

ETNO Reflection Document on the revision of the Television without Frontiers Directive

Executive Summary:

In ETNO's view, the review of the TV without Frontiers Directive should not extend into an all-encompassing content regulation. The key criterion for 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. Consequently, future obligations should remain limited to services which are characterised by a similar lack of control (broadcasting services).

The European Telecommunications Network Operators Association ETNO welcomes the opportunity to participate in the current process of revision of the TV without Frontiers Directive (TVWF), initiated by the Commission.

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

As recently announced, the Commission will present thematic papers on the revision process which will be submitted to public consultation next summer. In the current phase, ETNO is pleased to present its perspective on the future structure of a revised TVWF Directive, focusing on some core issues. More detailed comments are planned for the public consultation.

Current context

New technologies allow viewers nowadays to receive audiovisual content, which was previously only accessible via the television, through different platforms, such as terrestrial, cable, satellite, mobile or DSL. Furthermore, content is of increasing importance in the new value chain. The creation and distribution of broadband multimedia content and services will require investments, support and creativity from the industry, including platform providers, application and content providers, telecom operators, regional organisations and public administrations. In this new technological scenario, ETNO acknowledges that updating the Directive is legitimate and may be needed in order to take account of the new developments in the broadcasting market.

When reviewing the Directive it must, however, be taken into account 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. The scarcity of spectrum, of TV channels and of 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 no longer actual.

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, and these efforts might be hindered by an inappropriate horizontal regulation of content.

Concerning the scope of the Directive, ETNO takes the view that the review of the Directive should not extend into an all encompassing content regulation. For reasons which are explained in more detail in subsequent sections of the present paper, ETNO believes that such a move is unnecessary and will be counterproductive. Therefore, the strict separation between the rules of TVWF Directive on broadcast television, and the general rules on audiovisual content and on information society services offered on individual demand (such as VOD, download & play, interactive services) should be maintained.

In conformity with the principle of technological neutrality, the rules of TVWF Directive apply to all broadcasting services transmitted in a linear way, irrespective of the transmission technology used. Regulation of the different but converging markets, which by their mere existence increase

choice and diversity, should tend to deregulation instead of extending obligations from one market to another. In particular, regulation of broadcasting services should not be transpose to services that differ in nature, access and reception.

Clarification of the definition of “broadcasting services” is required

In light of the technological developments already mentioned, a clarification of the definition of “broadcasting services” is crucial. It is important to precisely 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.

“Broadcasting services” need to be defined by their general conditions: broadcasting services are those that transmit, on a one to many basis, audiovisual content presented in a linear way, based on a program schedule under the control of a publisher, which means that the user has no influence on the program, in particular concerning chronology and theme of the content being offered.

These broadcasting services should be strictly separated from audiovisual content offered on individual demand, such as VOD, download & play, interactive services. Thus, a new definition of broadcast services should ensure that it is limited to linear transmissions, contemporaneously available to all viewers, where the content is under the control of the publisher. The definition should be platform-neutral.

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. it determines the schedules of the television program.

It must be underlined that when an operator acts as a carrier without any role in the editing/publishing of the content, the obligations of TVWF remain the sole responsibility of the broadcaster, and do not apply to the carrier, in respect of the principles of the E-Commerce Directive. Equally, it does not apply to entities only bringing together existing channels, such as bouquet operators or a TV channel access portal.

User control is a key factor

In general terms, the key criterion for 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. Consequently, future obligations should remain limited to services which are characterised by a similar lack of control.

On the opposite, non linear services are activated by the user, at his/her choice, and therefore are not controlled by a provider; they usually include a point-to-point element. The final user has a much greater control over this content than over broadcasting content, as the user decides individually about what and when to download or stream. In case of user control, as should be ensured for on-demand services, regulation is not necessary.

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

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 we have 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 Recommendation¹ of 24/09/1998 concerning the Protection of minors and Human dignity and the current proposal for a European Parliament and Council Recommendation² 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. This creates a comprehensive legal framework for the Internet and new media world.

The fact that TVWF Directive provides qualitative rules specifically for broadcasters, 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 broadcasting market: important qualitative rules are already applicable to the online world through the existing European and national legislations³. 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

¹ 98/560/EC

² COM(2004)341 final

³ As explained in the Explanatory Memorandum of the current proposal, it is doubtful the Community can intervene on those matters through a Directive rather than a Recommendation.

industries. ETNO companies are active participants to this process of self-regulation.

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

Extension of content quotas 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.

We do not see neither feasible nor opportune the extension of current quantitative rules provided for broadcasting to non linear services, nor opportune to create new obligations on this matter. 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.

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ETNO members acted as enablers of broadband and will act as promoters of the new on line multimedia world. ETNO will continue to actively participate in the current process of revision of the TVWF Directive and is at disposal of the Commission for further discussion or clarification on this matter.