

Synopsis Report on the Responses to the Public Consultation on the Review of the Satellite and Cable Directive

1. Introduction

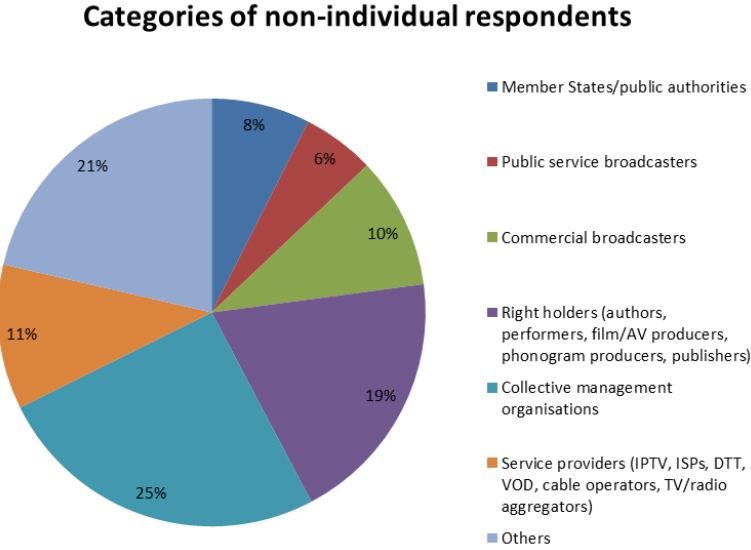
The public consultation on the review of Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (the "Directive") was held from 24 August 2015 until 16 November 2015. This review is part of the Digital Single Market Strategy which has as one of its objectives to enhance cross-border access to TV and radio programmes in the European Union.

This report provides an overview of the responses received, grouping them by category of stakeholder. The responses of those stakeholders who gave their consent to publication are also [publicly available](#).

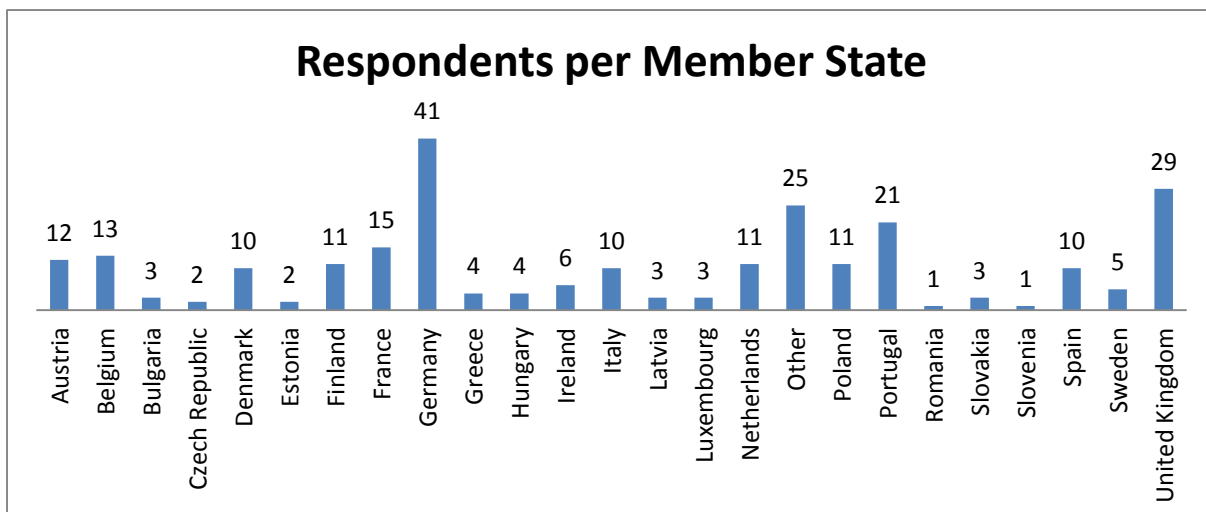
2. Overview of responses: statistics

The public consultation gathered a total of 256 replies. Of these responses, 56 are from individuals and 200 are from organisations, companies or institutions ("non-individual respondents").

