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ACCESS TO INFORMATION IN A CONVERGED MEDIA ENVIRONMENT

EBU Contribution
to the Council of Europe Conference of Ministers
Responsible for Media and Information Society
(Belgrade, 7 and 8 November 2013)

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The European Broadcasting Union (EBU) is the world's foremost alliance of public service media organisations, with Members in 56 countries in Europe and beyond. The EBU's mission is to defend the interests of public service media and to promote their indispensable contribution to modern society. It is the point of reference for industry knowledge and expertise. The EBU operates Eurovision, the media industry's premier distributor and producer of top quality live sport and news, as well as entertainment, culture and music content. The Eurovision satellite and fibre network is the largest and most reliable in the world directly plugged in to public service media everywhere.

The EBU is grateful for the opportunity to submit a contribution to the Ministerial Conference, in the context of the ongoing debate on media and audiovisual convergence.¹ By doing so, the EBU wants to draw attention to the evolving conditions for access to information in a converged media environment, in particular as regards access to services and programmes which are of particular value for citizens and society, and which are essential for democracy.

I. Overview and main conclusions

1. *Convergence brings tremendous opportunities to audiences and the audiovisual industry.* Audiences' capacity to choose when and where to enjoy a huge range of content is significantly enhanced. Naturally, audiences need to be equipped with skills to use this range of platforms: the promotion of media literacy should therefore be a part of audiovisual media convergence policies. For the audiovisual industry, the numerous opportunities created by convergence open doors for new services and innovative ways of reaching audiences.

¹ It is based on the EBU Response of 10 September 2013 to the European Commission Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values". The full EBU response is available at: <http://www.eurovision.com/cms/en/policies/initiatives/media-convergence>

2. At the same time, *convergence generates some critical challenges from a public policy perspective*. Access to audiovisual media is a complex landscape, influenced by a growing range of mostly global players. Pursuing public interest objectives in this landscape requires a proper understanding of the multi-platform environment and the role of digital intermediaries. The existing regulatory framework has supported a vibrant industry, but faces longer-term challenges in this rapidly changing environment. More generally, the speed and scale at which convergence is advancing is impressive and seems likely to further accelerate. All of which makes the present debate all the more timely and important.
3. The significant economic potential and anticipated impact of convergence are driving a range of changes in the industry that make it particularly vital and timely to give consideration to the broader political perspective and context, including the fundamental role of the media for a democratic society. *With ever-greater and faster access to information for citizens, the role of the media in serving the democratic, cultural and social needs of each society is more important than ever. The primary goals and values of the current audiovisual regulatory framework (protection of consumers and vulnerable groups, promotion of cultural diversity and media pluralism etc.) remain just as relevant.* But the practical implications of a situation where many players – who, in contrast to European audiovisual media service providers, are global and operating in an often unregulated environment – obviously need to be examined further.
4. So far, *public service media (PSM) organisations have been instrumental in developing digital technology and driving its adoption. They continue to play an essential role in helping the public, as well as the industry, to actually benefit from the opportunities created by convergence.* This instrumental role has developed in many ways, as demonstrated below:

Digital innovation: the EBU and its members have been early drivers of digital technologies, standards and innovation (DVB, DAB, HDTV, UHDTV, TPEG, peer-to-peer technology for the Internet etc.). The promotion of digital TV and radio standards opened up opportunities for multi-channel delivery and increased the wealth and diversity of content offers to the benefit of audiences.

PSM embrace the Internet: while linear consumption on TV and radio devices remains dominant, many PSM are also trusted brands in the online environment. Over the past decade, they have become an indispensable point of reference through a range of online services: from catch-up TV, radio podcasting, and live streaming of their programmes through their webportals, to making available services through smart phone and tablet applications.

Hybrid systems: PSM have been at the forefront of the development of hybrid TV systems such as HbbTV, YouView, MHEG-5 and MHP, which offer audiences a whole range of options for accessing audiovisual content which goes far beyond traditional linear TV. PSM have also been

instrumental in the development of technical standards for hybrid radio such as RadioDNS.

Sustained investment in original content: in the era of convergence, PSM remain committed to high and sustained levels of investment in high-quality and original European audiovisual productions. PSM in the big five markets (FR, GE, UK, SP and IT) currently invest over EUR 10 billion in content every year and on average 2/3 of PSM programming consists of own or commissioned works. PSM are also a guarantee for reinvestment in original content. Thus, they support the development of new content by creative talent in Europe and further develop innovative ways of delivering that content to the public.

Media literacy and empowerment: PSM's crucial role lies in helping people build the necessary skills and trust to become informed and active citizens in a multi-platform environment. They provide trusted spaces where people can confidently access media platforms and can critically engage with media. Many PSM also create safe, creative online digital environments for children and young adults and help them understand the risks associated with online engagement (Hetklokhuis.nl, ketnet.be, cbeebies, Planet Schule etc.).²

5. Currently, Europe boasts a vibrant media industry. *The European dual system of public and private broadcasting, often called the European audiovisual model, has brought about a culturally diverse offer of content and services, which is unparalleled elsewhere in the world.* As such, digitization and technical convergence alone are of limited value to citizens. But high quality content and services – which remain primordial in the digital world as much as in the analogue world – can now be accessed with greater flexibility and convenience. Naturally, such services need to be creative and innovative in order to continue appealing to the audience in a more competitive media environment. Exponential growth of audiovisual content quantity on the Internet should not be mistaken for a growth in terms of quality, choice and diversity. *Real choice for citizens can only be ensured by conditions that enable a diverse offer of high quality content.* Thought must be given to ensuring that technological innovation serves social and cultural goals and not merely economic profitability.
6. *Clearly, sustained investment in original content must be a key policy priority. But it will be meaningless without additional steps to ensure wide and easy access to such content for all audiences, across the growing range of distribution platforms.* Reaping the full benefits of convergence also implies that the best possible combination of broadcast and broadband technologies is made. Specific incentives therefore need to be in place to promote the most efficient use of the different relevant technologies. In a converging world with an increasing number of digital intermediaries, the EBU believes that the digital terrestrial platform continues to play a crucial

