

ETNO Expert Contribution commenting on Commission Issue Papers in preparation of the review of the TVWF Directive

Executive Summary

The Expert Contribution contains ETNO comments on TVWF Issue Papers 1, 3, 4 and 5.

IP1 - Rules applicable to the audiovisual content services

ETNO is concerned about the legal uncertainty that may arise as a result of the review of the Directive, at the very moment when the ICT sector is fully engaged in rolling-out new value-added broadband services. It might be more fruitful to only consider a possible review, depending on the future stabilization of the new emerging markets.

The strict separation between the rules of the TVWF Directive on linear broadcast television and the general rules on audiovisual content and on information society services offered on individual demand should be maintained. In general terms, the key criterion for issuing regulation should be the degree of user's control as opposed to publisher control. Where the user is in control, as exemplified by on-demand services, additional EU regulation is not necessary. Information Society services should continue to be regulated by the E-Commerce Directive, as it is more adapted to the nature of those new emerging markets.

IP3 - Cultural diversity and promotion of European and independent audiovisual production

Extension of obligations on European/independent works will be counterproductive. ETNO believes that the best way to foster production and distribution of the European works is by means of current financial programmes such as Media 2007 and e-Content Plus. Furthermore, concerning non linear services, producers are in a position to directly bring to the market their productions

IP4 - Commercial communications

As far as quantitative rules are concerned, ETNO supports the consensus which has emerged from consultations to date: the current advertising rules should be more flexible. As far as qualitative rules are concerned, specific advertising rules should continue not to apply to the non-linear services. The E-Commerce Directive already imposes a requirement for commercial communications to be clearly identified as such.

IP5 - Protection of Minors and Human Dignity, Right of Reply

ETNO agrees on the necessity to have an audiovisual market with an appropriate regulation for general interest matters such as protection of minors or right of reply, but has concerns on the juridical instruments to pursue such objectives. It is fully justified that the scope of the TVWF Directive be limited to the linear services. Important qualitative rules are already applicable to the online world through the existing European and national legislations.

The European Telecommunications Network Operators Association ETNO welcomes the opportunity to participate in the public consultation on the potential revision of the TV without Frontiers Directive (TVWF).

ETNO represents 42 major telecommunication companies throughout Europe including all EU Member States, providing a number of different services from traditional fixed line telecommunication services to mobile telecommunications, content provision and Internet services.

ETNO members act as important enablers of broadband communications, they are among the key promoters of the new on-line multimedia world, and are pleased to present their views on the future structure of a revised TVWF Directive, focusing on core issues.

Issue Paper 1 – Rules applicable to the Audiovisual Content Services

Executive Summary

ETNO is concerned about the legal uncertainty that may arise as a result of the review of the Directive, at the very moment when the ICT sector is fully engaged in rolling-out new value-added broadband services, which are key to the future of electronic communication markets. Indeed, extraordinary investments are being made to create an appealing broadband market of content, networks and services. These efforts might be adversely affected by an inappropriate horizontal regulation of content. This uncertainty is a further reason for a cautious approach in reviewing the TVWF directive ex ante. It might be more fruitful to only consider a possible review, depending on the future stabilization of the new emerging markets.

The strict separation between (1) the rules of the TVWF Directive on linear broadcast television, whereby the timing and the succession of the programmes are under the full control of a publisher/editor, and (2) the general rules on audiovisual content and on information society services offered on individual demand (such as VOD, download & play, interactive services, etc.) has proven to be a sustainable principle to approach the issue and should be maintained.

In general terms, the key criterion for issuing regulation should be the degree of user's control as opposed to publisher control. Many of the obligations found in the current Directive are justified by reference to the user's lack of control in the context of traditional broadcasting. The broadcaster is responsible for the composition of the program, by determining the schedules of the television program and deciding the time of delivery. Consequently, future obligations should remain limited to services which are characterised by a similar lack of control by the viewer.

On the other hand, non-linear services are activated by the user at his/her choice and therefore are not controlled by a provider. Where the user is in control, as exemplified by on-demand services, additional EU regulation is not necessary.

This difference in control fully justifies a separation between television (TVWF) programmes and Information Society services (e-Commerce Directive) rules. Information Society services should continue to be regulated by the E-Commerce Directive, as it is more adapted to the nature of those new emerging markets.

The creation and distribution of broadband multimedia content and services will require investments, support and creativity from an industry which is

composed of platform operators, application and content providers, telecom operators, regional organisations and public administrations. In this new technological scenario, ETNO acknowledges that an update of the TVWF Directive may be needed in order to take into account the new developments in the broadcasting market.

