



5 September 2005

By email: avpolicy@cec.eu.int

DG Information Society & Media Public Consultation On Television Without Frontiers:

Response from EuroISPA

Introduction

EuroISPA, as the main EU level representative of the Internet service provider (ISP) industry, welcomes this opportunity to contribute to the consultation on the Issue Papers for the Liverpool Audiovisual Conference. DG Information Society & Media's Issue Papers address key policy areas for the future development of the EU's information society. This sector's importance for the future growth and competitiveness of the EU economy has been keenly emphasised by recent initiatives, such as *i2010*, that seek to reinvigorate the Lisbon agenda.

However, many of our comments reflect our overwhelming concern that there is insufficient consideration of how the proposals for the revision of the EU Television Without Frontiers Directive (hereinafter: TVWF Directive) will impact electronic communications and online service providers. The cornerstone of the European Commission's current regulatory policy for online services is the E-Commerce Directive (Directive 2000/31/EC), which continues to be lauded as an example of successful, light-touch regulation that contains an appropriate balance of stakeholders' interests. EuroISPA is frustrated that the Issue Papers do not explain why DG Information Society & Media (hereinafter: DG INFSO) now appears to believe that an additional, parallel regulatory regime may be necessary.

EuroISPA was not invited to any of the Focus Groups hosted by DG INFSO. EuroISPA was invited only to the final expert group on cultural diversity, at which we expressed our concerns about the absence of sufficient consultation with all stakeholders - especially the range of different companies that can be described as "Internet service providers". Our members remain deeply concerned that the policy considerations reflected in DG INFSO's Issue Papers are limited to a thorough consideration of the need to revise regulation applicable to "linear service providers" (broadcasters in the traditional sense). There seems to be little consideration of how the indicated policy choices will impact the plethora of services and service providers currently subject to EU regulation aimed at the online world.

We therefore urge the European Commission to take full account of our comments and to give Internet service providers due prominence in further consultations relating to EU regulatory policy on audiovisual content, starting with the discussions at the Liverpool conference.

Definitions

EuroISPA expresses concern at the definitions used in the Issue Papers. In particular, the draft definition of “non-linear audiovisual services” is difficult to differentiate from the definition of “information society services” used in the E-Commerce Directive. Both definitions refer to services provided by electronic means that are available upon request. Thus EuroISPA believes that “non-linear audiovisual services” are already covered by current EU legislation; the Issue Papers do not justify why DG INFSO appears to believe the provisions of the E-Commerce Directive, which are so strongly supported by EU industry in the information society, are insufficient.

There is also great uncertainty regarding which content will fall within the definition of “audiovisual content”. EuroISPA fears that such uncertainty will lead to content providers establishing their services outside the EU.

General Scope of a Proposed New Directive: Rules applicable to Audiovisual Content Services

Among EuroISPA members, there is widespread unrest about a possible extension of the scope of broadcasting regulation to audiovisual content delivered via the Internet. Exciting new markets relating to online distribution of audiovisual content are in their infancy; the European Commission’s traditional approach to promising new services has been to avoid burdening them with unnecessary regulation. In light of the Commission’s welcome recent initiatives that attach such importance to the ICT industries, it is all the more surprising that this approach has been set aside. As these new markets offer compelling new reasons for citizens to embrace the online environment, using broadband technologies, these proposals risk not alone damaging those markets, but also creating a domino effect and damaging the prospects for broadband growth as well. EuroISPA fully supports the promotion of competition in the online sector, but believes that the approach reflected in the Issue Papers will impose barriers to market entry and innovation.

The absence of any real justification for the extension of scope of a revised TVWF Directive is thus even more disconcerting. Additionally, the Issue Papers fail to acknowledge that the online world is already subject to established and generally well-supported regulation, in particular the E-Commerce Directive (Directive 2000/31/EC) and the electronic communications regulatory framework. In addition the E-Commerce Directive provides for complementary self-regulatory measures and self-regulation is also provided for by 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 (currently in the course of adoption). The latter Recommendations explicitly recognise that the achievement of effective results without compromise to the EU’s competitiveness, can be best be secured through reliance on self-regulation. While we have reservations about parts

of the draft Revised Recommendation, we can see no evidence for needing to depart from self-regulatory approach favoured to date. In the absence of this, EuroISPA believes it cannot be objectively concluded that the necessary justification for any extension of the scope of the TVWF Directive exists.

The issue of Jurisdiction:

EuroISPA continues to emphasise the ongoing importance of the country of origin principle. It is enshrined in EU legislation that is integral to the functioning of the internal market, such as the E-Commerce Directive and the current TVWF Directive. EuroISPA strongly opposes any dilution of this principle. Within the EU, cross-border audiovisual services within the scope of the E-Commerce Directive are subject to a country of origin rule. Any uncertainty regarding the continuity of this legal certainty would fragment this market and *de facto* impose significant barriers to entry for new services and service providers, contrary to the aims of *i2010* and the Lisbon agenda.

Cultural Diversity and the Promotion of European and Independent Audiovisual Production

In the expert group on cultural diversity, EuroISPA questioned the need and practicality of any “investment or catalogue requirements” for online audiovisual content services. The notion that it would be feasible to implement any such system would seem to support our earlier statement that the Issue Papers do not fully consider whether concepts from the traditional broadcasting world can be applied in the Internet environment. There are billions of websites containing material that would be included within the broad definition of audiovisual content services. We simply cannot imagine how compliance with quotas could be exercised, assessed or enforced.

