English only

FINAL EBU REPLY (as of 16 November 2015)

CONSULTATION

on Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (Sat-Cab Directive)

Questionnaire

(…)

Executive Summary attached as Annexe 1

EBU memo as Annexe 2

EIPR article as Annexe 3 (not included)

II. Assessment of the current provisions of the Satellite and Cable Directive

1. The principle of country of origin for the communication to the public by satellite

For satellite broadcasting, the Directive establishes (Article 1.2) that the copyright relevant act takes place "solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth" (often referred to as “the country of origin” principle). So, rights only need to be cleared for the "country of origin" of the broadcast (and not for the country/ies of reception, i.e. the countries where the signals are received [1]). The Directive indicates that in determining the licence fee for the right of communication to the public "the parties should take account of all aspects of the broadcast such as the actual audience, the potential audience and the language version" (Recital 17)

[1] There is no case-law from the Court of Justice of the European Union regarding the interpretation of Article 1.2 of the Directive.

1. Has the principle of "country of origin" for the act of communication to the public by satellite under the Directive facilitated the clearance of copyright and related rights for cross-border satellite broadcasts?

Yes

To a large extent

To a limited extent

No

No opinion

1.1. If you consider that problems remain, please describe them and indicate, if relevant, whether they relate to specific types of content (e.g. audiovisual, music, sports, news).

[For Members' individual input] Please see also the reply to Question 2.2.

2. Has the principle of "country of origin" for the act of communication to the public by satellite increased consumers' access to satellite broadcasting services across borders?

Yes.

To a large extent

To a limited extent

No

No opinion

2.1. Please explain and indicate (using exact figures if possible) what is, to your knowledge, the share (%) of audiences from Member States other than the country of origin in the total audience of satellite broadcasting services.

For broadcasters, the principle of "country of origin" for the act of communication to the public by satellite has definitely increased their satellite broadcasting services across borders.

The facts indisputably show that the Sat-Cab Directive has proved to be an effective measure for facilitating satellite broadcasting in Europe. For example, by the end of 2013, 75% of PSM organisations in the EU were distributing their 'flagship' national TV channels – on top of any existing international services they had - in other EU markets (Source: EBU MIS). The satellite injection rule has made possible both cross-border radio and TV channels in selected Member States where there is audience demand, as well as the proliferation of unencrypted satellite broadcasts in Europe. There are approximately 1270 free-to-air satellite channels without encryption available in Europe, the numbers reaching about 1500 when taking linguistic versions and HD simulcasts into account. The country of origin principle has also been helpful in increasing the availability of PSM broadcasts across borders: EBU Members from the EU broadcast over 100 channels on satellite without encryption, while 26 out of 40 EBU organisations from 18 different EU countries broadcast at least one channel without encryption on satellite (*Source*: EBU – MIS).

By mid-2015, around 3600 various TV channels were available via satellite in Europe, up to 4350 when considering the various linguistic versions of the same channels, and up to almost 5000 when counting the HD simulcasts thereof (*Source*: EBU-MIS based on European Audiovisual Observatory/MAVISE). Given that the total EU audiovisual market is composed of around 9000 TV channels (*Source*: European Audiovisual Observatory), ***more than a third of all TV channels in Europe are available via satellite***. These figures are impressive and demonstrate the success of the Sat-Cab Directive.

This success can easily be explained. In order to clear the necessary rights for their programmes, PSM organisations conclude individual agreements (e.g. with film producers), collective agreements with representative bodies (e.g. for contributor rights, such as musicians and writers) as well as direct clearances with individual right holders that are not represented collectively. A single, 30-minute episode of a TV-series can involve up to a hundred contributions. A large national broadcaster with various radio and TV channels can produce up to ***800,000 broadcast hours*** per year (*Source*: EBU – MIS). The intensive daily rights clearance by the broadcaster – involving ***multiple usage rights, multiple right-holders and multiple platforms*** - must obviously be based on the domestic copyright law of

the broadcaster's place of establishment. The same applies to its satellite services. A broadcaster's domestic law also serves as reference for its legal assessments as to whether a certain use of programme material meets the conditions of an exception or limitation (and subsequently would not require additional rights clearance).

Broadcasters' satellite rights clearance system is fully in line with the principle of territoriality and maintains their contractual freedom, thereby safeguarding a high level of protection for the exclusive rights of producers and other right holders while including the necessary flexibility of rights clearance according to audience preferences.

The aim of the Sat-Cab Directive was to confirm broadcasters' rights clearance practice by providing ***express legal certainty*** for the cross-border availability of their radio and TV services, thereby ***complementing the EU media regulation*** (see Question 9.4 below). The legislative measure was deemed necessary to reflect broadcasters' reality and correct the now-discredited "Bogsch theory": The satellite rule clarifies that a single act of broadcasting cannot be made subject to the cumulative application of a multitude of national laws (see Recital 14 of the Directive). In practice, this rule is not really new: ever since the beginning of broadcasting, the same has applied to the unintentional overspill of terrestrial broadcast signals into neighbouring countries. As the figures above show, the practical result of that legal construction is that it is proved an enormous success for satellite services.

The country of origin principle is also used as the basis of other EU Directives, such as the 2000 Services Directive, the 2000 E-Commerce Directive and the 2011 Audiovisual Media Services Directive. Moreover, the satellite rule does not only apply in the EU: a similar clause in the 1994 Council of Europe's Convention on Satellite Broadcasting defines the country where the signal is introduced as the territory where the transmission originates, with the result that such transmission is governed exclusively by the law of that country.[1]

Since there are no subscription contracts for receiving direct-to-home transmissions, it is impossible to obtain specific audience figures for non-domestic free-to-air satellite channels.

2.2. If you consider that problems remain, describe them and indicate, if relevant, whether they relate to specific types of content (e.g. audiovisual, music, sports, news) or to specific types of services (e.g. public services broadcasters', commercial broadcasters', subscription based, adverting based, content specific channels) or other reasons.

One issue that the Directive does not solve is the question of which courts should have the **competence** to decide over a matter of (possible) infringement of the satellite broadcasting right. For example, a large EBU Member is being sued for infringement in a **foreign** jurisdiction regarding the use of copyright works in one of its programmes that was broadcast via a satellite service. This would seem to contradict the legal purpose of the satellite rule which is to clarify unambiguously where the relevant act of satellite broadcasting takes place and should therefore also clarify where infringement of that right occurs. A dispute on the infringement of that right should then be dealt with **exclusively** by the courts of that same country, applying that country's law. It would make no sense for a dispute between a national broadcaster and a domestic collecting society in country X on the level of payment for the satellite right to be brought before a dispute resolution body of country Y, instead of before the domestic resolution body in country X. Although the question of jurisdiction is not the

[1] The wording (in part) of the relevant CoE Convention provision is as follows: "*Article 3 – The applicable law: 1) A transmission of works and other contributions covered by Article 1 occurs in the State party in the territory of which the transmission originates and, therefore, shall be governed exclusively by the law of that State. 2) The State party in the territory of which the transmission originates means the State party in which the programme-carrying signals transmitted by satellite are introduced, under the control and responsibility of the broadcasting organisation, into an uninterrupted chain of communication via the up-link and down to the earth*." See http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007c07c.

subject of the Sat-Cab Directive, a review of that Directive should solve this ambiguity and streamline the issue of enforcement.

3. Are there obstacles (other than copyright related) that impede the cross-border provision of broadcasting services via satellite?

Yes

To a large extent

To a limited extent

No

No opinion

3.1. Please explain and indicate which type of obstacles.

[For Members' individual input]

4. Are there obstacles (other than copyright related) that impede the cross-border access by consumers to broadcasting services via satellite?

Yes

To a large extent

To a limited extent

No

No opinion

4.1. Please explain and indicate which type of obstacles.

[For Members' individual input]

5. Are there problems in determining where an act of communication to the public by satellite takes place?

Yes

To a large extent

To a limited extent

No

No opinion

5.1. Please explain.

The answer to the question of where such communication takes place is already provided by the Sat-Cab Directive, and for public broadcasting organisations such act always takes place in the country of their establishment. However, as explained in our reply to Question 2.2 above and given the actual experience of one EBU Member, it seems important to clarify that proceedings for copyright infringement should also be commenced in the country of origin, and applying the law of the country of origin, otherwise the legal certainty that the Sat-Cab Directive is supposed to give to broadcasters may be undermined.

6. Are there problems in determining the licence fee for the act of communication to the public by satellite across borders, including as regards the applicable tariffs?

Yes

To a large extent

To a limited extent

No

No opinion

6.1. Please explain.

The level of contractual freedom under the Directive is one of its basic pillars that must be maintained. However, this freedom cannot be abused to ask for non-equitable remuneration: some EBU Members have been confronted with difficulties stemming from certain right-holders' demands for tariffs that – in view of the language version at stake - did not correspond to a realistic assessment of the audience of the given satellite service in overspill countries, and despite the fact that Recital 17 of the Directive clearly indicates that all such aspects are to be taken into account for determining a fair level of remuneration. This situation provides another reason why such disputes should be subject only to domestic resolution procedures (see above Question 2.2).

In view of the application of the "country of origin" principle, the Directive harmonised the rights of authors to authorise or prohibit the communication to the public by satellite (Recital 21, Article 2), established a minimum level of harmonisation as regards the authorship of a cinematographic or audiovisual work (Article 1.5) and as regards the rights of performers, phonogram producers and broadcasting organisations (Recital 21, Articles 4 to 6).

