Response to the issues papers prepared by the European Commission for the Liverpool Audiovisual Conference on 20-22 September 2005

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Executive summary

The six issues papers assume general agreement that regulation drawn from the 1989 Television without Frontiers Directive should be extended to all forms of video transmission over electronic networks. This would include all websites and other Internet-based facilities within its scope. The papers do not analyse the impact that such an extension would have on the Internet sector.

Governmental control of information accessible to the public encroaches on free speech as guaranteed by article 10 of the European Convention on Human Rights. The present proposals would violate this fundamental freedom. Moreover, it seems that this would result from confusion of purpose and inattention to consequences, not from a deliberate change of policy backed by reasoning and analysis.

No detailed consideration is given to enforcement, although the proposals would need greatly expanded regulatory capacity. Interference with commercial involvement in Internet-based businesses risks stifling innovative approaches to website financing. New administrative burdens would encourage information businesses to move away from the reach of EU law, and so deprive the European Union of indigenous businesses and jobs.

This mischief could be avoided by identifying more specifically the broadcasting to which the proposals are intended to apply.

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Three matters arising from the proposals are of particular concern to journalists:

1. New scope for interference with free speech

2. Extension of regulation to all audiovisual services without distinction

3. New administrative burdens for the information business

Freedom of speech and of the press is guaranteed by article 10 of the European Convention on Human Rights, which is in force in all EU countries. The proposals for revision of the Television without Frontiers Directive ("TVWF") are profoundly disturbing in this context. They propose an extension of regulatory supervision and the power to order withdrawal of video material – *i.e.* censorship – to the entire online sector, where no such regulation exists at present. On no account should the Convention freedom be any further eroded.

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This paper explains why the issues papers go beyond what is necessary to achieve the proposer's apparent intention. It goes on to suggest a more limited definition of the services to which regulation might be extended. No comment is made here on the proposals to revise the TVWF Directive for traditional "linear" TV.

Journalists are concerned in particular about websites that give access to video material, such as news sites run by newspapers. For the sake of brevity, the following refers mainly to websites, but the same reasoning applies to other media, and those yet to be invented, that serve the purpose of imparting and receiving information.

Free speech and the freedom to impart and receive information

Any power to order the removal of content from websites without justification under the general law will violate the freedom guaranteed by article 10 of the European Convention on Human Rights. Where there is any risk that this freedom might be infringed by a legislative proposal, the proposer should at the very least analyse its constrictive effect and give reasons why it is believed to be necessary. The issues papers are silent on the subject.

The law of all EU countries makes incitement to violence, hatred or harm to children a crime. Civil law also imposes limits, e.g. defamation and enforcement of intellectual property rights. Yet other laws control, for example, misleading advertising. The difficulties faced by police forces, plaintiffs and others in pursuing the perpetrators of these violations would be just as real for broadcasting regulators.

If the proposal here goes beyond expression that is unlawful in itself, what is it intended to cover? Lawful expression that pushes the boundaries of what is socially acceptable is not a proper subject for preemptive regulation. The justification for the TVWF is that traditional television has a captive audience lacking control over what it sees – except through the off-button, by which time the harm has been done.

Websites are not in the same category since the user always has to take positive action to visit them. It is a truism that those who find offensive material on websites, such as the weirder forms of pornography, have almost always gone to look for it. They rarely happen on it by accident because website visitors are in control.

Any machinery designed to protect visitors from nasty surprises on apparently innocuous websites would be censorship, calling for regular inspection, enforcement and penalties. The market has a better solution – visitors who have disagreeable experiences are wary of visiting those websites again. The Safer Internet Plus Programme, with its emphasis on filters, parental control and industry codes, is a more appropriate context for considering the protection of children who might be tempted to explore the darker side of Internet.

There would be a real danger that regulation of the TVWF type would be used against websites that carry lawful material that the regulator deems to be undesirable, such as information on the motivation of suicide bombers, instructions on how to beat the bank at blackjack, or scientific information that might be used for malign purposes.

Any attempt to suppress such information would be a direct interference with the right of free speech on which journalists and the public at large depend. If society believes that a given type of information is in itself so dangerous that possessing it or giving it expression should be controlled, the criminal law is the proper way of doing so, with full legislative and judicial involvement. Internet cannot accommodate regulation in the pursuit of good taste.

