



## **TELEFONICA COMMENTS ON THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION REGARDING "CONTENT ONLINE IN THE SINGLE MARKET"**

### **1.- INTRODUCTION**

With reference to the public consultation regarding contents on-line launched by the Commission, Telefónica would first of all like to express its support for this important initiative by the Commission.

Telefónica considers that the topics covered by the consultation are very relevant and are being called upon to play a decisive role in the competitiveness of the European economy. In particular, Telefónica would like to express our gratitude for the publicity and distribution that is being given to this consultation, which undoubtedly will enable the participation of all parties involved.

As is well known, in recent years, an increasing percentage of income for telecommunications operators originates from services that are not related to voice calls, which we refer to as data, multimedia or content services. It is expected that this trend will increase in the coming years. Therefore Telefónica is very interested in having the digital content market grow as much as possible.

Telefónica feels that the study carried out by the consultants appointed by the Commission, which was presented at the workshop held in Brussels last July, is generally well focused, since it highlights what will probably be the major obstacles for the development of content on-line. However, there are several points with which Telefónica is not in agreement with and which we will explain below.

Given the scope and diversity of the issues that are being raised in the questionnaire, as well as the topics being dealt with in the consultation (music, games, films, radio, etc.) we agree with the goal of the initiative (to promote content on-line in the European market) as well as with most of the conclusions of the report drafted by the aforementioned consultants (hereafter referred to as the Report). We feel that the practical and effective thing to do is to have an influence on those issues that we consider have not been raised and which, in our opinion, have therefore not been properly dealt with.

The dominant role that the electronic communications regulatory framework plays and the numerous initiatives that exist and which can change the conditions for the scope of this market (i-2010 initiative, Television without Frontiers Directive, e-commerce Directive, copyright, etc.) and which have a direct effect on the development of these new services, has to be mentioned. Therefore, we must be able to rely on a regulatory framework that promotes the

creation of new services, since superposing various regulatory frameworks could lead to inappropriate over-regulation, thus becoming a burden that will have a negative impact on any decisions involving new technologies and innovations in new services. Likewise, we must ensure that these initiatives are implemented in a consistent manner in order to avoid any contradictions between the various regulations applicable to the same market.

In this respect, intervention by the regulatory authorities must focus on creating appropriate market conditions for the growth of new content access services, by making the necessary resources available to operators so that they can provide these services, such as the availability of the radio spectrum for the harmonized provision of Mobile TV services throughout the European Union.

In fact, in a clearly emerging market such as the access to content market, regulatory intervention should not focus so much on the ex-ante imposition of obligations but rather on the close monitoring of market growth. Intervention should be ex-post, in order to correct any restrictive behaviour involving competition as well as to generate the necessary market conditions to promote investment and innovation in this area.

The role of the European Commission regarding this matter is especially relevant inasmuch as it must guarantee a high degree of harmonization so that conditions for providing these services are more or less homogeneous, thus avoiding any protective regulations under the principle of subsidiarity that could alter the competitive conditions under which access to content services are developing (i.e. spectrum availability, gradual elimination of “must carry” restrictions, elimination of quotas in content, etc.).

## **2.- TELEFÓNICA’S COMMENTS ON THE CONSULTATION**

Telefónica would like to provide more detailed comments on the various aspects that we deem relevant.

### **A) Access to mobile platforms**

Some sections of the Report assert that the position which mobile operators occupy allows them to have excessive control over the availability of content on behalf of the end user, as well as the price or the breakdown in revenue obtained through their distribution. The issue regarding the advisability of imposing certain access obligations on mobile operators was even raised during the aforementioned workshop.

The spectacular growth in mobile telephony over the past decade demonstrates that mobile operators have been able to offer attractive services to end users by investing huge sums of money for this purpose and entering into agreements with numerous service and content providers under advantageous terms for both parties (win-win situations).

The existence of multiple alternative mobile platforms for providing access to content has ensured sustainable growth in these services, guaranteeing users availability of an extensive offer under optimal terms of quality, variety and price.

In this respect, we should point out the extraordinary effort being made by mobile operators to eliminate any entry barriers for users to take advantage of content access services in mobility, through a policy of subsidizing terminals.

