

**COVER PAGE FOR THE SUBMISSION OF COMMENTS TO THE ISSUES PAPERS OF THE
COMMISSION REGARDING THE REVISION OF THE TVWF DIRECTIVE**

In order to facilitate the consultation process you are kindly requested to fill out the following form:

Organisation (exact name): Versatel Deutschland Holding GmbH
Organisation (abbreviation): Versatel
Name of contact person: Miriam Hui
E-mail: miriam.hui@versatel.de
WWW: www.versatel.de

Subject:

(please tick **one** appropriate box)

- ☒ 1. Material and Territorial Competence
- ☐ 2. Rights to Information and Short Extracts
- ☐ 3. Cultural Diversity and Promotion of European and Independent Audiovisual Production
- ☐ 4. Commercial Communications
- ☐ 5. Media Pluralism
- ☐ 6. Protection of Minors and Human Dignity, Right of Reply

The European Commission invites you to submit your observations on these issues papers by **5 September 2005**. Please submit your comments in a generally readable electronic format. Please submit a **separate document** for each issues paper you would like to comment on. All submissions will be published on the Commission's website if not requested otherwise. If you would like your contribution to be treated confidentially, please indicate this at the top of the first page of your submission. Should you want to add a cover letter please do so in a separate document. In case your comments exceed four pages please start your submission with an **executive summary**. All submissions should be mailed to the functional mailbox of the Audiovisual Policy Unit of the Directorate-General for Information Society and Media: avpolicy@cec.eu.int.

Submission of Comments from Versatel Deutschland to the Issues Papers of the commission regarding the revision of the TVWF Directive

Issues Paper: Rules applicable to Audiovisual Content Services

I. General remarks

Versatel as a telecommunications network operator faces a new regulatory framework due to innovations and integration of voice-, video- and data services and thus, the development of triple play products. Legal and planning uncertainties result from these innovations. Therefore, Versatel welcomes the opportunity to comment on the issues addressed.

Versatel generally favours a liberal approach to the future regulation of audiovisual services which supports and fosters the development of new innovative communication services and products. It supports the Commission in its commitment, to maintain a solid, forward-looking regulatory framework. Versatel would like to stress that it is crucial for the telecommunications network operators not to extend the narrow regime of the current TVWF Directive indiscriminately to new Triple Play services. In regards to the fact that those services are still in the phase of development at present time, and it is hard to predict as to what extent they will succeed on the market, their successful development may be seriously endangered by an over regulation. In Versatels view the need for an in-depth-regulation of innovative services should be assessed carefully on the basis of market implementation and development.

II. Issue 1: Material competence

In view of the changes in the technological progress and convergence, it is of main importance that the scope of application of the TVWF Directive will be amended to grant legal and planning security to the providers. However, in consideration of the fact that the new services differ from the conventional broadcast of television due to on-demand provisions as well as the occurring lack of capacity problems, Versatel doubts on the need to extend the application of the narrow regulatory provisions on the new services. Since the end customers will be enabled to influence the services due to interactive options, the grade of regulation for these services should be considered as lower than for the traditional television broadcasts.

The TVWF Directive and regulatory requirements, set out in the Electronic Commerce Directive and the Communications Package, complement each other in forming a system of a graduated regulatory approach which should not be undermined by an overextended application of the TVWF Directive.

In reference to the proposed options for the notion of audiovisual content services, Versatel generally doubts the practicability of both approaches of the Commission. A simple update of the definitions in order to cover services similar to television by the revised directive might lead to further legal uncertainties in terms of services that will continue to proliferate. In view of new services, a “one-size-fits-all approach is not appropriate. Providers must never be in doubt as to which regulation they will be subject to.

