



**European Commission Consultation
Modernising EU rules for audiovisual content**

**Comments of Deutsche Telekom
September 2005**

Executive Summary

Deutsche Telekom welcomes the European Commission's aim to establish a legal framework for the media industry that is as modern and as flexible as possible. In particular, it greatly appreciates the Commission's intention to set an example for the 'better regulation' initiative by revising the Television Without Frontiers (TVWF) Directive.

Before embarking upon considerations for regulation of a developing market, it will be necessary to provide concrete regulatory goals. In view of the promotion of the usage of cross-border content offers, it will in particular be necessary to assess the consequences, which should not only include the economic impact of the planned changes but also the question of the necessity for regulation.

The revision of the TVWF must not result in a transposition of tight broadcasting regulation to other audiovisual content offers and services. Such a step would not be conducive to effectively solving the regulatory issues resulting from the convergence trend.

We favour Option 1, calling for a revision of the TVWF Directive, while limiting the scope to television broadcasters. Deutsche Telekom is convinced that it is sufficient to clarify the scope of the TVWF Directive by establishing a definition of broadcasting that takes into account technology changes. The two-tier approach that the Commission has proposed in Option 2 contains conceptual weaknesses and the risk of renewed legal uncertainty due to its imprecise differentiation of linear and non linear content services. Moreover, other than broadcasting services are already sufficiently covered by the e-commerce directive.

A revision of the legal framework should focus on reducing media regulation, establishing legal certainty and fostering an investment-friendly climate. This makes it necessary to create a clear definition of the scope to which the TVWF Directive will apply. A linear audiovisual service (the term proposed by the European Commission) offers a sound starting point but does, however, require a more detailed definition. Alongside the linear criteria that have been adopted by the EU Commission, the definition must also include the significance of influence and control options for users. In addition, 'point to multipoint broadcast' without special conditioning for the user or interaction with users should be included. That would allow a clear distinction to Information society services which are delivered on a point to point basis.

The country of origin principle as the guiding principle of the TVWF Directive should be maintained. A departure from the country of origin principle would contradict the goal of the TVWF Directive: to strengthen the free movement of services and audiovisual products. Therefore, the Commission should clarify that the country of origin applies in case of programmes that are transmitted to another country via satellite or via another technical medium.

In the case of quotas, unnecessary encumbrance and overregulation for market players must be avoided. The discussion about quota provisions, in particular the proposed catalogue requirements and investment quotas for non-linear services, impose unnecessary constraints on the entrepreneurial freedom of providers of new, digital entertainment offers. New and innovative services require freedom in programming allowing to offer services tailored to customers' demand. Quotas can have a

counterproductive effect on diversity in media services and would mean the end of new offers, such as those limited to U.S. cinema classics.

In the field of advertising regulation, we agree with the Commission that, with the emergence of new advertising formats, deregulation is possible. The Commission should let itself be guided by the principle of 'recognition' without introducing new definitions that would make it more difficult to implement new advertising formats. Instead we should rely on existing industry self-regulatory mechanisms, which are more effective and flexible regarding present and future advertising formats. In this context, the suitability of advertising bans for legal products should be reviewed.

The proposed provisions for the protection of minors illustrate the difficulties if the TVWF Directive would be extended to cover non linear services:

- First, existing, effective self-regulatory instruments coupled with EU recommendations on the protection of minors are already in place which show that there is no need to further harmonize the protection of minors throughout the EU. Following the principle of subsidiarity any EU legislation should consider national regulation that covers national expectations and ethical/moral preferences.
- Second, the proposed text is not in line with the current self regulatory approach of the Commission.

The present national regulations on the right of reply render further regulation – in particular an extension of Article 23 of the TVWF Directive – unnecessary.

Issue Paper: Protection of Minors and Human Dignity, Right of Reply

The Commission proposes the following two paragraphs on the protection of minors:

- [1] *"Member States shall take appropriate measures to ensure that audiovisual content services are not distributed in such a way that might seriously impair the physical, mental or moral development of minors.*
- [2] *In respect of non-linear audiovisual content services Member States are encouraged to put in place systems of co-regulation or self-regulation as well systems of filtering, age verification, labelling and classification of content."*

These proposed provisions exemplify the difficulties in extending the TVWF Directive to all audiovisual content. First, the need to regulate and harmonise the protection of minors at EU level, particularly with regard to non-linear audiovisual content is highly questionable. Second, the proposed provisions do neither fit into EU's policy framework nor into the legal system of the already existing instruments.