Under these conditions, we feel that the imposition of access obligations or any other type of similar regulatory measures could have an effect on the take-off of a market, which is currently in its initial phase, as is the case with the content market for mobile electronic communications.

#### B.- Intellectual Property. The role of the collecting societies

The Internet boom and the transition from the analogue to the digital world has meant a dramatic change in the way consumer products such as music, games, films, etc. are being marketed and consumed.

However, in many countries, legislation regarding intellectual property is lagging behind this new reality. This can be evidenced by the example of Spain where, up until the reform of the intellectual property law of July 2006, the right to availability, as a means of public communication, for granting the legal protection necessary for the distribution of works on new supports is not mentioned in the Spanish legal code. In other words, it has taken us five years to transpose Directive 2001/29/CE into Spanish law.

Therefore, Telefónica feels that it would be very appropriate to consider a radical change in EU legislation, and obviously, in national legislation, regarding intellectual property, for the purpose of providing the appropriate legal response to the challenges that new technologies are raising, as well as to the new ways of creating, distributing and consuming content.

On the other hand, Telefónica agrees with the assertions of the Report regarding the role of the rights collecting societies. Telefónica feels that there should be an increase in the transparency of the catalogues on which the rights and the payments that are being made appear, especially if they are pan-European.

#### C.- Payment methods.

The Report exposes some criticism with regard to the availability and efficiency of payment methods in the digital environment. The SMS Premium service is specifically mentioned. The Report asserts that they are expensive and that the mobile operator retains a high portion of the revenue.

SMS Premium services were developed by operators in response to repeated requests by content providers that we use our relationship with the customer to charge on their behalf for the content that they were offering.

However, traditional payment methods (such as credit or debit cards) have proven to be ineffective for honouring payment of transactions that are

generated on the mobile content market, which are characterized as being a low amount or referred to as “micro-payments”.

Other payment systems via mobiles were subsequently developed, especially focusing on micro-payments, which have not had the success that was hoped for at the time of their inception. An example of this is the Simpay service.

In Telefónica’s opinion, a factor that is hindering the launch of payments via mobiles is the excessively rigid regulation that is not taking the particularities of micro-payments that mobile operators could offer sufficiently into account. Instead, practically the same obligations as traditional electronic payment means are being imposed on them.

Regarding this point, Telefónica wishes to stress that a legal framework that does not inhibit innovation, technological development and one which is proportional to the risks inherent with each activity is essential so that the various legal requirements do not act as entry barriers for new entrants, to the detriment of consumers.

#### D.- Mobile TV

All studies point to the fact that mobile TV is going to be one of the most requested services by customers in the coming years. Putting aside the issue of technological uncertainties that is currently being raised and that should be resolved within the short term, Telefónica believes that it an urgent priority that the issue of the radio spectrum, which should be allocated to provide these services, be dealt with in a coordinated manner in all EU Member States, in order to avoid any fragmentation that would make provision of pan-European services impossible or at best very difficult.

On the other hand, as we have already expressed on numerous occasions during the proceedings involving the revised TV Without Frontiers Directive, we feel that the implementation of the audio-visual regulation to include non-linear services provided by mobile operators is neither appropriate nor necessary since they are already being regulated by existing e-commerce legislation.

Technological evolution and innovation should not be burdened by legislation that is leveraged on the past and was initially designed to regulate the methods of provision, which since have been overtaken by the course of events. By assimilating any distribution of audiovisual content to broadcasting and, therefore, extending and implementing the regulatory framework of the latter, is to be unaware of the reality in which new methods of distributing content are evolving. Production, publishing and distribution of content have been transferred from broadcasters to the users themselves (You Tube, MySpace, Vblog, etc).

Therefore, it is essential to ensure that the regulatory framework currently under discussion adopts a long-term vision that promotes investment and new business models, in order to provide maximum benefits to the market, based on the creation of innovative and value-added services for European consumers.

## E. NET NEUTRALITY:

The debate on net neutrality that has been launched and is ongoing in the United States is not directly comparable to Europe due to the different market situation and regulatory framework in force.

