EUROPEAN
COMMISSION

Brussels, 14.9.2016
SWD(2016) 308 final

COMMISSION STAFF WORKING DOCUMENT

EVALUATION

of the

Council Directive 93/83/EEC

on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

{SWD(2016) 309}

SECTION 1 – INTRODUCTION

1.1. Purpose of the evaluation

This Staff Working Document (SWD) provides the results of the retrospective evaluation of the Satellite and Cable Directive (Directive 93/83/EC, hereinafter "the Directive").

The retrospective evaluation was carried out in preparation of the EU copyright modernisation initiative set out in the Digital Single Market Strategy for Europe[1] (Commission Communication of 6 May 2015, COM(2015) 192) and the Commission Communication "Towards a modern, more European copyright framework"[2] (9 December 2015, COM(2015) 626).

In particular, the evaluation contributes to the evidence-base for a decision whether and to what extent the legal mechanisms similar to the ones established by the Directive could be used in the envisaged EU copyright modernisation measures.

The evaluation does not arise from an obligation of the Directive but is an initiative under REFIT, the Commission's Regulatory Fitness and Performance programme. REFIT provides an evidence-based critical analysis of whether EU actions are proportionate to their objectives and delivering as expected.

1.2. Scope of the evaluation

The evaluation covered all the core provisions of the Directive establishing, respectively, the "country of origin" principle for satellite broadcasting and the two-stop-shop copyright clearing mechanism for cable retransmission (individual licensing by broadcasters combined with mandatory collective management of all other - "underlying" - rights).

In accordance with the better regulation guidelines, the evaluation covered the provisions mentioned above from the point of view of effectiveness, efficiency, relevance, coherence and EU added value. The effectiveness and efficiency of the negotiation and mediation mechanisms - linked to the cable retransmission in the Directive - were evaluated separately, in line with the different function envisaged for such mechanisms in the plans for the EU copyright modernisation initiative.

In particular, the assessment was made whether the EU action is still relevant in this area, whether it is coherent with other EU actions, whether the Directive provided clear added value as compared to an action taken at the Member States level as well as whether the application of the Directive mechanisms resulted in any specific costs. As regards effectiveness, the evaluation considered both whether / to what extent the Directive has facilitated clearing copyright for the service providers concerned (satellite broadcasters, cable

---

[1] "[…] ensuring cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector"

[2] "[...] enhancing cross-border distribution of television and radio programmes online in the light of the results of the review of the Satellite and Cable Directive
Supporting right holders and distributors to reach agreement on licences that allow for cross-border access to content, including catering for cross-border requests from other Member States, for the benefit of both European citizens and stakeholders in the audiovisual chain. In this context, the role of mediation, or similar alternative dispute resolution mechanisms, to help the granting of such licences, will be considered"

operators) and whether / to what extent it has facilitated consumer cross-border access to broadcasting services in the EU / the cross-border distribution of such services.

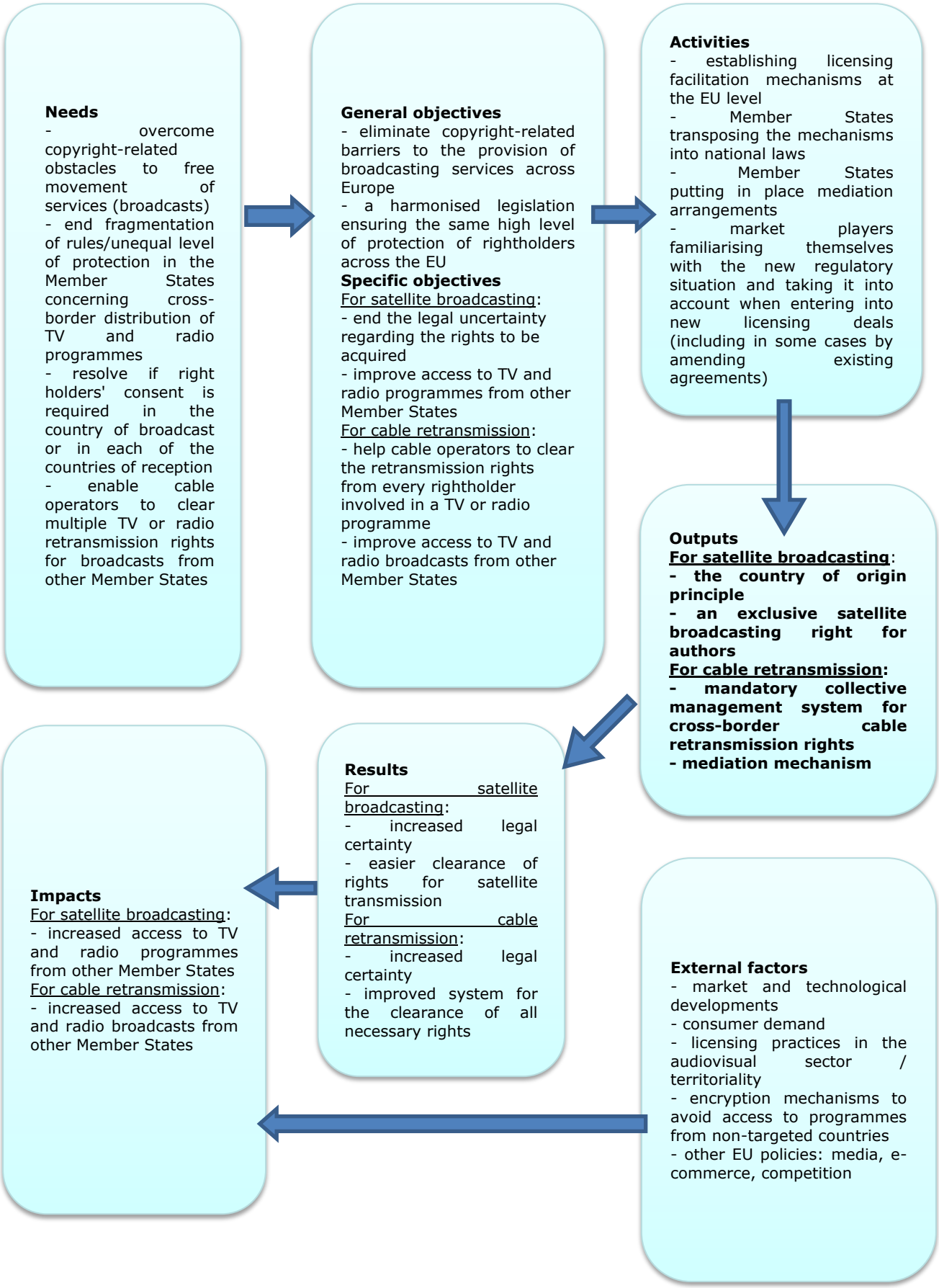
The evaluation focused on the period after 2002 (the year of the latest Commission's implementation report) and considered, in particular, the way technological developments in that period (especially Internet and digital distribution of TV and radio broadcasts) has affected the functioning of the Directive. The evaluation covered the whole EU, although some information / data gathering actions covered a more limited sample of the Member States.

SECTION 2 – THE SATELLITE AND CABLE DIRECTIVE

2.1. Description of the initiative and its objectives

The **intervention logic,** setting out the rationale and approach for the operation of the Directive is given in Figure 1. This includes its general and specific objectives, the activities and inputs required to achieve these objectives, and the outputs, results and impacts that should be achieved through their implementation. By first understanding how the legislation is intended to work, the evaluation can more clearly assess what has happened in practice.

Figure 1 – the intervention logic



In summary, the intervention has involved: (i) the EU establishing, in the Directive, licensing facilitation mechanisms for, respectively, satellite broadcasting and cable retransmission; (ii) the Member States transposing the provisions of the Directive into national laws; (iii) the Member States putting in place mediation arrangements for the potential disputes concerning cable retransmission; (iv) the market players familiarising themselves with the new regulatory situation and taking it into account when entering into new licensing deals (including, in some cases, by amending existing agreements.

Problems / needs

Concerning satellite broadcasting, the legal uncertainty regarding the rights to be acquired was the main issue at the time discussions on facilitating licensing for satellite broadcasting started: "*due to its technical characteristics, a satellite broadcast covers the territories of several states (its "footprint"). It was controversial whether the right holders' consent was required in the state of broadcast or in each of the states of reception.[…]"*[3]

Indeed, *"in some Member States courts had determined that a satellite broadcast is a restricted act in all States within the footprint of the satellite, meaning that right holders in one Member State would be able to block a satellite broadcast intended for the whole of Europe."*[4]

Concerning cable retransmission, the difficulty to clear numerous rights in a very short time frame - "*structural problem of rights management*"[5] - was the main issue: "*[…] the primary broadcasters determine the timing and the content of the programmes and it was derived from this circumstance that they had sufficient time to acquire the right holders' consent on an individual basis.[…] By contrast, it was impossible for a cable operator to acquire the rights in the same way, on an individual basis."*[6] Taking into account that each retransmitted channel delivers numerous programmes composed of a multitude of copyright-protected works, that a typical cable TV service offers multiple channels, that the cable operator has no control over the use of works in particular channels and no time to obtain licences for those works, the potential copyright clearing burden for cable operators was important.

This structural problem did not concern the rights held by broadcasters themselves, since it was not too complicated for the cable operators to deal with a relatively limited number of easily identifiable broadcasting organisations (only those the channels of which the cable operator was planning to retransmit).

In addition, the Directive aimed at solving the "outsider problem": *"in many Member States, collective agreements were concluded to deal with the cable retransmissions of broadcast programmes (even before the adoption of the directive). However, the cable operators still faced the uncertainty of "outsiders", i.e. right holders who are not affiliated to and therefore not represented by the contracting collecting societies and who therefore still have the*

---

3 Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "Infosoc Directive"), De Wolf & Partners, p. 59 http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

4 T. Dreier, P.B. Hugenholtz, "Concise European Copyright Law", p. 263

5 P. Bernt Hugenholtz "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", IRIS plus 2009-8, p. 13

6 Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "Infosoc Directive"), De Wolf & Partners, p. 206-207

possibility of claiming remuneration or blocking the exploitation by an action for injunction.[…]"[7]

Finally, it was considered that the conclusion of contracts regarding the authorisation of cable retransmissions (negotiation, renegotiation) could pose a problem.

Those problems were especially affecting the cable operators retransmitting TV / radio broadcasts from other Member States, since clearing rights with "domestic" right holders is generally considered to be easier than with "foreign" ones.

The objectives pursued, activities and outputs

As regards the objectives of the intervention, the main purpose of the Directive was to tackle copyright-related obstacles to cross-border transmission and retransmission of TV and radio broadcasts by, respectively, satellite and cable.