7. Is the level of harmonisation established by the Directive (or other applicable EU Directives) sufficient to ensure that the application of the "country of origin" principle does not lead to a lower level of protection of authors or neighbouring right holders?

Yes

To a large extent

To a limited extent

No

No opinion

7.1. Please explain. If you consider that the existing level of harmonisation is not sufficient, please indicate why and as regards which type of right holders/rights.

The EBU considers the level of protection for all right holders concerned as sufficient, for the following reasons:

Harmonisation through the satellite rule safeguards the territoriality principle under EU copyright while maintaining contractual flexibility; this is explicitly recognised to ensure a high level of protection for right holders (see Recital 24). Moreover, Recital 17 of the Sat-Cab Directive clarifies that the actual and potential audience in other Member States are taken into account in determining the level of remuneration. This recital thereby ensures that right holders can obtain a fair remuneration for the satellite broadcast. This further reduces the

incentive to circumvent national legislation as well as the risk and possibly negative effects of location-shopping.

In any event, with particular respect to broadcasters' services, the debate on the risk of delocalisation is not new and has also proven to be exaggerated. Such a concern was raised when the satellite injection rule was enacted, but evidence of a broadcaster moving its location to another country purely for copyright reasons is non-existent. Moreover, EU-based broadcasters are already subject to the anti-circumvention rules of the Sat-Cab Directive (see Recital 24, 2nd sentence, which applies to both radio and television broadcasters).

For the purposes of evaluating the current EU rules, the Commission should assess the costs and relevance, coherence and EU added value of EU legislation. These aspects are covered by questions 8-9 below.

8. Has the application of the "country of origin" principle under the Directive resulted in any specific costs (e.g. administrative)?

Yes

No

No opinion

8.1. Please explain.

By having to clear the relevant rights only once, the satellite rule **saves** broadcasters from duplicated transaction costs and administrative costs.

9. With regard to the relevance, coherence and EU added value, please provide your views on the following:

9.1. Relevance: is EU action in this area still necessary?

Yes

No

No opinion

9.2. Coherence: is this action coherent with other EU actions?

Yes

No

No opinion

9.3. EU added value: did EU action provide clear added value as compared to an action taken at the Member State level?

Yes

No

No opinion

9.4. Please explain.

If the intention of Question 9.1 is to ask whether the existing satellite rule needs to be maintained, the EBU reply is a clear yes. The reply to Question 9.2 is negative, because the Sat-Cab Directive is closely linked with the 1989/1997 Television without Frontiers Directive, and while the latter has since been updated (as the AVMS Directive), modernisation of the Sat-Cab Directive has so far not taken place.

In general terms, the success of the Sat-Cab Directive should not be evaluated in isolation as its provisions played, and continue to play, a fundamental role in **supplementing the European media rules** (in particular the AVMS Directive) which aim at creating a vibrant and diverse audiovisual market in the EU and its Member States. The purpose of both sets of rules is to create a Single Market for programme production and dissemination, by preventing the availability of broadcast services in Member States other than where they originated from being unduly hindered or limited.[2] Updating the Sat-Cab Directive (see below) would therefore be fully coherent with the DSM Strategy to foster more cross-border access to audiovisual content online. Given the effect of harmonisation, it would furthermore provide a clear added value as compared to actions on the national level.

In particular, the current satellite rule allows those European broadcasters who so wish to provide a truly cross-border service. However, as the Sat-Cab Directive only facilitates **linear**, offline services, in order to allow European broadcasters to remain successful in a globalised and converged market place, both at the European and national levels, the Directive needs not only to be maintained but also to be adapted to new technological and market developments. Otherwise, EU actions will be incoherent and the present aim of modernising the EU media framework risks being frustrated by outdated licensing rules. Under existing rules, a broadcaster that wishes to use online platforms or other new forms of cross-border services cannot benefit from the same legal certainty as for the satellite delivery of its programmes. This awkward situation must be remedied.

Please see also the reply to Questions 31 and 32 below.

2. The management of cable retransmission rights

The Directive provides a double track copyright clearing process for the simultaneous retransmission by a cable operator of an initial transmission from another Member State (by wire or over the air, including by satellite) of TV or radio programmes (Article 1.3). Broadcasters can license to cable operators the rights exercised by them in respect of their own transmission, irrespective of whether the rights concerned are broadcasters' own or have been transferred to them by other copyright owners and/or holders of related rights (Article 10). However, according to Article 9, all other rights (of authors and neighbouring right holders) necessary for the cable retransmission of a specific programme can only be exercised through a collecting society. Finally, Articles 11 and 12 introduce negotiation and mediation mechanisms for dispute resolution concerning the licensing of the cable retransmission rights.

10. Has the system of management of rights under the Directive facilitated the clearance of copyright and related rights for the simultaneous retransmission by cable of programmes broadcast from other Member States?

Yes

To a large extent

To a limited extent

[2] See Recital 12 of the Sat-Cab Directive: "*Whereas the legal framework for the creation of a single audio-visual area laid down in Directive 89/552/EEC must, therefore, be supplemented with reference to copyright.*"

No

No opinion

10.1. Please explain. If you consider that problems remain, please describe them (e.g. if there are problems related to the concept of “cable”; to the different manner of managing rights held by broadcasters and rights held by other right holders; to the lack of clarity as to whether rights are held by broadcasters or collective management organisations).

The specific rights clearance system for simultaneous, complete and unchanged cable retransmission, as introduced by the Sat-Cab Directive, ***has proven to be a huge success***. It promotes the availability of European broadcasting services in all EU countries by providing local cable retransmission companies with greater legal security and facilitates the clearance of rights for their use. Cable television is now available in almost all European countries (apart from Greece and Italy which are satellite-dominated markets). By mid-2015, there were around 2600 TV channels broadcast over EU cable networks, numbers increasing to 3375 when counting the various linguistic versions of the same channels, and even to 4100 channels when counting the HD simulcasts of those channels (*Source*: EBU-MIS based on European Audiovisual Observatory / MAVISE). These figures show that over a third of all TV channels in Europe are available via cable. In particular, among 40 EBU Member organisations in the EU, 33 organisations broadcast at least one channel on another EU country’s cable network.

This success can be explained by the special licensing construction: the Sat-Cab Directive applies a "dual" (partly individual, partly collective) licensing system for simultaneous, unchanged and unabridged retransmission of broadcast programmes by cable operators. The cable operator is responsible for clearing the retransmission rights with the originating broadcaster on the one hand, and with the collecting societies for the remaining rights not held by the broadcaster (such as the producers’ rights and the underlying rights of the many actors, singers, musicians, scriptwriters etc., in each of the broadcasters programmes) on the other hand. For the latter, the Directive introduced **mandatory collective** licensing. This legislative measure was considered necessary since cable operators and broadcasters wished to conclude arrangements for the simultaneous retransmission of broadcasts, but individual licences from every right-holder in each individual part of the programmes retransmitted would be impossible to obtain, as the contributors’ rights which are embedded in the programmes are far too numerous; hence, in practice, these underlying rights can only be cleared collectively, via representative collecting societies.

Moreover, the Sat-Cab Directive intended to also cover situations where certain underlying rights would not be represented by a collecting society, notably by specifically recognising the method of “*extended collective licensing*” (see further below Question 30).

Equally important is the fact that the Directive explicitly exempts the exercise of the rights **held by broadcasting organisations** to their own programmes (acquired rights and neighbouring rights) from mandatory collective management, because these rights can be **directly** obtained by cable operators individually from the limited number of broadcasters whose services it wishes to retransmit.

Please see also reply to Question 14.4 below.

11. Has the system of management of rights under the Directive resulted in consumers having more access to broadcasting services across borders?

Yes

To a large extent

To a limited extent

No

No opinion

11.1. Please explain. If you consider that problems remain, please describe them and indicate, if relevant, whether they relate to specific types of content (e.g. audiovisual, music, sports, news) or to specific types of services (e.g. public services broadcasters', commercial broadcasters', subscription based, advertising based, content specific channels) or other reasons.

Please see the reply to Question 10.1 above.

12. Have you used the negotiation and mediation mechanisms established under the Directive?

Yes, often

Yes, occasionally

Never

Not applicable

12.1. If yes, please describe your experience (e.g. whether you managed to reach a satisfactory outcome) and your assessment of the functioning of these mechanisms.

[For Members' individual input]

12.2. If not, please explain the reasons why, in particular whether this was due to any obstacles to the practical application of these mechanisms.

[For Members' individual input]

For the purposes of evaluating the current EU rules, the Commission should assess the costs as well as the relevance, coherence and EU added value of EU legislation. These aspects are covered by questions 13-14 below.

13. Has the application of the system of management of cable retransmission rights under the Directive resulted in any specific costs (e.g. administrative)?

Yes

No

No opinion

13.1. Please explain your answer.

Through the mandatory collective licensing of the underlying rights (where collective representation exists), and the recognition of the "extended collective licensing" (ECL) system, the cable licensing regime **reduces** transaction and administrative costs for rights clearance by broadcasters and cable operators.

