for the distribution of content as well as to embrace the convergence to IP services delivery. Cable operators across Europe have deployed successfully advanced television services for their customers leveraging on the new devices available in modern households and providing some of the best in class consumer experience.

## **Question 8: What frequency allocation and sharing models can facilitate development opportunities for broadcasting, mobile broadband and other applications (such as programme-making equipment) carried in the same frequency bands?**

Cable Europe welcomes new sharing models for spectrum allocation. However, this cannot be addressed without the full consideration for the possible impact on existing services operating in the spectrum bands in question. For example, during the initial discussion on the Digital Dividend in the 800MHz band, the impact on Cable systems was not fully studied and taken into account when setting up the technical condition enabling the deployment of the new mobile broadband services. Tests in Germany, UK and the Netherlands have shown that interferences between



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LTE devices and cable customers' devices can occur to an extent that cable services cannot be used properly anymore.

Cable Europe would like to emphasise that coexistence issues need to be addressed from the outset in order to maximize the overall value for spectrum reallocation or sharing. In the context of the overall objectives, releasing additional spectrum at the expense of existing services is counter-productive and will disincentivise investment across the value chain.

We would also highlight the fact that Cable operators have progressively introduced upgrades to their networks to make more efficient use of the spectrum within which they deliver services. The upgrade to the Docsis 3.1 standard will increase efficiency further and thus the capacity available to deliver services.

In addition, the migration from analogue to digital TV services, as has already been undertaken by many cable companies, results in a more efficient use of the available frequencies resulting in additional capacity becoming available for innovative, next generation products. We would welcome the Commission to confirm that the analogue switch-off promotes digital services, innovation and further investment.

Viewed in this context, it is important to note the role that fixed networks such as cable play in meeting the ever increasing demands placed on available spectrum. In addition to progressively improving the efficiency with which they utilise frequencies within their own networks, fixed networks play a crucial role in supporting wireless services. Wireless services are ultimately dependent on fixed line capacity to underpin their operation. And, fixed networks can help to alleviate the capacity pressures experienced by wireless services by, for example, providing off-loading facilities, expanding WiFi capability etc.

While the increasing demand for mobile and wireless connectivity inevitably leads to calls for more spectrum to be made available for mobile broadband, meeting that demand should not be limited to simply allocating more spectrum for use by 4G/5G services. There should instead be a greater focus on ensuring that existing spectrum allocations are used efficiently and maximising the opportunity presented by alternative wireless technologies.

In this regard, regulators and policy makers must not overlook the role that Wi-Fi services can play. Wi-Fi has evolved into a vital component of the end user experience and a key factor in reducing the demands on mobile networks. Ensuring that sufficient spectrum remains available for Wi-Fi services in the future should therefore be a priority for the Commission. Again, however, we would stress the need to ensure that existing services operating in the frequency bands in question, including Cable, are not disrupted.

## **Question 9: What specific research needs with regard to spectrum have to be addressed to facilitate such development?**

Cable Europe encourages research to take a new approach to spectrum coexistence as highlighted by the European Forum for Spectrum Coexistence. The Commission is also investigating the role of wifi as an alternative to pure mobile or



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terrestrial capabilities. Cable Europe believes that development in technologies can help frequencies allocation.

## 5. *Regulatory Framework*

**Question 10: Given convergence between media, is there evidence of market distortion caused by the regulatory differentiation between linear and non-linear services? If yes, what would be the best way to tackle these distortions while protecting the values underpinning the EU regulatory framework for audiovisual media services?**

Cable Europe considers that the current system of linear and non-linear services differentiation works well and still fits the converged audiovisual world as even if linear and non-linear services will increasingly compete on the same screen, they remain different in essence as the customer control element remains a significant differentiating feature for users.

**Question 11: Is there a need to adapt the definition of AVMS providers and / or the scope of the AVMSD, in order to make those currently outside subject to part or all of the obligations of the AVMSD or are there other ways to protect values? In which areas could emphasis be given to self/co-regulation?**

Cable Europe considers that the definition of AVMS providers in the Directive is fine and should not be changed. Current regulatory obligations however are borne by European providers only and impede to compete with external players like OTT.

Cable Europe advocates for a lowering of the barriers to all players to allow European providers to effectively compete with external players. The main prospective of the European lawmaker should be, to prevent the discrimination of European players compared to international OTT players.

Deregulation should be complemented by self regulation measures for certain specific aspects like children protection for example. This kind of approach may also be very positive for the market as it could stimulate competition, for example by brand leveraging etc.

