

**CONSULTATION on Directive 2010/13/EU on audiovisual media services  
(AVMSD) *A media framework for the 21<sup>st</sup> century***

**Information about the respondent**

Name of the organisation

**The European NGO Alliance for Child Safety Online – eNACSO**  
<http://www.enacso.eu/>

**Transparency Register Id No: 68951559498-60** (Registered since 24/9-2012)

We are answering this questionnaire as an **NGO network representing the interests of children.**

**Our contribution may be published under the name we have indicated above.**

Main country of residence

eNACSO is a European network consisting of **23 NGOs from across Europe.** Our Secretariat is based in Italy.

Countries of activity

All Member States of the European Union

**Date of Response: 29 September 2015**

## **Summary of the eNACSO response**

eNACSO welcomes the consultation on audio-visual media services as an opportunity to bring EU policy and legislation in this area in line with the UN Convention on the Rights of the Child. We believe that EU policy and law plays an important role in protecting and promoting the rights of children to well-being, protection and participation.

eNACSO would like to emphasise that the principle of mutual recognition is crucial to protecting children against harmful content and that national principles on age restrictions and definitions of what constitutes material that impairs the physical, mental or moral development of children must be respected.

eNACSO defines children as persons under the age of 18, as set out in the UN Convention on the Rights of the Child article 1.

Our key considerations expressed in this consultation include:

1. The country of origin principle is no longer acceptable. Effectively this means the country with the most liberal regime determines policy for the whole of the remainder of the EU. There are two potential possibilities to address this shortcoming:
  - a) establish the principle that all publishers of non-linear content on the web should ensure that they comply with the laws and regulations of each country into which they publish their material (and with improvements in geo-detection systems that should be a relatively trivial matter) **or**
  - b) specify an EU-wide definition, which defines more closely what type of content should normally only be available on the web following the completion of an age verification process.
2. The current references within the AVMS to material that might “seriously impair the physical, mental or moral development of minors” are wholly inadequate and will only catch the most egregious material. The reference needs to be accompanied by stricter definitions of what constitutes such material. The principle of mutual recognition is crucial since there are substantial divergences between Member States of what is defined as harmful content.
3. TV sets will increasingly become internet enabled devices, yet it is still highly likely they will continue to occupy a prominent or central part in a large proportion of family homes. In addition more and more traditional linear publishers are becoming part of the non-linear world. Thus it will become increasingly difficult to maintain the distinction between the regulatory regimes applying to linear and non-linear content when both can be accessed with equal facility from the same devices.

## QUESTIONS

### 1. *Ensuring a level playing field*

#### Services to which the AVMSD applies

##### **SET OF QUESTIONS 1.1**

**Are the provisions on the services to which the Directive applies (television broadcasting and on-demand services) still relevant<sup>1</sup>, effective<sup>2</sup> and fair<sup>3</sup>?**

Relevant?  YES

Effective?  NO

Fair?  NO

##### COMMENTS:

The “country of origins principle” is creating unacceptable anomalies. The relevant test should reference the “country of consumption”.

Given the sophisticated way in which online geo-detection now works it ought to be a relatively trivial matter for online publishers to be able to comply with national rules. If they do not wish to do so they have the option not to publish at all within that jurisdiction but they ought not to have an option to subvert a country’s attempt to give expression to its own national standards or mores.

In effect the current country of origins principle means the child protection standard to be applied to online on-demand content in all 28 Member States can be determined by the most liberal or least restrictive regime. That cannot be right.

An example that illustrates this point is the web site “Killergram”. The site is domiciled in and published from Holland but very clearly targeted at the UK. It even sports a Union Jack (the UK’s national flag) on its home page. Much of the content on the site would struggle to get an R18 certificate in the UK and therefore, had the site been domiciled in or published from the UK, it would have been covered by the ATVOD regime. Inter alia that means the site would have to operate a robust age verification system.

When the matter was raised with NICAM (the appropriate Dutch regulator) they simply said they could find “no indications that the content on Killergram might seriously impair the physical, mental or moral development of minors”. This means that according to the Dutch Media Act, NICAM considers the warning page to be sufficient in terms of the protection of minors and therefore it does not intend to take any further action in relation to the site.

We have no complaints about a Dutch regulator taking a view about what is appropriate for Dutch children but a Dutch regulator ought not to be able to decide, in effect, that the same standard ought to be applied to children in another country.

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<sup>1</sup> Relevance looks at the relationship between the needs and problems in society and the objectives of the intervention.

<sup>2</sup> Effectiveness analysis considers how successful EU action has been in achieving or progressing towards its objectives.

<sup>3</sup> How fairly are the different effects distributed across the different stakeholders?

