

Comments

on the Commission Consultation on Rules Applicable to Audiovisual Content Services – Issue Paper 4

The German Association of Information Technology, Telecommunication and New Media, BITKOM, represents 1,300 companies, around 700 of which are direct members, generating an approximate total turnover of €120 billion and employing some 700,000 jobholders. Among them are producers of terminal equipment and infrastructure systems as well as suppliers of software, services, new media, and content. More than 500 direct members belong to the medium-sized business sector. BITKOM has committed itself to improving the general regulatory environment in Germany and in the European Union, modernizing the educational system and advancing the information society.

The Commission Communication “i2010 – A European information society for growth and jobs”, adopted on 1 June 2005, announces that the Commission will propose by the end of 2005 a “revision of the Television without frontiers directive to modernise the rules on audiovisual media services.” Four Focus Groups met between September 2004 and February 2005 and produced six issues papers.

BITKOM welcomes the opportunity to comment on the issue papers. BITKOM fullheartedly supports Commissioner Viviane Reding in her commitment to maintain a solid, forward-looking regulatory scheme for cross-border television. BITKOM generally favours a liberal approach to the future regulation of audiovisual services. The Lisbon strategy, in which communications services, in particular new services, form an important cornerstone, suggests a regime that will help foster the development of new and emerging communications services in 2010.

In contrast, the current *TVWF Directive* is characterized by a high degree of regulatory intervention. Today, broadcasting is one of the most heavily regulated industries in the European Union. BITKOM urges the European legislator not to extend this narrow regime indiscriminately to new and emerging services. Newly emerging services are often fragile in nature and their successful development may be seriously endangered by heavy-handed regulation. The need for in-depth-regulation of new services must therefore be assessed carefully on the basis of a case-by-case analysis. BITKOM especially emphasizes the need for liberal rules in the field of advertising – it is the commercial basis of existence for broadcasters and other media.

BITKOM believes that a special emphasis should be put on self-regulatory regimes. Due to the fast pace of both the broadcasting and the online sector, self-regulatory regimes generally tend to work better than the less flexible approach of a too detailed legislation.

Our core question that we would like the Commission to address more often, i.e. before *any* legislative action, is:

What is the added value of legislative action in the light of existing rules?

This examination is clearly mandated by the “Better Regulation” programme. We are surprised how rarely the Commission actually addresses this question in the instant revision process.

■ Executive Summary

- **Material Competence:**
 - **An overarching directive regulating all audiovisual media is not justified.** Audiovisual services are governed by the Electronic Commerce Directive and the Communications Package, together already forming the “first tier” the Commission envisions. We urge the Commission to address the question of added value of a new, additional framework which has not been done so far.
 - **Suitable criteria for any two-tiered approach, that is, for the distinction between the regulation of traditional broadcast and new services, should be the degree of user choice and user control.** From a policy point of view, they are more appropriate than a mere distinction between linear and non-linear services. Under the criteria of user choice and control, new services must not be governed by the regime for traditional broadcast. Instead, some services currently governed by the TVWF may have to be shifted to a lower tier.
- **Territorial Competence:**
 - **The country of origin principle must be maintained.** It has proven to be a market- and development-friendly rule and has largely contributed to strengthening the European media base. It is at the core of the TVWF Directive and a necessary condition for the creation of an internal market for television broadcasts. Its adoption in the Electronic Commerce Directive has prompted a similar success story as in the market of traditional television.
 - **Modifications of Artt. 2 (3) and 2a TVWF are not justified.** In spite of minor interpretations problems, these rules have proven to work well. Language is not a suitable criterion to determine an intent to evade legislation.
- **Cultural Diversity:**
 - **Quota obligations are inappropriate for new services.** Due to practically non-existent entry barriers, pluralism is inherent to the technical characteristics of these new services.
 - **Quota obligations for traditional television are obsolete.** Growing diversity in the area of traditional television requires a re-evaluation.
- **Commercial Communication:**
 - **No new definitions are necessary, nor is an inclusion of all audiovisual commercial communication into the scope of the TVWF justified.** The Electronic Commerce Directive already governs all forms of electronic commercial communications. Again, we urge the Commission to discuss any added value of additional definitions and regulations.
 - **Existing qualitative advertising restrictions must be re-evaluated and not be extended to new services.** New services offer numerous effective and for the industry less burdensome ways so protect minors or other groups.
 - **Existing quantitative advertising restrictions are obsolete and cannot reasonably be imposed on new interactive services.** The growing degree of user choice and control has made any kind of quantitative restrictions unnecessary. Their application in an interactive environment does not make sense.