The below graph provides a breakdown of non-individual respondents by category.



As to the geographical distribution of all responses, contributions came from 24 EU Member States. The largest number of responses came from Germany (41), the United Kingdom (29) and Portugal (21). 25 responses are from non-EU countries.



3. Analysis of responses

3.1. The principle of country of origin

Respondents were asked about the functioning of the existing rules applicable to clearance of copyright and related rights for satellite broadcasting (the "country of origin" principle).

Respondents were also asked about their views on the impact of a possible extension of the application of the principle to the different online services.

Evaluation of the current provisions

Overall, about half of the respondents consider that the existing provisions facilitated the clearance of rights at least to some extent. Respondents' views are split as to whether the application of the country of origin principle has increased consumers' access to satellite broadcasting services across borders.

A significant part of **consumers** and their representatives raise that the current provisions of the Directive do not sufficiently ensure access to content available in other Member States. Some consumers underline that these problems concern not only premium content (such as sports and films) but also other content, for instance cultural programmes.

The majority of **Member States' public authorities** consider that the country of origin principle facilitated the clearance of rights. Some of them, however, underline that the practical application of this principle is limited for audiovisual.

The majority of **right holders** do not consider that the application of the country of origin principle facilitates the clearance of rights. Right holders indicate that multi-territorial licences are available and that therefore there are no problems with acquiring them. In their view, cross-border offerings of content are limited because of insufficient consumer demand, language barriers as well as commercial choices of service providers. Certain right holders, in particular *film/AV producers*, argue that the application of the country of origin principle diminishes the scope of their rights because it limits their freedom to license the rights as they see fit.

A significant proportion of **collective management organisations (CMOs)** considers that the application of the principle of country of origin has not facilitated copyright clearance. The majority of CMOs do not have an opinion on whether its application has increased consumers' cross-border access to TV and radio programmes.

The vast majority of **broadcasters** consider that the country of origin principle facilitates the clearance of rights at least to some extent. Also, they generally consider that this principle increased consumers' cross-border access to satellite broadcasting services. A number of *commercial broadcasters* submit that there are obstacles to cross-border access which are not related to copyright. Similarly to right holders, they mention insufficient consumers' demand and language barriers.

Other service providers (internet service providers (ISPs), internet protocol television (IPTV) operators, digital terrestrial television (DTT) providers, cable operators, telecommunication network operators and video on demand (VOD) operators) do not have much experience with the practical application of the country of origin principle. Yet, the majority of them consider that it facilitates the right clearance and cross-border access by consumers.

Assessment of the need for the extension

Views are divided as concerns the need of an extension of the country of origin principle to online transmissions.

Consumers representatives call for a broad extension of the country of origin principle to cover all online services. In addition, certain argue that introducing this principle with regard to online transmissions would not be sufficient on its own - such an intervention would need to be accompanied by a rule explicitly prohibiting technical or contractual restrictions on "passive sales" across EU borders (restrictions on responding to unsolicited requests from consumers residing in other Member States).

While a number of **Member States/public authorities** are open for discussions with the view of enabling more cross-border access to content, there is a strong call for caution. In their view, any reform should not undermine contractual freedom, a high level of protection of intellectual property and the exclusivity of rights and should ensure a level playing field. Certain Member States submit that they are against any extension of the application of the country of origin principle because of risks of unintended negative consequences, especially for the audiovisual sector.

Right holders are, in general, against any extension of the application of the country of origin principle. They consider that any such extension would de facto lead to pan-European licences and would restrict their ability to license rights on a territorial basis. They are in particular concerned about an extension which would cover broadcasters' VOD services and, even more so, any online services by any service providers. The main reasons given against it are:

- negative consequences for the value chain of the production (e.g. financing of AV works) and the distribution of creative content (notably for AV works, as producers would no longer be able to rely on pre-sales of distribution rights with territorial exclusivity);
- right holders would be no longer able to decide for which territories in the EU they license their rights;
- not needed, as voluntary multi-territorial licensing schemes already exist;
- the application of the principle to online services and the consequential focus of the licensing system on the country of origin could have a negative impact on creators' revenues;
- risk of forum shopping by service providers and more complicated enforcement by right holders;

- risk that rights in musical works may be withdrawn from CMOs if right holders come to the conclusion that CMOs cannot ensure the effective collective management of rights across the entire EU.