**Question 12: What would be the impact of a change of the audiovisual regulatory approach on the country of origin principle and therefore on the single market?**

Cable Europe considers that the country of origin principle should be protected. This is essential to give AVMS providers legal certainty and help them develop new cross border business models. Derogations to this principle would undermine both the main aim of the Directive to create an internal market as well as the free flow of information: the country of origin principle allows indeed for the unhindered distribution of AVMS throughout the EU. In addition, Cable Europe favours a full harmonisation of the AVMS rules that would avoid too many differences between EU countries.



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**Question 13: Does increased convergence in the audio-visual landscape test the relationship between the provisions of the AVMSD and the E-Commerce Directive in new ways and in which areas? Could you provide practical examples of that?**

No, despite increased convergence in the audiovisual landscape, Cable Europe considers that the AVMSD and e-Commerce Directive continue to regulate different services and the barriers should remain that way to ensure legal certainty for AVMS providers.

## 6. *Media freedom and pluralism*

**Question 15: Should the possibility of pre-defining choice through filtering mechanisms, including in search facilities, be subject to public intervention at EU level?**

### **“EPG regulation”**

Against the backdrop of the changed balance of powers in the media environment, the traditional criterion of owning a network for any form of access regulation, including pre-defining choices, is no longer appropriate to ensure pluralism and a diversity of offerings.

It is not only the cable network operators who are offering electronic program guides and navigating tools but it is also the manufacturers of devices and other portal operators – who offer the same orientation function as the navigators in place with the network operators. The navigators used by network operators are receding into the background as internet-capable televisions and CI-Plus modules are becoming more and more prevalent, and in many cases are no longer even visible to customers at all (since they generally require a set-top box to be installed that is either made by the corresponding network operator or has been certified by the manufacturer). Their place is being taken by the portals and navigators offered by the manufacturers of terminal devices. The result of the increased number of platforms should be that regulatory authorities should more and more concentrate on the potential abuse by individual market actors, possibly in an ex-post procedure. And this should not only address the traditional players, but also the providers newly entering the market. This concerns device manufacturers just as much as the providers of internet portals or mobile portals.

We therefore invite the Commission to look at disparity in regulation between European companies and their foreign counterparts. In order to create a level playing field for the various parties involved, the rules governing the operation of platforms should be deregulated in the long term. It seems that a supervisory authority of abuse, ex-post, is sufficient in order to safeguard the objectives of ensuring the variety of media and pluralism. This certainly is the case as no situation of abuse of power is yet known.

Deregulation would seem to be advisable also because international terminal device manufacturers are easily able to evade regulation and in many cases are



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not regulated at all as a result of the enforcement deficit often found in international scenarios. In particular in the interests of end customers, these distortions of competition must be avoided.

## **“Visibility in search engines, recommendations”**

As a result of the multiplication of content to end customers, another paradigm of regulation has changed. General opinion now accepts that what was once a bottleneck situation has started to shift. It is no longer the scarce transmission frequencies that pose the challenge for ensuring pluralism and relevance to public opinion. Rather, the oversupply, or at any rate the clear increase in number, of linear and non-linear content has become what some claim to be a problem. Because the offers available in the audio-visual sphere are steadily increasing and services are being developed that compete with traditional TV offerings, it is becoming more and more difficult for content providers to be noticed by end users. The “Must-Carry” approach, based on the paradigm of the scarcity of means of transmission is starting to fail its purpose.

In this context, both public and private broadcasters request on the basis of the pluralism principle that their offering is placed in a good position in the navigators offered by platform operators but also those of the device manufacturers and other portal operators.

Even if this approach – of controlling users’ attention by giving better placements to individual broadcasters and monitoring that placement by the regulatory authority – is conceptually questionable, Cable Europe considers that the legitimate interests of the other parties involved should not be disregarded.

To begin with, the interests of customers need to be considered. For end users, the growing offering of audiovisual content – be it linear TV, video-on-demand (VoD) or content made available “over the top” (OTT) – enables them to access content in new ways and to select from the content so offered. But end users also need to have the possibility of finding the content relevant to them.

In order to meet this demand, cable network operators no longer just offer mere program lists to their customers, providing current channel numbers and, as needed, categories – increasingly, they are putting in place “recommendation engines” and search engines that deliver recommendations for the content available on the platform, such recommendations being aligned with customer behaviour or searches performed previously. These recommendations include OTT content in addition to linear television and VoD offerings, and thus offer customers the most comprehensive media landscape available to them.

