

Introduction

Ofwatch is an organisation that represents the interests of adult service consumers in the United Kingdom. Although much regulation is aimed at controlling adult content, the views of the consumers who are affected by this regulation are rarely heard. Ofwatch aims to change this.

1.1 The notion of audiovisual content services

It is neither desirable nor practical to continue with strict regulatory controls on audiovisual content. Although there is still scope for considerable amounts of regulation in some areas, there remains a risk of serious damage from excessive regulation until regulators fully understand the dynamics of the new emerging media.

We are told that there is very limited support for the idea of imposing lighter obligations on smaller operators of linear services, but we are not told why. Perhaps the reason for this lack of support was the lack of representation for very small operators in the focus groups?

One of the main remaining factors favouring regulation is the “mass effect” that broadcast services have. The mass effect will not be present for very small services so they should not be regulated in the same way.

If very small linear Internet operators and potentially even individuals are to have the full weight of traditional broadcasting regulation imposed upon them then the reasons why this is necessary must be more clearly stated. Imposing this level of regulation may seriously skew the market in favour of the bigger operators and impair innovation in a medium where freedom has traditionally been very highly valued.

There is no pressing need to regulate radio and it should not be regulated as a non-linear service when it is clearly a linear service. The desire to introduce non-linear regulations for a linear service is understandable given the low need to regulate, but is also indicative of a basic problem with the concept that regulation should be split along linear/non-linear lines.

The distinction between linear and nonlinear services has been made to allow less regulation where viewers have greater control. There should be less need for control where audience expectations are likely to be satisfied. Where a random group views variable content there is more need for regulation, but where a self selecting group views expected content there is less need for regulation.

Careful consideration must be given to define what constitutes a single ‘selection’ for the purposes of non-linear services. In the case of broad interest services the selectable unit must be relatively small to ensure expectations can be met, whilst on narrow interest services a larger selectable unit of content should be acceptable. Audience expectation should always be the guiding principle. To illustrate the point, a day of cricket should be selectable as a single non-linear choice, but a group of films should only be selectable as a single unit if the nature of the content of each is clearly described before selection.

1.2.4 Right of reply

Right of reply is entirely inappropriate for Internet based services.

1.2.1 Protection of minors and human dignity

“The implementation of the TVWF Directive in the Member States shows that there are no European standards of public decency which would allow the terms ‘pornography’ or ‘gratuitous violence’ to be defined at European level. It therefore should be left to the Member States to define these notions.”

Member States will find it increasingly difficult to uphold national standards in an open IPTV world. More emphasis needs to be placed on filtering and sign posting as opposed to controlling and prohibiting. Individual adult citizens should be recognised as the proper authority to decide these matters rather than Member States. Failure to directly address the fundamental conflict between national margin and free communication (further discussed in the next section) will lead to irrelevant and ineffective regulation.

2 Territorial competence

In a world where IPTV services permit any person to access any service from anywhere what role will be left for the national margin? But in a world where the national margin is seen as immutable and barriers are created between nations to protect individual margins, what is to become of free communication?

Despite the conflict mentioned above, national margins have co-existed with fairly open communications up until now with only relatively minor problems. But this is largely because technological, commercial, geographical and political barriers have helped to compartmentalise and separate communications to some extent.

When the new Internet based services such as IPTV come into widespread use in a few years time they will remove the first three of these restrictions resulting in a very direct and pronounced conflict between free communications and the national margins in some areas.

In order to determine what should be done to resolve these conflicts it is best to go back to first principles to see why free communications and the national margins are valued in the first place. Free communications are valued in their own right as part of the fundamental right to free expression. Subsidiarity and the national margin of appreciation are means to an end, tools to ensure that cultural differences are respected and are necessary because national regulators are more closely in touch with the culture of their nation than the centralised European regulatory bodies.

Yet while there are undeniably clear cultural differences between nations that must be recognised, there are even greater cultural differences between individuals within nations. Taking the principle of subsidiarity one step further, which is the most “local and immediate” authority to decide what is acceptable for a Frenchman living in Liverpool? An unmarried mother in Glasgow? Or an elderly couple in Truro?

The national margin is particularly suited to resolving the cultural issues that result when public “push” services distribute a wide variety of differing content and contexts to a variable audience. In these cases there is a serious risk of causing offence to some that must be balanced against national public expectations of such services.

But where individual adults specifically seek out and subscribe to content, even linear content, in the privacy of their own homes and where the exact nature of that content is never in any doubt, the national margin has a very limited authority to decide on what is appropriate.

In such instances the principle of subsidiarity should be taken to its logical conclusion and the national margin of appreciation should give way to a personal margin of appreciation, as the individual adult is far better placed to decide matters of harm, taste and offence than any national authority in these cases.

The difficulty of applying a national margin in this area is clearly illustrated by the case of Satisfaction Television, where back in 2000 the incumbent UK regulator (the ITC), decided that the service was unacceptable and requested that the UK Government proscribe it. Despite this request from the national regulator there have been insurmountable problems in deciding if the national margin of appreciation should be applied or not in this case. More than five years after the original request, the minister has been entirely unable to reach a decision. Yet at the level of the individual this case is easily resolved. It is a very simple matter for people to form an opinion and decide if the service is suitable for them or not and those who do subscribe do so in the full knowledge of what to expect.