"The Directive is based on two core principles:

- *In order to prevent the European satellite market from being fragmented*[8]*, it established at Union level a right for communication to the public by satellite*[9] *and defined that the act of communication to the public by satellite occurs only in the country of origin of a satellite transmission. According to the "country of origin principle", rights only need to be cleared for the country of origin of the broadcast and not for the countries where the signals are received. Thus in order to broadcast in other Member States only a licence in the country of origin of the satellite broadcast is needed;*
- *The second principle introduced by the Directive is a system of mandatory collective management of cross-border cable retransmission rights. Under the Directive's rules, rights-holders, such as film producers and screen-writers, cannot exercise their cable retransmission rights individually vis-à-vis cable operators. Cable rights may be exercised only by collecting societies that represent individual rights-holders, except for the rights held by broadcasting organisations. The system aims to facilitate licensing of cable retransmissions and to avoid 'black-outs' (or 'black holes') in retransmitted broadcasts".*[10]

As regards the activities and outputs of the satellite broadcasting part of the intervention, the Directive (i) defined the communication to the public by satellite as "*the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth*"[11]; and (ii) determined the location where such protected act takes place. It occurs "*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*

---

7 Idem, p. 207

8 And to avoid the cumulative application of several national laws to one single act of broadcasting (Recital 14 of the Directive)

9 A legal novelty at the time, see Prof. P. Bernt Hugenholtz "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", IRIS plus 2009-8, p. 9

10 The survey and data gathering to support the evaluation of the Satellite and Cable Directive and assessment of its possible extension (the "SatCab Study"), Section 4.2.2

11 Article 1(2)(a) of the Directive

satellite and down towards the earth"[12]. If, however, it takes place outside the EU, alternative criteria are provided to attach it to a Member State (i.e. the uplink station in a Member State or the establishment of the broadcaster in a Member State).[13]

According to the Directive, *"the footprint of the broadcast is taken into account for the calculation of the remuneration, but the broadcaster is not required to secure the right holders' authorisation in each Member State of the footprint. […] The effects of "territoriality" are thus mitigated: the satellite broadcasting takes place in one country of origin, although it has effects beyond the Member State of origin. The Member States cannot define other "relevant acts" and consider these act part of the satellite broadcasting right, thus giving the author the possibility to exercise her right (in addition to the country of origin)."*[14]

As regards the activities and outputs of the cable retransmission part of the intervention, "*the Directive was meant to address the problem of the clearing of rights for cable retransmissions (as described above), in a uniform way (at least for retransmissions coming from another Member State), i.e. by means of a mandatory collective management of this right. By consequence, the central exercise of these rights by one or more collecting society was proposed, "in order to prevent rights in individual programme components from standing in the way of the cable retransmission operation as a whole".*[15]

The Directive has also aimed at solving the problem of outsiders, i.e. right holders who have not transferred the management of their rights to a collecting society: according to Article 9(2) of the Directive, the collecting society which manages rights of the same category is in such a situation deemed to be mandated by such a right holder.

The Directive addressed the different situation of the broadcasting organisations by obliging the Member States to ensure that "*Article 9 [mandatory collective management of rights] does not apply to the rights exercised by a broadcasting organisation in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights.*"[16]

The solution adopted in the Directive introducing negotiation and mediation mechanisms "*aims at facilitating contracts […] by shaping a system of impartial mediators.*"[17]

Below is a short overview of the provisions of the Directive concerning satellite broadcasting and cable retransmission:

- **Right of communication to the public by satellite**: Article 2 requires Member States to establish an exclusive right for the author to authorise the communication to the public by satellite of copyright-protected works.
- **Country-of-origin principle**: Article 1(2) establishes that the copyright relevant act (communication to the public by satellite) takes place "solely in the Member State

[12] Article 1(2)(b) of the Directive
[13] Article 1(2)(d) of the Directive
[14] Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "Infosoc Directive"), De Wolf & Partners, p. 59-61
[15] Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "Infosoc Directive"), De Wolf & Partners, p. 207
[16] Article 10 of the Directive
[17] Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "Infosoc Directive"), De Wolf & Partners, p. 207

where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth".

- The Directive indicates that the country of origin principle does not affect **contractual freedom** (Recital 16) and makes it possible "to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned".
- The Directive points to the necessity to ensure that creators and producers of programmes obtain a **fair remuneration** and indicates (Recital 17) 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".
- **Definition of "cable retransmission"**: Article 1 defines "cable retransmission" as "the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public".
- **Cable retransmission right**: Article 8 requires Member States to ensure that when programmes from other Member States are retransmitted by cable in their territory, such retransmissions take place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.
- **Mandatory collective management of rights**: Article 9 requires Member States to ensure that cable retransmission rights may be exercised only through a collecting society.
- **Management of the rights of non-members**: Article 9 establishes the principle that collecting societies shall be deemed to be mandated to manage the rights of right holders who have not transferred the management of their rights to the collecting society, as long as the society manages the rights of the same category.
- **Exercise of the rights of broadcasting organisations**: Article 10 exempts broadcasting organisations from the provisions of Article 9 in respect of their own transmissions, irrespective of whether the rights concerned are their own or have been transferred to them by other right holders.

2.2. Baseline

Situation prior to the Directive

Prior to the adoption of the Directive, "broadcasting" was typically understood as transmission of TV / radio channels over terrestrial networks using dedicated parts of radio spectrum, and "retransmission of broadcasts" referred to cable retransmission:

"*When the broadcasting right was first adopted, radio and television programmes were transmitted by Hertzian waves. Cable operators could distribute these programmes by capturing this broadcast Hertzian signal by means of an antenna and introducing these signals in their cable networks in order to bring the radio or television programmes to the connected radio or television sets. At that time it was clear that a "broadcast" was a wireless*

transmission to a public and that other communications to the public (by cable) were not "broadcasts"."[18]

Broadcasts were already subject to certain international rules[19]. When **broadcasting by satellite transmission** became widespread, the question of the qualification of such act under copyright law was raised. A distinction was usually made between direct satellites and communication satellites.

- Direct satellites. The market players were facing legal uncertainty: whether copyright was affected only in the country of origin of broadcast or also in all countries of reception of the satellite signal. While clearing rights for satellite transmissions broadcasters were trying to reduce the extent of such legal uncertainty by obtaining the required rights also for those countries of reception where cable retransmission was envisaged. However, the legal uncertainty still persisted: given wide satellite footprints, there would inevitably be countries for which copyright has not been cleared, and right holders in such countries of reception could take legal action to stop satellite broadcasting in its entirety.

- Communication satellites. In general, broadcasting of programs via communication satellites was not considered relevant from the copyright point of view, since content was not usually made accessible to the public. The acquisition of rights was only relevant in the Member States where it was considered a copyright-relevant act[20]: in France and Spain, where a 'droit d'injection' (a right concerning the beaming of protected works to a communication satellite) was provided for in national law, clearance of copyright was facilitated by a legal presumption (it was presumed that a broadcaster having the rights to broadcast a work territorially had also acquired the rights for satellite broadcasting). In the United Kingdom, it was necessary to acquire the rights for broadcasting via a communication satellite.

As regards **cable retransmission**, a distinction was usually made between (i) terrestrially broadcast programs and (ii) programs broadcast by satellite.

- Terrestrially broadcast programs. Contracts with the main right holders were concluded to ensure clearance of rights. There were two problems with this system: (i) the negotiations might not achieve the result in time and (ii) the 'outsider problem' (i.e. the fact that cable operators had no guarantee that a (smaller) right holder who is not party to the contract will not claim individually the right to authorise the retransmission). To address them, in particular the 'outsider problem', some Member States (e.g. Denmark and Austria) introduced statutory licences. Some other countries (e.g. Norway, Sweden and Finland) had excluded individual claims by extending the application of contracts to outsiders.

---

[18] Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "Infosoc Directive"), De Wolf & Partners, p. 200.

[19] Article 11bis(1)(i) of the Berne Convention already provided for that authors shall benefit from the exclusive right to authorise "the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images". It was generally considered that this principle applied to satellite broadcasting.

[20] In practice, where a broadcaster was acquiring the rights for the subsequent retransmission by cable the contracts often also included provisions entitling the broadcaster to transmit the works via a communication satellite.

- Programs broadcast by satellite. Cable retransmission rights were usually acquired (aggregated) by satellite broadcasters from other right holders. Even though this mechanism benefited cable operators, it did not protect them against claims from individual outsiders (operators were still liable under copyright law for their retransmission acts). Some countries developed solutions: Denmark had introduced a statutory licence for cable retransmission of direct satellite broadcasts. In the UK, cable operators were exempted from copyright claims filed by holders of retransmission rights, except for broadcasters.[21]

SECTION 3 – EVALUATION QUESTIONS

The questions that will be further examined in Section 6 are the following:

- Effectiveness:
  - To what extent has the SatCab Directive (COO principle) facilitated the clearance of copyright and related rights for cross-border satellite broadcasts, contributed to ensuring the legal certainty for satellite broadcasters and improved access to TV and radio programmes from other Member States?
  - To what extent has the SatCab Directive (notably, mandatory collective management) facilitated the clearance of copyright and related rights for the simultaneous retransmissions by cable of broadcasts from other Member States while ensuring a high level of protection for right holders and to what extent it has improved access to TV and radio broadcasts from other Member States?
  - Have the negotiation and mediation mechanisms established under the SatCab Directive contributed to promoting the acquisition of rights?
- Efficiency: Has the application of i) the country of origin principle, ii) the mandatory collective management and iii) the mediation and negotiation mechanisms resulted in any specific costs and benefits?
- Relevance: How well do the original objectives still correspond to the needs (including of EU citizens) within the EU?
- Coherence: Is this action coherent with other EU actions?
- EU added value: Did EU action provide added value as compared to an action taken at the Member State level?

SECTION 4 – METHOD

The evaluation process was assisted by a Steering Group chaired by the Secretariat-General and composed of the representatives of selected Directorates General (DGs) including COMP, TRADE, GROW, JUST, EAC, RTD, JRC, ECFIN, SANTE, ENV, EMPL, EPSC, ESTAT and the Legal Service. The Group steered and monitored the progress of the exercise, ensuring the necessary quality, impartiality and usefulness of the evaluation.

The evaluation took place between August 2015 and June 2016 and drew from the data sources and methods described below.

