

**Review of the Television Without Frontiers Directive
Intellect Response to European Commission Issue Papers**

5 September 2005

Final

Summary

Intellect does not believe that the European Commission's issue papers provide an appropriate basis on which an Audio Visual Content Directive can be drafted, despite the political commitments that have been made to the publication of a draft Directive by the end of the year. We urge the European Commission to withdraw this commitment and work with all of the relevant stakeholders across the full value chain to develop an alternative approach to addressing the legitimate policy issues at hand. Industry takes concerns about the 'dark side of globalised media' seriously. However, we believe that it would be wholly inappropriate to extend broadcast regulation, developed for the analogue era, to the new emerging audio-visual content market. If pursued, this policy approach could severely inhibit the development of this potentially rich new sector. Moreover, it is our firm opinion that such an extension, as outlined in the issue papers, would be largely unenforceable by the time that the Directive is finally implemented by the Member States.

Introduction

Intellect is the UK trade association for the Information Technology, Telecommunications and Electronics industries. Intellect works to influence policy, improve markets and enhance business performance for its members. Our membership spans blue chip multi-nationals through to early stage technology enterprises across the converging sectors within the ICT world. Intellect's Director-General John Higgins is a board member of the European association EICTA.

This paper is submitted in response to the European Commission's call for comments on the issue papers it published on the Review of the Television Without Frontiers directive (TVWF) on 11 July 2005.

The review of the TVWF directive is taking place under the umbrella of the i2010 Communication. In this document, the European Commission set out its objective to amend, where appropriate, the existing EU policy framework to take account of the rapid change taking place across the communications sector as a result of digital convergence. Intellect strongly supports this objective - we have long argued that digital convergence would require policy convergence - however, we do not believe that the policy options set out in the TVWF issue papers provide an appropriate or effective response to this difficult challenge.

There is a lot at stake. Deloitte estimate that convergence is prompting a \$1 trillion shift in value worldwide by 2010¹. It is important to recognise that regulation in the wrong direction will divert potential investment in the new media sector outside the EU, as was recently recognised by the Chief Executive of Ofcom, Stephen Carter:

"if, collectively, public policy is unwilling to accept the consequences – good and bad – which flow from convergence then it is unlikely that it will produce holistic solutions which harness the good and mitigate the bad. Combine this with a degree of technophobia and slow policy-making and you have a potentially dangerous cocktail where the cheaper labour markets combine with the new infrastructure and technology markets to leave the western economies not balanced by their checks and balances but limited by them.

Stephen Carter, Chief Executive, Ofcom

¹ Capitalising on Convergence - Intellect Report July 2005. \$1 trillion as quoted in Deloitte presentation to Intellect Consumer Electronics Conference – July 2005 (http://www.intellectuk.org/publications/reports/capitalising_on_convergence.pdf)

Creating an environment for innovation, investment and growth in audio visual services

Convergence is driving rapid change across the global communications sector. Intellect's report 'Capitalising on Convergence' highlighted that convergence has the potential to deliver an unparalleled degree of choice, flexibility and convenience to consumers in the way that they access and exploit information, communication and new media content services and applications. Digital convergence implies a world where information and content are digitised, personalised and accessible 'on-demand' via multiple fixed and mobile platforms and services. A world where the consumer is more engaged, actively contributing to and interacting with services rather than simply passively consuming them.

Convergence is therefore changing the definition of what we still refer to today as 'broadcasting' and 'telecoms', however, we don't yet have a clear picture of what the converged world will look like, even five years from now (in 2010). The only thing that is certain is that it will be different to the analogue world of the 1980s when the TVWF Directive was first conceived and probably very different from today (2005). It is therefore clear that the TVWF Directive needs to be revised, but it is much less clear how this should be done.

'Broadcasting' no longer operates on a purely linear one-to-many model. Much content is now available on demand via the internet or through personal video recorders (PVRs) such as TiVo and the Sky+ service in the UK. Consumers are finding and adopting a host of new non-linear services to access content in an increasingly vibrant and dynamic market. There is some concern that without some reforms traditional 'linear only' broadcasters could be marooned on an island of analogue regulation whilst their new media competitors enjoy much greater regulatory freedoms. It is this concern that lies behind the current proposals. However, Intellect believes that in a market where technology innovation and multi-platform delivery are increasing the scope of competition the need to 'level the playing field' should not lead to the extension of old 'analogue' regulation to new emerging services – many of which do not even exist yet. On the contrary, any review should focus on rolling back regulatory restrictions in order to allow competition to flourish. Clearly this does not mean blanket de-regulation. There are many essential public policy safeguards that need to be ensured. However, Intellect does not believe that an Audio Visual Content Directive is the most effective way to ensure such safeguards and indeed we would argue that many of these safeguards are already provided for in existing legislation and self-regulatory initiatives.

