

■ AUDIOVISUAL MEDIA SERVICES DRAFT DIRECTIVE

Opinions and Recommendations
from Stakeholders in the UK

APRIL 2006

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This document has been agreed by representatives from a cross-section of businesses, organisations and communities who operate from the UK, as well as across the EU and globally.

It provides a synopsis of their views on the draft Audiovisual Media Services (AMS) Directive.

■ AUDIOVISUAL
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EXECUTIVE SUMMARY

We are committed to the i2010 and Lisbon agendas, to the principle of a single market for television services, and to public policy interests, such as the protection of minors and the promotion of European works.

■ We agree with the principles of the directive, but not the proposed approach

- The telecommunications, media and technology sectors (TMT) play a vital role in the UK's culture and economy. They are key enablers and suppliers of Europe's knowledge economy, serving citizens and consumers in their daily lives and businesses of all sizes.
- It is essential for the benefit of all EU citizens that TMT companies are able to evolve and respond rapidly to global commercial change and become more competitive in an environment that stimulates growth and attracts investment. We are committed to achieving these aims within the context of the i2010 and Lisbon agendas. There is also broad support for the principle of free movement of television services within the single market, and for the pursuit of public policy interests, such as the protection of minors and the promotion of European works.
- However, we do not believe that the draft AMS Directive will be able to deliver these objectives. Instead, in its current form, it will have a number of unintended consequences that will undermine the growth and global competitiveness in the converging media sector in Europe and compromise public policy aims.
- At the heart of the problem lies the proposal to extend broadcasting legislation to cover all 'audio visual media services'. While we support deregulation within the current scope, and agree that definitions relating to 'TV-like' services need to be revisited, we oppose the extension of scope as defined. The proposed extension severely undermines the legal certainty derived from existing legislation, in particular the eCommerce Directive (eCD), creates unenforceable definitions, and fails to allow effective self-regulatory approaches to develop, and as such goes against the best practice principles laid out in the Commission's Better Regulation policy.

We support deregulation within the current scope, and agree that definitions relating to scheduled broadcast 'linear' television services need to be revisited, but strongly oppose the extension of scope to cover so-called 'non-linear' services as defined.

Our main recommendations are as follows:

- The Television without Frontiers (TVwF) Directive should be amended to update regulation affecting scheduled broadcast ('linear') television as outlined in Option 3 of the Commission's Impact Assessment. This should include more widespread liberalisation of its advertising provisions than is proposed in the draft Directive. However, the scope of the Directive should not be extended to cover so-called 'non-linear' services as currently defined.¹
- The definition of 'linear' television should be revised to include services that are identical in nature to traditional scheduled broadcast services, but delivered over different platforms. European Institutions, Members States and stakeholders should engage in rigorous debate to arrive at workable definitions in this respect.
- Self-regulatory mechanisms should be encouraged to work with 'non-linear' services in order to best protect consumers and to promote a healthy audiovisual industry in Europe.
- The principle of subsidiarity in areas of public policy where no established unitary Community standards exist should be respected.

¹ We do not believe that the terms 'linear' and 'non-linear' as described in the draft Directive are workable as legal definitions. However, for the purposes of this document we refer to 'linear' services as those which are identical to scheduled broadcast television, and 'non-linear' to services which do not fall into this category.

OPINIONS AND RECOMMENDATIONS

We support the retention of the Country of Origin principle within the existing scope.

We welcome moves to liberalise advertising provisions within the existing scope and support product placement, but question the 35 minute rule, which would discourage investment.