Extension of regulation to non-linear audiovisual services

It is unacceptable for content regulation designed for traditional television programming to be imposed on all audiovisual services without regard to their actual character. The field includes a huge and shifting mass of informal media, such as websites that incidentally include access to video files or live output. In the proposals as outlined, they would be brought within the scope of regulation, but not of the licensing framework that makes regulation feasible for mainstream television.

According to the first issues paper, any service offering "delivery of moving pictures with or without sound to the general public" over an electronic network would fall within the regulatory ambit. The service provider would be the person who either "has editorial responsibility for the content of the audiovisual content service" or "determines the manner in which audiovisual content is organised".

This language is very broad. Its impact would be comprehensive. The type of regulation proposed for "non-linear" audiovisual services, *i.e.* material that is viewed at a time of the user's choosing rather than at a time fixed by the broadcaster, is narrower than the full current range, but the case has simply not been made for bringing the entire online sector within any form of regulation. There is even a risk that live webcasting would be within the "linear" category since the time is fixed, albeit not by the broadcaster.

Broadcasting content can be regulated easily through the broadcasting licence. The issues papers do not openly discuss the possibility that websites carrying video material should be licensed as broadcasters in future. Is this the intention?

The type of regulation in question – harmful content, commercial involvement and the right of reply – does not exist at present. Without licensing, the "appropriate measures" envisaged would have to be imposed by new law of general application. A blanket control of information disseminated to the public has to be consistent with article 10 of the European Convention on Human Rights. The proposals would almost certainly fail to meet this standard.

Further, the regime would require extensive supervision and the recruitment of armies of regulators to enforce it. Internet is a constantly moving target, with new websites being created freely and lawfully by the hour. A regime that cannot be enforced easily should not be enacted at all – discriminatory application is sure to follow.

It is also suggested that non-traditional services might be compelled to devote a majority of their feature programme transmission to works of European origin, and a tenth to the work of independent producers. For the "non-linear" online sector, this suggestion is bizarre. Would a service devoted to Indian films become illegal? The proposal seems unworkable even for traditional broadcasters offering specialist channels. For websites, it is wholly inappropriate.

The proposed regime

Five elements of the Television Without Frontiers Directive are listed in the first issues paper as rules to be applied to all forms of video transmission to the public. Four of these would be restrictive and burdensome. Many providers would be exposed to regulation for the first time.

1. Protection of minors and human dignity: This category allows direct regulation of programme content beyond what would be unlawful because it violated the criminal, civil or administrative law. Currently a regulator may impose such restrictions through the broadcasting licence. It can be argued that the institutional character of mainstream television implies general cultural responsibilities, and that these justify special protective rules *(e.g.* the timing of transmission so that children are not exposed to unsuitably frightening or manipulative material). The informal sector does not owe the

same social duties. People choose to visit a website when in search of a particular sort of information. Rules designed for mass audiences of differing susceptibilities have no place in that context.

2. Identification of commercial content: Websites are in perpetual need of finance. No wholly satisfactory business model has yet been devised for information-based websites. The market is still at a formative stage and creative financing ideas may well emerge. Prescriptive rules on identifying advertising, sponsorship or product placement could be a deterrent in this process. More disturbing is the notion of a regulator with extensive powers to enforce these inappropriate rules against websites.

3. Qualitative obligations on commercial content: This is already prescribed by law *(e.g.* the tobacco advertising ban). The idea of uniform control over all promotion on audiovisual services therefore means either stronger enforcement of the existing law or new restrictions going beyond the general law. Both would be cumbersome to administer, and the second is of doubtful legitimacy as a restraint on the freedom of commercial expression. Rules designed to prevent surreptitious insertion of promotions into regular TV programming are simply irrelevant to websites. This would be a compliance burden with minimal utility for user protection.

4. Right of reply: This concept is not objectionable in principle, but it would be oppressive in practice for the informal sector. Websites could not themselves set up the mediation services that large broadcasting institutions run to investigate complaints and compel publication of corrections. A collective complaints service might be developed but that would have to be funded by the sector. In the scale of things, this would be of doubtful value, and the compliance burden would be yet another reason to move offshore.

The fifth proposed group of rules – identification and masthead requirements – is not in itself objectionable but it does pose the problem of enforcement without licensing.

The suggestion that content regulation might be extended to radio, and hence to audio files accessible online, is not discussed in any detail in the issues papers otherwise than as a possibility. Given the vast expansion of regulatory jurisdiction that this would entail even in the traditional radio sector, without any obvious countervailing benefits, it should be dropped without further debate.