² http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Publication%20Library/EBU-Viewpoint-Media-Lit_EN.pdf (EBU viewpoint on media literacy)

role. It delivers universal, free-to-air access to a wide range of channels. It significantly contributes to platform competition and user choice even in countries where other distribution platforms are predominant. It will continue to be in a unique position to deliver these benefits in the foreseeable future, allowing innovation in response to consumer preferences and technical development. The Digital Terrestrial Television (DTT) platform has for many years successfully delivered high quality free-to-air content; bringing social, cultural and economic benefits to four out of ten households in the EU. *Tried and trusted terrestrial broadcasting platforms play a role that will remain necessary to complete and complement offers delivered through broadband technology.*

7. We also recognize that *the Internet plays an ever more important complementary role to TV and radio in disseminating news, information and audiovisual content, creating a vital need for effective rules on net neutrality.* In a converged media environment, most non-linear content in hybrid offers is likely to be distributed over the open Internet. By using specific traffic management tools, network operators providing Internet connectivity can act as gatekeepers for data traffic flows to end-users. This entails the risk that users may no longer have full access to a plurality of information and the quality content of their choice. *The EBU supports a strong regulatory framework for net neutrality, both at EU and national level, reflecting the fact that the openness and non-discriminatory features of the Internet are key drivers for innovation, economic efficiency and safeguarding media freedom and pluralism.* As a general principle, providers of electronic communications to the public should not be allowed to apply any traffic management practices in the open Internet which would block, throttle or degrade any content services. Non-discrimination is important to prevent providers from privileging their own content services or applications, or those for which they have concluded commercial arrangements. In addition, it is important to ensure that the development of managed services/networks (such as IPTV) by providers is not detrimental to the open Internet.
8. Convergence is adding significant complexity to the access value chain. It puts Internet companies, device manufacturers and other platform operators in a key position to decide whether and to what extent media services are accessible to the public. *Reaching all audiences with diverse content lies at the heart of the PSM model: we therefore strongly believe in content distribution models which enable as many citizens as possible to actually access a plurality of media content.* Universal access to networks, devices and other platforms should therefore be sufficiently guaranteed. As digital intermediaries are often large and powerful organisations which operate at a multinational if not global level, the need for more coordinated

policy approaches securing universal and easy access for citizens increases. In this respect, *public policy safeguards for transparency, monitoring access practices and effective "backstop" powers for regulatory authorities where platform practices become a threat to plurality will provide citizens with the necessary trust to use and engage with these platforms.*

9. It is in the citizens' interest to have access to a broad range of media services, in particular those deemed important for the democratic, cultural and social needs of European societies. In a converged media environment, there are further opportunities to foster fundamental rights and democratic values. However, if PSM are to fulfil this role, they must be visible. Currently, national must carry, due prominence or "must-be-found" rules guarantee the visibility of services of public value on the main TV (and radio) platforms and help to make sure that all citizens can actually consume media content of public value. *However, convergence creates challenges for existing prominence regimes, which could fail to fully reach the public policy objectives for which they were originally designed. The EBU strongly advocates in favour of an appropriate prominence approach as a key component of any policy framework relating to the access to platforms.*
10. Finally, broadcasters' access to platforms may also be hampered by copyright issues. *The complex framework of rights clearance for broadcasters' online services in particular needs to be simplified to offer consumers easy access to such services on Internet-connected devices.* Furthermore there is a need for technologically neutral regulation, especially with regard to the redistribution of broadcasters' services on the different platforms. Increasing the amount of content available legally also helps in the fight against piracy.
11. *In light of these arguments, the EBU would like to recommend the following objectives in developing appropriate policy approaches on convergence:*
 - *Create the right conditions for citizens to reap the full benefits of convergence;*
 - *Ensure that current goals and values underpinning media policies, such as media freedom and pluralism, cultural diversity, accessibility, protection of minors and of vulnerable groups and data protection are adequately fostered and safeguarded;*
 - *Maintain and support high levels of sustained investment in original content;*
 - *Facilitate and support the development and strengthening of platforms for media distribution at national and European level;*

- *Streamline the copyright clearance framework for EU-operated services so that multiplatform access to programmes and related online services offered by EU broadcasters is facilitated;*
- *Secure efficient use of both broadband and broadcast technology;*
- *With regard to the terrestrial broadcasting platform:*
 - *Ensure that it continues to be as strong, appealing, relevant and competitive as it is today and provide a strong signal at EU level that sufficient UHF spectrum will be made available for long-term broadcasting use;*
 - *Ensure that any changes to the use of broadcasting UHF spectrum do not create any disadvantages for audiences nor any additional costs for broadcasters;*
- *Ensure universal and easy access across platforms to a plurality of information sources and diverse content. This particularly requires action in the following fields:*
 - *Strengthening net neutrality principles regarding the open Internet through regulatory safeguards, both at EU and national level and ensuring their effective implementation;*
 - *Leaving room for Member States to apply must-carry rules on managed networks for linear and non-linear audiovisual media services of general interest;*
 - *Providing safeguards for access to content platforms and gateways, in the interest of media freedom and pluralism, in addition to rules on access to technical facilities;*
 - *Leaving room for Member States to ensure the findability of programmes and services which are of particular value for society;*
 - *Ensuring sufficient levels of transparency for consumers regarding the practices of digital intermediaries, and proactive monitoring and effective "backstop" powers for regulatory authorities where platform practices become a threat to plurality;*
- *Protect signal and content integrity against commercial overlays and other parasitic business models across platforms to safeguard the European audiovisual production value chain;*
- *Ensure that third parties are prevented from transmitting broadcasters' content or signal without their permission via effective IP protection.*