14. With regard to the relevance, coherence and EU added value, please provide your views on the following:

14.1. Relevance: is EU action in this area still necessary?

Yes

No

No opinion

14.2. Coherence: is this action coherent with other EU actions?

Yes

No

No opinion

14.3. EU added value: did EU action provide clear added value when compared to an action taken at Member State level?

Yes

No

No opinion

14.4. Please explain your answers.

If the intention of Question 14.1 is to ask whether the existing provisions on cable retransmission need to be maintained, the EBU reply is a clear yes. Question 14.2 is answered negatively, because the Sat-Cab Directive is closely linked to the 1989/1997 Television without Frontiers Directive, and while the latter has since been updated (as the AVMS Directive), modernisation of the Sat-Cab Directive has so far not taken place.

Although the cable licensing regime was a huge success in most EU countries and provided a clear added value for European citizens (please see Question 10.1), EU action is still necessary as the cable licensing regime of the Sat-Cab Directive is not implemented identically across Europe. While in some countries simultaneous retransmission of broadcast programmes on third-party platforms which are similar to cable is legally assimilated to cable retransmission (e.g. Belgium, Sweden, Denmark, and in contractual practices also in the Netherlands), this is not the case in other Member States, such as in Germany and Poland, hindering the smooth licensing process.

Therefore, an extension of the Sat-Cab Directive as outlined below (see the reply to Questions 20-30) is necessary.

III. Assessment of the need for the extension of the Directive

The principles set out in the Directive are applicable only with respect to satellite broadcasting and cable retransmissions[2]. They do not apply to transmissions of TV and radio programmes by other means than satellite or to retransmissions by other means than cable. Notably these principles do not apply to online transmissions or retransmissions.

Until relatively recently, broadcasters' activities mainly consisted of non-interactive transmissions over the air, satellite or cable and broadcasters needed to clear the broadcasting/communication to the public rights of authors, performers and producers. However, the availability of broadcasters' programmes on an on-demand basis after the initial broadcast (e.g. catch-up TV services) is on the increase. Providing such services requires broadcasters to clear a different set of rights than those required for the initial broadcast, namely the reproduction right and the making available right. Forms of

transmission such as direct injection in cable networks or transmissions over the internet (e.g. webcasting) are also increasing. Digital platforms also enable programmes to be retransmitted simultaneously across networks other than cable (e.g. IPTV, DTT, simulcasting).

[Footnote 2] The concept of retransmission is generally understood as the simultaneous transmission of a broadcast by a different entity such as a cable operator.

1. The extension of the principle of country of origin

15. Please explain what would be the impact of extending the "country of origin" principle, as applied to satellite broadcasting under the Directive, to the rights of authors and neighbouring right holders relevant for:

15.1. TV and radio transmissions by other means than satellite (e.g. by IPTV, webcasting).

(Reply to 15.1, 15.2 and 15.3)

Extending the "country of origin" principle would have a clear positive impact on the online availability of all EU broadcasters' TV and radio programmes via webcasting, simulcasting, catch-up TV and broadcasters' VOD services, and IPTV. This can be explained as follows:

The Directive's satellite rule was specifically intended to ***eradicate legal uncertainty*** and avoid the cumulative application of several national laws to one single broadcasting act receivable all over Europe (see Recitals 7 and 14). Extending this rule to all media services by EU-based broadcasters would clarify the place where the sole act of communication by broadcasters takes place and thereby provide the same level of legal certainty for broadcasters' online services, while maintaining contractual flexibility and sufficient protection. The free movement of goods, services and capital under the EU Treaty implies that a certain autonomy and freedom of contract is guaranteed, and the satellite rule reconciles the free flow of information and legal certainty for broadcasters with the contractual freedom for right holders. ***The satellite rule is therefore the most solid evidence that a "country of origin" approach is fully compatible with both right holders' and broadcasters' needs for contractual freedom and flexibility, and it demonstrates that a high level of protection for right holders can be maintained alongside such rule.***

Broadcasters, and especially PSM, provide original programming on a daily basis and therefore have a uniquely huge administrative task in clearing rights. The magnitude of this obligation (see the reply to Question 2.1 above) clearly differentiates broadcasters from online music shops such as Spotify, because providing musical recordings involves clearing markedly fewer rights than for audiovisual services, and from VOD providers such as Netflix or Amazon which mostly offer a limited catalogue of films and TV series, acquired with "all rights cleared" in advance. (**This is further explained in Annexe 2**.)

The rights clearance tasks for broadcasters are disproportionately cumbersome and costly - not only for their broadcast use but also for their online services. The acknowledgment of broadcasters' specific rights clearance burden is reflected in several legal provisions of international and EU copyright law,[3] and the Sat-Cab Directive's satellite rule is fully coherent with these provisions; this Directive can thus not be considered to be of some "exceptional" nature (see also Question 2.1 above). In order to allow broadcasters to maximise available online content for cross-border access, it is essential for them that they can clear the rights for their non-linear services at the same time and in the same manner as they clear the rights

[3] See the examples in Annexe 2.

for their linear programmes. It is therefore of equal importance ***for any form of delivery*** of broadcasters' online services, be it via their own webcasting or simulcasting services, their own catch-up TV services, their own VOD services, etc. This same exact purpose was achieved for satellite services through the existing satellite rule.

Because broadcasters must be able to use the same approach towards rights clearance for their online programming services, this renders the newly introduced concept of "multi-territorial licensing" ill-equipped for PSM and various other broadcaster services that are focussed on the national audience only. By exempting the collective licensing of online music rights to broadcasters from the multi-territorial licensing regime in Article 32 of the CRM Directive, the EU legislator already recognised that fragmentation of rights clearance would be detrimental to the broadcasting sector and therefore the exemption allows broadcasters to continue clearing both broadcast and online rights with the same music collecting societies.

Furthermore, as explained in the reply to Question 9.4 above, the satellite rule serves as a necessary support for the freedom of broadcasters' audiovisual media services in the EU; it also reflects the fact that broadcasters are characterised by their exercise of ***editorial responsibility*** over their programmes and services, and that they assume full legal and editorial liability for any signal transmitted by them. As AVMS providers, broadcasters are also subject to many other obligations, including e.g. for the production or distribution of European works.[4] The latter set of obligations is taken into account by the country of origin principle underlying the AVMS Directive, as otherwise their cross-border activities would risk being impossible to carry out in a lawful manner.

As to the question of the expected ***financial impact***, comparable to the satellite rule the matter is mainly a question of ***saving*** unnecessary administrative costs. By way of example, EBU Members' experience with archives' rights clearance has revealed that the checking and clearing of online rights can raise administrative costs alone up to 15-20,000 Euros in a standard case, whereas a difficult case could amount to 60-80,000 Euros. Given that EBU Members in the EU aggregate up to 10 million broadcast hours per year, and significant parts thereof could be used online, it is not difficult to imagine that the lack of legal certainty for broadcasters' online services risks amounting to (a total of) ***billions of Euros in extra administrative costs***. As those costs could not be afforded, this risk would ultimately lead to a ***reduction*** of broadcaster's online content, in order to avoid exposure to legal liability.

Conversely, extending the satellite rule to the broadcasters' own online services would increase the cross-border availability of their content. For example, the online cross-border availability of news and current affairs programmes which, on average, represent 25.5 % of EBU members' programmes (*Source*: EBU/MIS), could be improved. These programmes include a high number of embedded materials (e.g. still pictures, short audio-visual clips) for which a legal assessment under numerous different national laws in a short time frame is simply not possible. Another example is fiction: as explained above, a single programme can involve up to 100 contributions and right holders, and major PSM conclude more than 70,000 contracts with right holders per year. Many programmes would therefore benefit from the requested legal certainty, which would also provide revenue for right holders.

15.2. Online services ancillary to initial broadcasts (e.g. simulcasting, catch-up TV).

[4] Apart from copyright law, there are many other reasons why mere film catalogue providers, music online shops or social networks are not comparable to broadcasters, such as not being subject to an intensive audiovisual policy for safeguarding public interests, like cultural diversity, the right to information, media pluralism, the protection of minors and consumer protection, and to enhance public awareness and media literacy. The mere fact that other entities use the same distribution technology for their content services cannot automatically make them equivalent to broadcasters, as this would completely ignore the fundamental role and tasks which broadcasters fulfil in society.

Please see above reply to 15.1. The legal reasoning is the same for all online services ancillary to initial broadcasts.

15.3. Any online services provided by broadcasters (e.g. video on demand services).

Please see above reply to 15.1. The legal reasoning is the same for all online and/or on-demand services by broadcasters.

15.4. Any online content services provided by any service provider, including broadcasters.

The EBU proposes to adapt the satellite model only to broadcasters' (own) online services, as for the legal certainty of their programming the country of origin principle is a *sine qua non* condition.

16. Would such an extension of the "country of origin" principle result in more cross border accessibility of online services for consumers?

Yes, with respect to broadcasters' online services. The country of origin principle is especially important for the day-to-day work of broadcasters which produce a plethora of original content including e.g. news, current affairs, documentaries, educational and cultural programming, which require extensive copyright clearance.

Broadcasting transmissions have always crossed borders, particularly where they can be received in neighbouring countries. Hence, as the satellite rule maintains full contractual freedom, it must be realised that the rule was necessary both for the contractual as well as for the non-contractual clearance by broadcasters.

This can be easily explained: broadcasting activities involve a large variety of programmes for which several exceptions could apply, and broadcasters' legitimate reliance on such exceptions under the applicable national law may require dozens or even hundreds of legal assessments and decisions on a daily basis; the more a broadcaster produces or commissions of its own programme content, the more pertinent this fact is, as in those situations the broadcaster cannot rely on a contractual warranty from external producers. For example, current affairs programmes are often produced on the basis of several exceptions, which may all be subject to different conditions in each Member State.

