

**Audiovisual Conference
Between Culture and Commerce
Liverpool, 20-22 September 2005-09-29**

**Report WG 1
Shape of future regulation for audio-visual services
Rapporteur: Ruth Hieronymi MEP**

In Working Group 1 our chair, Lord Currie tabled 4 questions.

- the cost and benefit of providing a minimal harmonisation at European level of content regulation for audiovisual content services
- Adequacy of the linear/non linear criteria to distinguish the level of regulation
- Role of self- and co-regulation for the basic tier of regulation
- Jurisdiction

But the crucial question in our working group was: why do we need a new directive in AV content at all?

Consumer organisations together with public service broadcasters, but also some commercial broadcasters, support revising content rules on television in a comprehensive regulatory framework for all audiovisual content services.

Internet service providers argued against what they call the “extension of TVWF Directive to on-line services”. Some of them fear that over-regulating new media could hinder their take up and favour delocalisation outside the EU.

Telecom operators and Internet Service Providers not only refused the “extension” of out-of-date broadcast regulation to the online-sector, but asked that the e-Commerce Directive should cover the “traditional” AV sector.

Primarily the panellists explained the reasons and the background for the new challenges concerning the regulation of audio-visual content.

16 years ago the Television Without Frontiers Directive was adopted in order to allow the free movement of television services throughout Europe. It is based on the principle of regulation by the country of origin made possible by a basic harmonisation of public interest rules.

Today, digitisation and the convergence of technical platforms have made possible the emergence of new services inducing a phenomenon of fragmentation of the offer and of the audience.

The first question we now face is: do we believe it is appropriate to see audio-visual content services covered in future by a directive that can span the bridge between commerce and culture?

If the answer is no, then the solution is simple and lies in e-commerce or the services directives.

But we should also remember that, if that is our conclusion, then we bring this set of services into the scope of the current round of WTO/GATS negotiations on services.

If the answer is yes, if we want to span the bridge between commerce and culture, then we need to act swiftly because without a conclusion, both, or at least one of those other directives will include audio-visual content and there will be no opportunity to argue the cultural case.

And if the answer is yes, then our first task is to ensure that the audio-visual content services that are brought within the scope of the new directive are done so in a way that properly recognises those measures that already exist, rather than imposing new regulation upon them.

I will deal with each of the 4 questions in turn.

1. The first question concerned **the cost and benefit of providing a minimal harmonisation at European level of content regulation for audiovisual content services**

Most contributions agree that technological neutrality remains an important principle.

All industry representatives recalled their support of the country of origin principle as the basis for the business models (public service broadcasters, commercial broadcasters, telecom operators, multimedia industry, advertising industry, internet service providers, satellite operators, print press and regulators). But the country of origin principle is not possible without some minimum harmonisation. This is how you create a level playing-field.

It was argued that an extension of the scope could be in the interest of the industry, provided that there is indeed the risk of diverging national regulation within Member States for e.g. video on demand services.

But, as I said before, it is important that audio visual services should be brought within the scope of the new directive in a way that properly recognises the measures that already exist, so that we do not impose additional regulation. When the directive is done in this way, there should be no significant additional cost, but the benefit of free movement, based on the principle of the country of origin, could be realised by the service providers.

Some of the public policy objectives pursued in broadcasting continue to be relevant in the on-demand world. In any case, technological change makes it increasingly difficult to draw a clear line between different types of services.

Together with newspapers and internet service providers they argue that this essentially would create another layer of regulation in an area already subject to legislation, without any real justification. There would be no added value in it and market failure had not been demonstrated. New regulation only should be introduced after a thorough regulatory impact assessment had been undertaken.

Representatives from the press demanded clear rules for services containing moving pictures as well as other content.

Many contributions asked for clarification of the relation of the new instrument to the eCommerce Directive.

Commercial broadcasters indicated that they could support a Content Directive if the level of regulation was lower than the present Directive, especially in relation to advertising rules.