Furthermore, Versatel doubts the workability of the two tiers approach for determining whether a service is subject to the TVWF Directive. The approach of distinguishing between linear and non-linear services comprises the assumption that streaming and web-casting are similar to traditional broadcasting. It should be considered that the transmission of broadcast via new infrastructures such as ADSL2+/VDSL differs from traditional transmissions in the possibilities of using the capacities for a broad scope of different applications and services. The operators are enabled to offer an overwhelming choice of services to the end users. Thus, the future legislation should focus on the level of consumer choice as the main criterion to distinguish between different types of services. A high level of consumer choice reduces the need of regulation for allowing better control on the consumption of the service itself, especially in terms of advertising.

Moreover, the two tiers approach also leads to legal uncertainties in its current performance. Considering the case that if a network operator does not provide pure on demand services of third parties which are identifiable as such, but bundles different serves to a programme package, it remains unclear whether the operator fulfils the criteria of a broadcaster as defined in the issues paper. If the operator shall be considered as broadcaster he will be obliged to comply with the higher degree of regulation though he does not have any influence on the content itself. Thus, it should be clarified, that the fact of bundling does not lead to the capacity of a broadcaster.

With focus on the definition of audiovisual services, Versatel appreciates the clear applicability on the content of Triple Play products which gives legal and planning certainties to the operators. However, the quotation of moving images might also lead to regulatory gaps. For example, in regards to EPGs, an extract of a programme could be implemented and provided as a fixed image on a page. It should be assumed that this provision of content must also comply with the requirements of protection of minors, etc.

Versatel considers a technologically neutral definition of audiovisual services as essential to grant legal certainty. As an example, the criteria of the delivery platform leads to substantial

legal uncertainties in terms of must-carry obligations for telecommunications network operators on the German market, due to the provisions of the Interstate Treaty on Broadcasting focusing at traditional cable operators and Art. 31 of the Universal Service Directive. Pursuant to Art. 31 of the directive, Member States may impose reasonable must carry obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive broadcasts. However, the directive does not define the underlying scope for the “significant number”. Thus, it remains unclear whether customers of Triple Play services, which could also be considered as closed user groups, fulfill the term of a “significant number” of end-customers.

III. Issue 2: Territorial competence

On the issue of territorial competence, Versatel strongly favours the continued application of the country of origin principle as it has proven to be a market and development friendly rule and has contributed to strengthening the European Media base. Further more, the country of origin principle is a basic institution to support the unification within the European Union while nourishing the diversity of the European media landscape. Therefore, Versatel calls upon the Commission not to weaken the principle.

In regards to the case law of European Court of Justice, according to which a member state can apply its rules to broadcasts by a broadcaster established in another member state if the broadcasts in question are directed at the first member state and if the choice of establishment was made with the sole purpose of evading the legislation of the first Member State, Versatel generally appreciates the approach. Nevertheless it should be taken into account that due to the wide scope of new services, such a purpose will be difficult to detect. Especially the pan-european network operators will design their services compatible to a broad international field of end users to reach a high value added revenue.

Versatel considers the establishment criteria of Art. 2 sec. 3 TVWF Directive as not sufficient. Legal uncertainties could derive from the application of the term “editorial decisions”. The term appears to be too broad in practice due to the above mentioned comments on the capacity of broadcaster. Moreover, as a result of digitisation, each content can easily be subject to minor modifications. For instance, providers of Triple Play products negotiate to what extent they could implement own advertisements into programmes that they stream for third parties. In these cases, a doubtless determination of final editorial decision will be hard

to asses. Additionally, a clarification of this criteria will help to reduce the risks of abuse and circumvention. However, with focus on non-linear audiovisual services, Versatel is of the opinion that the suggested criteria will be sufficient, due to the fact that most of the content will be stored on company-owned servers.

With reference to the suggestion to support the use of “a language of a programme” as a suitable criterion to asses territorial competence, Versatel would like to stress that this could only serve as an indication but will not be compatible with a multi-lingual internal market in which cross border provisions are particularly prevalent. Especially in regards to Anglophone content, it should be considered that this is being provided increasingly in the original version in foreign countries. Particularly providers of Triple Play services will offer various content in original versions.

Berlin, September 2, 2005

Versatel Deutschland Holding GmbH

Jan Mönikes, Regulatory Counsel

Syndikus Versatel Deutschland