The following information / data gathering actions were undertaken during the evaluation period:

[21] For more information on the situation prior to the Directive please see the November 1990 discussion paper "Broadcasting and Copyright in the Internal Market", http://aei.pitt.edu/1331/1/copyright_broadcast_work_paper_1990.pdf

1. The **survey and data gathering to support the evaluation of the Satellite and Cable Directive and assessment of its possible extension** was commissioned by the Commission to EFECTIV consortium in November 2015 (referred to in this SWD as the "SatCab Study"). The terms of reference ("ToR") of this SatCab Study were designed to avoid duplication with the previous De Wolf & Partners Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "Infosoc Directive") and defined the purpose of the Study as follows:

   i. to assess the relevance of the provisions contained in the Satellite and Cable Directive aimed at facilitating cross-border access to broadcasting services in the current environment (thus feeding in the ongoing Commission's evaluation of the Directive) and the need for review/extension of these provisions to new technological means;

   ii. to assess the appropriateness of extending the scope of some or all provisions of the Directive to broadcasters' online transmissions and to online services other than broadcasters' online transmissions; and

   iii. to gather facts and figures to help the above assessment.

   The SatCab Study focussed on the sample of 11 EU Member States: Denmark, Germany, Ireland, Spain, France, Italy, Hungary, Netherlands, Poland, Sweden and United Kingdom. It relied on a combination of sources and methods, including desk research, collection of relevant market data, advice from industry experts, interviews with and structured questionnaires addressed to market players and competent authorities of the Member States.

2. A **questionnaire** was sent **to all Member States** to gather details about the **transposition and application of the Directive** in national law / legal orders. The Commission asked for the indication of the particular provisions that transposed the satellite and cable regimes as well as the mediation and negotiation mechanisms. The Commission also enquired about national case law concerning the Directive and, specifically, about provisions / case law applying to retransmission services other than cable as well as new transmission practices (such as direct injection, internet etc.). The results of this information gathering exercise are presented in Annexes 1 and 2.

3. Finally, in accordance with the Better Regulation Guidelines, a 12 week **on-line public consultation** was undertaken on the EU Survey website from 24 August 2015 until 16 November 2015 using a questionnaire based on the five criteria and questions of the mandate. The questionnaire was available in 3 EU languages and attracted 256 responses. An initial summary report of the findings was published in December 2015, and the full report of the public consultation was published in May 2016[22].

The <u>other (pre-existing) information / data sources</u> that supported the evaluation include:

- The previous (2002) **Report on the application of the Satellite and Cable Directive** (the "2002 Report")[23].

[22] https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive

[23] Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite

Its objective was to analyse the transposition into national law and to examine the practical application of the Directive. In particular, the Report indicated that both the provisions relating to satellite broadcasting and the provisions relating to cable retransmission had been correctly transposed in all Member States. It also noted that "generally speaking, it appears that the mechanisms put in place by the Directive contribute to the cross-border broadcasting of television programmes", while recognising that "a trend is […] emerging whereby producers sell their programmes to broadcasting organisations on condition that satellite transmissions are encrypted so as to ensure that they cannot be received beyond national borders". In addition, the Report analysed the evolution of television services, but concluded that a review of the Directive was pre-mature at that stage: "ongoing technological developments (including digital television and the Internet) will generate a manifold increase in the possibilities and arrangements for the cross-border provision of audiovisual services. The audiovisual services that will be offered in the near future will lead to changes in viewers' habits through providing them with more individualised and personalised access to these services. It is too early, however, to gauge the content and impact of these changes and, hence, to determine at this stage whether it is necessary to extend the scope of Directive 93/83/EEC".

- The **Commission's Green Paper of July 2011** on the online distribution of audiovisual works[24].

It included questions on the extension of the right clearance regimes laid down in the Directive to the online distribution of audiovisual works[25].

- The broad public **consultation on the review of the EU copyright rules of December 2013**[26].

It included questions on the territorial scope of the rights involved in digital transmissions and the segmentation of the market through licensing agreements. Some questions specifically addressed the problems related to the provision of and access to online services across borders.

- The 2013 **Study on the application of Directive 2001/29/EC on copyright and related rights in the information society** prepared by De Wolf & Partners[27].

This study addressed, among other things, the content and elements of the Directive. Concerning the satellite regime, the study included a section on the "making available right" and its links to the Directive, in particular the implementation of the country of origin principle together with the territoriality of copyright. The study also contained a detailed section on the cable retransmission regime, describing the provisions of the Directive,

---

broadcasting and cable retransmission, COM/2002/0430 final http://ec.europa.eu/internal_market/copyright/satellite-cable/index_en.htm

24 COM(2011)427final http://ec.europa.eu/internal_market/consultations/docs/2011/audiovisual/green_paper_COM2011_427_en.pdf

25 The Satellite and Cable Directive concerns not only audiovisual works but all works protected by copyright and all related subject matter protected by neighbouring rights. It also applies to satellite radio broadcasting.

26 Consultation document: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf; Report on the responses to this public consultation: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

27 http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

analysing the definition of the cable retransmission right / its constitutive elements and verifying how the cable retransmission regime had been applied by the national courts.

- The publications and data from **the European Audiovisual Observatory**, notably the MAVISE database[28] and IRIS plus 2009-8 "Convergence, Copyrights and Transfrontier Television"[29].

Limitations – robustness of findings

The intervention provided by the Directive has a particular character: it puts in place tools for easier clearing of copyright, but does not oblige the market players to achieve any particular result in terms of cross-border transmission / retransmission of TV and radio broadcasts. Moreover, the tools provided build on and/or continue to leave the scope for the market practices that pre-dated the Directive (contractual limitations regarding the exploitation of rights in the case of satellite broadcasting, and licensing by broadcasters of their own rights as well as the underlying rights aggregated from other right holders in the case of cable retransmission). This character, combined with important technological and market developments that have taken place since the adoption of the Directive but independently from it, make it difficult to detect clear causal links between the intervention and the evolving reality. Significant differences between the Member States, both in legal and economic terms, have further complicated drawing clear conclusions.

Moreover, despite the extensive information / data gathering exercise, it was difficult to obtain quantitative data. Specifically, the contractors in charge of the SatCab Study obtained limited quantitative data regarding licensing practices and very limited data regarding revenues obtained from different licensing practices. It was also not possible to obtain quantitative data concerning the potential costs and benefits generated by the application of the Directive. This is mainly due to these factors: (i) the confidentiality of such data; (ii) the difficulty to extract data concerning the Directive from wider data sets; (iii) the fact that the Directive has been in place for a long time.

Due to the budgetary and timing constraints, certain information / data gathering actions, notably the SatCab Study, covered only a sample of Member States.

There are inherent limitations in the findings of the public consultation. Firstly, as in all surveys, the answers received reflect the views of a sample of relevant stakeholders and not those of the entire population who has a stake in this domain. Secondly, stakeholders' views convey an individual rather than a holistic perspective.

Finally, since the Directive does not provide for monitoring arrangements (other than a report by the Commission), the evaluation lacked evidence covering in a systematic and comprehensive manner the whole period of its application.

Based on the elements above, this evaluation has been carried out on the basis of the best available data. Whenever reliable quantitative data is lacking, this is indicated as appropriate and counter balanced with qualitative analysis and considerations.

---

[28] http://mavise.obs.coe.int/

[29] IRIS plus 2009-8, Convergence, Copyrights and Transfrontier Television (Susanne Nikoltchev (Ed.), European Audiovisual Observatory, Strasbourg 2009): http://merlin.obs.coe.int/iris/2009/8/article1000.en.html

SECTION 5 – IMPLEMENTATION STATE OF PLAY (RESULTS)

According to Article 14(2) of the Directive, Member States were required to transpose the Directive at national level before 1 January 1995[30].

In 2002, in accordance with Article 14(3) of the Directive, the Commission carried out a review to assess whether the objectives of the Directive had been achieved (the "2002 Report").[31]

The 2002 Report *"revealed that the rules of the Directive were generally satisfactory implemented in the then 15 Member States. The provisions relating to satellite broadcasting in the transfer of copyright and related rights were correctly transposed into all national legislations (i.e. Articles 2 and 3 of the Directive). The opportunity to extend the collective agreement to rights-holders of the same category not included in the membership of collective management organisations was only incorporated in the national law of those Member States where this procedure was already established. Similarly, the provisions related to cable retransmissions (Articles 8, 9 and 10) concerning payments in respect of cable retransmissions rights were correctly transposed in all the Member States except Germany, where the part related to alternative negotiations between collecting societies and cable operators was defined as considerably weak. Finally, the provisions relating to the principles of mediation and good faith were correctly transposed at national level."*[32]

Since then, 13 countries have joined the EU. All 28 Member States have introduced rules having as their objective the transposition of the Directive. A table detailing the national transposition laws, together with the relevant national case law from different Member States, is presented in Annex 1[33].

As regards **infringements**, the Commission received a number of complaints regarding in particular the mandatory collective management mechanism set out in the Directive for the cable retransmission of broadcasts. One infringement procedure was launched against Denmark, based on the additional conditions imposed by the Danish law on the collective management organisations as regards exercising the cable retransmissions rights of the right holders. The law in question required these organisations to represent a significant number of national right holders. Denmark removed this condition from the law, and the case was closed in 2001. An on-going infringement procedure against Poland concerns potential non-compliance of Polish law with Article 10 of the Directive: contrary to the provisions of that Article, no exemption from mandatory collective management seems to be provided for rights held by broadcasting organisations.

The Directive appears to have been properly transposed in all the EU Member States subject to the ongoing infringement and is generating relatively few legal disputes.

---

30 11 Member States were late to transpose the Directive into national law and communicate their transposition measures.

31 Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM/2002/0430 final.

32 SatCab Study, Section 4.2.3

33 This Annex is based on the questionnaire sent to all Member States to gather details about the transposition and application of the Directive in national law / legal orders.

SECTION 6 – EX-POST EVALUATION OF THE SATELLITE AND CABLE DIRECTIVE

6.1. Effectiveness

6.1.1. To what extent has the SatCab Directive (COO principle) facilitated the clearance of copyright and related rights for cross-border satellite broadcasts, contributed to ensuring the legal certainty for satellite broadcasters and improved access to TV and radio programmes from other Member States?

As explained above, in order to avoid the cumulative application of several national laws to one single act of broadcasting, the Directive: (a) introduced a harmonised exclusive right to authorise satellite transmissions of broadcasts (this right was later subsumed by Article 3 of Directive 2001/29/EC on copyright and related rights in the information society - the "Infosoc Directive"); (b) introduced a principle according to which the copyright and related rights relevant act of communication to the public by satellite occurs solely in the Member State from which the programme-carrying signals originate (and the right holders' consent should be acquired for this Member State).

Once transposed into national laws (and following the expiry of the transitional period that lasted until 1 January 2000 for agreements remaining in force beyond the transposition deadline - 1 January 1995), these provisions started to apply without the need for any additional action on the part of Member States or the relevant stakeholders (right holders, satellite broadcasters). They, therefore, almost immediately delivered on the Directive's objectives to facilitate the clearance of copyright and enhance the legal certainty for satellite broadcasters.