2. Adequacy of the linear/non linear criteria to distinguish the level of regulation

Public service broadcasters and representatives from consumers and civil society organizations indicated that the distinction between linear and non-linear services appears to be a workable basis for a definition and is likely to remain valid for the foreseeable future. However, some commercial broadcasters, telecom operators and ISPs consider that non linear services should more clearly defined. One panellist suggested a definition of “audiovisual media services”, and a regulator suggested a variant of “edited services”.

The two tier approach is considered to be a very good way forward in the view of public service broadcasters, who stress that similar rules have to be applied to all linear services. The five obligations outlined in the issues papers are supported by those who accept the idea of a comprehensive regulatory framework.

Representatives of the content industry asked for the inclusion in addition of cultural objectives in the basic tier obligations, which was a major concern for others. This is strongly opposed by others in particular ISPs.

Newspapers are concerned that electronic newspapers with audiovisual elements might be subject to two different regulatory regimes.

None of the participants argued in favour of the inclusion of radio in the scope of future regulation. EBU however states, that if Community action is envisaged it should be in sector specific instrument and not the Services Directive.

None of the comments received proposed an alternative to the distinction between linear and non-linear services and corresponding tiers of regulation of varying intensity. Some ISPs, cable and telecom operators proposed to apply only the e-Commerce Directive to non linear services. However, some other telecom operators explicitly supported the two tier approach and acknowledged the benefit of legal certainty for development of new services.

But there was no agreement around the detail of the possible linear / non-linear split, and almost everybody indicated that a clarification of the different borders is both urgent and indispensable if we are to make real progress. Our chairman called for regulators and governments, those who would have to draft and implement any rules, to be urgently involved in developing such proposals. In particular, these proposals need to be realistic and future-proof.

3. Role of self- and co-regulation for the basic tier of regulation

In the on-line world, we have already in 19 EU member states a range of measures including general or specific legislation or self regulatory instruments and codes of conduct are already used to regulate some social issues like the protection of minors.

Many contributions from telecom operators, internet service providers, self-regulatory bodies and a regulator see a case for European-wide objectives and principles that could be supported by self- and co-regulatory models.

Advertisers particularly strongly supported such schemes.

Therefore it is essential that the new directive should encourage and support self and co-regulation, rather than seek to replace it, as well as placing proper weight on national law. However, it was stressed that co-regulation might be an adequate instrument to implement a future Directive.

Some representatives of consumer and civil society organizations expressed doubts about the effectiveness of self-regulation mechanisms on the other hand. The Commission explained that in the case of co-regulation there was a clear empowerment of public Authorities and effective sanctions.

It was concluded that the study on co-regulation commissioned by DG Information Society and Media should provide in depth information on this regulatory concept.

4. Jurisdiction

In reaction to the concerns expressed by some M.S about circumvention of national rules, nearly all stakeholders (private and commercial broadcasters and radios, telecom operators, multimedia content providers) stressed the importance not to weaken the country of origin principle.

With respect to concrete measures (clarification of the establishment criteria, codification of case law of the European Court of Justice, extension of Article 2a) there was no clear preference and it seems that one single measure would not solve the different national problems.

Our attention was drawn to the problems of content which originates from beyond the EU, and the need for any regulatory framework to deal with it effectively. We also recognised the need not to create a framework which would have the perverse effect of driving content suppliers “off-shore” to avoid regulation.

Conclusion

First, if we wish to span the bridge between culture and commerce, we must act.

Second, I know there is a discussion about support for European works on non-linear services. But that debate will be meaningless if we have not first agreed among ourselves on the need for a directive to cover audio-visual content.

Third, the orientations given by the Commission go in the right direction, but we need clarification on several crucial points, in particular:

- What are the proper criteria to distinguish (a) audiovisual services from others and (b) linear from non linear services, in a clear, consistent and future proof way.
- What do we mean by co-regulation?