II. Specific issues

1. Sustaining a thriving and diverse European audiovisual media landscape

The European dual system of public and private broadcasting has successfully contributed to maintaining a thriving European audiovisual industry with high take-up and demand. The competition between public and private media organisations has led to a healthy diversification of productions, offering a range of content catering for the variety of audiences' interests. And the dual system contributes to plurality in news and current affairs as well as cultural diversity.

The EU audiovisual market: key figures

- The EU audiovisual market represents 20% of the world audiovisual market in 2011 and has a value of EUR 131 billion.³
- The vast majority of the 121 000 companies⁴ composing the EU audiovisual sector are independent from extra-EU conglomerates.
- EU companies, whether public or private, and operating either on a pan-European, national, regional or local level, make up a pluralistic and diverse EU TV landscape
 - They produced almost 1 300 films in 2012,⁵
 - They provided more than 8 300 TV channels and more than 2 700 on-demand audiovisual services by mid-2013.⁶

Specific public policy interventions both at national level and EU level support the EU audiovisual media industry and allow the audiovisual media sector to flourish (some ensure competition, whilst others aim at securing important public values for Europe, such as media pluralism and cultural diversity).

Characteristics of the European audiovisual industry

The European audiovisual industry is marked by a number of characteristics: language and cultural specificities; the preferences of national markets and the limited availability of financial sources. In Europe, a variety of actors, ranging from

³ European Audiovisual Observatory, Yearbook 2012.

⁴ European Audiovisual Observatory, Yearbook 2012, based on Eurostat data.

⁵ European Audiovisual Observatory, Focus 2013.

⁶ European Audiovisual Observatory, Mavise Database.

small independent producers to large groups, produce high quality media content and ensure the preservation of cultural and linguistic diversity across Europe.

Audiovisual works encompass particular national values, identity and meanings that very often go beyond their strictly commercial value. A number of specific factors need to be considered, such as audiences' affinity with media content closely linked to local language and culture; the regulatory and support mechanisms in place to serve public interest; the broad diversity of players active in the industry; the need to ensure specific productions or content services aiming to benefit minorities or people with special needs/disabilities, etc.

In this light, the production of culturally diverse content is a European asset. European audiences appreciate this, as shown by the popularity of original locally produced content. There is a need to preserve this European asset. It generates social and cultural benefits that go beyond the audiovisual industry. Support for sustained investment will contribute to spur audiences' interest in diversified content.

Public Service Media: key contributors to European cultural diversity

Public Service Media (PSM) play an indispensable role in the European audiovisual landscape, as they largely invest (and reinvest) in locally produced, high quality content, thus stimulating national media industries. PSM therefore contribute to economic and industrial growth and at the same time promote diversity which is a characterising element of modern societies.

Cooperation projects and co-productions between PSM in the wider Europe and neighbouring countries, including the Mediterranean Region, give a crucial perspective on today's multi-cultural societies, fostering social understanding and integration.

PSM organisations have a particularly essential role as far as the creation and distribution of diverse European content is concerned, due to their strong commitment to investment in quality original content. Some figures reflecting this role are highlighted in the frame below:

PSM contribution to growth in the European audiovisual industry:

- PSM broadcast 275 national and international TV channels in the EU, more than 180 national and international radio stations, hundreds of regional and local services⁷ and already *more than 400 on demand audiovisual services* in 2013,⁸ that are recognized for the quality of their programming and their fulfilment of public service values.
- In an era of convergence and multi-platform distribution, PSM services continue to be trusted and popular among a wide share of European audiences. In the EU, TV channels broadcast by PSM gathered in 2012 *an average 27.8%⁹ viewing share*. *In general, radio also remains very popular. In 2012, it reached 80% of the population in an average week in many European countries and people spent more than 3 hours listening to radio every day (192 minutes)*. On average, more than four out of ten radio listeners listened to PSM radio in these countries.¹⁰
- PSM contribute to the EU audiovisual value chain through *major investment in content*. In the UK, PSM overall network spend amounted to EUR 3.4 billion in 2012.¹¹ In Germany, ARD and ZDF invested EUR 3.8 billion in 2011.¹²
- More so than other audiovisual service providers, PSM in particular invest in the creation of quality original content. *In the "big 5" markets (France, Germany, Italy, Spain and the UK), 71% of PSM programming spend was invested in original content.*¹³
- Currently, European fiction represents 37% of total fiction programmes (feature films, TV films, short films, series and animation) broadcast by all European TV channels, a figure that rises to more than 60% when considering PSM alone.¹⁴

Recognising the value of quality in European content is all the more crucial at a time when changing distribution models and consumption patterns highlight the importance of quality content as a the primary driver of the audiovisual market.