- **Protection of Minors and Human Dignity:**
 - o **Due to the successful work of self-regulatory bodies, no further legislative interference is justified.** Instead, any interference would jeopardize effective self regulation¹.
- **Right of Reply:**
 - o **Harmonisation is not justified.** Remedies for “assertion of incorrect facts” (Art. 23 TVWF) exist in Member States for all forms of media because they stem directly from the general protection of personal dignity.

■ Issue Paper 4: Commercial communications

I – RULES COMMON TO ALL AUDIOVISUAL COMMERCIAL COMMUNICATIONS

ISSUE 1: THE CONCEPT OF AUDIOVISUAL COMMERCIAL COMMUNICATIONS

As we have stated before we strongly oppose the extension of the scope of the TVWF to all audiovisual services. The Commission considers adopting new definitions such as “audiovisual commercial communication” as a subcategory of “commercial communications” as defined in the Electronic Commerce Directive and further subcategories. However, we cannot see the added value of creating additional definitions and subcategories.

BITKOM believes that the current definitions are still appropriate and sufficient. Experience has shown that the current general provisions establish workable standards for new advertising techniques like mini spots, telepromotion, split screen, interactive advertising, virtual sponsorship etc. These new techniques do not require specific regulation. If they are not subject to specific regulation, they need not be defined.

Amending the current set of definitions would, in contrast, adversely affect the clarity and effectiveness of advertising regulation in the TVWF. Moreover, the audiovisual landscape continues to be in a state of flux. The Commission should therefore keep in mind that any revision of the current definitions in the TVWF Directive might soon be obsolete as advertising techniques continue to proliferate.

ISSUE 2: RULES ON HUMAN DIGNITY AND THE PROTECTION OF MINORS

Our national experience shows that the rules on the protection of minors are satisfactory. If problems are seen with a view to the application of these rules, this is a matter of enforcement, not legislation. Insufficient enforcement of existing rules should not lead to a more restrictive wording of the law, but must be addressed on the administrative level.

Successful self-regulatory schemes are in place and might be adversely affected by any interference. The protection of minors and human dignity is an important cluster in European audiovisual policy. With this regard, self-regulation has proven to be a successful and flexible instrument which is supported by the

¹ Hereafter, “self regulation” is understood as voluntary industry cooperation in order to ensure public policy goals; cooperation consists of industry code of conducts, joint implementation of policy actions or cooperation with governmental authorities.

- Action Plan “eEurope 2005: An information society for all” (COM(2002) 263 final; see page 14: “Since the publication of the e-commerce communication in 1997, the Commission has developed a comprehensive policy in this field. Among the achievements have been [...] a number of non-legislative initiatives aimed at promoting self-regulation [...]”) as well as by the
- Communication from the Commission to the Council and the European Parliament – Better Regulation for Growth and Jobs in the European Union (COM(2005) 97 final; see page 14, reg. impact assessment: “Instruments which provide an alternative approach to legislation, such as co-regulation and self-regulation, have to be considered when assessing options.”)

A general harmonisation of standards would endanger and possibly replace successful self regulation regimes and thus dramatically conflict with the outlined standards of “Better Regulation”. Instead, the Commission should continue not to interfere with effective self regulation schemes.

We therefore urge the Commission to examine carefully if there is a genuine need for harmonisation.

ISSUE 3: RULES RELATING TO PUBLIC HEALTH CONSIDERATIONS (TOBACCO, ALCOHOL, MEDICINES)

Policy Reasons Advise Against Adopting TVWF-Rules to New Services

As we stated above, we agree with the view that audiovisual commercial communications in an interactive environment require less regulation due to a higher degree of user choice and user control. As far as the protection of minors or other special user groups is concerned, an interactive environment offers numerous ways to achieve effective protection without unduly restricting legitimate industry interests. The use of the Internet Content Rating Association (ICRA) as well as similar programs, for example, provide effective and innovative solutions. We therefore do not see a justification to extend bans or restrictions on advertising in the TVWF to all audiovisual services.

Existing Bans and Restrictions Must be Re-Evaluated

Instead, we would like to encourage the Commission to rethink even existing bans on advertising for legal products. Creating a liberal and forward looking advertising regulation requires a re-evaluation of such existing rules.

As far as pharmaceutical products are concerned, we suggest relying on the self-regulatory bodies mentioned by the Commission. Their work has been very effective and we see no justification to regulate an area that is successfully governed by self regulation.

ISSUE 4: IDENTIFICATION OF COMMERCIAL COMMUNICATIONS IN GENERAL, INCLUDING SPONSORED SPOTS

BITKOM believes that the requirement to make advertising and teleshopping spots recognisable (Art. 10 (1) TVWF) is an essential, yet sufficient cornerstone for the industry to gain consumer trust. It is also part of the Electronic Commerce Directive (Art. 6) und thus already governs the entire realm of audiovisual services. No additional regulation is justified.