For example: PSM organisations create news reports on the basis of several exceptions, such as ephemeral recordings, use of a work in connection with the reporting of a current event (fair dealing), a political speech, a work located in a public place, quotations, and the incidental inclusion of a work visible during an interview. Many of those news reports are used by other broadcasters around the world. Moreover, legal assessments under copyright regarding news reports must be taken within an extremely narrow time frame, sometimes "on the spot". Broadcasters produce and transmit multiple news programmes throughout the day however this would be practically impossible if the broadcaster could not rely on the (sole) applicability of its domestic copyright law. This is valid both for broadcasters' linear, as well as for their non-linear services.

The satellite rule is therefore not something "exceptional" but is simply in full conformity with the daily practice of broadcasting, since it is relevant for all programmes in which one or more exceptions are embedded (which is practically the case with most content that broadcasters produce or commission themselves). At the same time, the satellite rule also provides broadcasters with the necessary legal certainty for the ***contractual arrangements*** because it creates a "default" position of EU-wide authorisation unless the contract expressly stipulates otherwise. (In the US, film producers obtain the same effect of a reversed assumption via the "work made for hire" doctrine.) The high number of contracts for EU broadcasters and this "combined effect" explain why the satellite provision does not make any distinction between the genres of programmes that broadcasters provide. The satellite rule is an overall critical concept for the required legal certainty.

For the same reasons, it is equally important for ***encrypted*** satellite services providing cross-border access.

By enhancing legal certainty and reducing transaction and rights clearance costs for such services, the country of origin principle underlying the satellite rule has clearly resulted in more cross-border access to broadcast programming, as satellite broadcasting would otherwise not be possible.[5]

At the same time, the satellite rule also facilitates the cross-border provision of programme services ***by third parties***, notably by cable retransmission. Cable retransmission is a separate communication to the public taking place in the country where the cable subscription is offered to the public. With respect to programmes from broadcasters in other countries, in many cases the local cable operators retransmit the satellite programme service of such foreign broadcaster. This results in the satellite rule providing legal certainty to the cable operator by saving it from a high risk of liability, as it is deemed sufficient for the cable operator to clear only the retransmission rights while not being exposed to possible claims resulting from differences in exceptions or limitations applying to the retransmitted satellite programme.

These aspects are equally important for broadcasters' online services, as – similar to satellite broadcasting - no organisation could afford to seek legal advice on all foreign laws in countries where the online service may be received. A failure to extend the satellite rule would create higher liability risks and thereby inevitably reduce the amount of content that could be made available online for cross-border access.

16.1. If not, what other measures would be necessary to achieve this?

It has been suggested that abolishing the territoriality principle in the EU, which allows for national licensing schemes, would "automatically" create more cross-border access, but this assumption is unfounded. Such abolishment would create more difficulties for EBU Members to acquire the rights for productions in their online catch-up services, including those accessible cross-border as overspill, or they could find themselves forced to clear rights for foreign territories where they have no interest in investing, since their funding is mainly based on the domestic market only. This would lead to a reduced variety of audiovisual content and ultimately citizens would lose out.

Extending the satellite rule to broadcasters' online services is therefore a far more effective and pro-active measure than abolishing territoriality.

17. What would be the impact of extending the "country of origin" principle on the collective management of rights of authors and neighbouring right holders (including any practical arrangements in place or under preparation to facilitate multi territorial licensing of online rights)?

Some academic studies have analysed the introduction of a general country of origin rule for (all) online services. The results are fairly mixed, but at least one study favoured this principle if combined with the freedom of contracting, as it could reduce transaction costs while preserving the ability of stakeholders to agree on appropriate contractual clauses.[6] A recent study for the JURI Committee of the European Parliament also concluded that applying the principle of the country of origin for online transmissions would have the most impact on

[5] This has been explicitly recognised by AG Kokott in her opinion of 3 February 2011 for the joint *Premier League* cases, C- 403/08 and C-429/08, see No. 153 ("excessively difficult or even impossible").
[6] "Economic Analysis of the Territoriality of the Making Available Right in the EU", Charles River Associates, March 2014, at p. 119.

improving the EU copyright framework ("2nd-best" only to the unification of copyright rules via the EU Copyright Title).[7]

However, none of these studies examined ***broadcasters' services separately***. In particular, the question of whether any concerns on right holders' bargaining position ever materialised under the satellite broadcasting licensing regime, which is explicitly recognised as maintaining a high level of protection for right holders, has never been investigated. Also, there is no evidence that collective rights management entities would be more disadvantaged if broadcasters applied the same rights clearance regime for their online services.

In any event, extending the country of origin principle to broadcasters' online services will not have any negative impact on collective management arrangements with broadcasters. On the contrary, as this principle allows broadcasters to maintain the most efficient system of rights clearance for all their programmes, its extension to broadcasters' online services is only logical: it makes practical sense and would result in the same nature of contractual arrangements with right holders as for broadcasting services. This also explains the explicit recognition of "extended" collective licensing (ECL) for broadcasters' services in Article 3(2) of the Sat-Cab Directive, as it allows for efficient contractual clearance of the underlying rights, in particular for "secondary" uses of broadcasters' programming. This regulation gives also a direct cross-border effect to broadcasters' programming services. Applying the satellite rule to broadcasters' online services should thus go hand-in-hand with the possibility for Member States to introduce ECL for such services by broadcasters or third-party platforms that re-use broadcast programmes, and thereby provide direct benefits to the right-holders for which local collecting societies wish to conclude ECL agreements for such purposes.

To give another example, both the 2014 Recommendation on music licensing (voluntarily agreed) by EBU/GESAC/ECSA/ICMP[8] and Article 32 of the CRM Directive aim to prevent the fragmentation of music rights and preserve the one-stop-shop licensing of both offline and online music rights for PSM (and other) broadcasters. Therefore, a withdrawal of the music rights from collective licensing that are needed for the broadcasters' one-stop-shop to the world repertoire would result in the ***opposite*** of what Article 32 intended to achieve. As the Commission is aware, music rights are only a small part of the rights needed for broadcasters' programming output, and the special treatment of broadcasters in the CRM Directive is therefore not only necessary but also fully coherent.

18. How would the "country of origin" be determined in case of an online transmission? Please explain.

It would mean that for the **exercise** of the right of communication or the right of making available to the public under Article 3 of the Directive 2001/29/EC of an online service by a broadcasting organisation established under the jurisdiction of a Member State, the initial act of such communication or making available would be deemed to occur solely in that Member State concerned.

Criteria for the "establishment" of broadcasting organisations at EU level are available, *inter alia*, under Article 2, and in particular paragraph 3, of the AVMS Directive, and there is ample case law regarding that notion. Online media services of broadcasting organisations include their online radio channels and are thus not strictly limited to services which are subject to that Directive.

[7] See EPRS | European Parliamentary Research Service, Review of the EU copyright framework (October 2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU%282015%29558762_EN.pdf.
[8] http://www3.ebu.ch/files/live/sites/ebu/files/News/2014/04/Recommendation%20for%20the%20Licensing%20of%20Broadcast-related%20online%20activities.pdf.

The authorisation of the online right would remain unaffected. This allows right holders to make the exploitation of the rights subject to certain conditions, which ensures the necessary flexibility of rights clearances according to audience preferences, and to arrive at a fair remuneration for the rights by taking account of all aspects of the use concerned. Therefore, the principle of contractual freedom under the Directive is fully maintained, which safeguards the high level of protection of all right holders involved. At the same time, it allows for control of the access to the online service through geo-blocking (where parties deem it necessary) in the same manner as encryption for satellite services.

19. Would the extension of the "country of origin" principle affect the current level of copyright protection in the EU?

No, this is explained above (Q 17/18). The current level of protection remains unaffected, because the principle would only relate to the ***exercise*** of the rights, so that the initial act of communication or making available would be deemed to occur solely in the Member State concerned. It would allow right holders to make the exploitation of the rights subject to certain conditions, which ensures the necessary flexibility of rights clearances according to audience preferences, and to arrive at a fair remuneration for the rights by taking account of all aspects of the use concerned.

19.1. If so, would the level of EU copyright harmonisation need to be increased and if so in which areas?

No, this is explained above (Q 17/18). As the current level of protection for all relevant rights would remain unaffected, there is no need for the level of harmonisation to be increased.

2. The extension of the system of management of cable retransmission rights

20. According to your knowledge or experience, how are the rights of authors and neighbouring right holders relevant for the simultaneous retransmissions of TV and radio programmes by players other than cable operators currently licensed (e.g. simulcasting or satellite retransmissions)?

The rights of authors and neighbouring right holders are relevant for any simultaneous and unchanged retransmission of broadcast programmes over third-party platforms other than cable (i.e. where a platform operator intervenes between the broadcaster and the end-consumer of the broadcast programmes) to the extent that such retransmission falls under the “communication to the public” right of Article 3 of the 2001 Copyright Directive.