Regulatory burden

This problem affects major websites, such as those devoted to news coverage, but it puts the very survival of the small business end of the market in jeopardy.

Internet has greatly expanded the information generally available to the public. In the process, this has enabled services working as an alternative, or supplement, to traditional media to thrive in a way that can only be for the common good. The fact that this opportunity is abused by some is no excuse for suppressing it.

Regulation of the manner in which commercial interests are allowed to support website operation will fetter the development of Internet as a useful and reliable source of information. Because websites are sought out by the visitor, the problem of surreptitious advertising does not arise. In any event, website visitors soon learn that they have to be rather sceptical in relation to bias in the information they find on Internet. They do not need prescriptive regulatory protection.

The cost of setting up a website is trivial compared with the cost of producing even the cheapest news service on paper, let alone over the airwaves. Internet has enabled small businesses, including one-man operations, to thrive on a nearly equal footing with the media giants. Video files are commonplace.

By contrast, the cost of the labour involved in keeping a website supplied with information is far from trivial. Its financing is a major problem that has not yet been solved. Online advertising is not particularly successful because Internet users have an understandable distaste for it. Apart from placing material behind a subscription wall and having users pay for information, means of covering cost are still in their infancy. Commercial support for websites, where the promoter and the information provider share an interest in success, is therefore an important key to the further development of Internet-based information services.

Restricting the scope of the proposed regulation

The proposals in the six issues papers are out of all proportion to what seems to be the intended purpose. No attention is paid to practicability. Expanding a body of regulation beyond its existing boundaries calls for an identifiable need based on solid facts and plans for a system of demonstrable efficacy.

No facts are put forward to support the extension of TVWF regulation to the entire online information sector. Nothing in the papers suggests that informal online media are the object of this exercise. Indeed, there is little to suggest that they even fell within the contemplation of the papers' authors. Introducing censorship by accident cannot be what the EU's policy-makers have in mind.

Rather, it seems that there is a general desire to have TVWF-type controls extended to the various services that technology has spun off from traditional television since the last revision of the TVWF directive in the 1990s. They include, for example, pay-TV, video on demand and interactive broadcasting.

It seems rational for the regulation that applies to scheduled broadcasting to be extended to the same broadcasters using different technologies to transmit the same programming. Put the other way around, and assuming that the regulation is justified for scheduled broadcasting, it seems irrational to move part of a broadcaster's output out of regulatory reach simply because it is not transmitted at a time fixed in advance.

Pre-fixing the time of transmission is no longer a sound criterion for distinguishing between different levels of regulation. For years, viewers have used the video recorder to time-shift their viewing. Digital TV is giving the viewer much the same opportunity without recourse to video tape. Pay-TV and video on demand are not essentially different from the linear channels that offer many different starting times for the same programme.

If pre-fixed timing is already out of date as a criterion, a revised TVWF directive based on it will be obsolete before it comes into force. The distinction should be based on something more realistic. If the scope was limited to broadcasting activities of a kind similar to linear TV, but using different technologies, many online services and information websites would not come into the picture at all.

A solution may lie in the regulatory sphere itself, in particular the nature of the network being used and the meaning of "broadcaster" and "programme". At present the broadcaster is the person who has editorial responsibility for the transmission of TV programmes by wire or over the air. The reference to wire brings in cable broadcasting but, unless the services in question are defined more narrowly, it is apt to include all transmission over Internet.

Use of radio frequencies is particularly convenient for regulation because they are universally licensed for use by government, so enabling TV-specific regulation to be spelt out in the licence. Cable television is more complex, but its dedicated networks are within the owner's control as far as transmitting broadcast programmes is concerned. Although third parties may be able to compel access to the network in a non-broadcasting context, rival broadcasters cannot require a cable company to give them access for the purpose of broadcasting in competition with it.

Both the airwaves and cable networks therefore involve the use of resources that are finite either by nature or because of the owner's monopoly control. Internet is not a finite resource since capacity can be added freely to meet demand. EU law secures access to it for all comers. To interfere with the regime for electronic communications networks, for example by compelling a website to be licensed to carry video material, would call for revision, if not reversal, of the concept of networks as public highways.