The research undertaken in the context of the SatCab Study confirmed that the Directive has largely achieved the objective of eliminating copyright-related barriers to cross-border satellite broadcasts. The stakeholders interviewed in the context of the study agreed that there were no particular barriers to clearing such rights. This has been achieved through the mechanism provided by the Directive by which broadcasters can acquire any underlying rights that have not been assigned to them by producers or by other rights-holders during the process of creating an audio-visual product. The Directive has also provided legal certainty for those rights that broadcasters acquire from producers and other underlying rights-holders. Finally, the Directive has confirmed that broadcasters and rights-holders have the freedom, subject to the application of Union law, to determine the territories that are covered by satellite communications.

Results of the public consultation

The results of the public consultation tend to indicate that the Directive has achieved its objective of facilitating the clearance of rights for satellite broadcasting. Overall, about half of the respondents considered that the existing provisions facilitated the clearance of rights at least to some extent. Very limited evidence of problems in application of the Directive – e.g. regarding the establishment of the place of transmission or calculation of the remuneration on the basis of the footprint of the satellite broadcast – was provided. A number of stakeholders also believed that it contributed to increased access by consumers to satellite services.

The synopsis report on the results of the public consultation provides an overview of the positions expressed by the different types of stakeholders:

- A significant part of consumers and their representatives raised that the current provisions of the Directive do not sufficiently ensure access to content available in other Member States. Some consumers underlined 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 considered that the country of origin principle facilitated the clearance of rights. Some of them, however, underlined that the practical application of this principle is limited for audiovisual[34].

- The majority of right holders did not consider that the application of the country of origin principle facilitates the clearance of rights. Right holders indicated that multi-territorial licences were 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, argued 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) considered that the application of the principle of country of origin has not facilitated copyright clearance.

- The vast majority of broadcasters considered that the country of origin principle has facilitated the clearance of rights at least to some extent. Also, they generally considered that this principle increased consumers' cross-border access to satellite broadcasting services. A number of commercial broadcasters submitted that there are obstacles to cross-border access which are not related to copyright. Similarly to right holders, they mentioned 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) did not have much experience with the practical application of the country of origin principle. Yet, the majority of them considered that it has facilitated the right clearance and cross-border access by consumers.

Moreover, the feedback collected during the public consultation shows that setting licence fees for satellite transmissions available under the country of origin principle across borders has not caused any substantial practical problems (only some respondents pointed to difficulties with measuring the audience). In addition, the results of the public consultation confirmed the absence of concrete substantial risk that broadcasters would relocate their place of establishment due to the ease of clearing copyright (broadcasters are generally established in the country where their main audience is located and rely on infrastructures which cannot be easily relocated).

[34] As broadcasters use geo-blocking techniques to reinforce territorial distribution of broadcasts by satellite, especially for audiovisual productions and sports content

Concerning the Directive's objective to improve access to TV and radio programmes from other Member States, as explained above, the Directive has not affected the freedom to agree on limitations regarding the exploitation of rights to satellite broadcasting[35].

In the 2002 Report the Commission stated that *"[c]omplete application of the principle of the Directive, which involves moving beyond a purely national territorial approach, should […] be encouraged in order to allow the internal market to be a genuine market without internal frontiers for rightholders, operators and viewers alike.*"

Indeed, "*Broadcasters […] perceive that most value is in the distribution on a territorial basis and acquire rights only for the specific territories that they wish to target. Encryption is then widely used to prevent the reception of satellite services outside the target market. In addition, technological advances are improving the ability to target satellite signals on a specific territory, meaning that the extent of spill-over is reducing.*"[36]

"While satellite services could potentially all be offered on a multinational basis, the analysis suggests that in practice there are relatively few pan-European services. With the exception of services such as some news and sports channels, the majority of satellite services are aimed at specific geographic markets."[37]

Nevertheless, satellite channels relying on the country of origin principle for the purpose of licensing, notably non-encrypted channels, continue to be provided to European consumers:

Free to view satellite channels available in 11 sample EU countries 2015[38]

Viewing country	TV Channels	Public or mixed ownership	Originating from other Member States
Denmark	3	2	2
Germany	124	39	7
Ireland	2	2	2
Spain	22	15	3
France	7	2	3
Italy	110	14	3
Hungary	8	5	2
Netherlands	16	13	2
Poland	22	6	3
Sweden	5	2	2
United Kingdom	144	36	2
TOTAL	463	136	34

Source: European Audiovisual Observatory MAVISE database
informitv analysis

[35] It should be noted that in its 4 October 2011 judgement in Joined Cases C403/08 and C429/08, Football Association Premier League Ltd v QC Leisure (C-403/08); Karen Murphy v Media Protection Services Ltd (C-429/08) the Court of Justice of the EU considered, among other things, that the obligations on the broadcasters not to supply decoding devices for use outside the territories covered by the licence agreements (absolute territorial exclusivity clauses) constituted prohibited restrictions on competition under Article 101(1) TFEU which cannot be justified by Article 101(3) TFEU.

[36] SatCab Study, Section 6.1

[37] SatCab Study, Section 2.1.3

[38] SatCab Study, Section 2.3.2

Despite a limited amount of evidence, there are indications that overall the Directive (COO principle) has facilitated the clearance of copyright and related rights for cross-border satellite broadcasts and contributed to ensuring the legal certainty for satellite broadcasters, notably those operating in a particular satellite broadcasting market segment – free to view satellite TV / radio (that does not include encrypted and territorially limited satellite pay-TV / radio services). For all these free to view transmissions broadcasters need to obtain rights only for the Member State of origin. As such, it can be considered that the Directive contributed to improved access to TV and radio programmes from other Member States to a limited but tangible extent.

6.1.2. To what extent has the SatCab Directive (notably, mandatory collective management) facilitated the clearance of copyright and related rights for the simultaneous retransmissions by cable of broadcasts from other Member States while ensuring a high level of protection for right holders and to what extent it has improved access to TV and radio broadcasts from other Member States?

As explained above, the Directive provided for the two-stop-shop copyright clearing mechanism for cable retransmission: individual licensing by broadcasters combined with mandatory collective management of all other - "underlying" - rights.

As regards the Directive's objective to facilitate the clearance of copyright for cable retransmission while ensuring a high level of protection for right holders, the SatCab Study explains that the Directive has largely achieved its aim of eliminating copyright-related barriers to cross-border retransmissions via cable. According to the stakeholders interviewed in the context of the study, the combined application of individual licensing by broadcasters and mandatory collective management resulted in a well-functioning system for the clearance of rights: *"Some broadcasters acquire most rights from producers and/or other rights-holders and then make use of Article 10 to assign rights for retransmission to cable operators in other countries. Broadcasters welcome the contractual freedom that they are allowed under Article 10, as well as the right to retain control over their channels and thus determine where and by whom those channels are retransmitted. For those rights that are not directly cleared by the broadcaster, mostly music rights but also rights of audio-visual authors and producers, cable operators are able to make use of mandatory collective management under Article 9. Cable operators welcome the opportunity to clear rights collectively and in their own country, rather than on an individual basis with rights-holders in other countries."*[39]

For certain collective management organisations licensing cable retransmission rights is a primary activity. In particular, this is the case for organisations belonging to AGICOA (the Association for the International Collective Management of Audiovisual Works), an international, not-for-profit organisation representing, collecting and distributing royalties to independent producers of audiovisual works. For certain other organisations it is an important activity. For instance, as reported by SAA (Society of Audiovisual Authors), "*in many European countries, cable retransmission royalties represent more than 40% of the collections of audiovisual authors' CMOs (Austria, Croatia, Czech Republic, Estonia, Finland, Hungary, Portugal, Romania, Slovakia, Slovenia, the Netherlands and the UK). In*

[39] SatCab Study, Section 6.3

these countries, cable retransmission royalties are the authors' main revenue generated from the use of their works, in particular from foreign countries."[40]

In contrast, retransmission revenue represents a small proportion of annual income of collective management organisations representing music producers (it appears that, at least in some Member States, cable retransmission revenue is slightly higher than e.g. IPTV retransmission revenue):[41]

Member State	Cable (Mandatory Collective Licensing)	IPTV (Voluntary Collective Licensing)	OTT (Voluntary Collective Licensing)
ES	3.6%	5.6% (Mandatory and voluntary licensing)	N/A
HU	3.2%	N/A	N/A
IE	2.1%	0.15%	N/A
IT	N/A	0.03%	0.22%
NL	5.4% (This includes cable and IPTV)		N/A
PL	3.2%	N/A	N/A
UK	0.009%	N/A	N/A

The SatCab Study examined the possible impacts of mandatory collective management on right holders, in terms of management of rights and licensing revenues, explaining that this impact strongly depends on the capacity of a right holder to conclude licensing deals with cable operators: *" an individual rights-holder that is well-established in the market place and supported by appropriate legal expertise could independently reach an agreement with users that may surpass the revenue potential of the collective approach and take into account broader strategic considerations to generating revenues from transferring certain rights to specific users. However, stakeholder feedback suggests that many authors and performers are not in this position and this was suggested to cover a large segment of this business population in terms of the number of operators."*[42]

As regards the Directive's objective to <u>improve access to TV and radio broadcasts from other Member States,</u> the available market data points to a significant number of TV channels retransmitted by cable in different EU Member States[43]:

[40] SAA contribution to the public consultation
[41] SatCab Study, Section 5.3
[42] SatCab Study, Section 5.2.7
[43] SatCab Study, Section 2.3.7

Comparison of international, national or regional channels available on cable services versus channels established in 11 sample EU countries 2015

	Channels established in country										
Viewing country	**DK**	**DE**	**IE**	**ES**	**FR**	**IT**	**HU**	**NL**	**PL**	**SE**	**UK**
Denmark	44	17		2	11	3		11	2	46	96
Germany		316		3	32	10	1	7	6		51
Ireland			26		13			5			436
Spain		1		201	28	1		1	1		33
France		34		10	352	14		24	6	2	90
Italy		7		2	23	348		2	2		44
Hungary		14		2	35	2	44	10	1		139
Netherlands		65		2	45	2		165	2		94
Poland		11			34	12		16	122		114
Sweden	3	3		1	18	3	2	11	2	127	134
United Kingdom			5	1	14	1		10			617

Source: European Audiovisual Observatory MAVISE database extract
informitv analysis

Results of the public consultation

The results of the public consultation confirm that the Directive has largely achieved its objectives as far as cable retransmission is concerned. The majority of respondents considered 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 synopsis report on the results of the public consultation provides an overview of the positions expressed by the different types of stakeholders:

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

- Member States / public authorities considered 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, underlined 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 did 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 considered that they are adversely affected by these rules, because they cannot issue licences on fair market terms. Some right holders highlighted 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 had a much more positive view.