- **UK stakeholders support the review of regulation governing existing scheduled broadcasting**
 - We agree that a review of legislation governing 'linear' broadcast television is timely and welcome a number of aspects in the Commission's proposal, while wishing to make some comments.
 - We strongly support the retention of the Country of Origin principle as the bedrock of the draft Directive. Without the legal certainty afforded by this, the rationale for retaining minimum standards across Europe would be undermined to the detriment of the growth of multi-channel 'linear' television.
 - Advertising remains a vital revenue stream for non-publicly funded original programmes which are delivered over 'linear' broadcast channels, and has allowed plurality and dynamism to flourish. In the UK it plays a central role in sustaining the largest per capita expenditure on domestic TV content production of any country in the world. In order to enable this positive situation to continue, we consequently strongly support moves to liberalise advertising provisions in TVwF.
 - We agree with the removal of the 20 minute rule, and the Commission's view that 'detailed regulation with regard to the insertion of spot advertising with the aim of protecting viewers is no longer justified', but can see no validity in the 35 minute insertion rule proposed. This rule would increase advertising restrictions on news and children's programmes and would have only a marginally improved impact on films. Its unintended effect, however, would be to discourage investment in these genres.
 - We would also like to see deletion of the isolated spots rule in order to allow experimentation with new break patterns, while maintaining the integrity of programmes.
 - Clarification that product placement is legal in 'linear' television is also welcome. While it is not a panacea, it does increase the attractiveness of the communication package available through scheduled broadcast television and therefore also advertiser commitment to the medium.
 - In line with the principle of deregulation in this area, we believe that the promotion of European content should primarily remain a decision for broadcasters rather than regulators. Commercially funded public service channels in the UK already meet or exceed European and independent quota requirements, due to strong demand for local and regional content from audiences, and many thematic channels are also now increasing their levels of European and independent production.

Consumers are already protected from harmful content delivered over 'non-linear' services by the eCommerce Directive, and by self- and co-regulatory schemes.

The proposed extension undermines the legal certainty and commercial success derived from the eCommerce Directive, and goes contrary to the Better Regulation policy.

- **No internal market, public policy or legal rationale exists for the extension of scope to 'non-linear' services as defined**
- While supporting the liberalisation of 'linear' broadcasting regulation, we strongly object to the extension of scope to cover so-called 'non-linear' services, even if in a graduated way.
- The draft Directive's memorandum argues that there are two market-based motives for extending scope in this way: that a non-level playing field exists between different types of audiovisual media content and that a lack of harmonisation between national legislation unfairly creates legal uncertainty for services not currently covered by the Directive.
- However, neither of these drivers adequately justifies the extension as defined:
 - an 'unlevel' playing field is a competition issue, not one that should be solved by an internal market-based solution,
 - disparities between national legislation 'cannot justify per se Internal Market harmonisation' as decreed by the Court of Justice in its 'Tobacco' judgement.² It should also be noted that the 'non-linear' service providers whom this move is intended to benefit, are opposing extension.
- Nor do public policy concerns justify the extension as defined. This is not because we believe that 'non-linear' audiovisual media services should be exempt from legal standards protecting citizens and consumers, but because adequate and effective legislation in this area already exists and is functioning well.
- As 'information society services', 'non-linear' audiovisual media services that fall outside of the scope of the current TVwF Directive are covered by the eCommerce Directive (eCD), as well as a range of other Directives.³ This legislation is supported by self- and co-regulatory schemes operating across Europe (see page 7), which effectively address public policy objectives such as the protection of minors.
- The fact that Member States can derogate from eCD has been cited as a justification for extending the scope of TVwF. However, the necessity for and consequent strength of the Country of Origin principle in eCD is unequivocally understood by Member States and service providers alike, and derogations are permissible only in exceptional circumstances under strict scrutiny. There is no evidence to suggest that derogations, where made, have harmed UK businesses and so the problem cited by the Commission does not justify extension of scope when weighed against the negative consequences.
 - eCD has provided the strong legal framework on which growth and investment in the new media sector has been built over the last five years. Allowing TVwF to stray into this territory in order to address a perceived weakness elsewhere undermines the legal certainty derived from both Directives, as well as the commercial success that has been built on them, and certainly goes contrary to best practice principles laid out in the Commission's Better Regulation policy.