While the 1993 Sat-Cab Directive introduced, with the aim of stimulating cross-border media services, an efficient collective rights clearance system for the simultaneous cable retransmission of broadcasts, it was never adapted in all Member States to cater to similar retransmission services. In the absence of a technologically neutral application of the cable rights clearance provisions, the retransmission of linear programmes on other-than-cable platforms would need to be done via a much larger dimension of individual rights clearances than for cable. This is particularly cumbersome for broadcasters which produce or commission large amounts of original content themselves. As a result, there is no level playing field between different third-party platforms for broadcast programmes which often have a very similar business model, such as cable, DSL and IPTV.

For example: Between Finland and Sweden, there is a small group of islands called Åland, which for a long time was part of Sweden, but since 1917 officially belongs to Finland. Nevertheless, it has an autonomous status, and Swedish is still its official language. This explains the popularity of SVT's broadcast programmes which are freely accessible in Åland via simultaneous retransmission over local cable, based on the cable retransmission regime of the Sat-Cab Directive. This is with the authorisation of SVT for the broadcasters' own and acquired rights and that of the Finnish collecting society (Kopiosto) for other right holders. However, since there is no legislative certainty under the

current EU copyright rules with respect to SVT's own online services, the population in Åland does not have any lawful access to SVT's full range of online services, even though local platforms in Åland may well be interested in offering such services in addition to the cable retransmission scheme. This discrepancy is impossible to justify to the Åland citizens.

20.1. Are there any particular problems when licensing or clearing rights for such services?

Please see the answer immediately above to Question 20.

21. How are the rights of authors and neighbouring right holders relevant for the transmission of broadcasters' services via direct injection in cable network currently licensed?

This matter is currently subject to pending European Court proceedings (Case C-325/14; *SBS Belgium*), and the EBU reserves the right to express its view once the decision has been published.

21.1. Are there any particular problems when licensing or clearing rights for such services?

[For Members' individual input]. Please see also above Q 21

22. How are the rights of authors and neighbouring right holders relevant for non-interactive broadcasters' services over the internet (simulcasting/ linear webcasting) currently licensed?

[For Members' individual input] Please see also below Q 24

22.1. Are there any particular problems when licensing or clearing rights for such services?

[For Members' individual input] Please see also below Q 24

23. How are the rights of authors and neighbouring right holders relevant for interactive broadcasters' services currently licensed (e.g. catch-up TV, video on demand services)?

[For Members' individual input] Please see also below Q 24

23.1. Are there any particular problems when licensing or clearing rights for such services?

[For Members' individual input] Please see also below Q 24

24. What would be the impact of extending the copyright clearance system applicable for cable retransmission (mandatory collective licensing regime) to:

24.1. the simultaneous retransmission[3] of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)?

[Footnote 3] Understood as the simultaneous transmission of the broadcast by a different entity than the broadcaster (see footnote 2).

The impact of such extension would be to allow consumers to benefit from a wider offer of broadcast services over a larger variety of platforms, while promoting fair competition between platforms.

The specific licensing system for cable retransmission is applied all over Europe. Equality of treatment, legal certainty and compliance with copyright principles justify a ***technologically neutral application*** of this system to similar cases of programme retransmission over closed platforms. This system already applies in several Member States and would notably concern IPTV, mobile networks and digital terrestrial or satellite platforms ("bouquets"), and possibly also closed subscription- or registration-based retransmission systems. In the absence of a technologically neutral application of the cable rights clearance provisions, the retransmission of linear programmes on other-than-cable platforms needs to be done via a much larger dimension of individual rights clearances than for cable.

Making the cable licensing system technologically neutral puts all right holders involved in programme retransmissions over new platforms, including their exclusive retransmission rights, in the same position as with respect to cable retransmission. Failing to adopt the proposed solution would lead to market distortions, since cable operators can clear rights with respect to broadcast programmes more easily than other operators of "closed" subscription or registration-based platforms. Such a difference in treatment cannot be justified.

The proposed solution would mean that the retransmission rights held by broadcasters themselves (i.e. their own neighbouring rights and the rights they have acquired from other right holders) would remain to be cleared by the platform operator individually with the broadcasters concerned, whereas retransmission rights in the contributions embedded in the programmes (and which are not held by the broadcasters) would be cleared with the relevant collecting societies.

24.2. the simultaneous transmission[4] of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)?

[Footnote 4] Understood as the simultaneous transmission of the broadcast by the broadcaster itself.

To avoid misunderstandings, simultaneous satellite transmission by the relevant broadcaster itself is already covered by Article 2(1) of the Sat-Cab Directive. If no re-transmission (by a third party) is involved, Internet simulcasting and IPTV should follow the satellite rule. In IPTV, however, there is generally a third-party offering the programme service directly to the consumer, such cases should follow the two-tier cable licensing regime (see reply to Question 24.1).

25. In case of such an extension, should the different treatment of rights held by broadcasting organisations (Article 10 of the Directive) be maintained?

Yes. Article 10 of the Directive explicitly exempts the exercise of the rights held by broadcasting organisations to their own programmes (acquired rights and neighbouring rights) from mandatory collective management, because these rights can be ***individually*** obtained directly by cable operators from the limited number of broadcasters whose services it wishes to retransmit. This is markedly different from the other rights embedded in the programmes which are far too numerous; so, it is reasonable that cable operators clear these underlying rights *collectively*, via representative collecting societies, while dealing with the broadcasters' rights on an individual basis.

26. Would such an extension result in greater cross border accessibility of online services? Please explain.

Yes. In a few years' time, most EU households will be equipped with hybrid TV sets, which allow broadcasters' online services to be offered, in linear and non-linear ways, via a single TV screen. New media services also increase the need for **interoperability**; pursuing

technical interoperability of hybrid TV sets and other media devices EU-wide would be meaningless if, for reasons of cumbersome rights clearances, those devices cannot show both the programmes and the related online services. It is therefore illustrative that a request for effective rights clearance systems is explicitly made in the Resolution of the European Parliament on Connected TV.[9]

27. Given the difference in the geographical reach of distribution of programmes over the internet (i.e. not limited by geographical boundaries) in comparison to cable (limited nationally), should any extension be limited to "closed environments" (e.g. IPTV) or also cover open simultaneous retransmissions and/or transmissions (simulcasting) over the internet?

The retransmission licensing system should generally be extended only to nationally limited environments, but these could include retransmissions by third-parties over the Internet if these are based on a geo-blocked national subscription/registration system which ensures a controllable scope of the audience.

28. Would extending the mandatory collective licensing regime raise questions on the EU compliance with international copyright obligations (1996 WIPO copyright treaties and TRIPS)?

No. As with Articles 8 and 9 of the Sat-Cab Directive, such extension would concern only the **exercise** of rights and is specifically authorised by Article 11*bis*(1) sub (ii) of the Berne Convention, upheld by the Agreed Statement to Article 8 of the WIPO Copyright Treaty. Also, Article 9 TRIPs obliges member countries to comply with the Berne Convention.

29. What would be the impact of introducing a system of extended collective licencing for the simultaneous retransmission and/or the simultaneous transmission of TV and radio programmes on platforms other than cable, instead of the mandatory collective licensing regime?

The ECL system, given its basically voluntary nature, bears the risk of certain right holders opting out of the collectively agreed contract, which would obviously result in less cross-border accessibility of online services than the mandatory collective licensing solution which applies to cable. On the other hand, the possibility of opting-out may not necessarily be used, so ECL would provide for more access than the option of “doing nothing”. The mandatory collective solution (for the underlying rights) has proven to function well in practice for retransmissions, and there is no reason to assume that it would create substantially more difficulties if applied to (nationally limited) simultaneous retransmissions over other-than-cable platforms. Applying ECL in this context would unnecessarily weaken the licensing system for underlying rights. It could however be combined with the mandatory solution, similar to Article 9 Paragraph 1 and 2 of the Sat-Cab Directive.

30. Would such a system of extended collective licencing result in greater cross border accessibility of online services?

Generally yes, and especially if applied to cases where broadcasters authorise their on-demand offers to be re-used by other platforms. ECL is a well-recognised licensing tool in various EU Directives, such as in Recital 18 of the 2001 Copyright Directive, Recital 12 of the CRM Directive, Recital 24 of the Orphan Works Directive, and of course in Articles 3(2) and 9(2) of the Sat-Cab Directive. Apart from being successfully applied in the Nordic countries since 1960, it has been introduced in Hungary, the Czech Republic, the UK and other countries will follow. In the area of collective licensing for reprographic use, ECL has proven

[9] 2012/2300(INI), No. 39 (“…work towards the establishment of straightforward rights clearance systems…”), http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0212&language=EN.

to be far more beneficial for right holders (i.e. higher remuneration per capita) than other licensing arrangements.

Apart from the abovementioned simultaneous use of broadcast programming on other platforms, the EBU believes that there are strong arguments for extending the outlined "dual" individual-collective licensing system for the programme rights, to the use of broadcasters' on-demand offers which are clearly related to their linear offer by other platforms (which makes them different from traditional, "stand-alone" video-on-demand offers). An attractive solution on this particular issue can be provided through the ECL system, as recognised in the Sat-Cab Directive (and, as implemented in several Member States, having cross-border effect). In such cases, the collective licensing of the underlying on-demand programme rights (i.e. those not held by the broadcaster itself) is not mandatory, but cleared via a voluntarily agreed collective licensing scheme, with the exception of those right holders who decide to "opt out" from that agreement. Thereby, the contractual freedom of the right holders involved in the (on-demand) re-use of the broadcasters' programmes is not affected.

