



GSME response on EC Consultation on Revision of the TVWF Directive

Issues Paper on Cultural Diversity and the promotion of European and independent audiovisual production

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Introduction

GSM Europe (GSME) is the European Interest Group of the GSM Association, the premier global body behind the world's leading wireless communications standard. Today GSM Europe represents around 148 operators in 50 countries/areas in Europe and counts around 480 million subscribers.

GSME has reviewed the Issue Papers published by the European Commission for the audiovisual conference in Liverpool, concerning the review of Directive 89/522/EEC as modified (hereafter, the "**TVWF Directive**"). We welcome this opportunity to participate in the debate expected to lead to the adoption of a new Directive on audiovisual content services.

Mobile operators provide electronic communications services and also information society services (content such as ringtones, wallpapers, logo, music, games, news texts...). Certain mobile operators are also now distributing audiovisual content (TV programmes and video). An increasingly wide range of types of content – and means of accessing them – will be made available over the coming years. Not all so-called 'mobile TV' channels are likely to replicate identically the programming approach of a TV broadcaster. Access may be on a free-to-air or on a subscription basis, may consist of on-demand access to specific events or short-clips (pay-per-view), on-demand behind age controls etc.

The adoption of a new Directive on audiovisual content services is therefore relevant to mobile operators in so far as the scope as currently defined seems likely to:

- Duplicate regulation of information society services as defined by Directive 98/34/EC¹; and
- potentially increase regulation of audiovisual content services more broadly, specifically of non-linear services.

The stated objectives underlying the revision of the TWF Directive is to protect the general public interest and at the same time promote an internal market for audiovisual content. Nevertheless, the extent to which the revision will actually contribute to achieving these objectives is currently

¹ 1) Any service normally provided for remuneration, at a distance¹, by electronic means¹ and at the individual request of a recipient of services¹



not clear from the Issues Papers. The regulatory exercise undertaken should now be an opportunity to assess:

- 1) the current audiovisual landscape and need for change;
- 2) the relationship between the range of measures regulating the provision of digital content, including:
 - a. eCommerce Directive (2000/31/EC)
 - b. Framework Directive (2002/21/EC)
 - c. Recommendation on Minors Protection of 1998
 - d. Directive 1998/34/EC as amended by 1998/48/EC on information in the field on technical standards & regulations

With a view to avoiding duplication; as well as

- 3) undertake a thorough impact assessment of the consequence of any move.

This would be in line with the Commission's commitment to '**Better Regulation**'.

Legal certainty is also critical for the industry and the development of the audiovisual market in Europe. This requires that:

- 4) the scope of the new Directive, including that of the suggested two tiers, be clearly defined, including with respect to the instruments noted above; and
- 5) an assessment be made of the potential consequences this extended new scope may have on the applicability of rules such as Conditional Access.

Promotion of European and independent audiovisual production

The Commission suggests that it may be necessary to impose minimum quotas for European and independent content, or other obligations to secure 'cultural diversity', on non-linear service providers in order to create a level playing field. In doing so the Commission fails to recognise the differences between television broadcast and non-linear services. It fails to recognise that these services operate in different markets. It also fails to recognise the different roles that these services have in society.

The Commission is wrong to describe broadcasters as competing against service providers and 'telcos' on an un-level playing field. Television broadcasters and non-linear service providers do not operate in the same markets – that is to say, they are not direct competitors. They compete only to the extent that they both require consumers' scarce time, in the same way that other leisure activities such as reading or playing sports also compete for that time.



Furthermore, non-linear services do not have the same role in society, nor the same impact, as linear services. They are accessed and consumed in different ways. Television broadcasters are engaged in mass market broadcasting rather than responding to individual consumer demand. This has given them a unique role in society, and one that has led to public service obligations. The history of how television broadcasting services were created with Government involvement, as compared with the competitive market place in which mobile and Internet services have emerged underlines their different roles in society.

Providers of non-linear services are, in any event, developing new content without the need for quotas. Indeed, independent producers, as content rights holders, may be in better position in the new media world because they can directly access the consumer. There may be many more businesses commissioning non-linear content (for example, mobile operators) than linear content, where there are a limited number of broadcasters. This, in turn, is likely to lead to greater demand for diversity than may exist with traditional television broadcasting.

We thus firmly oppose any extension of the basic obligations to include cultural diversity obligations - such as quotas or financial contributions.

It is, indeed, essential for all stakeholders that VOD service providers be in a position to create offers which can compete with the illegal VOD sites. If cultural diversity obligations are imposed on VOD service providers at this early stage, they will be handicapped vis-à-vis their illegal counterparts. Consumers will then (continue to) turn to these illegal sites.

This is true for catalogue quotas but also for financial obligations such as a requirement to fund certain cultural activities. Such additional costs, whether borne by the content service providers or passed on to consumers, will serve only to hinder all the more the already painstaking emergence of legal alternatives to illegal P2P file-sharing. GSME is aware, for example, that VOD service providers in France have since July 2004 been under a legislative obligation to contribute 2% of the price paid for each download to a cinematographic fund - a sum passed on in part to the customer. One year later, legal VOD offers in France seem to have made little progress in their battle with illegal alternatives. Rights-holders - like VOD providers - thus continue to suffer.

In this context, GSME respectfully submits that the primary contribution of VOD to cultural diversity must be to continue its development as a viable alternative to illegal activity.