Extending the scope of broadcast regulation

There is a groundswell of industry unease and concern being articulated in the UK about the current proposals to extend the scope of the TVWF Directive. The approach set out in the issue papers would have the effect of bringing almost all audio-visual content within the scope of EU broadcast regulation. We believe that such an extension would be both a disproportionate and ineffective regulatory remedy. In particular we believe there are inherent problems in the reliance upon the classifications of linear and non-linear services that are at the heart of the proposals. In our view there are likely to be very few purely linear services by the time the Directive would enter into force at the end of this decade making such classifications meaningless. We therefore believe that these classifications do not provide a sustainable basis on which a Directive could be developed.

There is already evidence that these definitions are deficient as it is becoming increasingly hard to differentiate between linear and non-linear content even today. Many products and services already contain elements of both and it is unlikely that there will be any content services that could be classified as purely linear by 2010. (Most service providers will seek to incorporate some elements of

interactivity into their services and are likely to make these services available on-demand via various channels).

Meanwhile, we can see very little audiovisual content that would not fall into the 'catch-all' definition of non-linear content by 2010. Content from blogs to webcasts to video messages, alongside many other established services, would fall into the scope of the proposed directive. Audio-visual content available on the internet is growing at an exponential rate and will continue to do so. The sheer volume of this content is likely to render the non-linear sphere impossible to regulate. Indeed Ofcom recently suggested at an industry discussion that it would be impossible to monitor the volume of content covered by the proposals.

Furthermore, the imposition of broadcast regulation on non-linear content sets a precedent that is of serious concern to industry. It creates the possibility of further regulatory creep in to the non-linear realm. Concerns about the potential for regulation to creep into previously lightly (and largely effectively) regulated platforms can stifle investment in an already uncertain market. Many in industry are concerned that the audio-visual content proposals represent an attempt to regulate the internet 'via the back door'. It is also the case that the non-linear regulations would apply to many areas such as newspaper content where the EU has no competence or jurisdiction.

These difficulties surrounding the classification of content in a multi-platform arena reflect that fact that we simply no longer have an adequate definition for what the terms 'broadcasting' and to some extent 'telecommunications' will mean five years from now. It seems sensible therefore for this issue to be explored further before any adaptation of 'broadcasting' regulation is undertaken.

We mustn't underestimate the pace of technological change

Industry concern about the scope of the proposals is compounded by fears that despite reassurances, policy makers have under-estimated the pace of technological change that is defining the ICT and content markets. Over the last 2-3 years a host of new products have come to market, which have changed the way consumers access content, from the MP3 player to the Personal Video Recorder to 3G mobile phones. It is almost impossible to predict how quickly technology will develop and how quickly new technologies will penetrate the consumer market. This has been demonstrated consistently in the UK market where mobile, DTV and broadband penetration has vastly exceeded predicted levels².

If the TVWF review process continues as currently scheduled, the Audio Visual Content directive would come into force in member states in around 2010 by which time the media landscape will have changed dramatically. Intellect is certain that the provisions of the directive would be out-of-date as soon as they come into force. This gives industry both inside and outside the EU little confidence that European policy makers properly understand or support the technology agenda.

The case for additional EU regulation of the non-linear sphere has not been made

The issue papers propose the imposition of light touch regulation, such as protection of minors and distinguishable advertising, to non-linear content. Industry strongly supports the need to ensure such essential safeguards and indeed already ensures such protection through compliance with many existing regulations and self-regulatory schemes. Indeed, in this regard, it is the case that providers of new audio-visual services are subject to many of the same national level and EU obligations as traditional, linear broadcasters.

² <http://www.ofcom.org.uk/media/speeches/2005/06/oecd>

If implemented, the Audio-Visual Content directive would risk subjecting content to double regulation undermining the objectives of the European Commission's Better Regulation agenda. The eCommerce directive imposes requirements for service providers to clearly identify themselves and for commercial communications to be labelled. The Directive on Unfair Commercial Practises also regulates advertising and protection of minors is addressed in the 1998 recommendation on the matter. These issues are also being adequately protected at member state level by a host of laws and industry led initiatives such as the UK mobile operators Code of Practice on adult content.