Alternatively, some EBU Members feel that, at least for the third-party re-use of broadcasters' "catch-up" services, a mandatory collective licensing system for the underlying rights should be possible, because those services involve exactly the same programmes as previously broadcast. In that case, in order to stimulate local access to such on-demand programme services from other Member States, the EU framework should allow Member States to opt for a mandatory licensing solution (for the underlying rights) in their national law.

This solution requires that ECL is indeed available in the copyright law of the Member State where the parties concerned wish to apply this system. The EU framework should therefore foster that availability, similarly as to what was done for the ECL solutions for cable and satellite broadcasting under the Sat-Cab Directive. This is not the same as an "EU-wide ECL", as its application would be limited to national licensing situations. However, the ECL licensing process would result in providing consumers of domestic subscription services with on-demand access to both national and foreign broadcasters' programmes, and thereby create more convenience for consumers.

Concrete examples of the latter can be found in Denmark. The legal provision that made ECL possible for the simultaneous and unchanged retransmission of radio and television programmes in cable (and wireless) networks was recently amended to take into account technological developments and particularly the new on-demand exploitation opportunities where a broadcaster authorises third-parties (an explanation of the Danish law amendments is provided in **Annexe 3**). The modified provision now makes collective rights clearance possible for a large variety of uses, *inter alia*:

- the online retransmission of broadcasts,
- the retransmission of online-only webcasts,
- the on-demand use of broadcasts (such as "start-over" use),
- the re-use of a broadcaster's (online) on-demand services (e.g. the catch-up service),

irrespective of the platform for such redistribution (cable, IPTV, online, DTT etc.).

As with cable retransmission, ECL covers only the underlying rights of the programme; the relevant broadcasters license their own rights individually (done via joint sales in Nordic practice). In Denmark, important ECL agreements, which include both national broadcasters' services and those from broadcasters in other countries, have already been concluded on the basis of this new provision. Thereby, ECL has cleared the underlying rights in the programmes of non-domestic broadcasters in the same collective manner as for the local cable distribution of non-domestic programmes, allowing the broadcasters to authorise Danish platform operators to offer on-demand uses of both domestic and non-domestic services.

By way of example, the income for right holders collected by the Danish collecting societies for additional uses of TV programmes under the Danish ECL regime (e.g. retransmission and various digital TV services like Start Over, extended Start Over up to 48 hours and various other catch-up services, etc.) regarding rights not held by the broadcasters themselves ***rose between 2010 and 2014 with 63%.***

	2010	2011	2012	2013	2014	
Index	100	114	128	151	163	(*Source:* CopyDan Verdens/UBOD)

This shows that the ECL system also provides clear benefits for the right-holders involved.

3. The extension of the mediation system and the obligation to negotiate

31. Could the current mechanisms of negotiation and mediation in Articles 11 and 12 of the Directive be used to facilitate the cross border availability of online services when no agreement is concluded regarding the authorisation of the rights required for an online transmission?

Yes, it would seem helpful and consistent to have such mechanisms available for all (existing and future) broadcasters' services under this Directive. These can be combined in a single, overall provision (please see Question 32 below).

32. Are there any other measures which could facilitate contractual solutions and ensure that all parties concerned conduct negotiations in good faith and do not obstruct negotiations without justification?

It would be suitable to move Article 12 of the Directive ["Prevention of the abuse of negotiating positions"] to Chapter IV, "General Provisions", and to amend paragraph 1 of that provision so that

- it applies to authorisation *"for any use"* under the Directive,

- Member States' measures can include *"independent, impartial and efficient dispute resolution procedures"* (cf. the CRM Directive) as well as *"mediation"* (cf. Article 11), and

- negotiations in good faith include those *"on fair remuneration taking account of the potential and actual audience and the language concerned".*

Paragraphs 2 and 3 of Article 12 need not to be maintained.

V. Other issues

33. These questions aim to provide a comprehensive consultation on the main themes relating to the functioning and possible extension of the Directive. Please indicate if there are other issues that should be considered. Also, please share any quantitative data reports or studies to support your views.

- Genuine cross-border access

The aims of a Digital Single Market are reflected in the original purpose of the Sat-Cab Directive, which has proven to be successful. A failure to update its provisions will have negative repercussions for said aims. In comparison, the "portability" of domestic media subscription services while travelling does not provide local citizens with access to programmes of non-domestic broadcasters. Consequently, a modernisation of the Sat-Cab Directive remains necessary, independent of, and in addition to, any EU measures for promoting portability.

- **Authorisation of the main act of communication to include reproductions**

In order to facilitate the licensing of online rights, it must be ensured that such licence could not be made undone by a right with respect to reproductions that was invoked separately. In such cases there is a risk of discrepancy between the conditions that are set (or have been agreed) for the two rights concerned and that of double payment for the same use. The risk is especially high if the rights are in different hands. Separate exercise of the reproduction right can thereby frustrate the economic activity for which permission had been obtained.

Therefore, if the reproduction right is only ancillary to another right that is governing one and the same economic activity, such as broadcasting or the broadcaster's on-demand use, that activity should subject to one licence only; a reproduction that is merely necessary to prepare the core activity should have no independent relevance. This reflects, to a certain extent, the European Court's *Premier League* decision that allowed for a broader application of Article 5(1) of the 2001 Copyright Directive.[10]

Such normative interpretation would not abolish or devalue the reproduction right itself. Even where the rights are in different hands, it would merely force the relevant right holders concerned to agree among themselves on their respective shares from the overall communication licence fee.

- **Updating the broadcasters' neighbouring right in EU law**

Reform to make the EU copyright framework fit for the digital age should also include a meaningful update of the broadcasters' neighbouring right. Currently, the biggest gaps in the legal protection of broadcasters' signals are:

- A platform- or delivery-neutral retransmission right (simultaneous or deferred);
- Protection of broadcasters' online signals (i.e. beyond mere simulcasts) - cf. the recent *C-More Entertainment* judgment of the European Court;
- Protection of the pre-broadcast signal, and
- Protection of the signal integrity (against third party overlays).

Such reform would require amendments in several EU Directives, but as the Sat-Cab Directive is a specific regulation for the broadcasting sector, another option could be to enrich this Directive with substantive provisions in order to streamline the desired harmonisation. (The EBU would be pleased to offer technical input on a possible legislative approach.)

---

[10] Joined Cases C-403/08 and C-429/08, 4 October 2011 - *Football Association Premier League v. Karen Murphy and Football Association Premier League v. QC Leisure*.

Executive Summary of the EBU reply

on the EU consultation regarding the Satellite and Cable Directive

1. The success of the Sat-Cab Directive

The Sat-Cab Directive has been a huge success for facilitating satellite broadcasting and the retransmission on cable networks across Europe, significantly increasing cross-border availability of TV channels.

The **satellite injection rule** has made possible both cross-border radio and TV channels in selected Member States where there is audience demand, as well as the proliferation of unencrypted satellite broadcasts in Europe. By the end of 2013, 75% of Public Service Media (PSM) organisations in the EU were distributing their 'flagship' national TV channels – on top of any existing international services they had - in other EU markets (Source: EBU MIS). There are around 1270 free-to-air satellite channels without encryption available in Europe, the numbers reaching about 1500 when taking linguistic versions and HD simulcasts into account. EBU Members from the EU broadcast over 100 channels on satellite without encryption, while 26 out of 40 EBU organisations from 18 different EU countries broadcast at least one channel without encryption on satellite (Source: EBU – MIS).

By mid-2015, there were approximately 3600 various TV channels available via satellite in Europe, up to 4350 when considering the various linguistic versions of the same channels, and up to almost 5000 when counting the HD simulcasts thereof (Source: EBU-MIS based on European Audiovisual Observatory/MAVISE). Given that the total EU audio-visual market is composed of approximately 9000 TV channels (Source: European Audiovisual Observatory), more than a third of all TV channels in Europe are available via satellite. These figures are impressive and demonstrate the success of the Sat-Cab Directive.

Cable television is now available in almost all European countries (apart from Greece and Italy which are satellite-dominated markets). By mid-2015, there were around 2600 TV channels broadcast over EU cable networks, the numbers reaching 3375 when counting the various linguistic versions of the same channels, and 4100 channels if counting the HD simulcasts of those channels (Source: EBU-MIS based on European Audiovisual Observatory / MAVISE). These figures show that over a third of all TV channels in Europe are available via cable. In particular, among 40 EBU Member organisations in the EU, 33 organisations broadcast at least one channel on another EU country's cable network.

2. Existing provisions

- ***General level of harmonisation***

The Sat-Cab Directive was necessary to facilitate cross-border access to broadcast content by striking a balance between the interests of right-holders and those of broadcasters. Importantly, it enshrines the territoriality principle in line with the EU copyright *acquis* and has in-built safeguards for a fair level of remuneration. At the same time, it maintains contractual freedom, ensuring a high level of protection for the exclusive rights of producers and others. This has resulted in the Directive being a backbone of the Single Market stimulating the free flow of broadcasts across the EU.

Although the cable licensing regime was a huge success in most EU countries, it has not been implemented identically across Europe. While in some countries simultaneous retransmission of broadcast programmes on third-party platforms similar to cable is legally assimilated to cable retransmission (e.g. Belgium, Sweden, Denmark, and in contractual practices also in the Netherlands), this is not the case in other Member States, such as Germany and Poland, which hinders a smooth licensing process.