Helping the European audiovisual sector face US competitive advantages

The US 'success formula' is well-known by now. US companies have managed to successfully establish a competitive advantage in relevant markets outside the US by exploiting the presence of economies of scale. They are backed by a large

⁷ EBU, Media Intelligence Service (MIS).

⁸ Figures from the European Audiovisual Observatory.

⁹ EBU, Media Intelligence Service (MIS) based on data from Eurodata TV Worldwide.

¹⁰ EBU, Media Intelligence Service (MIS) based on data from 18 Members.

¹¹ OFCOM, Public Service Broadcasting Annual Report 2013.

¹² EBU Media Intelligence Service (MIS) based on Members' data.

¹³ Oliver & Ohlbaum Associates Ltd., PSB investment in the creative industries in Europe, 2010.

¹⁴ EBU Media Intelligence Service (MIS) based on data from European Audiovisual Observatory (referring to data provided by ROVI).

domestic market (with one prevailing language), characterised by a specific market structure (presence of large integrated companies). Well organized and powerful industrial clusters foster innovation as well as research and development, and have become hubs for attracting talent.

Meanwhile, the wide-spread use of English around the world facilitates the international distribution of US films and fiction (together with an effective marketing machine, in which big budgets are invested).

Moreover, the EU and US approaches to data protection and privacy are quite different. While data protection is recognised as a fundamental human right in Europe and as such, benefits from a strict regulatory framework, the US approach is more focused on commercial purposes and consumer rights. In practice, differences between US and EU data protection rules allow US companies to collect *user data* relating to the use of programmes and services by European consumers, offering them a real competitive advantage. It is a general feature of the online economy that the collection and control of usage data confers an enormous competitive advantage. This is not only relevant in the EU/US context and for the collection of data from Internet searches. It also affects the relationship between broadcasters and distributors/intermediaries. Broadcasters have a legitimate interest in not being excluded from access to usage data regarding their own services that may be collected by third parties.

One might also argue that the more flexible regime of ownership of rights and the remuneration for use of audiovisual works under US law has served to reinforce this competitive advantage.

The EU's trade deficit in this area is clear: in 2010, the market share of European films in the US was 6.5%. In 2011, the average market share for US films in EU countries was 61.4%.¹⁵ The EU is the primary export market for US films, whereas the majority of EU Member States primarily export within the EU.

Furthermore, EU-US negotiations on the Transatlantic Trade and Investment Partnership (TTIP) should not diminish the scope for regulatory and support mechanisms designed to promote investments in original content and secure public value in the EU audiovisual market. It is widely understood that open trade in audiovisual services between the EU and US would expose the EU audiovisual sector to the overwhelming competitive advantages of its US counterpart, and further accentuate the existing trade imbalance.

¹⁵ [Trade in commercial services, Key developments in 2011: a snapshot, WTO](#)

Distribution of audiovisual works and access issues

The way in which audiences enjoy content is changing rapidly. Ensuring wide access to the quality content created by PSM through audiences' preferred means is the key to being competitive. The full value of the content produced by PSM will only be realized if European PSM can stay fully apace with all new forms of access on a growing range of devices.

In the current rapidly-evolving and converging environment, changes are needed to ensure that quality European content enjoys a level playing field with content from US or other international players in the European market. Large US-based companies have controlled international cinema distribution markets for decades: this has given them a competitive advantage and contributed to the successful export of their audiovisual works. With the advent of convergence, they may be able to exploit economies of scale to an even wider extent than before. So, in addition to supporting investment in content, another key priority is to support the development and strengthening of platforms for media distribution both at the national and European level.

The EBU would like to point to another specific risk linked to the fact that non-European companies control content platforms. It may become harder for European audiences to access European content and could also impact the diversity of content and news which is produced. As convergence progresses, the need for specific measures becomes ever greater in order to secure wide, easy and universal access for European audiences.

New audiovisual services in converged markets

The regulatory framework should enable public and private partnerships, allowing European companies to compete on a level playing field with their US competitors. EU and national competition rules in particular should be applied accordingly. There are a few examples of such successful cooperation: the YouView joint venture in the UK and the test application Stievie for iPhone and iPad (live and catch-up TV covering the past 36 hours) in Belgium (Flanders).

However, there are concerns that other ventures that would have benefited European consumer interests have been found to violate EU and/or national competition law, leaving the field open to US conglomerates to effectively take over the market. A combination of "first-mover advantage" and global resources quickly create overwhelming barriers to entry for EU market players in this sector, as the market for global search engines has already clearly demonstrated.

Moreover, undue restrictions imposed on PSM with respect to their presence on, and dedicated services for different platforms (including the mobile platform) can stifle future innovation and competition between broadcasters (intra EU and

EU/US) and between platform operators. It is important to note that *ex ante* public value tests for significant new PSM services under the State aid rules must be applied and interpreted in an appropriate and proportionate way, in order to prevent an overall chilling effect on broadcasting innovation in the EU. If such *ex ante* tests are too expensive and burdensome, PSM will simply not launch any new public interest services and the market and consumers will suffer.

2. Potential obstacles to access to information on new platforms

Citizens can now access content in new and more convenient ways and there is a huge potential for an ever more diverse and plural offer. However, the economic players controlling major platforms could become gatekeepers between content providers and the public and therefore restrict or distort access to media content. In the EBU's view, the existence of these risks call for a proper reflection on how to improve policy and regulatory safeguards relating to access to platforms.