EuroISPA highlights the importance of local content for Internet users and believes it is a vital stimulus for the take-up of high-speed Internet services and the bridging of digital divides. However, the use of quotas as a mechanism to protect European and independent audiovisual content would be futile in an online world, where there is no scarcity of distribution channels. It would be far more constructive to remove barriers to market entry in the provision of online services and to focus on promotional schemes to increase the quantity and quality of local audiovisual content.

Commercial communications

EuroISPA fundamentally questions the need to include all audiovisual commercial communications within the scope of a revised TVWF Directive. The E-Commerce Directive covers commercial communications in the online world and DG INFSO has not offered any reasoning as to why its provisions are insufficient.

The Commission points out that the E-Commerce Directive provides for exemptions from the country of origin principle for issues relating to public health, consumer protection, etc. However, once again the Commission has not specified why there is a consequent need to include this area within a revised TVWF Directive.

Protection of Minors and Human Dignity - Right of Reply

DG INFSO has suggested wording for a new Article 22 of the TVWF Directive, which would apply to non-linear services. In respect of online services, the wording suggests the imposition of provisions relating to filtering, age verification, labeling and classification of content.

EuroISPA is unaware of any successful, guaranteed age verification schemes in the online world. It is unclear exactly what DG INFSO is referring to in relation to “filtering”; while EuroISPA strongly encourages the use of end-user filters to exclude unwanted content and to contribute towards children’s safer use of the Internet, we strongly oppose other forms of filtering that are unreliable, unscalable and ultimately unsustainable. Finally, the compulsory labeling and classification of online content would be impracticable and any attempt is likely to give rise to the delocalisation of content from the EU. The notion of a one-stop shop for non-EU audiovisual content providers to register with a single Member State’s media regulator, in a similar mechanism to that currently used for VAT, is again impracticable for non-linear services. The Issue Paper infers that any audiovisual content *accessible* by EU consumers would fall within this regime, thus including the whole of the world-wide-web!

Moreover, the European Commission has been a very strong supporter of self-regulation in the Internet world. This is explicitly encouraged in the E-Commerce Directive. Therefore, EuroISPA does not understand why DG INFSO advocates stricter regulation without offering any reasonable justification as why the self-regulation approach is insufficient.

The European Commission’s Safer Internet Action Plan is an excellent example of where resources have facilitated initiatives that have made a genuine difference to the protection of minors and human dignity. Building on this, EuroISPA’s member associations and many individual ISPs have been at the forefront of self-regulatory schemes, including the development of national ISP codes of practice that contain provisions on the protection of minors.

EuroISPA urges the Commission to continue its support of industry best-practice on hotlines, awareness-raising and the development of technical tools to further improve the protection of minors, rather than jeopardise it with new regulation. In respect of tools provided by intermediaries for the purpose of safer Internet, EuroISPA does not believe it is appropriate or beneficial to discuss these in the revision of the TVWF Directive. Instead, the market should be encouraged to continue with the development and improvement of tools that have become a feature of service differentiation in a competitive ISP market.

Right of Reply

The Commission indicates that it would include a provision on the right to reply in a proposal for a revised TVWF Directive, which would apply to non-linear services. EuroISPA questions the justification for harmonisation of a provision on the right to reply; after all, remedies relating to an assertion of incorrect facts exist in all Member States for all forms of media, because they stem directly from the general protection of personal dignity. In addition, EuroISPA is concerned

that any new rules will impact the provisions of the E-Commerce Directive on intermediaries' liability.

Conclusion:

As reflected throughout this paper, EuroISPA is very concerned about the direction of DG Information Society & Media's policy on the review of the TVFW Directive. Overall, EuroISPA questions the need for any extension of the scope of the TVWF Directive to cover non-linear services in light of existing EU legislation, such as the E-Commerce Directive, and existing self-regulatory models. Given the positive evaluation of EU rules that currently apply to online services, we ask DG INFSO to clarify the added value of the inclusion of online audiovisual services within an extended scope of the TVWF Directive. In the absence of this justification, EuroISPA strongly opposes DG INFSO's preference for a revised TVWF Directive to form an Audiovisual Content Directive.

Above all, we are very concerned that the Issue Papers concentrate on the revision of legislation applicable to traditional broadcasters and do not demonstrate sufficient regard for the various other stakeholders that are (i) introducing and developing exciting new services in this emerging market, and (ii) already subject to an existing EU regulatory regime. This is particularly alarming for EuroISPA, given that the Commission is, at the same time, busily promoting the sector and encouraging the further rollout of faster connection services and content-rich services. Whilst the Commission stresses the need for light-touch regulation, especially relating to new services, the TVWF proposals appear to go in the opposite direction.

We look forward to contributing to discussions at the Liverpool Audiovisual Conference and urge DG Information Society & Media to take fuller consideration of all stakeholders in this debate.

About EuroISPA:

EuroISPA is the world's largest association of Internet Service Providers, representing around 900 ISPs across the EU. EuroISPA is a major voice of the Internet industry on information society subjects such as cybercrime, data protection, e-commerce regulation, EU telecommunications law and safe use of the Internet. Its secretariat is located in Brussels.

EuroISPA is predominantly funded by its member and associate member associations and the members of the EuroISPA Industry Forum.

For further information on this and other matters concerning EuroISPA, please contact Richard Nash, Regulatory Affairs Manager and Secretary General, at the address set out below.