

THE TELEVISION WITHOUT FRONTIERS DIRECTIVE

SUBMISSION TO THE EUROPEAN COMMISSION PREPARED BY THE BSAC WORKING GROUP

12 September 2005

Introduction

This submission to the European Commission has been prepared by the British Screen Advisory Council (BSAC) Working Group on the Television Without Frontiers Directive¹. The Group was convened by BSAC to undertake this work in advance of the UK Presidency's Conference in Liverpool (20 – 22 September 2005) on the revision of the Directive. It was drafted in the light of the speech given by Commissioner Reding on 30 May 2005² in which she set out the Commission's proposals for the revision, as well as of the six Issues Papers published by the Commission on 11 July 2005.

BSAC considers extremely regrettable that such an important consultation should have fallen over the summer, making it difficult to accomplish the work. It does not consider that it has been possible to do full justice to the topic. Notwithstanding, we have been able, thanks to the efforts of the Members of the Working Group, to produce a submission that draws together the views of key stakeholders of the UK's audiovisual industries.

The original purpose of the Television Without Frontiers Directive was *inter alia* “to permit and ensure the transition from national markets to a common programme production and distribution market and to establish conditions of fair competition without prejudice to the public interest role to be discharged by the television broadcasting services.”³

The new, stated purpose of the proposed revision of the Directive is “to put in place the conditions to respond to the expectations of both business and consumers while, at the same time, stimulating the European content industry and the European Information and Communications Technologies (ICT) industries. This necessitates the establishment of conditions for healthy competition, of clear rules and greater legal certainty.”⁴

¹ The Members of the Working Group were: Simon Olswang (Chair); Fiona Clarke-Hackston (BSAC); Stephen Collins (Yahoo); Jonathan Davis (Consultant); Roger Laughton (BFI/ Bournemouth University); Martin Le Jeune (BSkyB); Matteo Maggioro (BBC); Mita Mitra (BT); Jonathan Simon (Channel 4); Martin Stott (Five); Sarah Tingay (Fremantle).

² Commissioner Reding's speech of 30 May 2005 setting out her proposals for the revision of the Directive. <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/315&format=HTML&aged=0&language=FR&guiLanguage=en> (in French).

³ Council Directive of 3 October 1989 (89/552/EEC), third recital.

⁴ Seminar of the Luxemburg Presidency on the revision of the Television Without Frontiers Directive, opening address by Commissioner Reding, 30 May 2005

The proposed revisions to the Directive have two discrete purposes: 1) to amend the regulation of existing television services, for example, as this relates to advertising and listed events, and 2) to create a regulatory framework for new and emerging broadband services that fall outside the scope of the current Directive.

Given the inappropriate timing and the shortness of consultation period, except where stated below, BSAC does not feel able to express particular views concerning the proposal to amend the regulation for existing services. Nevertheless we do believe that there is some merit in seeking to lighten the existing regulatory burden in order to allow existing regulation to be sustainable for longer. **However, we are concerned that the proposal to extend regulation to “non-linear services” is not only unnecessary, inappropriate and unlikely to be effective; in many areas we believe it is likely to be damaging.**

BSAC’s key propositions

1. The Commission needs to be mindful that the revised Directive will not come into force for several years

The proposal for the revised Directive will presumably be published at the end of 2005. It could well require another twelve months before the actual Directive is adopted and perhaps another two or three years before Member States enact it in their legislation. **Accordingly, in assessing the likely impact and effectiveness of the proposed revisions, it must be borne in mind that the provisions of the new Directive are unlikely to take effect in Member States much before 2010.**

2. The revision of the Directive needs to be informed by the principles of “better regulation.”

BSAC endorses the following principles set out by Ofcom, the UK communications regulator:

- There needs to be evidence that changes to the Directive are necessary and that current levels of protection are inadequate.
- If regulatory change is needed, it must be subject to full regulatory assessment with the net benefit to citizens measured.
- Whatever emerges must be proportionate. Establishing principles is likely to be more practical than establishing rules.
- The Directive needs to recognise the respective roles of regulation, co-regulation and self-regulation.
- The Directive must encourage innovation, not stifle it.

BSAC believes that the application of these principles would ensure that there were no provisions in the proposed Directive that were

- unnecessary for the fulfilment of the objectives as defined by the Commission
- damaging to the competitiveness of the EU, for example, having the effect of inhibiting the emergence of new services
- likely to force activity outside of the EU
- likely to increase complexity and uncertainty at the expense of the Directive's reputation, for example, by intervening where regulations were already applicable, by overlaying existing regulation, or by seeking to regulate activities that had yet to take place
- unsustainable and/or unenforceable.