² Germany v. Parliament and Council judgement of 5 October 2000 (C-376/98)

³ Unfair Commercial Practices Directive, Misleading Advertising Directive, Privacy and Electronic Communication Directive

Broad and ambiguous definitions mean that implementation could be all but impossible.

We do not support the proposed linear/non-linear approach, which will create legal uncertainty, and argue that further work is needed to create a viable definition of broadcast services.

Poor definitions render the draft Directive unworkable

- By extending TVwF to cover a new category – ‘audiovisual media services’ – the draft Directive attempts to regulate a newly emerging sector whose parameters, characteristics and players are yet to be set. This means that implementation could be all but impossible. Ofcom has also expressed concern over the practical implementation of some of the proposals (Ofcom position paper, 27 January 2006).
- The sector’s nascence means that broad and ambiguous terms such as ‘ancillary’ and ‘principal’ purpose, ‘media services provider’ and ‘moving image’ lack consensus and permanency. It is therefore highly unclear which services would fall under the extended scope, and means that many services unconnected to scheduled broadcast television will be unintentionally caught.
- Other terms, such as ‘standard consumer equipment’ and ‘audio visual commercial communication’ have been newly introduced, the latter directly undermining definitions which exist elsewhere (in eCD for example), further compounding legal uncertainty.
- We acknowledge that the definition of broadcasting needs to be amended to include services that are identical in nature to traditional scheduled broadcast services, but delivered by different platforms. However, we do not support the linear/non-linear approach proposed in the draft Directive. These terms do not provide ‘a workable, future-orientated basis for a legal definition’, but would instead lead to the unjustified extension of regulation to a broad swathe of new unrelated services, in an area where definitions will not hold. Further work must therefore be undertaken with the full participation of stakeholders to create a viable definition of broadcast services, for the purpose of this Directive.
- Far from providing the new media sector with ‘legal certainty’, as the draft Directive intends, it in fact creates a confusing and uncertain environment in which to innovate and invest. It is therefore at odds with the best practice principles laid out in the Commission’s Better Regulation policy, and risks undermining alternative Directives and schemes that are effectively patrolling this area to the detriment of both business and consumers.

**AUDIOVISUAL
MEDIA SERVICES
DRAFT DIRECTIVE**

In addition to national laws and existing European Directives, alternative regulatory mechanisms are more effective in monitoring the fast moving and disparate 'non-linear' industry than state regulation at a European level.

The omission of 'self-regulation' from the draft Directive text rules out an effective regulatory approach.

- **Self-regulation is the most effective way to patrol so-called 'non-linear' services**
 - UK stakeholders are committed to the protection of consumers and the promotion of European works both in terms of social responsibility and commercial best practice. We support minimum qualitative standards in relation to 'linear' television services. However, we believe that in addition to national laws and existing European Directives, alternative regulatory mechanisms are more effective in monitoring the fast moving and disparate 'non-linear' industry than state regulation at a European level.
 - In this light, while we welcome references to self-regulation in the draft Directive's recitals, we do not think that the approach taken in the draft Directive itself is appropriate for 'non-linear' services.
 - The omission of 'self-regulation' from the draft Directive text rules out an effective regulatory approach. We find this surprising and unnecessary given that provisions were made in the eCD for self-regulatory-like schemes in the form of Codes of Practices run by agreed industry bodies. Such industry-supported bodies – the Association for Television on Demand (ATVOD) in the UK for example – are generally accepted to provide an effective and efficient consumer protection service, and are well supported by regulators.
 - ATVOD is proud of the fact that it has received no complaints thus far and argue that this is because members have behaved responsibly both when setting up and complying with the self-regulatory framework, as well as each member having an effective internal complaints system. However, it is highly unlikely that bodies such as ATVOD would have developed had they not been given the regulatory space to do so, something that the proposed AMS Directive's current approach does not allow.
 - In the UK a Co- and Self-Regulatory Forum⁴ has been established with the support of government and Ofcom, to continue to evolve and develop self- and co-regulation by improving models and spreading best practice. We believe that this model is an effective way to pursue the consumer protection agenda, and that it could usefully be adopted across the EU to offer harmonious consumer protection.
 - A self-regulatory approach also allows for subsidiarity in areas of public policy where no established unitary Community standards exist. The need for subsidiarity is best illustrated by the response to the Danish cartoon, illustrating that notions of acceptability in the media are extremely sensitive. It should also be noted that companies operating in overseas markets are acutely aware of different national cultural sensitivities, and will adjust their offerings accordingly in order to compete effectively regardless of legislation.