Intellect believes that it is critical for the European Commission to acknowledge that there are already a large number of regulatory, legal and industry-led standards in place that ensure that the essential standards for non-linear content, proposed within the issue papers, are respected. It is not clear that further regulatory activity at EU level is required in this area.

The potential cost of additional regulation

Any regulatory activity must start from the premise of ensuring that the EU is able to compete globally. There is huge scope for growth in the new media sector as consumers take-up new content, products and services, but there is also massive competition within an increasingly global marketplace. Our international competitors have made rapid progress over recent years with China and India in particular moving forward quickly. China is now the world's largest broadband market and has the largest number of 'fibre to the home' connections.

Whilst the EU is well positioned to exploit opportunities in the converging market – with strengths in both the ICT and content industries – this success is not guaranteed. If the emerging market is over-regulated, investment and innovation will simply be focussed in other regions. There will be no incentive for investment in the EU. This will inhibit the development of nascent markets as well as applying unfair restriction on established players such as old broadcasters.

The need for a revised approach

The scope of the proposed Audio-Visual Content directive reflects the size of the converging marketplace. It would cover a much wider section of industry than TVWF. It is critical that the European Commission engages with the full value chain in order to scope out its role in this new emerging market.

The problems with the proposals in the issue papers are in part a consequence of the review process to date. The European Commission has largely consulted those who were subject to the original TVWF directive, the traditional broadcasting sector. The outcome of the consultation therefore takes limited account of the views or expertise within the new media sector, which would fall under the terms of the new directive. Key parties such as the music industry, whose entire business model would be affected by an audio-visual content directive, have been not been sufficiently engaged in the review process to date.

It is Intellect's view that the issue papers do not provide a suitable basis on which a new audio-visual directive could be drafted. We believe the European Commission therefore should open a new round of consultation with all the players who fall within the ICT, content, and new media sectors to properly understand the issues of these industries as well as their potential development. This requires horizontal consultation with all parts of the value chain, which has expanded beyond the traditional broadcasters involved when TVWF was conceived. Such a process should be complimented by a comprehensive regulatory impact assessment taking account of the pace of technological development.

Industry is also concerned that the i2010 communication commits to review TVWF and the Electronic Communications Regulations separately. The very logic of convergence suggests that these two areas of regulation need to be informed by and cognisant of each other and that they should be reviewed concurrently. It is no longer possible or appropriate to consider the realms of broadcasting and communication distinctly as convergence is blurring market definitions. The new competitive environment of broadcasting and new media should prompt a harmonised approach building on the liberalising agenda and principles taken by the Electronic Communications Regulations.

The EU's objective must be the creation and support of a vibrant market for digital content, media and applications, supported by a robust and flexible communications infrastructure. We must accept that we need to compete in a global market – not a European one where only European rules and ethos apply. Through a proper assessment of the emerging marketplace, the European Commission will then be able to begin to assess what type of regulatory framework will be required to support it. Intellect is extremely concerned that despite commitments in i2010 to policy convergence, the European Commission's activities will inhibit growth in the EU.

Intellect's Call to Action

Intellect welcomes the opportunity to contribute to the consultation on the proposals for a new audio-visual content directive. In response, Intellect issues the following calls to action to the European Commission:

- Withdraw the commitment to publish a draft Audio Visual Content Directive by the end of 2005.
- Recognise the potential cost of initiating a debate on the blanket extension of broadcasting regulation to new, emerging and unforeseen audiovisual content services in the EU. The European Commission must not disadvantage EU industry by imposing too much regulation.
- Work with industry to assess what additional regulatory safeguards are required and develop appropriate, proportionate and effective solutions that take due account of subsidiarity. (This could be done concurrently with the review of the European Communications Regulations)
This would deliver:
 - A revised approach to the reliance on linear/non-linear definitions of content
 - An improved understanding of the pace of technological change and development
 - Identification of regulatory and self-regulatory schemes already in place to enforce key standards such as the protection of minors
 - Regulation appropriate to the pace of market developments in different Member States
 - A communications industry which is fully integrated into the converging markets, rather than one that is subject to a separate stand-alone review.
- Undertake a comprehensive impact assessment of any proposals to change the regulation of content in the EU prior to the drafting of directives.

Intellect will continue to work with its partners across the converging market place to emphasise the importance of a new approach to the regulation of content.

Ends

For further information related to this paper please contact Amy Ward at Intellect (amy.ward@intellectuk.org)