- The vast majority of collective management organisations (CMOs) considered 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 evaluated 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 pointed 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 considered 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.

Despite a limited amount of evidence, the Directive (notably, mandatory collective management) can be considered to have largely facilitated the clearance of copyright and related rights for the simultaneous retransmissions by cable of broadcasts from other Member States. While some stakeholders prefer individual licensing over collective management, the Directive has, overall, ensured a high level of protection for right holders. It has also improved access to TV and radio broadcasts from other Member States for consumers.

6.1.3. Have the negotiation and mediation mechanisms established under the SatCab Directive contributed to promoting the acquisition of rights?

The Member States have put in place different negotiation facilitation / mediation mechanisms (Member States typically rely on generic mechanisms - not dedicated to the Directive only - or "light" approaches, such as drawing a list of potential mediators), and they have been used to a varying, but overall limited, degree in practice. A table detailing arrangements for / experience with those mechanisms in different Member States is presented in Annex 2[44].

Results of the public consultation

According to the results of the public consultation, the Directive has partially achieved its objectives as far as negotiation and mediation mechanisms are concerned.

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 listed 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.

[44] This Annex is based on the questionnaire sent to all Member States to gather details about the transposition and application of the Directive in national law / legal orders.

On the other hand, 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.

The negotiation and mediation mechanisms established under the Directive have been used to a varying, but overall limited, degree. Nevertheless, they are perceived to have played a positive role in the few cases where they have been used.

6.2. Efficiency

Has the application of i) the country of origin principle, ii) the mandatory collective management and iii) the mediation and negotiation mechanisms resulted in any specific costs and benefits?

6.2.1 Direct costs

The Directive has not imposed any charges on the market players.

As regards administrative costs, the Directive does not provide for any market monitoring arrangements or reporting obligations to be fulfilled by the Member States (except for communicating to the Commission national transposition measures) or the market players. Nevertheless, since the application of the country of origin principle involves calculating the licence fee on the basis of the actual and potential audience, both in the Member State of broadcast and in any Member State of reception, satellite broadcasters have to collect such audience information when they make their broadcasts available in multiple Member States. The data collected in the context of this evaluation does not allow to determine the administrative costs resulting from such information collection.

As regards substantive compliance costs, in the business-as-usual scenario the licensing relationships (the subject matter targeted by the Directive) typically involve transaction costs (costs required to reach a deal) for both the licensor (right holder) and the licensee (satellite broadcaster, cable operator), licence fees paid by the licensee to the licensor as well as fees charged to individual right holders by collective management organisations.

As explained above, once transposed into national laws (and following the expiry of the transitional period that lasted until 1 January 2000 for agreements remaining in force beyond the transposition deadline - 1 January 1995), the provisions of the Directive establishing the country of origin principle started to apply without the need for any additional action on the part of Member States or the relevant stakeholders (right holders, satellite broadcasters). They could have involved limited one-off costs stemming from the need for the market players to familiarise themselves with the new regulatory situation, but have not led to any other (recurrent) substantive compliance costs.

The results[45] of **the public consultation** showed that a majority of stakeholders consider that the application of these provisions of the Directive has not resulted in specific costs. In

[45] Stakeholders were asked specific questions on whether in their view the country of origin principle and the application of the system of management of cable retransmissions had resulted in any specific costs. They

particular, Member States and public authorities, public and commercial broadcasters, and phonogram producers agree that the application of the country of origin principle to the satellite broadcasting has ensured legal certainty and therefore has reduced costs. Some CMOs signalled costs (from legal and political perspective, but not administrative), and some AV producers referred to an increase in administrative costs. Finally some CMOs and cable operators consider that the uncertainty in the application of the principle led to an increase in legal costs and management time.

The substantive compliance costs stemming from the provisions of the Directive establishing mandatory collective management consisted (potentially) of (i) costs associated with setting up collective management organisations to license cable retransmission rights and (ii) fees paid by individual right holders to CMOs for their collection/distribution services. As regards the first category, a network of CMOs (and cable licensing arrangements) was largely already in place by the time the Directive has started to apply. As regards the second category, such fees usually represent a small part of the licensing revenue collected (e.g. AGICOA network of CMOs - one of the main licensing entities as far as cable retransmission is concerned - charged 5% in 2015[46]).

Most of stakeholders (Member States and public authorities, public and commercial broadcasters, CMOs) that replied to the public consultation considered that the mandatory collective management has not resulted in specific costs.

No substantive compliance costs are generated by the provisions of the Directive on the mediation and negotiation mechanisms, since the parties to the cable retransmission licensing relationship have a possibility (but are not obliged) to call upon the assistance of mediators.

Most of stakeholders (Member States and public authorities, public and commercial broadcasters, CMOs) that replied to the public consultation considered that these mechanisms (as part of the mandatory collective management regime) have not resulted in specific costs. However a few reported that the costs (fees paid for the mediation) were one of the reasons why the mechanisms were not used.

As regards the implementation and enforcement costs, a Member State setting up a mediation mechanism dedicated to the disputes arising in the field of application of the Directive might incur both one-off (CAPEX) costs and recurrent (OPEX) costs. These potential costs depend on the precise nature of the mechanism. For instance, the operating costs of the French cinema mediator (le Mediateur du cinema[47]) amounted to €217.526 euros in 2014.[48] CMOs that operate alternative dispute resolution mechanisms report that the costs of setting them up would be in the range of €35.000, and the operating costs - in the range of €11.000 per year.

However, as explained above, Member States typically rely on generic mechanisms (not dedicated to the Directive only) or "light" approaches (such as drawing a list of potential mediators). Therefore, in reality these costs are likely to be limited.

6.2.2 Indirect costs

---

were asked to further explain their (positive) replies. Despite this fact, we were not able to obtain quantitative data concerning costs.

46 http://www.agicoa.org/english/about/factsandfigures.html

47 http://www.lemediateurducinema.fr

48 Source: 2014 Activity Report, February 2015. http://www.lemediateurducinema.fr/Mediateur/Includes/Pdf/rapport_2014.pdf

In the public consultation some stakeholders referred to possible negative impacts on the market functioning of both the country of origin principle (claiming that it could undermine the territory-by-territory content distribution strategies) and mandatory collective management (claiming that it does not allow for the licensing of cable retransmission rights on fair market terms). However no evidence or data were provided to support those claims.

The data collected in the context of this evaluation does not allow drawing firm conclusions in this regard. Nevertheless, concerning the country of origin principle, the Directive left open the possibility for contractual limitations regarding the exploitation of rights to satellite broadcasting, thereby preserving right holders' freedom to choose audiovisual production-distribution strategies. Concerning mandatory collective management, the EU has recently taken action to improve the functioning of CMOs, notably by adopting 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[49] which, among other, introduces rules on governance and transparency of CMOs.

6.2.3 Benefits

The main (recurrent) direct regulatory benefit of the Directive has been cost savings for the licensors and the licensees: where different entities are managing the same (e.g. music) rights in different territories, the effect of the Directive was to require a single licence in the country of origin instead of (potentially) multiple licences for the country of origin and the countries of reception falling within the satellite's footprint. Licence fees were not to be affected, as they have to be calculated taking into account the actual and potential audience, both in the Member State of broadcast and in any Member State of reception.

Illustration of the benefits of the country of origin principle for TV broadcasters[50]

Two of the six pay TV service providers with the most subscribers are cross-border operators (albeit with the majority of their subscribers in the country of origin), namely Sky UK and Sky Deutschland (see Table 2.29). Another example, Modern Times Group serves its audiences almost entirely via cross-border broadcasts: whilst its signal is uploaded in the UK, this signal is only available to audiences in other countries, i.e. in the Baltics and Scandinavia.

Illustration of the benefits of the country of origin principle for radio broadcasters[51]

The “country of origin” principle is key to enable remuneration by radios of rightholders in an appropriate manner. Radios are SMEs and therefore need as simple as possible licensing means to be able to clear all the required rights. Ideally, radio needs to obtain blanket licensing covering all of radios’ activities online and offline from one-stop-shops. This seems only feasible if a “country-of-origin” principle is applied.

Similarly, the impact of the provisions on mandatory collective management of cable retransmission rights is that individual right holders (e.g. audiovisual producers) need only to join a CMO instead of managing multiple contracts with cable operators from different Member States, and cable operators only need one licence for a category of right holders from a CMO in their country of operation instead of multiple licences from individual right holders based in different Member States. Change from individual licensing to collective management of rights can have an effect on licence fees and licensing revenue (rather positive for small

[49] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0026
[50] SatCab Study, Section 6.1
[51] AER contribution to the public consultation

right holders[52], rather negative for big right holders), but the evidence collected in the context of this evaluation is scarce and inconclusive[53].

Illustration of the benefits of the cable licensing regime[54]

Virgin Media (previously UPC Ireland) is retransmitting by cable the TV channels of UK broadcaster ITV in Ireland. Virgin Media receives the feed of an ITV channel from an English region. This feed includes the underlying rights for Ireland. Those rights are negotiated in a collective agreement between ITV, Virgin and the respective collective management organisations. As the licensee, Virgin Media pays all these parties, including ITV.

Despite a limited amount of evidence, the Directive can be considered to have been a cost-efficient and beneficial intervention. It has not created administrative burden or significant compliance / implementation costs for either stakeholders or Member States. The Directive has helped to reduce the transaction costs for the licensors and the licensees. Certain identified specific costs resulting from the application of the Directive (CMO fees charged for managing cable retransmission rights) can be regarded to be outweighed by benefits - savings in transaction costs. Some right holders referred to the Directive's possible negative impacts on the market functioning. However, they are not estimated to be significant in the case of the country of origin principle, since the Directive has left open the possibility for contractual limitations regarding the exploitation of rights to satellite broadcasting; and, in the case of mandatory management of cable retransmission rights, since individuals or SMEs, the category to which most right holders belong, due to their limited capacity to carry out multiple individual negotiations, are generally considered to be the main beneficiaries of this copyright clearing approach.

6.3. Relevance

How well do the original objectives still correspond to the needs (including of EU citizens) within the EU?

Satellite broadcasting

As far as direct satellite broadcasting is concerned (i.e. when a broadcasting organisation introduces signal into the uninterrupted chain of communication), without the country of origin principle there would be uncertainty as to whether a satellite broadcast is a restricted act in all Member States within the footprint of the satellite (in the sense that an authorisation from right holders in each Member State could be required for cross-border satellite transmissions). This issue remains relevant for those broadcasting organisations which engage in 'cross-border' broadcasting, i.e. direct broadcasting from one Member State to another as otherwise the same uncertainty as to the need to clear rights in the Member State of transmission or the Member State of reception would continue. It is not relevant for those organisations that offer satellite packages as these are essentially national. As indicated in the SatCab Study: *"the majority of all satellite channels that are available in Europe are encrypted pay-television channels. 64% of the television channels available on the main SES*

[52] According to Eurostat Structural Business Statistics, in the sector of programming and broadcasting activities, 98.9% of companies are SMEs (85% micro-companies) generating 17.9% of the value added. In the sector of film and music production, 99.9% of companies are SMEs (96% micro-companies) generating 85% of the value added (32% by micro-companies).