⁴ For more information on the Forum, please visit www.broadbanduk.org/bsg/forum_co&selfreg

Unworkable, unclear and unnecessary regulation will divert investment away from the EU, and undermine i2010.

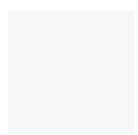
■ **Extending scope as proposed will undermine i2010 and negatively affect citizens and consumers**

- The very broad extension of broadcasting scope to cover a new, emerging and as yet unstable market where legislation already exists will have consequences that are diametrically opposed to the objectives it seeks to achieve.
- Far from providing legal certainty and commercial opportunity for non-linear audiovisual media markets, unworkable, unclear and unnecessary regulation will raise barriers to entry and deter new and existing players from the market. Investment and innovation will be diverted away from the EU and i2010 objectives will not be achieved.
- Citizen media such as blogs, videocasts and the like are one of the most exciting developments enabled by new technology. This phenomenon has the potential to create new businesses and allow the free movement of expression and culture across Europe, but this proposed regulation severely risks stunting its growth.
- Unnecessary, extra regulation will also negatively affect the citizen as a consumer. A less attractive commercial market will lead to less competition, higher prices and fewer improved services. There is also a real risk that because of the unclear scope and the employment of unsuitable mechanisms, the Directive will fail to protect citizens from harmful or offensive content in an area where self- and co-regulatory bodies are already effectively operating.

Unclear scope and the employment of unsuitable mechanisms risk failing to protect consumers in an area where self- and co-regulatory bodies are already effectively operating.

To reiterate, our main recommendations are as follows:

- The Television without Frontiers (TVwF) Directive should be amended to liberalise advertising provisions (with the aforementioned provisos) but without extending its scope to cover so-called 'non-linear' services, as outlined in Option 3 of the Commission's Impact Assessment.
- The definition of 'linear' television should be revised to include services that are identical in nature to traditional scheduled broadcast services, but delivered over different platforms. European Institutions, Member States and stakeholders should engage in rigorous debate to arrive at workable definitions in this respect.
- In addition to existing laws, self-regulatory mechanisms should be employed to monitor 'non-linear' services in order to best protect consumers and to promote a healthy audiovisual industry in Europe as part of the i2010 and Lisbon agendas.



AUDIOVISUAL
MEDIA SERVICES
DRAFT DIRECTIVE

SIGNATURES

To view the most up to date list of signatories to this paper, visit www.audiovisualstakeholders.org where you can download this paper and find out how to add your organisation's name to the list.

Alternatively you can email vicky.read@intellectuk.org.

- The Advertising Association
- ATVOD (Association for Television On-Demand)
- British Music Rights
- British Screen Advisory Council
- Broadband Stakeholder Group
- BT Group Plc
- Channel 4
- Cinema Exhibitors' Association
- Cisco Systems Ltd
- Communications Management Association
- European Publishers Council
- Five (channel 5 Broadcasting Ltd)
- Global Village Limited
- Homechoice
- H3G UK Ltd
- Institute of Practitioners in Advertising
- Intellect
- ISPA (Internet Service Providers' Association)
- ITV Plc
- Newspaper Publishers Association
- NTL
- PACT (Producers Alliance for Cinema and Television)
- Phonographic Performance Limited
- Satellite & Cable Broadcasters' Group
- T-Mobile UK
- Video Performance Limited
- Vodafone
- Wanadoo UK
- Yahoo!