When reviewing the Directive one must remember however that the technological and economic circumstances in Europe have changed radically since the first adoption of the Directive in 1989. Nowadays broadcasting is a much wider market with multiple players (public and private broadcasters, pay-TV, thematic channels, etc.), using multiple transmission infrastructures. "Do-it-yourself" content from outside the traditional broadcast media industry (e.g. videoblogging, ipodcasting) is also playing an increasing role. The scarcity of spectrum, TV channels or delivery methods that has been the core rationale for the heavy regulation of TV programming in general - and as a consequence had an impact on the original Directive - is less and less relevant.

The current scope of the Directive should be maintained

ETNO is concerned about the legal uncertainty that may arise as a result of the review of the Directive, at the very moment when the ICT sector is fully engaged in rolling-out new value-added broadband services, which are key to the future of electronic communication markets. Indeed, extraordinary investments are being made to create an appealing broadband market of content, networks and services. These efforts might be adversely affected by an inappropriate horizontal regulation of content.

If a review of the current directive turned out to extend the scope beyond the present reasonable two-tiered approach, ETNO would feel compelled to strongly object to any form of new, all encompassing content regulation. Such an extension would neither support the free flow of information and content between Member States, nor effectively address the political issues resulting from the enlarged carriage opportunities for broadcast content.

The strict separation between (1) the rules of TVWF Directive on linear broadcast television, whereby the timing and the succession of the programmes are under the full control of a publisher/editor, and (2) the general rules on audiovisual content and on information society services offered on individual demand (such as VOD, download & play, interactive services, etc.) has proven to be a sustainable principle to approach the issue and should be maintained.

In conformity with the principle of technological neutrality, ETNO agrees that the rules of TVWF Directive should apply to all broadcasting services transmitted in a linear way, irrespective of the transmission technology used. However, regulation of broadcasting services should not be transposed to services that differ in nature, access and use. If the EU Commission feels the need for adjustment of the current regulatory media framework in order to foster free flow of information within the internal

market, any proposal should be guided by the light touch approach of the E-Commerce directive.

Although services like TV over DSL, video on demand, media streaming, web casting etc. become more common, every regulatory action has to accept that these markets are in an embryonic stage. In those emerging markets, it is highly important for network operators, Internet service providers as well as for content developers to have a clear, stable and reliable regulatory framework. Although the discussion on a revision of the TVWF Directive is not new, convincing arguments for the need of an additional category of “audiovisual content services” within European media policy is lacking. A regulatory regime for new services should only be envisaged after a detailed impact assessment of the benefits and risks of such a horizontal framework approach for the development of the Internal Market. For instance, how should a new legal framework fit into the existing framework of E-Commerce, Electronic Communications Services as well as Media Law etc?

This impact assessment should not only analyse if there is a need for further regulation at the EU level, but also the financial impact of such measures. Furthermore, we must consider that - concerning new services - the innovations and new business are only being anticipated: as a consequence,, the need for additional regulation de facto cannot be assessed at this point in time. The Commission’s main focus should be to help creating an environment supporting future innovation and investment. The new markets, such as video on demand, film on line and other interactive audiovisual services, are emerging markets which still lie in the starting phase of their evolution. As far as we know, the future trends for these markets are more a matter of guessing and trust, than of materially based research. In those circumstances, any forecast would not contribute at present to a meaningful analysis of the impact of the TVWF revision hypothesis on the markets for the new services.

This uncertainty is a further reason for a cautious approach in reviewing the TVWF directive ex ante. It might be more fruitful to only consider a possible review, depending on the future stabilization of the new emerging markets.

Definitions

The current directive TVWF applies to “television broadcasting”, that means *“the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public”. It does not include “communications services providing items of information or other messages on individual demand [...]”*. (Art. 1a of the TVWF Directive). Broadcaster means *“the natural or legal person who has editorial responsibility for the composition of schedules of television programmes [...]”* (Art. 1b of the TVWF Directive). In light of the technological developments already mentioned, a clarification of the definition of broadcasting services would provide legal certainty for all market participants. In the light of the relevant regulatory goal, it is important to identify what constitutes a broadcasting service - irrespective of the technical modalities of

transmission - as opposed to an information society service, which should not be addressed by the same regulatory framework.

All linear services that - by their effect on the viewer and their nature - correspond to traditional broadcasting services, should be considered equivalent to broadcasting transmissions to which the TVWF Directive applies, irrespective of the platforms used for transmission. Therefore, a renewed definition of broadcasting services should continue to mean services which are intended for the reception by the public and which are scheduled, by a succession of programmes arranged throughout the day by the responsible editor (i.e. the broadcaster), and where the viewer does not control the content and the delivery time.