CMOs do not favour any extension of the principle. They raise the same arguments against it as right holders.

Broadcasters' views on the extension are split along the public service versus commercial broadcaster line. However, all broadcasters share the view that in all cases full contractual freedom should be maintained, enabling them to limit the exploitation of rights by territories.

The majority of *commercial broadcasters* argue that an extension of the principle would amount to pan-European licences. They raise the same arguments against the extension as right holders. By contrast, all *public service broadcasters* as well as commercial radios call for the application of the principle to EU broadcasters' transmissions by any technological means as well as to all broadcast-related online services. The main reasons given by those in favour of such an extension are:

- it would enable broadcasters to expand their services to other Member States;
- it would provide broadcasters with legal certainty;
- it would reduce significant administrative burden and costs associated with clearance of rights;
- it would provide for additional revenues for right holders by ensuring a wider dissemination of TV and radio programmes and, therefore, of their works and other protected subject matter.

Views of **other service providers** vary, though most of them call for a careful and measured approach. *ISPs* express most favourable views: they argue that it would enable digital content providers to offer services EU-wide. *Telecommunications network operators, cable operators, IPTV operators, DTT providers and VOD operators* are more cautious, even though some of them indicate that they favour technology-neutral approach. All of service providers other than broadcasters underline the importance of a level playing field. Also, many of them argue that contractual freedom should be maintained. They claim that if the extension of the application of the principle were to lead to pan-European licencing, it would put European and local market players at a competitive disadvantage in relation to multinational operators as they would not have the means to acquire pan-European licences.

3.2. The management of retransmission rights

First, respondents were asked about the existing rules applicable to clearance of copyright and related rights for the simultaneous cable retransmission. Second, respondents were asked about the impact of a possible extension of the mandatory collective management regime to different forms of online simultaneous retransmissions.

Evaluation of the current provisions

The majority of respondents consider that the Directive has facilitated the clearance of rights for the simultaneous retransmission by cable of programmes broadcast from other Member States and has helped consumers to have more access to broadcasting services across borders.

The few **consumers** who have replied to the questions related to cable retransmission have a rather negative view of the effectiveness of the current provisions and the degree to which they increased consumers' access to broadcasting services. Some of them stress the existence of gaps in the offer of channels on cable networks.

Member States / public authorities consider that the Directive has facilitated the clearance of rights for cable retransmission and has helped increasing consumers' access to broadcasting services across the EU. Some, however, underline that sometimes it is not clear which rights are managed by collective management organisations and which are managed by broadcasters.

The majority of **right holders** do not think that the current cable retransmission rules have either facilitated the clearance of rights or have resulted in greater consumers' access to broadcasting services across the EU. *Phonogram producers, music publishers and audiovisual producers* consider that they are adversely affected by these rules, because they cannot issue licences on fair market terms. Some right holders highlight the limited consumer demand for cross-border access to audiovisual content services or the limited business demand for foreign TV channels or multi-territorial licences. Respondents representing *authors and performers* have a much more positive view.

The vast majority of **collective management organisations (CMOs)** consider that the Directive has facilitated the clearance of rights and has helped increasing consumers' access to broadcasting services across the EU.

Similarly, a clear majority of **broadcasters** evaluate positively the current provisions and their role in ensuring consumers' access to broadcasting services across the EU. This is especially the case for *public service broadcasters*. However, some *commercial broadcasters* point to the scope for double payments in case CMOs assert their rights to license all rights irrespective whether they have been transferred to broadcasters or not.

Finally, the majority of **other service providers** (including cable operators) also consider that the Directive has facilitated the clearance of rights and has helped increasing consumers' access to broadcasting services across the EU. Still, according to some of them, it is not always clear which rights are managed by CMOs and which by broadcasters.