## Geographical scope of AVMSD

### **SET OF QUESTIONS 1.2**

**Are the provisions on the geographical scope of the Directive still relevant, effective and fair?**

COMMENTS:

Our view is anyone broadcasting to or publishing within the EU should be bound by its rules, irrespective of where they are their domiciled. Mutatis mutandis the same should apply where there is scope for differences at national level (see answer to 1.2 above) i.e. the rules established within the jurisdiction of the country of consumption should prevail.

Also see summary and comments below

**Are you aware of issues (e.g. related to consumer protection problems or competitive disadvantage) caused by the current geographical scope of application of the AVMSD?**

N/A

## **2. Providing for an optimal level of consumer protection**

### **SET OF QUESTIONS 2.1**

**Are the current rules on commercial communications still relevant, effective and fair?**

Relevant?  YES

Effective?  NO

Fair?  NO

See summary and comments below

## **3. User protection and prohibition of hate speech and discrimination**

### **General viewers' protection under the AVMSD**

The AVMSD lays down a number of rules aimed at protecting viewers/users, minors, people with disabilities, prohibiting hate speech and discrimination.

### **SET OF QUESTIONS 3.1**

**Is the overall level of protection afforded by the AVMSD still relevant, effective and fair?**

Relevant?  YES

Effective?  NO

Fair?  NO OPINION

See summary and comments below

**SET OF QUESTIONS 3.2**

**In relation to the protection of minors, is the distinction between broadcasting and on-demand content provision still relevant, effective and fair?**

Relevant?  YES

Effective?  NO

Fair?  NO

See comments in previous sections, the summary and below

**Has the AVMSD been effective in protecting children from seeing/hearing content that may harm them?**

NO

See comments in previous sections, the summary and below

**What are the costs related to implementing such requirements?**

N/A

**What are the benefits related to implementing such requirements?**

The obvious benefit is that children's rights to well-being, health, education, to be protected as set out in the UN Convention on the Rights of the Child, ratified by all EU Member States, are realised.

See comments in previous sections, the summary and below

**Are you aware of problems regarding the AVMSD's rules related to protection of minors?**

YES

COMMENTS: See comments in previous sections, the summary and below

***Preferred policy option:***

b)  *Complementing the current AVMSD provisions via self- and co-regulation*

The status quo would be complemented with self-/co-regulatory measures and other actions (media literacy, awareness-raising).

c)  *Introducing further harmonisation*

This could include, for example, more harmonisation of technical requirements, coordination and certification of technical protection measures. Other possibilities could be the coordination of labelling

and classification systems or common definitions of key concepts such as minors, pornography, gratuitous violence, impairing and seriously impairing media content.

**PLEASE EXPLAIN YOUR CHOICE:**

As more and more broadcast material that was once entirely linear starts to be delivered over the internet it is highly likely that the historic distinction between linear and non-linear will cease to have any real meaning or practical utility in family homes. To put that slightly differently: large, high definition TV sets already are internet enabled and this is very likely to continue. Yet such “TV sets” will continue to occupy a central place in or be a prominent part of the family home, even allowing for the fact that almost every household member will also have other means of accessing the same content.

Thus it will become more and more difficult to explain why, on the same object, - the TV - two different standards are applied to material which is just as readily accessible by pressing only a couple of buttons and which, in terms of production values and overall appearance may otherwise appear to be entirely indistinguishable, the one from the other.

If this new situation requires adjustments to be made to the current regulatory arrangements then we should make them and not allow ourselves to be prisoners of the vested or other interest of the existing regulatory arrangements and institutions.

Moreover, this trajectory will be reinforced and amplified by the growth in products such as TIVO boxes and other time- shifting services or facilities i.e. over reliance on historic approaches to the regulation of linear content will rapidly become irrelevant to and out of sync with “how life is actually lived”.

We appreciate the radical implications of our analysis but feel that we must nevertheless be clear on this point.

The current test which is applied i.e. that the material should only normally be put behind an age verification barrier if it could be said to “seriously impair the physical, mental or moral development of minors” is wholly inadequate and will only catch the most egregious material. A more general test of harm should be introduced.

Earlier we indicated our support for abandoning the country of origin principle, in favour of insisting that ways be found to make local standards apply. The principle of mutual recognition is crucial in relation to protecting children from harmful content.

If that proves too difficult, an alternative, at least in relation to sexually explicit and other adult content accessible via the worldwide web would be to establish a common definition of what “might seriously impair” means. We acknowledge that this might be just a slightly different way of achieving the same end and may attract opposition from countries such as Holland which have a more liberal tradition.

Either way our view is any and all content which “might seriously impair” the physical, mental or moral development of minors should ordinarily only be accessible by any viewer once they have successfully completed an age verification process.