The fundamental contribution to society of the media, in particular PSM, lies in the way it empowers citizens by helping them form critical opinions, make informed choices and engage in the public domain. Sustaining wide, easy and non-discriminatory access for citizens to a plurality of media, not in the least PSM, should be a major preoccupation driving any future policy approach responding to the challenges of convergence both at European and at national level.

PSM organisations embrace convergence and make engaging digital content and services available on a multitude of platforms. Over the past decade, PSM have strengthened their presence online and through other channels: from catch-up video services and live streaming of their programmes through their webportals, to making available services through smart phone applications and tablets. They are establishing new ways of connecting with their audiences through their active involvement in the development of hybrid systems (HbbTV, MHP, YouView etc.) and actual content provision through connected devices. Cooperation between media organisations and platforms proves to be of ever increasing importance to continue bringing diverse and quality content in a compelling way to the citizen.

The EBU would like to highlight several key issues which emerge from the debate about access to platforms and which may require (some form of) public intervention in order to ensure that the public interest is properly preserved. Before pointing to a number of shortcomings in current legislation and presenting possible regulatory solutions, it is necessary at first hand to clarify the potential role of "platforms" and identify the risks impacting citizens' access to a diverse and plural offer of media content.

Platform operators and digital intermediaries as potential gatekeepers

We understand the notion of "platforms" in a broad sense, covering not only technical networks used for the transmission of audiovisual content but also additional facilities for making audiovisual content available, which may include elements of software (e.g. applications) and hardware (e.g. connected TV sets and other connected devices), navigation systems (e.g. EPGs) and aggregated content offers.¹⁶

Currently, there is limited data in the public domain about the behaviour of intermediary actors, their role as gatekeepers and the repercussions they may have on the plurality of media content and the wider public interest.

A recent study by the Reuters institute refers to these actors as "*digital intermediaries*" and identified four different types: news aggregators, search engines, social media and digital stores.¹⁷ Whereas the notion of platform (or intermediary) indicates that they adopt a neutral approach to the content they carry, they might in fact have a substantial impact on control access. Their decisions not only directly impact the availability of content (becoming real bottlenecks), but can also affect the definition of the public/political agenda (due to their editorial capacity) as well as the economy of content provision.

This new gatekeeper position assumed by platform operators entails a specific risk, as media organisations might have difficulties accessing the former's distribution/commercialization platforms. Even if basic access is ensured, the prominence of certain media organisations could be very low in favour of services that have reached better agreements with the platform operator or better fit their business models.

It is also necessary to have a look at practices by platform operators concerning the collection of usage data. Such practices may not only raise questions about the protection of personal data, but also about the sharing of usage data to the benefit of all stakeholders, allowing them to better serve their customers and to compete on an equal footing. For example, broadcasters should be informed and, upon request, be given access to any data collected by intermediaries relating to the use of their programmes and services.

¹⁶ Given that decisions made at the level of the media device or the Internet connectivity can impact citizens' ability to access content and represent an important bottleneck for the distribution of media content, it is necessary to include manufacturers of connected devices and Internet connectivity providers in the scope of any assessment of the obstacles to access to platforms.

¹⁷ Foster, R. (2012). *News Plurality in a Digital World*. Reuters Institute for the Study of Journalism, University of Oxford.

Easy and wide access to media of public value: a precondition for media freedom and pluralism

In the digital and multiplatform environment, access to platforms is becoming a precondition for media freedom and pluralism, essential for the exercise of freedom of expression and information by citizens.

Consumers and media service providers need wide and easy access to platforms (including portals, connected devices and user interfaces). Digital intermediaries and platform operators may condition the access to content and services and may pose a threat to access in both directions, from the user to the content provider and vice versa. In many cases, their impact does not only result from the control of an essential facility but from their potential dominant position in adjacent markets or other parts of the value chain. This is a global trend.

a) Universal access to a plurality of media services

Today, the digital terrestrial platform provides universal, free-to-air access to media services that seek to inform, educate and entertain European citizens and contribute significantly to media pluralism. By providing citizens direct and free access to these services, the DTT platform helps to improve market competition and consumer choice even in those countries where other broadcast distribution platforms are dominant. Moreover, for nearly half of European viewers terrestrial networks are still the primary means of receiving TV services. These social, economic and cultural benefits cannot be replicated by any other distribution platform in the foreseeable future. While the terrestrial broadcasting platform is an optimal means of delivery of linear content to large screens in a stationary environment, it could serve mobile devices such as smart phones and tablets as well, if they had radio and TV tuners integrated like in some other countries (e.g. Korea, Japan).

Reaching all audiences with diverse content lies at the heart of PSM's mission. This is why the EBU strongly believes in content distribution models which enable as many citizens as possible to actually access a plurality of media content. Thus, it is necessary that universal access to networks, devices and other platforms is sufficiently guaranteed. As digital intermediaries are often large and powerful organisations which operate at a multinational if not global level, the need for more coordinated policy approaches securing universal and easy access for citizens' increases.

Furthermore, the EBU believes that it is of key importance that operators providing access to platforms (in the broad sense) guarantee full transparency to citizens on how access to content is determined. It will not only provide citizens with the necessary trust to use and engage with these platforms but will also help

them to establish whether and to what extent certain practices conditioning access could pose a threat to plurality.

Thus, any policy framework securing universal access and plurality of information should not only secure effective competition and net neutrality principles but also contain concrete safeguards for access to media services on all relevant platforms. Such a framework should also include sufficient levels of transparency and monitoring of access practices and provide effective "backstop" powers for regulatory authorities where platform practices become a threat to plurality.¹⁸

b) Findability of media services of public value

Prominence rules are specifically designed to ensure that as many citizens as possible can easily access media services of public value. Currently, national prominence or "must-be-found" rules guarantee the visibility of services of public value on the main TV (and radio) platforms¹⁹ and help to make sure that many citizens can actually consume media content of public value.