Assessment of the need for the extension

The few **consumers** who have replied to these questions tend to consider that the extension of the regime to the simultaneous retransmission of TV and radio programmes on platforms other than cable is likely to increase the cross-border accessibility of online services. They also tend to oppose maintaining the different treatment of rights held by broadcasting organisations.

Member States/public authorities, but also right holders, CMOs and broadcasters, recall that voluntary collective management, extended collective licensing and individual licensing are all used to clear rights relevant for the different new TV and radio transmission and retransmission methods and services.

In this respect some Member States argue that voluntary approaches lead to legal uncertainty since service providers cannot be sure that they have cleared all the rights or that the distinction between transmission and retransmission is not always clear.

Regarding the possible extension of the mandatory collective management regime to the simultaneous retransmissions on platforms other than cable, some Member States note that certain platforms (e.g. IPTV) are already covered by national provisions. Others are in favour of the extension.

Finally, the Member States that expressed an opinion on a possible introduction of a system of extended collective licensing conveyed concern with regard to the possibility of using opt-outs, the risk of repertoire fragmentation and the lower level of legal certainty for retransmission service providers compared to mandatory collective management.

Right holders underline the important role of individual licensing and argue that current licensing approaches work well and no changes are required.

Most right holders are against the possible extension of the mandatory collective management regime to the simultaneous retransmissions on platforms other than cable due to potential disruptive effect on the markets.

Right holders also argue that extending the mandatory collective management regime could raise questions regarding compliance with international copyright obligations.

Some right holders point to the potential negative effect on the value of rights.

CMOs' views on the licensing of the different new TV and radio transmission and retransmission methods and services differ: some note that such "new services" are sometimes reluctant to engage in licensing; others consider that the current licensing approaches, notably voluntary collective management, work well. Some are concerned that the "direct injection" technology has led to challenges to the retransmission regime by cable operators in some Member States.

The vast majority of CMOs are in favour of a possible extension of the mandatory collective management regime and do not find it problematic in the context of the international copyright obligations. Many insist that the extension should be limited to "closed environments" or services functioning "in a territorially limited way" because those services resemble cable retransmission services and should benefit from a level playing field.

Some CMOs, alongside some *right holders* and *other service providers*, see a need to abolish or change the provisions on the different treatment of rights held by broadcasting organisations, e.g. by making the transfer of rights from audiovisual producers to broadcasters conditional on the payment of effective remuneration to producers.

Finally, while for some CMOs extended collective licensing is a well-working and recommendable system, many expressed concern as regards the possibility of using opt-outs, the risk of repertoire fragmentation and the lower level of legal certainty for retransmission service providers compared to mandatory collective management.

Many **broadcasters** see value in individual licensing of the different new TV and radio transmission and retransmission methods and services and consider that current licensing approaches work well. However, some *public service broadcasters* highlight the lack of an effective licensing system for third parties' services allowing interactive access to broadcasters' content (e.g. catch-up TV).

Broadcasters are divided on the question of the possible extension of the mandatory collective management: *commercial broadcasters* tend to oppose it, while *public service broadcasters* support the extension and argue that no problems of compliance with the international

copyright obligations would arise. Most of the latter suggest limiting the extension to "closed" networks or territorially-limited services provided using open internet.

Both *commercial broadcasters* and *public service broadcasters* (alongside some right holders, cable operators and CMOs) consider that the different treatment of rights held by broadcasting organisations should be maintained.

Broadcasters are also divided on the merits of introducing a system of extended collective licensing: while for many *commercial broadcasters* direct licensing should be favoured whenever possible, some *public service broadcasters* support using extended collective licensing to enable the provision by third parties of services giving access to broadcasters' content on an interactive basis where such content is clearly related to broadcasters' linear (non-interactive) transmissions.

A range of **other service providers** complain, in general, about difficulties in clearing copyright for innovative audiovisual services. Some stress that the distinction between transmission and retransmission is not always clear.

Cable and telecoms operators tend to be in favour of the possible extension of the mandatory collective management regime and consider that it could result in greater cross-border accessibility of online services. While some of them insist that the extension should be limited to "closed" networks, others argue that it should not be tied to particular means of communication, devices or "technology environments". Nevertheless, some VOD providers see a danger that the extension could result in competitive distortions.