The first paragraph of the suggested text intends to transfer the key provision for the protection of minors of the TVWF Directive into a new directive that covers all audiovisual content. However, the EU has already established instruments for the protection of minors for non-linear audiovisual content, above all the Council Recommendation of 1998¹ and the Safer Internet Programme Plus of 2005². These instruments – based on industrial self-regulation and co-regulation between industry and authorities – aim at giving guidance and support for Member States' governments, relevant bodies and industry in order to ensure the protection of minors. In fact self- as well as co-regulation has proven to be very effective in the past and is increasingly taking place in Member States for all forms of content and their delivery – as demonstrated at the Commission's Safer Internet Forum on the emerging market for mobile content on 14 June 2005.

Furthermore, rules for the protection of minors in accordance with the Member States' national expectations, standards and cultural preferences are laid down in national law and will be further developed in accordance with their national needs. Following the principle of subsidiarity, any respective EU legislation should consider these rules as well as the legislation and self-regulation already in place. Deutsche Telekom cannot see how the extension of the TVWF Directive's rules to all forms of audiovisual content can further contribute to the protection of minors. Moreover, experience with different forms of delivery does not support the assertion that a unified approach for the protection of minors to all forms of audiovisual content is justified. So far, the Commission's approach lacks justification for an EU-wide initiative that goes beyond the already existing European and national legal and policy instruments.

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.

¹ Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity (98/560/EC)

² European Parliament and Council Decision No 854/2005/EC of May 11, 2005 establishing a multi-annual Community programme on promoting safer use of the Internet and new online technologies - 'Safer Internet Plus' Programme

With regard to paragraph two of the proposal, Deutsche Telekom welcomes generally the self-regulatory approach for non-linear audiovisual content. However, Deutsche Telekom would like to highlight some systematic concerns with regard to this proposal:

- First, by making detailed provisions exclusively for non-linear content the proposal is exceeding the obligations foreseen for linear content and conflicts with the two-tier approach taken by the Commission whereby one common set of provisions applies to all audiovisual content (including linear and non-linear) and an additional set only for *linear* content should be applicable. These extra provisions for non-linear content may result in a higher level of regulation compared to linear content.
- Second, the EU should not arbitrarily exemplify non-complementary means for the protection of minors from unsuitable content. The technological development and convergence of media, networks and devices makes any short-listing soon outdated and therefore is not appropriate to a legally binding instrument such as an EU Directive³. Also, potential means are highly dependent on the chosen level(s) of protection and legal and societal expectations. The choice of means must thus be undertaken at national level and cannot be codified at EU level⁴. As self-regulation is clearly understood as the best way forward, the currently adopted means should be left not only to the Member States but primarily to the industry responsible. It further needs to be recognised that the proposed measures should not be applied cumulative and have different benefits and costs. For example, if age verification is already in place there is no need to also have labelling which will be costly to implement yet provide no tangible benefit. Some of the means proposed would make already existing and effective protection systems in the Member States obsolete.
- Finally, Member States can not be obliged by an EU directive to enter into co-regulation with the industry or to "put in place" industrial self-regulation. The EU can only promote such instruments. With the 1998 Recommendation provisions on the protection of minors addressed at both Member States and industry the Commission has already gone down that road.

With regard to the right of reply, Deutsche Telekom kindly asks the Commission to examine carefully if there is an actual need for harmonisation, as remedies for "assertion of incorrect facts" (Art. 23 TVWF) already exist in Member States' legislation for all forms of media.

³ This viewpoint is also supported in the Issue Paper on 'Rules applicable to Audiovisual Content Services': "*Although the level of protection should be similar notwithstanding the linear or non-linear character of the service, the means employed to protect minors and human dignity would vary according to the characteristics of the service.*" This conclusion also applies to differences between non-linear services.

⁴ With regard to incitement to hatred this Issue Paper states that "... *the Member States would remain responsible for defining the notion of incitement to hatred in accordance with their national legislation and moral values ...*". And the Issue Paper on 'Rules applicable to Audiovisual Content Services' concludes "... *that there are no European standards of public decency which would allow the terms 'pornography' or 'gratuitous violence' to be defined at European level.*"