The net neutrality has been erroneously assimilated with the principle of non-discrimination in the Internet world, in such a way that the infrastructure provider's freedom to market access to the infrastructure using different means, qualities and prices is being restricted. The segmentation of supply, the existence of a balance between provisions requested (in terms of speed, quality, delay) and the price being charged for it, constitute the basic pillars of economic activity in various sectors, including the hypermarket sector for electronic communications, audiovisual and content.

Network neutrality could prejudice the innovation of networks since it does not allow priorities to be determined based on the speed of the traffic packets or the quality of the services.

Faced with the position by service providers who are in favour of the existence of a single price for transiting content over the Internet (satisfactory price for the user generally in the form of a flat rate), irrespective of the needs for this content, network operators for electronic communications are calling for the right to freely word their retail and wholesale offer. They want to be able to set prices, still in accordance with the laws established by virtue of the legislation in force in the area of competition and without price collusion, charging a different rate for that content or those applications, which due to the greater level of provision necessary, require that greater resources be allocated to guarantee an adequate level of service quality.

Otherwise, an unfair distribution of the costs associated with the use of the networks between the various users might occur. So those users/content/applications whose traffic profile determines greater levels of investment to guarantee the quality standards required, should, to a greater extent, help with the financing of these investments. The fair distribution of these costs among all users is far from being equitable inasmuch as it overlooks the principle of causality, thus unnecessarily raising the cost of access to those users who do not make intensive use of the Internet.

As a result, network neutrality can jeopardize the bridging of the digital divide, producing the phenomenon of crossed subsidy between users who make less use of the Internet in favour of those who use it more intensely.

## F. CLASSIFICATION

Mobile telephony represents an additional and alternative means for the distribution and broadcasting of already-existing content in general (films, games, etc.). Therefore, the classification of this type of content should already be used in other means (horizontal classification) and should be guaranteed or monitored by the industry itself, which is capable of ensuring that it is properly implemented in the most effective way.

Regarding this point, we should mention the importance of guaranteeing the principle of subsidiarity at the time of establishing content classifications, as well as the need for adopting a dynamic approximation inasmuch as the social acceptability of specific content depends to a great extent on the prevailing ethics and moral principles in society at a specific time, which have no reason to remain unchanged over time.

#### G- DRM

We agree that the DRM systems are critical for the rollout of content on-line. The proof of this is that mobile operators have created a specific working group within the Open Mobile Alliance (OMA) forum to deal with this issue. Unfortunately, various claims involving essential patents involving the technical solution that was specified at the OMA have arisen, which, in turn, is making their implementation difficult.

Telefónica feels that DRM systems make the collection of copyright levies on mobile terminals as storage devices totally unnecessary, since users are already paying for the content that they download on their mobile phone. Furthermore, this could slow down the sale of terminals and, therefore, jeopardize the success of this type of content.

The use of DRMs allows proper protection for the distribution of content with copyright and should be open, interoperable and increase consumer confidence in this type of services. The implementation of a complete DRM solution depends on many players in the chain and not only on operators. Therefore, the responsibility for its success lies with all players involved.

All these types of technical measures should be complementary and backed by an appropriate regulatory framework in order for it to work properly.

#### H-ACTION BY THE PUBLIC AUTHORITIES:

Public Authorities have a predominant role to play as promoter of the Information Society since they can institute numerous actions that promote the use of the Information Society. They should not distort competition, however, and take action only when the remedies that the rules of competition provide prove to be inadequate.

Some examples of this are the educational measures used by these authorities to bring new technologies closer to all citizens, as well as by promoting demand in rural areas or in areas with a low population density, or by making public content available to users (e-libraries). They are also able to promote innovation through the assigning of R+D and innovation funds to investment agents, as well as by setting an appropriate fiscal policy that promotes the development of new innovative and value-added services.

Regarding this point, there is an especially relevant need to establish close cooperation between the various public policies adopted in the various areas, at the EU level (i2010, e-content, Safer Internet, TVWF), as well as at the national

level so that the necessary synergies are generated to guarantee that the political objectives set in each of the policies are more effectively met, thus eliminating the risk of contradictory objectives.

Likewise, these public policies will have to become an integral part of a stable, coherent regulatory framework and with sufficient flexibility to adapt to the technological changes and business model that generates confidence among the investment community, thus preventing over-regulation or contradictory or any inappropriate regulation from burdening the future development of content access services.