- ***Satellite broadcasting***

The EBU strongly supports the retention of the country of origin principle regarding the clearance of rights for communication to the public by satellite. This principle has enhanced legal certainty and at the same time reduced transaction and administrative costs. It is especially important for the day-to-day work of broadcasters which produce a plethora of original content including e.g. news, current affairs, educational and cultural programming, requiring extensive copyright clearance. Rights clearance via this principle has enabled the proliferation of EU-wide satellite broadcasts, in both encrypted and unencrypted forms.

- ***Retransmission by cable***

The dual licensing system regarding the simultaneous and unaltered retransmission of broadcasts by cable operators set out by the Directive has proven an effective mechanism. While cable operators clear rights for the retransmission of programmes from broadcasters directly, a mandatory collective licensing regime applies for any additional copyright protected material embedded in the programmes. This differentiation, exempting broadcasters' own rights from collective licensing, reflects a pragmatic approach and promoted an important rise in cable platforms within the EU. The Directive has also increased legal certainty while reducing administrative costs.

3. Increasing cross-border access to broadcasters' on-line content

Given the transformation of the audio-visual market and the changes in user behaviour, the Sat-Cab Directive is no longer up-to-date. The fact that it does not apply to transmission and re-transmission of broadcasters' programming over online platforms is a great deficiency which does not reflect market realities and moreover generates legal uncertainty and liability risks. Importantly, enhancing the "portability" of national subscription services is different from providing citizens access to (non-domestic) services transmitted in other Member States. To enhance cross-border access to broadcasters' online programming, a revision of the Sat-Cab Directive is necessary.

- ***Extension and clarification of the satellite rule***

The EBU calls for the extension of the satellite rule to broadcasters' own online services. Broadcasters' unique position in terms of rights clearance has been recognised at the international and EU level, and this justifies an expansion of the rule to their services distributed online. Due to their constantly updated programme schedules, broadcasting organisations have an incomparably high demand for efficient licensing (see also Annexe 2) and it is all the more pertinent for broadcasters that the (future) copyright framework guarantees legal certainty. Taking into account 28 national copyright laws wherever a programme may be accessible cross-border creates a virtually impossible burden for broadcasters. Failure to extend the satellite rule would create higher liability risks and

thereby inevitably threaten to reduce the amount of content potentially available for EU broadcasters' online services.

Conversely, extending the satellite rule to broadcasters' own online services would increase cross-border availability of their content. In particular, broadcasters' own productions would benefit from legal certainty. For example, the online cross-border availability of news and current affairs programmes which, on average, represent 25.5 % of EBU members' programmes (source: EBU/MIS), could be increased. These programmes include a high number of materials (e.g. still pictures, short audiovisual clips) for which legal assessment under numerous different national laws in a short time frame is not possible. Another example is fiction: A single programme can easily involve up to 100 contributions and right-holders, and major PSM conclude more than 70.000 contracts with right-holders per year. Many programmes would benefit from the requested legal certainty, which would also provide revenue for those right-holders.

The EBU also considers that a revised Directive should clarify that the appropriate and exclusive jurisdiction for proceedings on the infringement of the satellite rule is the country of origin, in order to fully achieve the Directive's objective of legal certainty.

The establishment criteria of the Audiovisual Media Services Directive may serve to determine broadcasters' location.

- ***Technology-neutral rights management for simultaneous retransmission***

The EBU calls for a technology neutral approach for the management of retransmission rights in line with the two-tier cable licensing regime. Limiting this licensing scheme to *cable* retransmission only is no longer justified in light of the emergence of new platforms. The EBU's proposal would create a level playing field among operators of different platforms. Management of retransmission rights regardless of the technology is crucial to ensure the Directive remains future-proof and promotes cross-border access.

Accordingly, for the simultaneous retransmission of TV and radio programmes on ("closed") platforms other than cable, rights clearance via collecting societies should take place with respect to the underlying (protected) contributions. With regards to broadcasters' own rights, platform operators should continue to acquire the rights individually from the limited number of broadcasters they carry, as they are easily identifiable by the platform operators.

Programme-related *on-demand* offers on third-party platforms should follow a similar two-tier approach. For this secondary re-use of programming, the EBU proposes that collective management should be available in all Member States. At least, under national law, a system of *extended* collective licensing should be introduced; this system is voluntary and has proved successful in Nordic countries. This is consistent with the overall objective of ensuring the dissemination of broadcaster's digital content in line with consumers' convenience.

Making the licensing system technologically neutral between comparable platforms would increase the availability of foreign TV channels and their related online offers on cable, IPTV, digital terrestrial or satellite platforms and closed online platforms across the EU, such as through a Hybrid TV interface or via plug-in media players. It would respond to the demand of consumers who increasingly regard broadcasters' online services as an integral part of their offer.

4. Updating of the broadcaster's neighbouring right under EU law

The EBU is in favour of updating the EU copyright framework regarding broadcasters' neighbouring rights and proposes that amendments are created (in the revised Sat-Cab Directive or elsewhere) to establish a platform- or delivery-neutral retransmission right as well as the protection of broadcasters' online signals, the pre-broadcast signal and signal integrity.

EBU MEMO ON THE UNIQUENESS OF BROADCASTERS' RIGHTS CLEARANCE

This memo is intended to clarify that, under copyright law, various solutions have been adopted with the specific aim to support the *broadcasters' special rights clearance* needs which are closely related to their tasks under audiovisual policy, and that the 1993 Sat-Cab Directive plays a fundamental role in that context. An extension of the Sat-Cab Directive to include a new set of rules to facilitate rights clearance for broadcasters' **online** services must not necessarily encompass all other online content providers, for the following reasons:

- **Massive rights clearance administration**: Clearing rights for a 24/7 service on a continuing basis throughout the year requires a unique level of rights clearance activities; in comparison, online-only music shops or VOD catalogue providers have only a marginal rights clearance burden.

- There is ample **evidence of legal recognition** of this specific rights clearance burden in both international and EU law; however, despite the 1996 WIPO Treaties' addition of a **new exclusive right** to broadcasters' administration, there is no general rule facilitating this task for broadcasters;

- The Sat-Cab Directive is **directly connected to the Single Market aims** of the 1989 Television without Frontiers Directive. The 2007 update to include (certain) on-demand media providers in the AVMS Directive did not change the overall sectoral approach to audiovisual media; yet, the Sat-Cab Directive has still not been updated to reflect the new media landscape;

- The **main purpose of the Sat-Cab Directive's licensing systems** is to allow EU broadcasters to continue their rights clearance (both for cable and satellite) on the basis of their domestic laws, thus providing them the necessary **legal certainty**; this construction does not affect the exclusive right of communication to the public, it merely concerns the *exercise* of the right;

- Given broadcasters' experience with the clearance of online rights for their archives, an omission to provide broadcasters with the same legal certainty for their online services as for their linear services would force broadcasters to engage in excessive rights clearance processes -– this could ultimately risk adding up to **billions of Euros** in extra administrative costs which no broadcaster could afford. Providing the requested certainty would lead to more cross-border access to EU broadcasters' online content.

1. Extent and complexity of broadcasters' rights clearance

Broadcasters' activities can be characterised by three key elements:

- ***Variety of content***: The task of providing a large variety of programming to the general public, subject to strict conditions of audiovisual policy and assuming full editorial responsibility;
- ***Modes of delivery****:* The need to reach the general public which forces broadcasters to apply any mode of programme delivery (i.e. any platform) suitable for that purpose; for the younger generations especially, this includes the publicly accessible Internet;
- ***Massive rights clearance****:* Fulfilling the aforementioned tasks is possible only through a cost-efficient administration of rights clearance activities.

The complexity of broadcasters' rights clearance stems from the fact that they need to provide for constantly changing programming, a large extent of which they produce and/or commission themselves (although that varies among broadcasters), and which includes many different items in their daily schedules (in addition to films/series, there is news, current affairs, children programmes, entertainment, education/science, art/culture, religion, regional programmes*)*. This must all be delivered via an ever-increasing variety of platforms in order to reach the general public.

It is obvious that delivering broadcast programming on a 24/7 basis throughout the year requires a fundamentally different type and level of rights administration than an online catalogue of films or TV series. In comparison to the constantly changing radio or television programming, an online film or VOD catalogue is largely *static*, allowing for "one-off", broad-packaging (major film studios can offer large bundles of titles) and single-right licensing deals, which arguably involve merely a few hundred deals with producers, especially if the repertoire is focussed mainly on Anglo-American content. For example, in the largest EU countries Netflix offers ***only between 1150 and 2900 titles*** (films and series), and Amazon Prime only between 2000 and 2200 titles (*Source*: EBU - MIS); even if this were to grow to 5 or perhaps 10 times as much, it remains a marginal rights clearance burden.