BSAC does not believe that the current proposals to extend the scope of the Directive are compatible with these principles.

3. The tensions within the core objective of the Directive are only likely to increase

BSAC is concerned that, in formulating its proposals, the Commission has paid insufficient attention to tensions inherent in the scope of the Directive which we believe are set to become greater with the passage of time.

In her 30 May speech, Commissioner Reding stated, "A modern Community framework must be able to stand the test of time and, I believe, be platform-neutral. This neutrality will permit healthy competition between the providers of content services, will guarantee a coherent regulatory framework and will strengthen legal certainty."

BSAC believes that "healthy competition" means the absence of barriers to entry and exit, and of other conditions that might tend to distort competition. Healthy competition means business and consumers being able to choose freely between competing services, competing service providers and competing networks.

We believe that the emergence of "new" services (or "non-legacy" services") is indispensable to the achievement of the core objective of "healthy competition", thereby "stimulating the European content industry and the European Information and Communications Technologies (ICT) industries." We believe that it is likely that only to the extent that "new" services compete with or displace "traditional" (or "legacy") services will they contribute to the achievement of the policy objectives of European audiovisual regulation⁵.

⁵ These objectives could be characterised as: Industrial policy (e.g. promoting production, media champions, new infrastructure, a diverse production base); Protecting and developing cultural diversity; Regional policy (including industrial and cultural objectives); Preventing the emergence of undue commercial or political influence in the media; Political impartiality and pluralism securing the means for active citizenship and an informed democracy; and Consumer protection. See the "Report for BSAC on the Trade and Regulation Issues Relating to Audiovisual Services Working Group," adopted 25 June 2002 (the TRIRAS paper).

Clearly, there are tensions between the different “expectations of both business and consumers”, and between those expectations and the objective of “stimulating the European content industry and the European Information and Communications Technologies (ICT) industries.”

For example, consumers may wish to see an increase in the choice of services and a reduction in the prices they pay for those services. Business will tend to want the prices it pays for inputs to fall and the revenues it earns from its outputs to rise. The inputs of one group of businesses are the outputs of other groups of businesses. In order to stimulate the European content industry, the revenues flowing into that industry need to increase: this probably means intermediate and/or end-users of content paying more. In order to stimulate Europe’s ICT industries, on the other hand, intermediate and/or end-users will need to pay more, with proportionately less revenue flowing to the European content industry.

These tensions mean that “legacy” services may suffer in order that “non-legacy” services develop more quickly, or conversely, that the development of “non-legacy” services is retarded in order that “legacy” services remain viable for longer. Consumer expectations may be that the cost of services will fall; increasing costs may slow take-up, but lower costs will slow roll-out, or result in less revenues flowing to content owners.

Given these tensions, which are only likely to grow, BSAC believes that the ability of regulation to balance and reconcile these interests will be increasingly untenable and should not be attempted.

4. Scope of the Directive - Rules applicable to Audiovisual Content Services

BSAC believes that an effective regulatory framework must evolve from a bottom-up analysis of regulatory and political factors. In this respect we would like to highlight that the new services concerned are already regulated by the Electronic Commerce Directive and the Council Recommendation concerning the Protection of Minors and Human Dignity⁶. The Recommendation, which already covers all electronic media, explicitly recognises that the achievement of effective results, without compromising the EU’s competitiveness, can best be secured through reliance on self-regulation and the sharing of best practices. While we have reservations about parts of the draft Revised Recommendation, we can see no evidence, with respect to the proposed reform of the Television Without Frontiers Directive, for the need to depart from the self-regulatory approach favoured to date and confirmed recently in the Commission’s proposal to update the Recommendation.

The freedom to provide services across borders was the central purpose of the original Directive and should remain its key element. The Directive was conceived to regulate an environment characterized by spectrum scarcity and few channels, in which viewers had no control over the content pushed to them and very little choice indeed about what they

⁶ 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 (published in the Official Journal L 270 of 7.10.1998, p.48). This Recommendation is currently being updated at the initiative of the European Commission.

could watch. Today's environment is one of a multitude of satellite, cable and terrestrial channels and the choice the viewer exerts over what s/he views has increased.

The online environment is even more fragmented, with literally millions of content-based websites and applications from which to choose. There is no concern over spectrum and barriers to entry are very low, although the substantial costs associated with producing high quality audiovisual content and with acquiring sport, film, music and other rights, do constitute a significant barrier. Borders are entirely permeable and service provision is already guaranteed and regulated by the E-Commerce Directive. Consumers are also protected by the Recommendation on Protection of Minors and Human Dignity.