[53] SatCab Study, Sections 5.2.7 and 5.3

[54] SatCab Study, Section 5.2.4

and Eutelsat satellites are pay channels […] available through service providers. In most cases these encrypted pay channels are offered as part of package of channels, some of which may also be available free-to-air. Some encrypted channels may be free to view, as part of a package of channels."[55]

In 2009 the European Audiovisual Observatory analysed[56] channels broadcast outside packages on the 37 active satellites centred on Europe and concluded that among 5,500 or so channels broadcast by the same satellites in Europe 1,500 channels[57] were broadcast outside packages. Out of these 1,500 channels, 710 channels were designated as 'European channels' in the sense that either the channel is licensed or the broadcaster is established in Europe.

Similarly, the SatCab Study identifies the number of non-encrypted satellite TV channels available in 11 Member States:

Free to view satellite channels available in 11 sample EU countries 2015[58]

	Free to view satellite channels available		
Viewing country	**TV Channels**	**Public or mixed ownership**	**Originating from other Member States**
Denmark	3	2	2
Germany	124	39	7
Ireland	2	2	2
Spain	22	15	3
France	7	2	3
Italy	110	14	3
Hungary	8	5	2
Netherlands	16	13	2
Poland	22	6	3
Sweden	5	2	2
United Kingdom	144	36	2
TOTAL	463	136	34

Source: European Audiovisual Observatory MAVISE database
informitv analysis

This shows that the provisions of the Directive are relevant for a significant number of channels in Europe.

As regards the second specific objective with regard to the satellite broadcasting, i.e. improving access to TV and radio programmes from other Member States, in general, as already raised in the 2002 Report, the territorial exploitation of satellite broadcasts, a process which had already been present prior to the Directive's adoption, has continued.[59] This is not caused by the territoriality of copyright (as pursuant to the country of origin principle the rights need to be cleared for one country only) but is a consequence of licensing contracts that

55 SatCab Study, Section 2.4.2

56 IRIS plus 2009-8, Convergence, Copyrights and Transfrontier Television (Susanne Nikoltchev (Ed.), European Audiovisual Observatory, Strasbourg 2009).

57 The various language versions of a channel were considered as being different channels

58 SatCab Study, Section 2.3.2

59 See Joined Cases C403/08 and C429/08, Football Association Premier League Ltd, v QC Leisure, (C-403/08); Karen Murphy v Media Protection Services Ltd (C-429/08) and the Commission's Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland at http://europa.eu/rapid/press-release_IP-15-5432_en.htm

limit the exploitation of works to the territory of a given Member State. Audiovisual (AV) content is mainly licensed and distributed on a territorial basis. AV producers of premium content[60] typically grant an exclusive licence to a single distributor/broadcaster/service provider in each Member State. This form of licensing is considered by right holders to be important for the financing of European AV works, with rights being often pre-sold at the pre-production stage. In exchange for an upfront payment to the film producers, distributors and/or broadcasters often obtain exclusive exploitation rights in a specific territory for a defined period of time. As a result, TV broadcasters often make their channels available only in the territory of one Member State.

As indicated in the below table[61], satellite broadcasting remains an important source of TV and radio programmes for EU citizens:[62]

Television homes in thousands by platform in 11 sample EU countries 2015

000s	Terrestrial		Satellite		Cable		Telco
Country	Free	Pay	Free	Pay	All	Digital	
Denmark	194	307	45	193	1671	999	460
Germany	1777		14034	2020	17300	6158	2562
Ireland	189		237	707	404	363	57
Spain	11735	231	515	1553	1208	1112	1993
France	9020	1038	4861	6816	3136	1095	11907
Italy	15085	2805	1994	4734			231
Hungary	428	117	119	926	1847	734	512
Netherlands	15	441	15	636	4721	3577	1772
Poland	2764	133	727	6334	4350	2411	326
Sweden	26	560	261	628	2347	794	822
United Kingdom	8333		1860	10227	3770	3770	2422
TOTAL	49566	5632	24668	34774	40754	21013	23064
EU-28	**57832**	**6282**	**28762**	**41174**	**56415**	**30736**	**28321**

Source: Digital TV Research Digital TV World Databook for free-to-air; European Audiovisual Observatory Yearbook 2015informitv analysis

Therefore, the main objectives of the Directive for satellite broadcasting, i.e. (1) end the legal uncertainty regarding the rights to be acquired and (2) improving access to TV and radio programmes from other Member States, have not lost relevance since its adoption.

Cable retransmission

The rationale behind the copyright clearing system provided by the Directive is to ensure that cable operators are in a position to acquire all rights necessary for retransmission of TV and radio channels and that there are no black-outs in the retransmitted channels or programmes. At the time of adoption of the Directive it was considered that individual licensing was impractical in the case of retransmission, while voluntary collective management would not

60 Audiovisual content (such as films, series) which is considered as a vital input for broadcasting services because it attracts substantial audiences and thus generate substantial revenues for right holders.

61 SatCab Study, Section 2.2.9

62 The adoption of satellite subscriptions is forecast by Digital TV Research to remain relatively flat through to 2020, at around 18% of television homes in the current 28 European Union countries, Section 2.4.1

guarantee the absence of black-outs.[63] This rationale continues to be relevant for cable retransmissions today (no alternatives to facilitate licensing for cable operators have emerged in the meantime).

Moreover, the objective of improving access to TV and radio broadcasts from other Member States remains relevant, whatever the technique, and therefore also for the retransmissions carried by cable, which remains an important source of TV and radio programmes for EU citizens (see the table above), including for "foreign" TV channels: 177 such channels are available to cable subscribers in Germany, 150 in France, 158 in the Netherlands, 143 in Portugal, 163 in Denmark, 159 in Poland, 168 in Ireland and 232 in Hungary[64].

Therefore, the two objectives - (1) to help cable operators to clear the retransmission rights from every right holder involved in a TV or radio programme and (2) to improve access to TV and radio broadcasts from other Member States - remain relevant for retransmissions carried out by cable.

How well adapted is the intervention to subsequent technological advances?

The main principles of the Directive, i.e. the country of origin for satellite transmissions and the mandatory collective management for cable retransmission are technology-specific. The principle of the country of origin does not apply when a broadcaster clears rights for its online services. For online services offered across borders this potentially implies clearing rights in multiple jurisdictions. The difficulties related to such clearance of rights may reduce broadcaster's incentives to provide cross-border services.

The mandatory collective management system is limited to retransmissions by cable and therefore does not extend to retransmissions by other means such as IPTV[65] or OTT[66]. This means that, depending on the Member State (as national solutions may exist), providers of retransmission services by means other than cable cannot benefit from the system facilitating the clearance of relevant rights. Such providers therefore face a heavy rights clearing burden in order to be able to provide their services.

Since the adoption of the Directive TV and radio, but especially TV, have undergone a digital revolution thanks to the development of broadband internet access that allows the provision of high-quality online video and audio services over the internet. TV is still watched in the traditional manner but the new modes of viewing are increasingly important: 96% of Europeans watch television every day or almost every day, predominantly on a TV set but increasingly online (in 2014, 20% of Europeans – but 40% of those aged 15-24 – watched TV online at least once a week, representing a 3% increase compared to 2012). Analogue TV is switching to digital[67] and broadcasters are now commonly providing online offerings in addition to their 'traditional' broadcasting services. These offerings include: simulcasting services (TV/radio channels which are transmitted online alongside traditional broadcasting

63 The system of mandatory collective management of rights to retransmission of broadcasts is compatible with Article 11bis(2) of the Berne Convention which allows compulsory licences for any communication to the public by wire when this communication is made by an organization other than the original one.

64 Data from the European Audiovisual Observatory

65 Internet protocol television

66 Over-the-top or open Internet television

67 The gradual switchover from analogue to digital terrestrial television was completed in 2012. The remaining analogue cable services in Europe are expected to complete the migration to digital networks by 2020.

by satellite, cable, terrestrial), webcasting services (online only linear channels[68]), TV catch-up services[69] and podcasts, i.e. radio programmes that can be streamed or downloaded as well as other on-demand services (e.g. VOD).

Nowadays TV and radio channels reach viewers and listeners through several types of retransmission service providers: cable TV/radio providers, satellite TV/radio (package) providers, IPTV (TV/radio over closed circuit IP-based networks) providers, digital terrestrial TV (DTT) providers and also the emerging over-the-top (OTT) TV/radio service providers. The core business activity of retransmission service providers is to aggregate TV and radio channels into packages (basic, premium, thematic, etc.) and to provide them to consumers simultaneously to their initial transmission, unaltered and unabridged, typically against payment.

IPTV and OTT have been developing at a fast pace recently, which is explained by several technological and business factors: (i) IPTV and OTT have superior retransmission capacity; (ii) they are more attractive to consumers due to built-in interactivity of services and can be enjoyed (in the case of OTT) without the need for a dedicated hardware (such as a set-top-box and/or a satellite antenna); (iii) they are well promoted by numerous operators and major Internet platforms.

Finally, in some jurisdictions,[70] broadcasters inject program-carrying signals directly into cable networks (without any prior broadcast). This way of transmission is known as 'direct injection' as signals are directly injected by a broadcaster into the media gateway. It is argued that in such cases no retransmission of signals initially broadcast by another organisation occurs anymore and that therefore the provisions of the Directive on mandatory collective management do not apply. In Case C-325/14, SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM),[71] the CJEU ruled that:

"Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that a broadcasting organisation does not carry out an act of communication to the public, within the meaning of that provision, when it transmits its programme-carrying signals exclusively to signal distributors without those signals being accessible to the public during, and as a result of that transmission, those distributors then sending those signals to their respective subscribers so that they may watch those programmes, unless the intervention of the distributors in question is just a technical means, which it is for the national court to ascertain."

Depending on the development of the direct injection mode of transmission, retransmission by cable may become less significant.

<u>Results of the public consultation</u>

---

68 As of February 2016, BBC Three channel is available only online. On 31 May 2016, RTL II (Germany) launched its online channel RTL II You, which combines linear services with video-on-demand.

69 The concept of ‘catch-up’ television, enabling consumers to view programmes at the own choice of timing, is generally based on clearance of the rights for programming within a limited window, typically 7 to 30 days after transmission.