Given their increasingly important roles in selecting and guiding towards content and information, digital intermediaries, through their decisions and the design of their platforms, impact the "findability" of content with a public value or with a particular function for democratic society. Thus, convergence raises a challenge where existing prominence regimes could fail to fully reach the public policy objectives for which they were originally designed.

Whereas a sustained commitment by PSM to drive new technology definitely helps to secure a better position for public value content on many access platforms, the EBU strongly advocates that the development of an appropriate approach to prominence should also be a key component of any policy framework relating to the access to platforms.

It is also true that the use of open standards such as HbbTV - provided that these are supported by networks and devices - may ease access problems or make them less likely to occur. Despite this link, it is important to distinguish access and standardization/interoperability as separate issues.

3. Regulatory issues regarding access to information on new platforms

The current regulatory situation is characterised by the existence of certain *ex ante* safeguards in the form of net neutrality principles (at least in a rudimentary form) for the open Internet and in the form of access and must-carry rules for managed

¹⁸ See also Foster, R. (2012). *News Plurality in a Digital World*. Reuters Institute for the Study of Journalism, University of Oxford.

¹⁹ The existing scheme in the UK covers public service channels. See Section 310 (1) and (2) of the Communications Act 2003.

networks (e.g. cable TV and IPTV networks). However there is a striking absence of concrete safeguards as regards access to content platforms (see below for a possible definition of this term) and the findability of content on user interfaces.

An overview of the current regulatory situation is given in *Table 1*.

Table 1: Regulatory aspects of access issues

Access issues may arise with regard to:	... have competition aspects, addressed by:	... have media freedom and pluralism aspects, addressed by:
Open Internet	Net neutrality principles	
Managed networks, e.g. cable TV and IPTV networks	Access rules (EU Access Directive and national telecom law)	Must-carry rules (EU Universal Service Directive and national media law)
Content platforms, digital intermediaries	General competition law	No regulation (though German rules in RfStV on access to user interfaces on platforms)
Findability of content on user interfaces, EPGs, navigation systems, portals, etc.	General competition law	No regulation (though UK rules on appropriate prominence of public service channels on EPGs)

The above table reflects the EBU's understanding of the current legal situation.

There are strong indications that *ex ante* safeguards are necessary with regard to infrastructure and content gateways. This is even more important when considering market concentration and vertical integration, where technical and content elements are combined, or where companies provide content platforms and at the same time content/media services and/or technical infrastructure (networks or devices).

As highlighted above, access to platforms is becoming a precondition for media freedom and pluralism in the digital and multiplatform environment, and essential for citizens' exercise of their freedom of expression and information. Because of the close link between access to platforms and media freedom and pluralism, or more generally freedom of expression and information, merely addressing access through competition rules is not adequate.

As media freedom and pluralism hold a prominent position in the European constitutional framework, access to content platforms/gateways must not merely or primarily be considered from a competition law perspective.

Competition rules - whether general or sectoral, as in the case of the EU telecom directives - have a purpose which is different from media law: their objective is to prevent significant distortions of competition in the market place. They prevent single undertakings from abusing of a dominant market position, and acquisitions or mergers of separate companies from creating a dominant position. However they do not prevent the organic growth of single companies that, with or without vertical integration, are effectively able to act as gatekeepers.

Moreover, general competition rules apply only apply *ex post*, and their application in emerging markets is often characterised by long procedures and uncertain results. Applying general competition rules to the converging platform market may in certain cases help to open up the market, but falls short of providing any guarantees for a functioning media system which fulfils its democratic, social and cultural role.

The need for *ex ante* regulatory safeguards

The EBU sees a case for public intervention and for strengthened and enlarged *ex ante* safeguards in the following areas:

a) Ensuring open Internet with effective rules on net neutrality

There is an increasing need for effective rules on net neutrality, as the Internet plays an ever more important role in disseminating news and information. This includes more and more audiovisual content, which is an important cultural and social vector.

In a converged media environment, much of the non-linear content of hybrid offers is likely to be distributed over the open Internet. Thus, net neutrality principles are a fundamental instrument to safeguard freedom of expression and information.

By using specific traffic management tools, network operators providing Internet connectivity can act as gatekeepers for data traffic flows to end-users, which entails the risk that users may no longer have full access to a plurality of information and quality content of their choice. As recognised by BEREC last year,

network operators clearly have incentives to engage in differentiation practices regarding Internet traffic, not only if they are vertically integrated companies, but also in the absence of vertical integration.²⁰

The EBU supports a strong regulatory framework for net neutrality, both at the EU and national levels, which reflects the fact that the openness and the non-discriminatory features of the Internet favour innovation and economic efficiency, and safeguard media freedom and pluralism.

Any policy framework will need proper safeguards to maintain the open and non-discriminatory character of the Internet, and to promote its public service value. As a general principle, providers of electronic communications to the public should not be allowed to apply any traffic management practices which would block, throttle or degrade any content services. Exceptions should only be allowed in exceptional and clearly defined cases, for example along the lines of the recent Dutch law on net neutrality,²¹ and would only cover measures to the extent that they are necessary:

- to comply with a legal requirement or court order,
- to restrict unsolicited communications (with the user's prior consent),
- to preserve the integrity of the network, or
- to minimise the effects of traffic congestion in a non-discriminatory and verifiable way (treating equivalent types of traffic in the same way).