By contrast, broadcasters and "generalist" broadcasters in particular, must make a multitude of arrangements to cover all underlying right holders in their programming, at least for all material they produce or commission themselves. EBU Members in the five largest EU countries broadcast together (about) ***3.1 million hours yearly*** of radio and television programming (*Source*: EBU-MIS); a large broadcaster can use up to ***200,000 pieces*** of (recorded) music ***every week***. Of EBU Members' total programming hours in the big five countries, films and series normally represent ***less than 20%.*** Further, TV programmes have many different types of ***contributors***, and the rights must be cleared for a ***wide range of uses*** (e.g. television, radio, digital services, VOD, catch-up services, online-only (webcasting) uses, programme licensing, DVD/CD/CD-ROM and Download-to-own (DTO) sales, online previews, clip/archive sales, services for mobile phones use, format licensing, merchandising). A single daily TV programme often has 30 to 35 programme items so that the extensive rights clearance administration also has direct editorial consequences on the ***hourly uploading and removal*** of material on the broadcaster's website. And rights also need to be cleared for any ***additional footage*** that broadcasters use online in order to enrich or supplement their broadcasts. For example, broadcasters can have collective agreements with more than ***15 to 20 different right-holder associations***; a TV broadcaster like ZDF handles ***70,000 contracts each year***. Finally, exceptions or limitations are irrelevant for online film catalogues, as they are covered by the producers' contractual warranties, while for a TV broadcaster ***dozens or even a hundred of such legal assessments*** may be required on a ***daily*** basis.

The above contrast is even more obvious for *online music shops*, like Spotify or Deezer, as they offer only a fraction of the world repertoire and do not need to do any clearance with other right holders beyond those of the music concerned. In comparison, the German broadcaster ARD produces ***620,000 hours*** yearly for radio alone, in addition to its 190.000 annual TV hours.

The contrast between the rights clearance level of broadcasters and those of online-only operators is further exacerbated by the fact that broadcasters are confronted with an ongoing

proliferation of new platforms (e.g. xDSL/broadband providers, ISPs, mobile networks, DTT, VOD and OTT platforms, videogame consoles), which requires time- and labour-intensive ***coordination of various contractual arrangements***, given that broadcasters operate both as users and as right holders. Obviously, this element adds significantly to the rights clearance complexity.

Finally, online-only operators will always have significantly more possibilities than broadcasters to *delocalise* their centre of activities and can also freely decide to establish themselves outside the EU.

2. Recognition of broadcasters' rights clearance burden in international/EU law

The fact that the regulatory tasks and conditions could cause a huge problem in terms of rights clearance for broadcasters was acknowledged in legal instruments from the very beginning: When Art. 11*bis* Berne Convention introduced the exclusive broadcasting right for authors, the adhering countries also had the possibility to apply *compulsory licensing* for such use. Moreover, a special exception was created for *ephemeral reproductions* for broadcasting purposes (because many programmes could not be brought "live"). Art. 12 of the 1961 Rome Convention made the broadcasting of *commercial phonograms* subject to a *remuneration right* only, because adding other groups of exclusive right holders for broadcasting music could have thrown the delicate system of music licensing to broadcasters off balance; this acknowledgement was later confirmed by Art. 8(2) of the 1992 Rental and Lending Directive and is also upheld in Art. 15 of the WIPO Treaty for the Performers and Phonogram producers.

When new technologies for distributing programmes appeared, combined with the political desire for more cross-border access, rights clearance administration became more complicated for broadcasters, so that new legal solutions were needed: the 1993 Sat-Cab Directive established *mandatory* collective licensing for the local cable distribution of programmes from other Member States as well as *"extended"* collective licensing (ECL) for both satellite broadcasting and cable retransmission. In various EU countries, these forms of collective licensing are also applied at the national level for broadcasting and related services, including for services which allow for the *on-demand* use of programmes (e.g. start-over services).

The emergence of the Internet made the online delivery of radio and TV programming a much larger problem for broadcasters' rights clearance, because it was not only a new and freely (and globally) accessible means of delivery but it was also combined with the **creation of a *new right*** by the 1996 WIPO Treaties, while the existing solutions for broadcasters only apply to "broadcasting", as defined by pre-Internet technology; therefore, the new right imposed an *additional layer* to the already heavy rights clearance administration of broadcasters. Also, the 1996 Treaties omitted to deal with **legacy** issues resulting from the new online right (interpretation of older contracts).

This explains the acknowledgement in post-1996 Directives of the increased needs of broadcasters' rights clearance: Art. 5(2) sub (d) of the 2001 Copyright Directive *broadened* the exception for ephemeral recordings (confirmed by the European Court), Art. 5(3) sub (c) clarified the exception for the *reporting of current events* (which existed only at the national level) and Recital 26 of that same Directive expressly encouraged phonogram producers to enable *collective licensing of their on-demand rights* to broadcasters (so as to avoid the need

for mandatory licensing solutions). Moreover, in several countries special provisions for the online use of broadcasters' *archives* were created in order to solve an obvious rights clearance problem that is also recognised (but not solved) in the Orphan Works Directive.

Most recently, Art. 32 of the 2014 Collective Rights Management Directive included a special rule for collecting societies licensing *online music rights to broadcasters* which is based on the recognition (in the Impact Assessment) that a fragmentation of rights over several EU societies and/or individual right holders would create a clearance obstacle for broadcasters, especially for those in need of the *world repertoire.*

3. The specific role and purpose of the Sat-Cab Directive

Broadcast signals do not stop at physical borders; unintentional overspill in neighbouring countries is a century-old phenomenon. Rights clearance is already a heavy administrative burden for broadcasters for national programming services, but it would become much more difficult, if not practically impossible, if the same exercise needed to be repeated, even if only in part, for each territory where the signal could be received. The fact that mere reception of a broadcast signal is, of itself, not a separate act under copyright, allows broadcasters to focus on their ***domestic*** copyright law for rights clearance, thereby keeping the administrative tasks to a reasonably manageable level.

This situation was challenged when the Single Market policy aimed at increasing cross-border access to broadcast programmes. This could be achieved via the cable and satellite platforms, but to facilitate such access, ***licensing solutions*** had to be found. For cable it was solved by making the "underlying" programme rights subject to mandatory collective licensing, from which both broadcasters and local cable operators benefit because it creates various one-stop-shop opportunities. For satellite a practical approach was found: the satellite injection rule simply stipulates where the relevant act of satellite broadcasting takes place, while indicating to the contractual parties that they should take into account the relevant audiences within the satellite footprint when agreeing on the payment for the satellite licence. The satellite rule does ***not affect the exclusive right*** of communication to the public by satellite, it merely provides a "legal fiction" regarding the ***exercise*** of that right - which is fully in line with the international treaties.

Therefore, the ***main purpose of the satellite rule is to provide EU broadcasters with the necessary legal certainty*** that compliance with domestic laws is sufficient, while adapting the level of remuneration for right holders where justified (or, to use encryption or other conditions for the transmission such as the language, in order to limit the audience, see Recital 16). That legal certainty is not only valid for ***exceptions and limitations***, an area that is not harmonised and may thus differ from country to country, but also for ***contractual arrangements*** because it creates a "default" position of EU-wide authorisation unless the contract expressly stipulates otherwise. (In the US, film producers obtain the same effect of a reversed assumption via the "work made for hire" doctrine.) Given the high number of contracts for EU broadcasters, the satellite rule is thus a critical concept for the required legal certainty. It is equally important for ***encrypted*** satellite services which provide cross-border access.

Third-party platform operators re-using broadcast programmes from other Member States (in particular for retransmission) ***also benefit*** from that legal certainty. For example, local cable operators often retransmit the broadcast signals taken from the satellite. The legal

certainty thus has a direct, positive impact on the cross-border availability of broadcast programming.

Without that certainty, any broadcaster active online would have to verify every single contract with each right holder as well as to assess whether reliance on any national exception or limitation was also in compliance with the law in any other country of reception. This would be tantamount to making cross-border access to programmes practically impossible. If broadcasters' online services cannot benefit from the same certainty as their linear services, this is likely to lead to a drastically complicated rights clearance process for broadcasters, notably to avoid exposure to legal liability.

4. Consequences, options and conclusions

In sum, the 1993 Sat-Cab Directive should not be evaluated in isolation under EU copyright, because it is an integrated and indispensable part of the special regulatory regime for the broadcasting and audiovisual media sector. There is no category of rights user comparable to broadcasters given their role within the creative industries and for society in general, and there is no level playing field with online-only operators because they bear only a marginal burden of rights clearance. This context explains why provisions to facilitate broadcasters' rights clearance have existed from the very beginning of broadcasting, why legal certainty for their clearance systems is the dominant purpose of the Sat-Cab Directive and why such support is, and continues to be, reflected in post-1996 copyright legislation, at both the EU and national levels – but still not in the Sat-Cab Directive.

Extending the satellite rule to broadcasters' online services would have the same effect as for their other services, it would merely determine where the relevant act of online communication takes place, without affecting the exclusive right as such.

Without the required legal certainty for EU broadcasters' online services, and in view of the experience with their archives, one can consider that applying a different rights clearance system for broadcasters' online services would lead to enormous costs. By way of example, EBU Members' experience with on-demand rights clearance for their archives has revealed that the checking and clearing in a standard case can give rise to administrative costs alone by up to 15-20,000 Euros, whereas a difficult case could amount to 60-80,000 Euros. Given that EBU Members in Europe together aggregate up to approximately ***10 million broadcast hours*** per year, and significant parts thereof could be used online, it is not difficult to imagine that the lack of legal certainty for broadcasters' online services risks adding up to ***billions of Euros*** in extra rights clearance administrative costs which of course no broadcaster could afford. Providing the requested legal certainty would allow broadcasters to streamline their rights clearance administration more cost-efficiently and thus certainly lead to more cross-border access to EU broadcasters' online content.

Adapting the Sat-Cab Directive to broadcasters' rights clearance in the online world is therefore entirely coherent, and absolutely necessary.