70 E.g. the Netherlands and Belgium, see IRIS plus 2014-4 "Copyright, technology and the exploitation of audiovisual works in the EU", L. Guibault and J.P. Quintais, p. 20-21

71 http://curia.europa.eu/juris/document/document.jsf?docid=171788&doclang=en

The public consultation asked stakeholders if, in their view, the current EU action was still relevant in the satellite and cable markets. A large majority of respondents from all sectors confirmed that EU action was still relevant in both areas.

The Directive remains relevant, both as regards facilitating licensing of satellite broadcasts / cable retransmissions and as regards improving consumers' access to TV and radio broadcasts from other Member States. Within the scope of application of the Directive (satellite broadcasting and cable retransmission) its relevance has been limited by two factors: the proliferation of territorially-limited satellite pay-TV offerings and the practice to inject programme-carrying signals directly into cable networks (without any prior broadcast). Otherwise the Directive - due to the technology-specific nature of its provisions - does not cover various TV and radio broadcast transmission and retransmission means that have emerged in recent years.

6.4. Coherence

Is this intervention coherent with other EU actions?

Internal coherence: The country of origin provisions of the Directive facilitate licensing for satellite broadcasting services thereby stimulating the offer of such services. Similarly, the cable retransmission regime and the associated mediation and negotiation mechanisms stimulate the development of cable TV services. Together the two sets of provisions (i) make it easier to communicate TV and radio broadcasts to audiences in other Member States; (ii) enable such audiences to have a choice of the technological means to access foreign TV / radio broadcasts – satellite or cable. The internal coherence is confirmed by the market data: as explained in other sections of this SWD, both types of services have been successfully deployed in different Member States, and foreign TV / radio broadcasts are available on both satellite and cable.

Coherence with other interventions which have similar objectives: The Directive is coherent with other EU instruments harmonising copyright and its management. Notably, the exclusive right to authorise satellite transmissions of broadcasts provided by the Directive was subsumed by Article 3 of the 2001 "Infosoc Directive". Moreover, while the Directive provides for mandatory collective management of cable retransmission rights, the recent 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 aims at improving the functioning of CMOs and, at the same time, the efficiency of management of cable retransmission rights.

The Directive is also coherent with other EU harmonisation instruments in the audiovisual sector. In particular, the Audiovisual Media Services Directive (AVMSD) is aimed at creating a single market in audiovisual media services (including TV broadcasting services) through the country-of-origin based regulation. It therefore makes sure that there are no regulatory obstacles (related to advertising, protection of minors, etc.) to show TV broadcasts to viewers in other Member States. The Directive considered that "*the legal framework for the creation of a single audiovisual area laid down in Directive 89/552/EEC* [the "Television without frontiers directive", the precursor of AVMSD] *must […] be supplemented with reference to copyright*"[72], since its achievement "*in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by*

[72] Recital 12 of the Directive

a series of differences between national rules of copyright and some degree of legal uncertainty"[73]. Indeed, the AVMSD and the Directive share common history and purpose[74] and provide a legal framework for the free movement of services in the audiovisual sector.

Finally, the Directive is coherent with the EU non-legislative instruments in the audiovisual sector. Specifically, the Creative Europe's MEDIA Sub-programme provides financial support for the development, promotion and distribution of European films and other audiovisual works. Often such works are acquired by TV broadcasters[75]. In other words, the sub-programme helps enriching TV broadcasts which ultimately reach Europeans through satellite and cable services.

Coherence with wider EU policy: The Directive is coherent with the EU Digital Single Market (DSM) policy. In particular, the Digital Single Market Strategy[76], adopted on 6 May 2015, aims at ensuring better access for consumers and businesses to digital goods and services across Europe. The Directive contributes to this objective by making it easier to access TV / radio broadcasts from other Member States.

Results of the public consultation

Respondents to the public consultation had the opportunity to express their views concerning the coherence of this action with other EU actions. Most of them consider the Directive to be coherent with other EU policies.

The Directive is coherent both internally and with other EU interventions pursuing similar objectives, notably those in the audiovisual and media sectors. Moreover, the Directive's objectives remain valid in view of the new Commission priorities, including the completion of the digital single market.

6.5. EU Added Value

Did EU action provide added value as compared to an action taken at the Member State level?

As the country of origin principle has the objective of localising the copyright relevant act of satellite transmission in a single Member State, it could have only been introduced at EU level. In other words: even if a Member State adopted a law stipulating that copyright needs to be cleared only for that Member State in the scenario where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced in the territory of the Member State into an uninterrupted chain of communication leading to the satellite and down towards the earth, such law would not bind other Member States the authorities (e.g. courts) of which could continue to consider that the act of satellite transmission takes places in the territories of such other Member States too, if their residents can access the transmission.

[73] Recital 5 of the Directive

[74] See Prof. P. Bernt Hugenholtz "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", IRIS plus 2009-8, p. 7

[75] E.g. the proportion of programme schedule time devoted to European fiction broadcast by the public service general-interest channels was 57.6% in 2013. See André Lange (ed.), "Fiction on European TV channels (2006-2013)", European Audiovisual Observatory (Council of Europe), December 2014.

[76] COM(2015)192

It continues to be so and the potential withdrawal of this intervention would result in a situation in which satellite broadcasters would be faced with legal uncertainty as to the clearance of rights for cross-border transmissions.

As regards cable retransmission, national solutions are possible (and, as explained above, were put in place in some Member States before the adoption of the Directive) but would not guarantee a uniform application of the rules across the EU and could lead to a fragmentation of the internal market as far as cable retransmission services are concerned.

As regards satellite broadcasting, the Directive has provided significant added value, since no action with a comparable result could have been taken at the Member State level. As regards cable retransmission, action at the Member State level is possible, but the Directive has provided added value by establishing harmonised rules across the internal market.

SECTION 7 – CONCLUSIONS

Clear-cut conclusions on the performance of this Directive are difficult to draw, as its evaluation can only rely on very limited evidence. Obtaining data on licensing practices and licensing costs was especially challenging. It can, however, be observed that all Member States have introduced rules having as their objective the transposition of the Directive and that the transposed rules have generated over the years relatively few legal disputes.

The Directive can also be considered to have contributed to fostering thriving TV / radio broadcasting and distribution markets: 28.7 million EU households receive free-to-air satellite broadcasting services and 56.4 million – cable retransmission services.

As regards the *effectiveness*, there are indications that overall the specific mechanisms introduced by the Directive have facilitated the clearance of copyright and related rights for (free-to-view) cross-border satellite broadcasts and for the simultaneous retransmissions by cable of broadcasts from other Member States. Similarly these mechanisms can be considered to have contributed to ensuring a high level of protection for right holders and have improved, to different extents, access to TV and radio programmes from other Member States. The negotiation and mediation mechanisms established under the Directive have been used to a varying, but overall limited, degree; they were found helpful in the cases where they have been used.

The Directive can be considered to have been a cost-*efficient* and beneficial intervention. It has not created administrative burden or significant compliance / implementation costs for either stakeholders or Member States. The Directive has helped to reduce the transaction costs for the licensors and the licensees. Certain identified specific costs resulting from the application of the Directive (CMO fees charged for managing cable retransmission rights) can be regarded to be outweighed by benefits - savings in transaction costs. Some right holders referred to the Directive's possible negative impacts on the market functioning claiming that the country of origin principle could have undermined the territory-by-territory content distribution strategies and that mandatory collective management does not allow for the licensing of cable retransmission rights on fair market terms. However, these concerns are not estimated to be significant either in the case of the country of origin principle (since the Directive has left open the possibility for contractual limitations regarding the exploitation of rights to satellite broadcasting) or in the case of mandatory management of cable retransmission rights (since individuals and SMEs, the category to which most right holders

belong, are generally considered, due to their limited capacity to carry out multiple individual negotiations, to be the main beneficiaries of this approach).

The Directive remains *relevant*, as a tool facilitating licensing of (free-to-view) cross-border satellite broadcasts and cable retransmissions of TV and radio broadcasts from other Member States as well as, more generally, for improving consumers' access to TV and radio broadcasts from other Member States. Within the scope of application of the Directive (satellite broadcasting and cable retransmission) its relevance has been limited by two factors: the proliferation of territorially-limited satellite pay-TV offerings and the practice to inject program-carrying signals directly into cable networks (without any prior broadcast). Otherwise the Directive - due to the technology-specific nature of its provisions - does not cover various broadcast transmission and retransmission means that have emerged in recent years.

The Directive is *coherent* both internally and with other EU interventions pursuing similar objectives, notably those in the audiovisual and media sectors. Moreover, the Directive's objectives remain valid in view of the new Commission priorities, including the completion of the digital single market.

As regards satellite broadcasting, the Directive has provided significant *EU added value*, since no action with a comparable result could have been taken at the Member State level. As regards cable retransmission, action at the Member State level is possible, but the Directive has provided added value by establishing harmonised rules across the internal market.

In terms of REFIT, since the Directive has not created administrative burden or significant compliance / implementation costs for either stakeholders or Member States and since its provisions are, generally, setting out principles rather than procedures, the available simplification potential is estimated as limited.

Annex 1

Transposition of the Satellite and Cable Directive 93/83/EEC by the Member States

Member State	National legislation transposing the Directive	National case-law (if reported by the Member States / in the SatCab Study[77])
Belgium	Title V of book XI of the Code of economic law (originally transposed in the former Copyright law of the 30th of June 1994)	- Cour d'appel Bruxelles 9 juin 2015 (Agicoa) - Cour Constitutionnelle 12 février 2015 (Telenet) - Cour d'appel Bruxelles 17 juin 2014 (SBS Belgium C/ SABAM) - Cour d'appel d'Anvers 4 février 2013 (SABAM c/ Telenet)
Bulgaria	The 1993 Copyright and related rights act (SG. 56/29 Jun 1993), as amended	-
Czech Republic	Copyright Act No. 121/2000 Coll., as amended by No. 216/2006 Coll	Decision of the Regional Court in Brno (OSA v. DIGI Czech Republic, s.r.o., 23 C 176/2013-129) regarding the interpretation of the terms "cable retransmission" and "retransmission by microwave system"
Denmark	Danish Copyright Code (Consolidated Act No. 1144 of October 23 2014)	-
Germany	§ 20 a, 20 b, 87(5) of the German Copyright Act (*Gesetz über Urheberrecht und verwandte Schutzrechte*) § 14d of the German Copyright Administration Act (*Urheberrechtswahrnehmungsgesetz*)	Regional Court of Hamburg judgment of 8 April 2009 in the case Warner and Universal vs Zattoo.DE (nr.308 O 660/08) regarding the concept of cable retransmission
Estonia	The 1992 Copyright Act RT I 1992, 49, 615, as amended	2013 Estonian Supreme Court decision (*Riigikohus*) in civil case No 3-2-1-50-13 (Estonian Authors Society vs VIASAT AS) regarding the licensing of a satellite service
Ireland	Copyright and related rights act, 2000 (No 28), as amended	-