Based on this understanding, the broadcaster is a natural person or legal entity, who is responsible for the composition of the linear audiovisual service, i.e. who determines the composition of the television program and decides the time for delivery of the programs. Thus, a new definition of broadcast services should ensure that it is limited to linear transmissions where the content and the time of its delivery are under the control of the broadcaster. The definition should be platform-neutral.

All other services should be defined as non-linear services, fully understood to correspond to Information Society services which are regulated by the E-Commerce Directive 2000/31/EC. Such services include audiovisual content offered on individual demand, such as VOD, download & play, interactive services, etc. Extension of the TVWF rules to these services would represent an additional and unnecessary layer of regulation.

It must also be underlined that when an operator acts as a carrier (network without any role in the editing/publishing of the content), the obligations of TVWF should remain the sole responsibility of the content provider, and should not apply to the carrier in respect of the principles of the E-Commerce Directive. Equally, the obligations should not apply to entities only bringing together existing channels, such as bouquet operators or a TV channel access portal. The same holds true for other technical services that distribute content without having direct impact on the content itself, e.g. multiplexing, conditional access systems etc.

User control is a key factor

In general terms, the key criterion for issuing regulation should be the degree of user's control as opposed to publisher control. Many of the obligations found in the current Directive are justified by reference to the user's lack of control in the context of traditional broadcasting. The broadcaster is responsible for the composition of the program, by determining the schedules of the television program and deciding the time of delivery. Consequently, future obligations should remain limited to services which are characterised by a similar lack of control by the viewer.

On the other hand, non linear services are activated by the user at his/her choice and therefore are not controlled by a provider. They generally include a point-to-point element (but this is not the core defining element). The final user has a much greater control over this kind of content than over broadcasting content, as the user decides individually about what to download or stream. Where the user is in control, as exemplified by on-demand services, additional EU regulation is not necessary.

This difference in control fully justifies a separation between television (TVWF) programmes and Information Society services (e-Commerce Directive) rules. Information Society services should continue to be regulated by the E-Commerce Directive, as it is more adapted to the nature of those new emerging markets.

Territorial competence: the country of origin principle.

Regarding prospective Internal Market barriers, we note that the E-Commerce Directive already establishes a clear country-of-origin principle for cross-border provision of on-demand and non linear services.

The TVWF Directive was also drafted to confirm the same principle for broadcast television services. For the sake of legal certainty, it is important to maintain the country of origin principle for broadcast services as well as for all audiovisual services and Information Society services in general.

Cultural diversity should not be understood as contradictory with the country of origin principle: one of the most important elements of maintaining and developing cultural diversity in Europe is the availability of and access to non-national European works. This could seriously be limited if the country of origin principle were to be reconsidered.

In ETNO's view, the European Commission should focus on maintaining and enforcing this principle, rather than elaborating of a new layer of EU regulation for which a convincing case has not yet been made.

Issue Paper 3 – Cultural Diversity and Promotion of European and Independent Audiovisual Production

Extension of obligations on European/independent works will be counterproductive

ETNO supports the promotion of European and independent audiovisual works, to guarantee a European cultural identity. In light of the current trend of an increasing multiplicity of offerings via the Internet and in digitized formats - available at any time, at any place, on demand - there is a growing range of services catering for all types of interests. Therefore ETNO believes that the best way to foster production and distribution of the European works is by means of current financial programmes such as Media 2007 and eContent Plus.

Quotas infringe the programming freedom of the content provider who is no longer free to determine the orientation of its services. Furthermore, new and in particular digitized services tend to focus on specific customer needs and to allow a high degree of specificity. An Internet Service Provider might, for example, confine its programme to American Movies or Argentinean Dance. Such a special interest offer would, however, not be possible if the service provider was forced to integrate European works.

Furthermore, concerning non linear services, producers are in a position to directly bring to the market their productions, as they are no longer confronted with entry barriers, such as the need for very high investments, or capacity restrictions. Further support via quota obligations is therefore not necessary.

We do not see neither feasible nor opportune the extension of the current quantitative rules provided for broadcasting to non linear services, nor opportune to create new obligations on this matter, as proposed by the Issue Paper. Any step in such direction risks being detrimental to the rapid development of new technologies and to the creation of new markets for the widespread distribution of audiovisual content, and in particular of European audiovisual content.