Whilst in most cases it is not appropriate for European authorities to take precedence over national authorities, it is equally inappropriate in some cases for national authorities to take precedence over individual “authorities”. Whilst there is scope for a supervisory role at both the European and national levels, deference should be given where ever possible and this is particularly important in cases where *the position of the higher authority is unclear or undecided*, such as the case with Satisfaction Television.

Acceptance of a personal margin of appreciation would resolve some of the conflict between differing

national margins by redirecting some decisions that are difficult at a national level to a more appropriate authority. This would give the greatest freedom to the individual in the use of restricted services in private whilst still allowing the national margin sway in more general open communications involving a wider variety of contents, contexts and audiences.

Apart from being desirable the personal margin of appreciation is already a physical reality as can be seen by the large number of services that already take advantage of it such as European adult services like Satisfaction TV.

I have no doubt that the idea of a personal margin of appreciation will be treated with scorn and contempt in some quarters, but unless draconian measures are taken to censor Internet communications they are here to stay and will increase in importance.

We are moving away from a world of big broadcasters operating in broad geographical areas under the strict regulatory control of national Governments into a world where there will also be a multitude of small and medium sized services with enormous diversity and where it may not be clear which markets are being targeted, and for some small non linear services, there may not be a specific target nation at all.

The time has come for a fundamental re-evaluation of how and why communications services are regulated (or censored) and in particular why restrictions are put in place and for who's benefit. Although there is much talk in regulatory circles about the need to deregulate and much has been made of the small changes that have occurred, there seems to be little appetite for the big changes in outlook that will be necessary in the near future.

Regulatory activities would be far better employed in promoting media literacy, helping to signpost content, providing filtering mechanisms and taking a harder line against real harm such as child abuse. Half hearted attempts at preventing adults from watching what they want in order to protect the children that they may not have from harm that may not exist, are futile and unjustified. Regulation is intended to be a benefit for citizens not a hindrance.

2.1.1 Determination of jurisdiction and circumvention measures

“Industry representatives and experts consulted insisted on the importance of maintaining an effective country of origin principle as the ‘conditio sine qua non’ of the Directive while a number of Member States were concerned about finding solutions to their problems concerning broadcasters established in another Member States but targeting their market.”

In an IPTV world Member States will not be able to control the content that their citizens consume, but vain attempts to do so could create a great deal of regulatory damage.

There appears to be a state of regulatory denial over the direct clash between national margins and free communications. The advent of widespread IPTV will turn both broadcasting and broadcast regulation on their heads, but the magnitude of the impending change appears to have gone unnoticed. At the risk of using overly colourful language, the regulatory Titanic is steaming directly towards the IPTV iceberg whilst those in charge are happily rearranging the deckchairs in their national margins.

This line of thought was borne out by a statement made by John Whittingdale (shadow spokesman for Culture Media and Sport) at a recent London seminar concerning the TVWF directive. He said that he hoped we could avoid a television version of radio Caroline when IPTV was introduced. Television with a large national margin of appreciation coupled with open lines of communication will be the television content equivalent of a hundred radio Caroline's.

Recent discussions still appear to be focusing on how the relatively minor problems involving existing clashes between national margins in the non IPTV world might best be addressed in order to protect those national margins. Even here the proposed solutions of watering down the country of origin principle to allow tighter restrictions will not work and will be counter productive.

If restrictions are imposed on services that are established to circumvent national regulations, they will at best only provide partial relief for a short period, as services will be marketed so as to avoid such restrictions. Prevention of retransmission (i.e. direct censorship) will be very difficult and expensive as countries such as Saudi Arabia and China have found, and if that route is to be followed then the new directive might be better described as Television With Frontiers.

Whilst these measures will be ineffective at properly protecting the national margin they will introduce grey areas and exceptions that will increase the regulatory and legislative uncertainty and consequently damage the development of new services for everyone. When widespread IPTV services arrive, such restrictions will become an increasingly irrelevant regulatory handicap.

2.1.2 Review of the subsidiarity criteria for broadcasts beyond the EU

No additional rules are required concerning Multiplexers. In many cases multiplexing does not have a clearly defined location and introducing rules would add a large amount of complexity for little gain.

2.2.1 Possible criteria for determination of jurisdiction

“Should the scope of the new directive covers audiovisual content services, the question of the jurisdiction would be raised as for non-linear audiovisual content services. Possible criteria to determine the jurisdiction could be:

- * The place where the editorial decisions concerning non-linear services are taken.
- * The place where the content service provider is established. The general establishment criteria of the e-commerce directive could be applied.”

Consideration needs to be given to the prospect of a multitude of small businesses and even individuals distributing audiovisual content. These cannot be regulated in the same way as traditional broadcasters. The overriding principles for any new regulation in this area must be simplicity and transparency. If it becomes necessary to fill in a set of forms before a new audiovisual service website can be established something of great value will have been lost.

2.2.2 Implementation where there is no establishment

“any audiovisual services provider not established within the EU could opt for registration in one Member State. This operator would have to comply with any relevant existing provisions in that Member State. As a result of the registration for the content service provider this system would open up a possibility to benefit from the country of origin without being obliged to have the establishment within the EU.”

The focus is still on big operators and the “push” model. What benefit would a small “pull” service marketed via the Internet gain from being the subject of regulation in one or more EU member states? Unless Internet based content is to be blocked it would seem likely that most foreign services would simply ignore any regulation/registration entirely without fear of any adverse effects.

I hope that the comments made in this document will help to inform the regulatory debate.

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