BSAC believes that, in general, the proposal to extend the Directive in the manner proposed is unnecessary and fails adequately to take these facts of life (in particular the regulatory framework that already exists) into account, especially when we are looking five years hence. We therefore see no merit in seeking to extend 1980s-type broadcasting regulation to this new and very different environment.

In particular:

- The aims of the Directive would not be achieved by doing so. Consumers and citizens would not receive any greater real-life protections; compliance and cost burdens on a young industry would increase; investment in European content would decline as greater returns on investment could be made elsewhere in the world; some European online providers would simply move their operations to a convenient off-shore base and provide services into the EU from there, thereby avoiding the Directive's jurisdiction and placing those providers who choose to remain in the EU (for whatever reason) at a competitive disadvantage.
- The online environment is already quite heavily regulated by a number of specific instruments, such as the E-Commerce Directive and the Copyright Directive, as well as by existing EU and national horizontal, generally-applicable laws⁷. These Directives work. They are familiar, clear, generally well-designed and fit for purpose. Currently, these Directives appear to be adequate to the job for which they are intended; where, over time, they prove inadequate, they should be amended. In the meantime they should not be complicated by an over-arching extension of the Television Without Frontiers Directive.
- In the area of what has become known as IP TV, or broadband TV, development of services has only just begun. **Clearly, services that are absolutely identical to broadcast programmes but merely transmitted via a different medium with no increase in user control, should be treated as if they were also broadcast services and be subject to the Directive in the same way as traditional television services.** However, the live streaming of programmes available on competing broadcast

⁷ Where a specific need has arisen, such as in the area of combating child pornography, self-regulation has been successfully developed in co-operation with government (see. www.iwf.org.uk).

networks is only a part of IP TV and is only the first stage. We believe that is unlikely that future developments will compete with broadcast with like-for-like programming; rather there will be a fully-interactive range of new services from which the consumer and citizen can choose.

- The Commission's distinction between linear and non-linear services might work for the next year or two but, as new online services develop and consumers and citizens are able to access a range of *à la carte* services that combine on-demand, linear, time-shifted, live and non-commercial (i.e citizen-created) services according to their own – and not the service providers' – preferences and pro-active choices, the linear/non-linear distinction becomes untenable.
- The Commission's two-tiered approach to regulation may be difficult to reconcile both with the services we will see in coming years and with what already exists in Member States' national laws. The basic tier, suggested by the Commission to apply to all services, constitutes adherence to several fundamental rights already enshrined, for example, in the European Convention on Human Rights. Member States all have specific or general national laws protecting children from harm⁸. A right to reply online is already available to everybody instantaneously. The creation of a competing website or the use of message boards/chat rooms, is cheap (usually free), simple, and reaches the same audience as the original material. It thus seems at best unnecessary to cover existing laws (including on libel and privacy) and regulations in these areas with another layer of laws and regulations. At worst, compliance costs for industry will increase without any benefit accruing to citizens.
- Unlike any other medium, the Internet is truly democratic in its functionality. Citizens are able to create their own content and post it for others to see. They can participate in discussions directly with other citizens without the intervention by a third party, benevolent or otherwise. None of this is possible with broadcast, print, radio or any other medium. The Issues Paper makes it clear that only services aimed "at the general public" are covered. But the Internet redefines the notion of the "general public" with its offer of non-moderated citizen inter-action.
- In a converging telecoms/broadcasting world, any increase in regulation is likely to run contrary to the fulfillment of Lisbon Agenda goals, i2010 and the principles of "better regulation" set out above. The risk of damage to Europe's economy is obvious.
- Consumers in the non-linear world already benefit from a range of complementary self-regulatory frameworks (as required by the E-commerce Directive and the Recommendation on the Protection of Minors and Human Dignity) and tools, such as parental controls, that have not traditionally been available to TV viewers. Self-regulation offers advantages over externally imposed regulation, including its ability to respond quickly to market developments, the lower cost of implementation and enforcement, and its ability to foster new entry and new sources of competition. An

⁸ Those Member States, for example, France, that consider a right of reply online has to be protected by law, have introduced such laws already.

extension of external regulation to the non-linear world would be the equivalent of applying a straightjacket to this innovative, dynamic and vital new industry.

5. Additional matters: the country of origin principle and the role of “positive” regulation

The country of origin principle

A number of Member States⁹ have drawn the Commission’s attention to the problem of services, originating in one Member State but intended primarily for reception in another Member State, that serve to undermine the integrity of broadcasting, cultural and social policies in the Member State targeted by those services¹⁰ .