[77] The survey and data gathering to support the evaluation of the Satellite and Cable Directive and assessment of its possible extension (the "SatCab Study")

Greece	Law 2557/1997 (Official Journal FEK A' 271/24.12.1997)	-
Spain	Law on Intellectual Property, approved by Royal Legislative Decree No. 1/1996 of April 12, 1996 repealing Law No. 28/1995 of October 11, 1995, on the Incorporation in Spanish Law of Council Directive (EEC) No. 93/83 of September 27, 1993	-
France	Loi n° 97-283 du 27 mars 1997 portant transposition dans le code de la propriété intellectuelle des directives du Conseil des Communautés européennes n° 93/83 du 27 septembre 1993 et n° 93/98 du 29 octobre 1993	
Croatia	The Copyright and Related Rights Act ("Official Gazette" No. 167/03, 79/07, 80/11, 125/11, 141/13 and 127/14)	-
Italy	Decreto Legislativo 23 ottobre 1996, n. 581 "*Attuazione della direttiva 93/83/CEE per il coordinamento di alcune norme in materia di diritto d'autore e diritti connessi, applicabili alla radiodiffusione e alla ritrasmissione via cavo*" pubblicato nella *Gazzetta Ufficiale* n. 270 del 18 novembre 1996 *(Rettifica G.U. n. 286 del 6 dicembre 1996)* Legge n. 633/1941	Sentenza Corte di Cassazione, 13 ottobre 2011, clarifying the application of Article 2 of the Directive
Cyprus	Copyright and Related Rights Law 59/1976, as amended	-
Latvia	The 2000 Copyright Law ("Latvijas Vēstnesis", 148/150), as amended	-
Lithuania	The 1999 Copyright and Related Rights Law No. VIII-1185, as amended	-
Luxembourg	Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données (Mémorial A n° 50 du 30.04.2001)	-

Hungary	Act LXXVI of 1999 on Copyright, as amended	-
Malta	The 2000 Copyright Act XIII (Cap 415), as amended	-
Netherlands	Wet van 20 juni 1996, houdende wijziging van de Auteurswet 1912 en de Wet op de naburige rechten in verband met richtlijn nr. 93/83/EEG van de Raad van de Europese Gemeenschappen van 27 september 1993 tot coördinatie van bepaalde voorschriften betreffende het auteursrecht en naburige rechten op het gebied van satellietomroep en de doorgifte via de kabel (PbEG L248) The directive was implemented by amending the Copyright Act and the Neighboring rights Act. Publication (Stb 1996, 364) Act on Copyright Contract Law (Wet auteurscontractenrecht, Stb 2015,257), which entered into force on 1 July 2015 (proportional remuneration for a communication to the public of a film)	HR 28 March 2014 Norma - NL Kabel regarding the concept of cable retransmission
Austria	Urheberrechtsgesetz (= UrhG)- Novelle 1996 (BGBl I Nr 151/1996) Section 36 Collective Management Act	Austrian Supreme Court Judgment of 21 February 2008, 4Ob89/08d regarding the concept of cable retransmission
Poland	Act No. 83 of 4 February 1994 on copyright and related rights, as amended	-
Portugal	Decreto-Lei n.o 333/97, 27 November 1997	- Ruling of the Constitutional Court No. 102/2016
Romania	Law no. 8/1996 on copyright and related rights, as amended	-
Slovenia	Copyright and Related Rights Act of 30 March 1995 (Official Gazette of the RS No 21/1995), as amended	-
Slovakia	Copyright Act (Act No. 185/2015 Coll. on Copyright) Act No. 220/2007 Coll. on the Digital Broadcasting of Programme Services and on the Provision of Other Content through Digital	-

	Transmission, which also amends and supplements certain other acts (Digital Broadcasting Act) Act No. 420/2004 Coll. on Mediation, as amended and Act No. 244/2002 Coll. on Arbitration Proceeding, as amended	
Finland	Copyright Act (Tekijänoikeuslaki 404/1961) Arbitration Act 967/1992	-
Sweden	Copyright Act (1960:729) [lag (1960:729) om upphovsrätt till litterära och konstnärliga verk] Act on Mediation in Certain Copyright Disputes (Swedish Statute book, SFS, 1980:612, with later amendments)	-
United Kingdom	The Copyright and Related Rights Regulations 1996 (SI 1996/2967), which amended the Copyright, Designs and Patents Act 1988	- TV Catchup First Judgment [2011] EWHC 1874 (Pat) - TV Catchup Second Judgment [2015] EWCA Civ 204

Annex 2

Overview of the application of SatCab negotiation and mediation mechanisms in the Member States

Member State	Reported arrangements for / experience with the SatCab negotiation and mediation mechanisms
AT	No practical experience. The "Schlichtungsausschuss" [Arbitration Committee] is an arbitral tribunal. The Arbitration Committee consists of three members. One member is appointed by each party; both members elect the chairman. In case that one party refuses to appoint a member or members appointed by the parties do not elect the Chairman the Chairman of the Copyright Senate may be requested to appoint them
CY	The Copyright Authority decides on differences regarding the amount of fees payable by the user to the beneficiary/collecting Rights Management Societies. This Authority is appointed by the Minister of Energy, Commerce, Industry and Tourism and its decisions are binding on the parties
CZ	There is limited experience with the provisions on mediation. There are 5 mediators on the List of mediators managed by the Ministry of Culture. Since 2001 only 7 cases have occurred where mediators were involved in a mediation, in 8 cases they were only contacted but not eventually used. The scope of their competence has been broadened as it actually covers any form of exploitation
DK	The Copyright License Tribunal is the national out-of-court body handling most disputes in relation to e.g. remuneration to the rights holders in several different areas such as cable retransmission (latest ruling is from 2002) and use of music in radios (latest ruling is from 2013). The Copyright License Tribunal passes on average 1-2 rulings a year. The tribunal consists of three members – one of them a judge of the Supreme Court – and it is appointed for five years at a time
EE	In practice, the mediation process has not been used in cases related to the Directive. Copyright Committee is formed by the Ministry of Justice and serves as a mediation body that also resolves, at the request of the parties, disputes related to copyright and related rights by way of conciliation. If, in order to resolve the corresponding rights, a party has applied to the Copyright Committee, the parties are required to enter into negotiations through the committee and conduct the negotiations in good faith. The Copyright Committee is not used often by persons having legal debates on copyright issues (1-2 applications per year)
EL	No practical experience. According to the law, either party may call upon the assistance of one or more mediators selected from the list of mediators drafted by the Copyright Organization every two years. The Copyright Organization may consult the collecting societies and cable operators for the drafting of the said list. Mediators may submit proposals to the parties. It shall be assumed that all parties accept a proposal if none of them expresses its opposition within a period of three (3) months from the notification of the proposal
ES	The use of the mediation is voluntary for the negotiating parties, and not many substantial cases have been raised for mediation so far. The competent body - the First Section of the Intellectual Property Commission is composed of four members, named by Government at the proposal of the Ministries of Culture, Economy, Justice and Industry, among recognised experts in the field of intellectual property. Its resources are funded by the budget of the Ministry of Education, Culture and Sport

FI	It is not public knowledge whether mediation has been used after the implementation of the Directive. The parties may elect the mediator and the parties pay the mediator's fees and other costs
HR	Mediation is provided by the Council of Experts, consisting of a president and four members appointed by the Minister. Until this date there were no cases regarding the contracts on cable retransmission between the broadcasting organizations and cable operators. Costs are envisaged to be covered by the parties that initiate the proceedings
HU	According to the law, the members of the Mediation Board shall be appointed from among the members of the Council of Copyright Experts. If no agreement is reached between the parties, the Mediation Board shall draft a proposal concerning the content of the agreement which it communicates to the parties in writing. The parties may accept the agreement expressly or tacitly. It shall be regarded as a tacit acceptance if no objection is made by the parties to the Mediation Board with regard to the proposal for agreement within three months from the date of its delivery
LV	No practical experience. According to the law, the parties may agree regarding the candidature of a mediator or regarding the procedures by which a mediator shall be invited or appointed. If the parties cannot agree, the mediator may be appointed by the Minister for Culture. The mediator may express proposals to the parties to resolve the dispute and specify a time period within which the parties approve or reject his or her proposal. If none of the parties objects to the proposal of the mediator within a period of three months after receipt of the proposal, it shall be deemed that they have accepted such proposals
LT	Mediation is carried out by a committee (composed of 3 members) appointed by the Minister of Culture. The Ministry covers organisational and technical costs. In 2011 the mechanism was successfully applied to help finalise the negotiations over a framework licencing agreement between collective management organisations and Lithuanian cable operators' associations. It was again applied to facilitate re-negotiation of the agreement in 2015
NL	No practical experience. According to the law, each party can refer the issue to an independent mediator. The mediator is allowed to make proposals. The proposal is binding on the parties involved unless objections are made within three months upon receiving the proposal
PL	No practical experience. According to the law, disputes regarding the finally and bindingly approved tables of remuneration and disputes connected with the conclusion of the contract for cable retransmission may be settled by means of mediatory proceedings before the Copyright Commission, an independent arbitrary body appointed by the Minister of Culture and National Heritage
RO	According to the law, the Romanian Copyright Office shall convene, within 5 days as from the requesting of the arbitration, the parties for drawing lots for the appointment of 5 standing arbitrators that shall form the arbitration panel and of the 3 reserve arbitrators. The Romanian Copyright Office convenes, at its headquarters, the appointed arbitrators and the parties, for the establishing of the mediation panel. The mediation panel shall establish the fee, within the limit of the professional usages for the activities of arbitration, the first date and the place of mediation and informs the parties. The two parties in mediation, collective management organizations and, respectively, the users, contribute equally to the payment of the fee established by the arbitrators. Arbitrators, within 30 days as from the first date of arbitration, must file

	with the Romanian Copyright Office the award comprising the final form of the methodologies subject to arbitration, for the communication to the parties
SE	Limited practical experience. According to the law, any of the parties may file a request for mediation to the Government which then appoints a mediator who shall try to find a solution on the basis of proposals from the parties. If a final proposal for solution by the mediator is rejected or the mediator considers himself/herself unable to find a solution due to lack of cooperation from any of the parties, he or she shall inform the Government. A proposal by the mediator for solution of the dispute shall be considered as approved by the parties if none of them opposes the proposal within three months from the date when the party was informed about the proposal. The mediator has a right to reasonable remuneration for his/her work and for costs
SK	Mediation is not used very often. The parties usually go straight to the court, if any dispute arises