As a result, while user number 1 may find recommendations at the top of his recommendations list consisting of the offerings from public and private broadcasters governed, user number 2 may be referred primarily to offerings from the cable operator itself (VoD) or to those of an OTT provider. The decisive factor in this regard is what content the customer wants to have. From the perspective of the cable industry, it is natural that a user-controlled selection and placement will be permissible at all times. It is up to the customer to choose the recommendation



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he wants to follow. Placing the traditional broadcasters at the top of the results list, as a matter of principle, would not be compatible with that concept.

Furthermore, from the perspective of the cable industry, the demand from the broadcasters for improving visibility is just one side of the coin. Being able to be found means that data must be retrievable. Thus, for recommendation engines and search engines to be able to generate comprehensive and objective recommendations lists, the operators must have information (meta-data) regarding the content that is accessible. Where no such information is provided to the operator, it cannot be assured that the corresponding offering is taken into account by the search engine and subsequently recommended or listed.

Lastly, it must be prevented that content providers block the provision of meta-data by dragging out the copyright licensing negotiations for an excessively long time. As a consequence, it should be made clear that the meta-data must be licensed along with the program signal.

**Question 16: What should be the scope of existing regulation on access (art. 6 Access Directive) and universal service (art. 31 Universal Service Directive) in view of increasing convergence of linear and non-linear services on common platforms? In a convergent broadcast/broadband environment, are there specific needs to ensure the accessibility and the convenience to find and enjoy 'general interest content'?**

As per answer to question 15, in order to create a level playing field for the various parties involved in the new media landscape, the rules governing the operation of platforms and access in article 6 of the Access Directive should be deregulated in the long term. It seems that a supervisory authority of abuse, ex-post, is sufficient in order to safeguard the objectives of ensuring the variety of media and pluralism.

Furthermore, the principle that content originally produced with direct or indirect public subsidy should be made available to all distribution platforms on fair and non-discriminatory terms remains as relevant as ever. This principle plays to the long established role of the public service broadcasters (PSBs). The Commission must be mindful of changes of incentives and behaviour in respect of content syndication, especially where that behaviour favours interfaces and platforms created and sponsored by the PSBs.

The PSBs are given significant public subsidy in the form of preferential positioning on platform interfaces, benefiting from 'must carry' status and gifted spectrum. However, such privileges should also entail obligations to distribute content widely on FRAND terms. It is critical that the remit of PSBs' is clearly defined; subject to independent and transparent governance mechanisms; and exposed to the same regulatory scrutiny as any other broadcaster.

Currently, PSBs benefits outweigh their obligations. Increasingly, cable companies are finding it difficult to secure PSBs' content and are required to pay for it, whilst at the same time being under must-carry obligations. This is iniquitous for cable operators and unfairly penalises consumers who choose to subscribe to cable.



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According to art. 31 Universal Service Directive (USD), the imposition as well as the scope (when imposed) of obligations on platform operators are governed by an assessment of the necessity, proportionality and transparency of such measures.

In Cable Europe's view, the "Must Carry" paradigm should be replaced or at least complemented by a "Must Offer" obligation for those broadcasters enjoying access to operators' network resources in accordance with "Must Carry" rules to ensure that content is widely available on all devices and platforms and at zero direct or indirect cost to those same consumers who have subsidised the content. Moreover, the "Must Carry" rights of broadcasters vis á vis operators who have to invest in the improvement and maintenance of their network must also be paired with reasonable obligations for the broadcasters to remunerate operators for the transportation and to take full responsibility for the clearance of all copyrights necessary for the distribution. This is already a possibility enshrined in article 31 USD and Member states should now be obliged to foresee for such appropriate remuneration [See the special German case on this claim for compensation in Annex].

## **Question 19: Who should have the final say whether or not to accept commercial overlays or other novel techniques on screen?**

Content and platform providers should work together to create an appealing offer to the consumers who would have the final say on the screen. There should not be any further regulation on platforms that would increase competitive discrimination with OTT players. Competition on the screen must be allowed.

The present debate is characterized by the broadcasting companies in particular taking a strong stance against overlaying and scaling of images and media content on television screens. In some instances, the demand is that overlaying and/or scaling of the television image should be permitted only where the content provider has authorized this and, additionally, where the user initiates it.

From the cable sector perspective, the issue of "program integrity" seems to enjoy significant levels of protection already today. It should be noted in this context that neither overlaying processes nor scaling on the television screen tamper with the broadcasting signal. Accordingly, the protection of the broadcasting signal is not called into question in any way.