The current arrangements whereby it is the country in which a channel’s editorial decisions are made that has responsibility for regulating that service (the “country of origin” principle) should be retained: a constant and simple principle is preferable to one that requires interpretation. However, whilst we need to recognise the legitimacy of the concerns of the Member States affected by such services, we believe that any problems are best addressed through bilateral co-operation between national regulators according to the principle that Member States should recognise each other’s rights to set rules that are consistent with national culture and sensibilities¹¹ .

In line with our general contention regarding the regulation of on-line services, BSAC does not see any virtue in the proposal of having online service providers “choose” their jurisdiction.

The role of “positive” regulation

BSAC has long believed that “negative” regulation – to prevent what is harmful – would become less and less relevant in the digital world¹² . We believe “negative” regulation needs to yield to “positive” regulation that encourages and supports the creation and provision of what society and policy-makers want.

We believe that the role of restricting access to harmful or unwanted content has to be exercised primarily by the individual, secondarily by those responsible for that individual’s well-being (e.g. a child’s parents) and only thirdly by the state.

⁹ See the note (AUDIO 16) from the delegations of Austria, Belgium, the Czech Republic, Estonia, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovenia and Sweden to the Council (13 May 2005), ref. 8806/05.

¹⁰ For example, children’s services in Swedish are licensed in and uplinked from the UK, thereby circumventing rules for Sweden banning advertising around children’s programmes. RTL provides services for the Netherlands that are licensed in Luxembourg and that do not fulfil the public service obligations imposed on services licensed in the Netherlands. In 2001 Poland was in dispute with Hungary – the latter had licensed pay-TV services in Polish that competed with pay-TV services licensed in Poland that, unlike the services uplinked from Hungary, had obligations to invest in Polish production. Unable to grant an exclusive licence to the Polish pay-TV operator, the Polish government had to release the Polish pay-TV operator from its investment obligations.

¹¹ Strengthening the work of the European Platform of national regulators is the preferred approach.

¹² See BSAC’s Regulation Host Paper for the 1998 European Audiovisual Conference held in Birmingham under the UK Presidency.

However, what is considered harmful and unwanted varies from Member State to Member State. For instance, attempts to produce uniform ratings systems for films across Europe have consistently failed.

We therefore believe that regulation aimed at preventing harmful or unwanted content is best left to Member States' law of the land. This accords with the principle of subsidiarity. It also enables Member States to enact legislation or adopt suitable means of regulation, co-regulation or self-regulation which are domestically appropriate and which, as the law of the land, can be media-neutral, determined by the economic, political and consumer conditions that are relevant.

Emphasis should be placed on policies and principles that recognise and endorse public service broadcasting, on the one hand, and media literacy, on the other. The approach taken towards "positive" regulation needs to focus more on how public service broadcasters can contribute to the achievement of policy objectives, be they for the better circulation of non-national European works, to investment in and promotion of independent production, to an enhanced sense of European citizenship, or to the fulfilment of the Lisbon Agenda¹³ .

We believe that initiatives to ensure that public service broadcasters play a full part in the delivery on policy objectives would be expected to have much greater impact than measures, for example, restricting the number of advertising breaks in feature films¹⁴ .

Alongside measures aimed at reinforcing the delivery by public service broadcasters of policy objectives, **we believe much greater attention should be paid, at European and national levels, to media literacy as the means to equip citizens to be their own best regulators, able to make informed decisions about what they access and what they do with it.** The media ought to be in the forefront of building a citizenry able to take full advantage of the potential of the Information Society, one that is confident in its use of the tools and instruments of the Information Age¹⁵ .

¹³ This is not to say that other service providers should be absolved from any responsibility to deliver on these objectives; it is rather to recognise that in the public service broadcasters we have an instrument for pursuing social, cultural and educational objectives of which we might make better use. We consider that properly-funded public service broadcasters set standards that other broadcasters must match or emulate if they are to compete. Going back to the problem alluded to above of children's services in Sweden, we have present before us the German example: German regulators did not seek to outlaw advertising-supported children's television services; rather, the German public service broadcasters, ARD and ZDF created a public service children's channel (Kinderkanal) that was so successful it thwarted the development by the global media companies of children's channels aimed at the German market. In the UK, the BBC has used its resources to drive internet take-up and digital television; it is a vital element in the development of a Broadband Britain that is competitive in the Information Society.

¹⁴ This measure has been more honoured in the breach, bringing the Directive into disrepute. It may well have had the unintended effect of making the broadcasting of feature films much less attractive than it would have been had the same rules been applied to films as to other fiction.

¹⁵ The UK's Communication Act places significant weight on media literacy as the means of ensuring that citizens can deal with media on terms that put their interests first. BSAC regrets that the Commission's proposals for a revised Directive do not give the prominence to media literacy as the Commissioner indicated they would when she addressed the British Screen Advisory Council in April 2005.