The development of the market itself is the main instrument to promote European cultural diversity and the widespread diffusion of the European audiovisual works. In the broadcasting market, the current rules and quotas are seen to have had, in some case, a negative impact on the development of stocks of programmes and the offering of non national European programmes.

Issue Paper 4 – Commercial Communications

Increasing competition within and between the audiovisual markets - through the launch of multiple and different platforms - and the development of the new advertising techniques allow for advertising rules to be more flexible. We plead for them to be modernized.

As far as **quantitative rules** are concerned, ETNO supports the consensus which has emerged from consultations to date: the current advertising rules should be more flexible. Furthermore, there is no rationale for such rules in an on-line environment. The rules and provisions on quantitative advertising are evidently linked to the linear nature of the programmes. This generated a strong consensus from most stakeholders during the Focus Groups and the other consultations. With a growing degree of user choice and control even in the broadcasting world, the question is whether quantitative restrictions are necessary at all.

As far as **qualitative rules** are concerned, specific advertising rules should continue not to apply to the non linear services, which are markets in continuous evolution that strongly contribute to the growth of European economy and competitiveness. In fact, adopting new definitions such as “audiovisual commercial communication” as a subcategory of “commercial communications” which is defined in the Electronic Commerce Directive, or creating even further subcategories, would not deliver any added value. Experience has shown that the current general provisions establish workable standards for new advertising techniques which continue to flourish. The guiding principle of recognisability is a well established standard of the E-Commerce Directive and will provide not only sufficient but even better user/viewer protection than separation requirements.

The E-Commerce Directive already imposes a requirement for commercial communications to be clearly identified as such. Commercial communications are further regulated at EU level by the Directive on Unfair Commercial Practices and, at national level, many provisions make no distinction between the media in which an advertisement appears. If there are any gaps that need to be filled, Member States can be relied on to do this - whether or not they are forced to do so by EU legislation.

Existing restrictions should be re-evaluated instead of extending them to new services, which could grant effective and less burdensome ways to protect minors or other groups. In this case the European legislator should grant to avoid uncertainty to the legal framework for minors protection in advertising. Self regulatory bodies offer successful and flexible protection mechanisms. Apart from this, it is important to stress that Member States should maintain the legislative initiative regarding minor protection - e.g. the level of minor age - in conformity with the principle of subsidiarity. Furthermore, the commission should rethink and reconsider existing advertising bans on products legally available, to create a liberal and forward looking advertising regulation.

Issue Paper 5 – Protection of Minors and Human Dignity, Right of Reply.

New audiovisual services are not unregulated

ETNO agrees on the necessity to have an audiovisual market with an appropriate regulation for general interest matters such as protection of minors or right of reply, but has concerns on the juridical instruments to pursue such objectives. It is important to avoid a sense of “moral panic” particularly as qualitative rules (e.g. for the protection of minors and for the right of reply) already exist for online services.

At European level, the Council Recommendation of 24/09/1998 concerning the Protection of minors and Human dignity and the current proposal for a European Parliament and Council Recommendation on the Protection of minors and the Right of reply (in course of adoption) have defined and contribute to clarify a common European framework. The recommended measures are or will be implemented by the Member State legislations, and they are complemented in the Member States by existing rules on acceptable advertising, obscenity etc. In addition, the right of reply is addressed in the draft “Rome II” Regulation. This creates a comprehensive legal framework for new media world.

The fact that TVWF Directive provides qualitative rules only for broadcasting, does not mean that similar rules do not exist in Europe for the on line world. From a formal point of view, it is fully justified that the scope of the TVWF Directive be limited to the linear services. Important qualitative rules are already applicable to the online world through the existing European and national legislations. Furthermore, as advised by the Recommendation on Minors of 1998, self regulation instruments and code of conducts are the most appropriate instruments to regulate the protection of minors; those are already implemented in Member States and involve participation and representation of all affected industries. ETNO companies are active participants to this process of self-regulation, as illustrated in the annex.

Finally, concerning non linear services, a proportionate application of protection of minors rules should be considered when access to content is protected by encryption/payment systems. This relates to the motivation and thus the choice of the viewer to access a specific content. Payment mechanisms normally imply identification mechanisms, use of credit cards or other payment methods which can be used to deny access to protected categories (such as minors). In this latter case, the combination of the highest user control and need to pay increases to the maximum the user active role in accessing content, thus reducing the need to protect him/her (i.e. films for adults on demand) with additional measures. This should be considered by the Commission when revising the Directive.

In conclusion, before any additional European regulation for the protection of minors is considered, we suggest an impact assessment and deeper analyses where the current situation is weakening the protection of minors.