In light of the fast-paced development of the market for hybrid broadcast/broadband offerings, putting any requirements in place above and beyond those governing the protection of the broadcast signal in order to protect the "on-screen presentation" would seem premature and too restrictive. At present, it is impossible to forecast how broadcasting content will be integrated into hybrid platforms, and in which scope. As a tendency, it can be assumed that content providers and platform operators have a shared interest in integrating broadcasters' content on hybrid platforms in order to enhance both the dissemination of the content and the platform's drawing potential. In this context, overlay and scaling offer completely new forms of presenting content. Cable network operators are not interested in calling into question the offerings made by broadcasting companies. On the contrary, the intention is to make use of the



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opportunity to expand the existing offerings and to thus make them more interesting for users.

Overall, the discussion should focus more strongly on the aspect of user autonomy: from the perspective of the cable sector, the television screen belongs to the customer. And the customers are the ones who are buying interactive television sets in order to use the varied offerings available from traditional linear television broadcasts as well as new services, and, as the case may be, to do so in parallel. Accordingly, it must be left to the customers to decide how to use their screen. Regulatory restrictions on the first-screen experience by prohibiting overlays and scaling would unjustifiably restrict such user autonomy.

Any restrictive regulation enacted at the present time would hinder the further development of business models and would have detrimental effects on content providers, platform operators, and therefore on viewers. Competition on the first screen is what allows new providers to enter the media world. Against this backdrop, it seems sensible to generally deem overlaying and scaling possible if and when the measure is authorized by the content provider or is consciously controlled by the end user.

To avoid this situation, the Commission should launch a fact finding exercise to examine whether competition is hurt by any national regulations that would have not been notified according to Directive 83/189/EEC on information in the field of technical standards.

Such a notification has not been followed for the Flemish decree adopted in August which prohibits distribution platforms in Flanders to offer any TV or interactive functionality - e.g. fast forward, set-top box recording - allowing viewers to watch broadcast programs in a non-linear manner without the explicit prior approval from broadcasters as well as the payment for distribution. Should no broadcaster approval be agreed within 6 months, the decree requires that these functionalities should immediately be withdrawn.

In our view, the decree restricts the principle of free movement of services and should be assessed with these general treaty provisions. We also believe the measure - at a minimum - would also require assessment under the information society services transparency directive.



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## **ANNEX: "Claim to compensation in return for transmission obligations" – the German case**

An important aspect for the media regulation of the future, while safeguarding a fair allocation of the value added, should be that the platform operators' Must-Carry obligations are matched with an obligation of content providers to pay reasonable compensation for their content being transmitted.

Cable is, by comparison, the most cost-effective means of disseminating broadcasts in Germany for program suppliers, and reaches the largest number of households in Germany. The cable network providers are bearing the brunt of the distribution work. And there should be no justification whatsoever for the PSBs in Germany to refuse to pay feed-in fees compensation to cable operators while still paying it to satellite and DVB-T. This would have as a consequence to indirectly pass on the distribution costs to cable customers, although these customers are already paying for the distribution of the programs by the broadcasting fees charged for the public broadcasters' program. This is certainly the case since cable operators do not receive any other compensation fee for this comprehensive transport service. The "double remuneration" often cited as a benefit cable network operators would allegedly enjoy, supposedly paid by end customers and program suppliers, does not exist. What is happening instead is a two-sided market approach: consumers are bearing the costs of the subordinate distribution network and the dissemination services for the super-ordinate feed-in network are provided by the broadcasters.

Meanwhile, the PSBs are seeking to consolidate and extend their already far-reaching Must-Carry status. The opportunity given to the legislator to create a compensation obligation where there are Must-Carry obligations has already been established by the European legislation: Article 31 (2) of the Universal Service Directive expressly permits Member States to stipulate, in establishing transmission obligations, that compensation payments are made in favour of the network operators.

Accordingly, it is up to the national legislator to review the reasonableness of this concept and to address the question of anchoring in their respective media laws an entitlement to distribution compensation for the network operators. This applies particularly to those Member States having a high share of regulated channels and little or no involvement of network operators in the program selection.

The concept might be based on a compensation obligation for feeding in Must-Carry programs on the basis of the costs of efficient provision of services. The cable industry believes it is possible to distinguish between Must-Carry programs and "non-Must-Carry" programs. Another model could consist of a modification of the laws governing copyright in order for copyrights fees not to be due for Must-Carry channels. This model in particular would have the benefit of balancing out the existing interests in a transparent and easily understood manner. Finally, the lawmakers could permit new marketing forms to be used by platform operators for broadcasters, by relaxing the marketing prohibition, if and insofar as the broadcaster is not willing to pay feed-in compensation. In this way, the alternative application of a transport model (feed-in compensation) or of a marketing model (no feed-in compensation) might be flanked by the corresponding legal provisions.



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The cable sector would be happy to further discuss these proposals with all parties involved at any time.