Non-discrimination is important to prevent providers from privileging their own content services or applications, or those for which they have concluded commercial arrangements.

In addition, it is important to ensure that the development of managed services/networks (such as IPTV) by providers does not harm the open Internet. Not only should there be no general degradation of the quality of the service delivery on the open Internet, but the capacity for the open Internet should continue to be developed in a dynamic way. The definition of minimum requirements regarding quality of service would be a useful instrument in this respect.

b) Must-carry rules for managed networks (cable TV and IPTV)

In contrast to the open Internet, which is based on the "best effort principle", quality of service is guaranteed for (selected) services carried over "managed

²⁰ BEREC Report on differentiation practices and related competition issues in the scope of net neutrality, BoR content online (12) 132, 26.11.2012.

²¹ Art. 7.4a of the Telecommunications Act, which entered into force on 1 January 2013

networks" (also referred to as "specialised services"). Cable television networks are a traditional example, but IPTV services on broadband networks fall into the same category.

To ensure access to a comprehensive and pluralistic offer of radio and television services for viewers and listeners, and in particular to services of particular value for society, Member States have introduced must-carry obligations for operators of cable television and similar networks used for the distribution of radio and television services. According to Art. 31 of the EU Universal Service Directive, Member States may impose such obligations, for the benefit of specified radio and television channels and complementary services, on operators of networks which are used by a significant number of their users as the principal means for receiving radio and television.

Whereas the purpose of rules on access to telecom networks/services in the EU Access Directive is to ensure *competition in the telecom market*, the purpose of must-carry rules is, by contrast, to ensure *citizens' access to general interest content* which is of particular value for society. Accordingly, national must-carry rules are normally part of media law. They are nevertheless referred to in the EU telecom package, since they place obligations on network operators.

It is important that Member States maintain the freedom to apply must-carry rules, whenever deemed appropriate, to managed networks, including cable TV and IPTV networks.

With regard to connected TV, it is also important that must-carry obligations cover, as a complementary service, the hybrid TV signalling, which is part of the broadcasting signal and allows viewers to interact with the programme and to access complementary on-demand content.

Art. 31 of the EU Universal Service Directive currently restricts national must-carry rules to linear audiovisual media services. This restriction is at odds with a world in which linear and non-linear services are converging. Accordingly, it will at some point become necessary to broaden this provision so that Member States can include the transmission of non-linear audiovisual media services in their must-carry rules.

c) Rules on access to technical facilities

It is necessary to ensure access to technical facilities which are essential for the delivery of audiovisual media services, on fair, reasonable and non-discriminatory terms. The access rules in Article 6 (regarding conditional access systems) and in Article 5(1)(b) of the EU Access Directive (regarding APIs and EPGs), both in connection with Annex I, have served as an important safeguard for digital radio and television services. These provisions ensure that Member States and national regulatory authorities have the necessary powers to intervene when problems

occur, and this framework has played a useful role in preventing problems from occurring in the first place.

However, these provisions were introduced at the time of the former "Television without Frontiers" Directive and therefore only mention "digital radio and television broadcasting services"; they do not seem to cover (at least not explicitly) on-demand services and therefore do not include all audiovisual media services within the meaning of the AVMS Directive. As it is important for the access rules to remain fully effective in the online and converging world, clarification that they cover technical facilities for both linear and non-linear audiovisual media services is necessary at some point. In addition, of course, they should be applied in a technologically neutral way.

It should be kept in mind that the above-mentioned rules in the Access Directive apply to technical facilities but not to content gateways as such. Accordingly, they can only address the technical aspects of EPGs but not their content aspects; this is explicitly clarified in Article 6(4) of the Access Directive, which says that the provision is without prejudice to the ability of Member States to impose obligations on the presentational aspects of EPGs and similar listing and navigation facilities.

As it is necessary to clearly distinguish between telecom and media aspects, and between telecom networks/services and content platforms/gateways, the Access Directive can only play a limited role in ensuring access to new content gateways; it cannot resolve issues related to access to content gateways which fall within the scope of media law. This is also due to the different regulatory objectives (competition in the telecom market on the one hand, media freedom and pluralism on the other hand).

Accordingly, regulatory gaps with regard to access to content gateways should primarily be addressed through media law provisions where appropriate.

d) Safeguards for access to content platforms/gateways

Whereas the regulation of the open Internet and managed networks concerns the operation of technical network infrastructure and transmission services, content platforms/gateways are situated between the audiovisual media service and the transmission service.

Examples include platforms which bring together (linear and/or non-linear) content from different media service providers, such as interactive content portals provided by manufacturers of connected TV sets, media players providing live and catch-up radio and TV for a variety of connected devices, iTunes-like digital stores, and services like Google TV, Netflix etc.

The notion of content platforms/gateways

When addressing the questions of access to content platforms/gateways and the visibility of "general interest content", it is of course necessary to have a clearer idea of the kind of content platforms and gateways that should be covered.

The EBU does not think that a future initiative in this area should be linked to connected TV sets or in fact to any particular device. In addition to connected TV sets, there are other connected devices on the market, for example tablet computers, which are increasingly used for media consumption, and even smartphones may be used as television devices.

Any future regulation should therefore be adapted to the multi-platform and multi-device environment, and be technologically neutral and future proof. It should ideally cover the most relevant platforms providing public access to linear and non-linear audiovisual media services. This should not only apply to new legal provisions but also to self/co-regulation.