3.2. The mediation system and obligation to negotiate

First, respondents were asked if they had used the existing negotiation and mediation mechanisms established under the Directive. They were invited to describe their experience. Second, respondents were asked to give their view about a possible extension of these rules to facilitate the cross border availability of online services, and they were invited to suggest any other measure that could facilitate contractual solutions and negotiations in good faith.

Evaluation of the current provisions

Overall the replies to the public consultation indicate that the mediation mechanism has had very limited practical relevance.

Consumers did not express any particular view concerning the application of the current provisions.

Member States and **public authorities** in general did not address this issue.

Right holders and most of **collective management organisations (CMOs), broadcasters** and **other service providers** such as *ISPs, IPTVs, DTTs* and *telecom operators* indicated that the mechanism has not been used or has been used only occasionally. These respondents list as the main reasons for this situation the fact that the negotiations usually bring expected results and hence there is no need to resort to mediation, the non-existence of the appropriate mediation mechanism or alternatively the inefficiency of the existing system. On the latter, the respondents pointed to time-consuming procedures, deficiencies as to the confidentiality of the process, high costs involved and the fact that the results of mediation are not binding for the parties. Occasional use of the mechanism and the overall positive role played by the mechanism was reported by *cable operators* and a limited number of CMOs. Despite a very

limited practical relevance of the mechanism, some CMOs, broadcasters and IPTV operators support its application but complemented and reinforced e.g. by a firm timeframe to ensure efficient process.

Assessment of the need for the extension

The majority of respondents do not support the extension of the application of the mediation mechanism.

Consumers did not express any particular view.

Out of the **Member States/public authorities** which responded to the public consultation only one respondent commented on this matter, supporting the possible extension of the negotiation mechanism while also expressing doubts about its practical implementation.

In general **right holders** are against the extension of the application of the mechanism. The vast majority of *authors* oppose the extension, due to their negative view of the current mechanism's application. They also do not see the need for additional measures. *Film/AV producers* stressed their preference for freedom of commercial negotiations. All *phonogram producers* were against the extension of the mediation to online services, indicating potential interferences with right holders' freedom to exercise their exclusive rights. As regards new measures, they all referred to the need for a level playing field and a better balance in the digital markets, demanding that all online services which make the content available to the public comply with right holders' exclusive rights (and are not sheltered by Articles 12-14 of the E-commerce Directive¹). Most of *publishers* did not express any particular opinion. As regards additional facilitating measures, they mentioned the need to engage stakeholders in cooperation on enforcement issues as well as the need to encourage investment in new business models.

Most **collective management organisations (CMOs)** were sceptical about the possible extension arguing that the current system has had only limited results. Some indicated that the Collective Rights Management Directive² already contained provisions in this respect covering CMOs' activities, while other highlighted their preference for freedom to exercise exclusive rights. Only a minority of CMOs supported the idea of extending this mechanism to online services.

CMOs suggested a variety of possible measures for facilitating contractual solutions, such as greater transparency and quality of data and information, the obligation to conduct negotiations in good faith, the recognition of CMOs' mandate to represent audiovisual authors and the need for all online services to comply with the rules related to right holders' exclusive rights.

Broadcasters are split on the issue. Most of *public broadcasters* responding to this question supported the extension of the mediation to all broadcasters' services, while only few opposed it. They mentioned the need for effective, binding and cost-efficient mechanisms, called for extending the application to any use covered by the Directive and recommended the use of similar mechanisms as those already present in the Collective Rights Management Directive. Most of *commercial broadcasters* are reluctant as regards the extension of the mediation mechanism.

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16.

² Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014. p. 72-98.

Other service providers such as *TV and radio aggregators, VOD and DTT operators* did not provide any views on the potential extension. *ISPs, IPTV operators, cable operators and some other service providers* supported the extension on condition that the current lack of effectiveness of the mediation mechanism is redressed. As regards additional measures, some recommended to focus on the respect of competition law and the Collective Rights Management Directive by the CMOs as well as on the facilitation of market entry for new businesses. Some *cable operators* mentioned the need for a more transparent, rapid and non-discriminatory mediation procedure.