Under the proposition that the requirement to make advertising and teleshopping spots recognisable is strictly maintained, we support the Commission in its consideration to abandon the second requirement in Art. 10 (1) TVWF, the requirement of separation, in order to legalize certain forms of product placement. If the requirement to make advertising and teleshopping spots recognisable is maintained, a separation is not necessary to protect the consumer. If we follow the concept of a responsible consumer as it has been developed by the European Court of Justice, it is important, but also sufficient that the consumer identifies content as including a commercial message. This aim can be reached by various means other than separation.

ISSUE 5: IDENTIFICATION OF SPONSORED CONTENT IN PARTICULAR

We suggest clarifying that the insertion of the name and/or logo of the sponsor may be virtual, e.g. by replacing existing advertising boards on the playing field during sporting events, provided the integrity of the programme, the interests of rights holders, and the comfort and pleasure of the viewer are not prejudiced. Virtual sponsoring has also proven to be an effective, viewer friendly new advertising technique.

It should also be clarified that a mere co-operation between service providers (e.g. a content and a mobile service provider offering a mobile broadcasting service) are not sponsorships. Such co-operations will become more widespread due to the convergence of networks and services. Advertising is only concerned where a third party not involved in performing the service sponsors a programme.

Because of the different nature of interactive services with regard to user choice and control, we think the application of 17 TVWF to all audiovisual services is not justified.

ISSUE 6: APPLICATION OF THE RULES

BITKOM strongly supports the idea of co-regulation, self regulation and codes of conducts. We believe that a special emphasis should be put on self-regulatory regimes. Due to the fast pace of the industry, self-regulatory regimes generally tend to work better than the less flexible approach of a too detailed legislation.

II – QUANTITATIVE RULES ON TELEVISION ADVERTISING

ISSUES 1 and 2: HOURLY AND DAILY ADVERTISING LIMITS / HOURLY AND DAILY LIMITS APPLIED TO TEleshopping

Existing Rules Are Obsolete

Today, viewer pleasure and comfort have become quality parameters in the extremely competitive environment of traditional broadcasting. It is of paramount importance for broadcasters not to annoy viewers with excessive advertising. We trust in the market forces and therefore favour deregulation and simplification of the rules. Abolishing existing limits would be an important step towards a liberal approach to advertising regulation.

Quantitative Restrictions Cannot be Imposed on Interactive Services

As the Commission correctly notes, any kind of quantitative restrictions does not make sense in an interactive environment. Again, this shows that extending the scope of the TVWF rules to all audiovisual services is not justified. Instead, interactive services that today fall within the scope of the TVWF (e.g. the insertion of a still button as opposed to an animated spot) should not be subject to Art. 11 and 18 TVWF.

ISSUE 3: INSERTION OF ADVERTISING

The current wordings of Art. 11 (2) and Art. 10 (2) TVWF hinder the development of viewer friendly mini spots during short, accidental breaks, e.g. in sports programs, as well as split screens. The former fill in natural, i.e. accidental short breaks, mainly in sports programmes like boxing, wrestling, soccer, or football (corner, free kick, player replacement etc.). The latter are viewer friendly because they endow the viewer with the choice to follow the programme or the advertising or both at the same time. Neither of these new techniques interrupts the flow of the programme. Accordingly, both of them offer the viewer a piece of market information without “wasting” her extra time.

Both techniques, however, especially lend themselves to isolated advertising as opposed to airing several consecutive spots. Accordingly, Article 10 (2) TVWF is a strong obstacle in establishing these new, viewer friendly techniques.

BITKOM believes that the intended result – making sure that viewers do not confuse commercial and editorial content – can be achieved by a strict application of the requirement to make advertising recognisable. If advertising is clearly distinguishable from editorial content, there is no compelling need to prohibit isolated spots. We therefore suggest re-evaluating the validity of Article 10 (2) TVWF in an evolving, viewer friendly advertising environment. Abolishing the ban on isolated spots would solve the problems associated with the vague term “exception”. Finally, it would help in situations where the broadcaster does not have sufficient advertising orders to permit a group of spots.

The interpretative communication states that the term “intervals” in Article 11 (2) does not refer to these short, accidental breaks, but only to scheduled intermissions in a sports program. In our view, Article 11 (2) should be amended as to permit advertising during short, accidental breaks in sports programmes or similarly structured events.

Also, the current wording of Article 10 (1) requires a separation “by optical and/or acoustic means”; a temporal separation is not mentioned. If the requirement of separation is not abandoned altogether, it could be clarified explicitly that compliance with Article 10 (1) TVWF does not require a *temporal* separation.

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