Further, Internet capacity is allocated commercially between different levels of facilitator, not by a governmental process. A website has direct relations with a service provider, which in turn rents capacity directly or indirectly from the network operator. Because users are remote from the network operator, therefore, nothing in the chain gives rise to direct relations between any governmental authority and a website. Voice telephony and any type of data transfer may be carried without interference. Video material is just one type of data.

By defining the broadcaster more specifically by reference to the type of network being used, the category of operator within the scope of regulation would be limited to the type of broadcasting operation that the TVWF directive was designed to cover. Once subject to licensing, and so to a legal mechanism for extending the controls imposed by general law to areas of special concern for television broadcasting, the broadcaster's TVWF duties could easily be extended to transmissions of traditional TV programming over other types of technology, such as interactive digital TV. At the same time, services based solely on Internet would fall outside the regulatory scope.

Some types of communication might need specific provisions to exclude them from the TVWF regime, or include them in it:

1. Video material present on a website run by a broadcaster: On Internet, the broadcaster is operating, not as a licensed broadcaster, but as a website that users have sought out for material of their own choice. The broadcaster would have moved out of the broadcasting market into the website market. Content regulation would place the broadcaster at a competitive disadvantage in the website market. I would therefore argue that such websites should fall outside the regulation.

2. One-to-many 3G services received on mobile phones: The telecoms company may need a frequency licence to offer these services, but the audiovisual service provider would not necessarily be that company – more likely not. The medium for transmission has more in common with Internet than television, especially in the fact that the transmitter of content is in a contractual relationship with the network licensee and probably has no direct contact with the licensing authority. I would argue that these services should not be regulated because the person responsible for content is not necessarily the direct licensee.

3. The new generation of dedicated broadcasting over Internet: This developing phenomenon is troublesome. The making available on websites of audiovisual material of the type normally transmitted on linear television is becoming a feasible alternative to traditional TV due to broadband and advances in video display software. I am told that it is already normal in Korea where broadband capacity is plentiful and almost universal. It creates a distinct economic type of transmission because the cost of programmes made for TV puts them beyond the reach of the general run of Internet businesses. The nature of popular feature programmes might also warrant some similar restrictions if this became the normal means of transmitting them.

However, although this method may in time supplant traditional television, it is far from doing so yet, at least in Europe. Some of the considerations that justify content control over linear TV are absent because the user selects individual programmes, but there is a case for ensuring that popular TV programmes downloaded from Internet do not contain nasty surprises or hidden advertising.

This type of transmission might be included in licences issued to broadcasters also operating through Internet, although this would discriminate in favour of independent companies making a business out of Internet transmission of TV programming. To right this balance, such companies might be included in the broadcaster bracket, despite their use of Internet rather than airwaves or dedicated cable networks. However, the market seems to be too fluid at present to find a wise answer to this dilemma, so it would be better not to act on it at all for the time being.

Postscript

In several contexts, the issues papers note the absence of "controversial discussion" among the "experts" and conclude from this that there is general consensus on the relevant proposals. This is disturbing. If the experts found dismissal of the problems outlined above to be uncontroversial, their views should not be given undue weight in the EU's decision-making process. Indeed, one is forced to speculate on the relevance of their expertise.

Although an exact count cannot be made from the lists of focus group members, it seems that, reasonably enough, about two thirds were drawn directly from the broadcasting and advertising sectors (advertising to include both agencies and advertisers). About a tenth were neutral (mainly from the academic world), but less than a tenth came from the sectors most affected in the ways outlined above – the online sector (telecoms, broadband) and the printed press.

Of the responses to the consultation in 2003, about 60% were from the broadcasting, advertising and content sectors, 19% from governmental authorities, 15% from NGOs, and 6% from the rest. It thus seems likely that the EU public was not aware of the proposal that TVWF-type regulation should be extended to all online video transmission. The 6% of responses included four contributions from the Internet/telecoms sector and three from the press. Those submitted by the UK, ETNO and Telefónica contain much that is relevant to the problems I have outlined above. However, they do not raise the most important obstacle of all - article 10 of the European Convention on Human Rights.

Finally, EU-level regulation is not in itself undesirable. With its internal market purpose, it can rein in any national regulators that are inclined to adopt unduly restrictive rules. However, these proposals are unlike the normal range of internal market measures because they would introduce a duty for national government to regulate where none exists at present. The expansion of censorship and control that they would lead to would have been created at the EU level. This should not be allowed to happen.

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