Any definition of a *content platform/gateway operator* for that purpose should aim to cover operators:

- which *select the content, services or applications* that are offered or made available on a given platform, and/or
- which *control the user interface or the conditions for access by the public.*²²

Similar to the criterion retained for must-carry obligations in Art. 31 (and Recital 44) of the EU Universal Service Directive, findability rules (or rules on due prominence) would only need to be applied to significant platforms/gateways, i.e. those which are used by a significant number of users for accessing audiovisual content.

In line with the different functions of media and telecom law, access to such content platforms/gateways is not currently covered by the access rules of the telecom package. Rules on access to relevant content platforms/gateways in a converged media environment should, in the first place, serve the citizen's right to information and also foster media freedom and pluralism, and not just competition in the telecom market. Accordingly, media law would seem to be the best way of dealing with these access issues.

As shown in Table 1, neither the telecom rules on fair, reasonable and non-discriminatory access to telecom networks/services, nor must-carry rules for broadcasting services on cable TV and similar networks cover access to the new content platforms (including portals, user interfaces and other gateways controlled by intermediaries).

²² See also the definition proposed by Communications Chambers in their study on PSB Prominence in a Converged Media World (see Footnote 24 below) on p. 36: "Significant content gateways would be defined as those which meet specified threshold tests and which select, aggregate and organise content from a range of different providers in the form of channels, applications or programme catalogues."

In other words, there are regulatory safeguards for access to network infrastructure, introduced in the interest of competition in the telecom market, but no safeguards for access to content platforms, in the interest of access to information and media pluralism. This can be considered as a regulatory asymmetry which is difficult to justify.

Considering the importance of audiovisual services (radio, television and new media) in forming public opinion in a democratic society, there is a need for regulatory safeguards to be in place to ensure access and plurality on content platforms and gateways. The existence of access obligations would also give regulatory authorities a basis for monitoring and swiftly addressing problems in the market, for example detecting an operator's exclusionary behaviour at an early stage.

This is all the more significant as content platforms/gateways are becoming increasingly important in a converged media environment: they are the key to providing an integrated, seamless offer of linear and non-linear media content.

e) Findability of services on user interfaces (due prominence)

It is not enough that media services are available on content platforms; they must also be findable for the user. Accordingly, regulation must not only address access to content platforms/gateways as such, but also the findability of media services on user interfaces, and in particular public services which are of particular value for society.

Some Member States have laid down certain provisions in national law which could serve as a starting point (for example, Germany with its rules on non-discriminatory access to user interfaces on broadcasting/telemedia platforms, and the United Kingdom with its rules on appropriate prominence for public service channels on EPGs). Member States must retain the power to develop these provisions further and to adapt them to the converging media environment.

In the converged media environment, scarcity of transmission capacity is not always the major bottleneck. A bottleneck of increasing importance is the interface through which users find their favourite programmes, since users' attention span is limited and there is only limited space on the front screen of any user interface, portal, programme guide, etc. Moreover, media convergence and connected devices will lead users to be increasingly dependent on interfaces, portals, guides, search engines, etc. to find the content they wish to access.

As the rapporteur for the European Parliament report on Connected TV, Ms Petra Kammerevert, put it in her Explanatory Statement: "*Ensuring the findability and accessibility of content will become the main issue in maintaining diversity.*"²³

²³ Report on connected TV, A7-0212/2013, Committee on Culture and Education, 10.6.2013, p. 14.

Because of the limited space available, equal treatment in a formal sense of all content services is impossible, and some kind of ranking or order of priority needs to be applied. The top places can be awarded only once, and the concept of neutrality cannot fully work here.

In this situation, citizens can legitimately expect that programme services of a particular and recognised value to society, be it for democratic, social or cultural reasons, are given due prominence on content platforms and user interfaces, and are thus "easy to find". Gatekeepers should be prevented from bearing too heavily on consumer choices and from "re-directing" consumers for purely commercial reasons. Accordingly, content services of a particular value to society should be prominently displayed and easy to access on all major content platforms.

The recent study on "PSB Prominence in a Converged Media World" by Communications Chambers for the BBC provides sound evidence in favour of regulatory safeguards.²⁴

Rules ensuring the findability of public service content can be seen as a logical prolongation of must-carry rules in the digital and converged environment. Just like with must-carry rules, it would be up to Member States to specify the services which should benefit from must-be-found rules.²⁵

In this respect, the EBU would also like to draw attention to the European Parliament's conclusions in its report on connected TV adopted on 4 July 2013. It invites the Commission to consider how to improve the findability of content providers which have been entrusted with a public broadcasting remit by the Member States, or which otherwise help to promote objectives in the public interest, or undertake to carry out duties that maintain the quality and independence of reporting and promote diversity of opinion.²⁶

²⁴ See: <http://www.bbc.co.uk/blogs/aboutthebbc/posts/Ensuring-prominence-for-public-service-content-as-media-converges>

²⁵ Art. 6(4) of the EU Access Directive recognises that the telecom rules are "without prejudice to the ability of Member States to impose obligations in relation to the presentational aspect of electronic programme guides and similar listing and navigation facilities". Accordingly, under the current regulatory framework it is entirely up to Member States to adopt measures to ensure due prominence for content of particular value for society. This should not only apply to electronic programme guides for digital television but equally to content platforms and user interfaces in a converged media environment.

²⁶ Paragraph 20 of the European Parliament report on connected TV, adopted in plenary on 4 July 2013.