



**ECCA's response to DG Information Society Issues Papers for the Liverpool
Audiovisual Conference**

The European Cable Communications Association (ECCA) is an association of cable operators and their national associations active in Europe. Its main objective is to foster co-operation between cable operators and to promote and represent their interests in European, national and international fora. ECCA members have more than 55 million subscribers and following significant investments to upgrade their networks offer a variety of services including digital TV, interactive services, VoIP, and on- and near on-demand video services in addition to their more traditional analogue TV offer.

ECCA welcomes the opportunity to comment on DG Information Society's (DG InfoSoc) proposals to review the TVwF Directive. As an active participant in Focus Group 1, we have been involved in discussions concerning this review from the outset and appreciate the chance to offer formal comments on the DG InfoSoc's observations from those meetings. This paper also elaborates upon ECCA's earlier position paper of 15 July 2003 (*ECCA's comments regarding the Television without Frontiers Directive review process - ECCA4497*).

As requested we have provided an executive summary of our main concerns below. This is followed by more substantive comments.

We look forward to continuing our constructive dialogue with DG InfoSoc on this policy issue.

Executive Summary

- ECCA views this consultation as an opportunity for the European Commission to scale back on existing legislation to reflect changes that have occurred in the audiovisual landscape since its introduction in 1989.
- Provisions in the original Directive were developed at a time of spectrum scarcity and lack of cross-border movement of TV content offerings - problems that no longer exist with the advent of digital TV and the proper functioning of the Internal Market and application of the country of origin principle.
- As such we would question the need for the continued use of a range of existing provisions. We would therefore argue that the focus of the review should be on evaluating existing provisions to determine whether these provisions are still justified in today's commercial environment.
- Ultimately we would want to ensure that services offered in a linear or traditional broadcasting manner do not face competitive disadvantages due to continued application of delivery specific legislation.
- ECCA therefore supports the notion of the need for a level playing field for all audiovisual services irrespective of platform or transmission delivery.

- We would not however support the creation of such a level playing field by extending the current Directive to new services such as non-linear services.
- Non-linear services are already regulated by the E-Commerce Directive (2001/31/EC) and the Transparency Directive (98/34/EC) under which they are categorised as “information society services” meaning they constitute e-commerce or other more general online services. They are defined as services made available on individual request, offered at a distance and via electronic means. Given that they are already governed by an EU Directive, we would therefore question why they need to be regulated further. Certainly, we would request that any moves to introduce new regulation (no matter how light touch) cannot be considered until such time as it be demonstrated, using appropriate impact analysis, that it will have a beneficial effect for citizens, consumers and the industry.
- We would argue against the extension of quotas to non-linear services as many of these services are still in their infancy and there is a lack of certainty as to how successful they will be commercially. Proposals to impose content quotas on such services indicate a lack of understanding of the business models concerned (i.e. content is driven by consumer demand) and will create difficulties in the introduction of a viable and competitive service.
- We would also call for the scaling back of quota provisions on NVOD and thematic or niche channels. The existing provisions penalise these services by obliging these channels - which already have a limited target audience - to invest in content that falls beyond the scope of the niche offering.
- The current regulatory distinction between linear and non-linear services does not help to provide a consistent investment climate for the creation and distribution of (broadband) multimedia content or new non-linear services like video-on demand.
- Due to the increasing diversity of the audiovisual content services industry, a self-regulatory approach is most likely to address the relevant market issues in such a way as to encourage all market players to participate in the operation of a self regulating market.
- As operators of pan-European services, maintenance of the country of origin principle is fundamental to our business models. This principle is one of the underlying principles of Community law and which allows for the proper functioning of the Internal Market - the creation of which was the basic premise for the introduction of the original TVwF Directive. Any moves to force operators to comply with multiple national regulatory regimes will not only be cost-prohibitive thus undermining the introduction of certain commercial offerings, but it will seriously restrict operator's freedom to offer services on a pan-European basis.

General comments:

On a general note, it is important to recall that the push for a review of the Directive has been generated by the DG InfoSoc itself. Faced with an ever changing and increasingly competitive audiovisual market, it has, over the past number of years, invited industry to comment on the merits of drawing up of a new framework Directive. Industry involvement in this regulatory debate has therefore been at the DG InfoSoc's invitation and comments submitted focused on proposed measures by the Commission. In other words it is important to note that Industry and certainly the cable sector, has never actively called for a revised Directive.

That said and in keeping with our continued involvement in this debate we would put forward the following general observations when discussing draft proposals for a new Directive (as referenced in the various Issue Papers):

- Issue Paper: Rules applicable to Audiovisual Content Services

Unique opportunity to scale back on existing provisions

When reviewing the TVwFD, it is important for the Commission to recognise and to take into account that technological and economic conditions in Europe have changed radically since the Directive was first adopted in 1989 and revised in 1997. The number, range and scope of audiovisual services being provided by public and private broadcasters, pay-TV operators, etc. has increased dramatically. New technologies allow customers to receive audiovisual content services through different platforms such as terrestrial television, cable, satellite, mobile or DSL. Whereas, in the past, the scarcity of spectrum, of TV channels and of delivery methods has been a core rationale for heavy regulation of TV broadcasting in general, this is no longer the case and will become even harder to justify when Europe switches from analogue to digital transmission.

We would therefore argue that the focus of the review should be to evaluate whether it makes sense to continue to regulate those services that have historically fallen under the scope of the Directive. As previously mentioned, the audiovisual landscape is in a continued state of flux with the emergence of new and competing services being offered over a variety of alternative platforms. It is important that those who currently fall under the remit of the 1997 Directive are not at a competitive disadvantage due to having to fulfil a suite of regulatory obligations not faced by new entrants. (See below for more detailed comments on the quota issue).

This does not mean to say however that we would support the extension of existing provisions (or even a subset thereof), to non-linear services.

A comprehensive framework for any form of electronic delivery of audiovisual content is already in place via the Communications Package. The underlying objective of this Package is to ensure the existence of a level playing field for all platforms of distribution. Similarly TVwF is a technology neutral Directive and as such also creates for a level playing field for linear services regardless of the infrastructure over which they are offered (terrestrial, cable, satellite, internet).

Given that both linear and non-linear services are already covered by platform agnostic legislation we do not see the need to further extend the scope of either Directive. Certainly, we do not believe DG InfoSoc has provided adequate justification as to why new services should be brought under a revised TVwF Directive.

The focus of the TVwFD has and should continue to be on the actual regulation of the content offered. We would therefore reject the Commission's claims that the review of the TVwFD is justified on the basis of a need for further regulation of distribution platforms.

- Issue Paper on Cultural Diversity and the Promotion of European and Independent Audiovisual Production

Unique opportunity to scale back on existing provisions

Facilitating the circulation of audiovisual works from other (EU) countries is in fact something that cable operators have been doing since their establishment. It forms part of our core business.

The existing quota regime penalises the emergence of new services (e.g. niche channels, NVOD) by obliging these channels - which have a limited target audience - to invest in content that falls beyond the scope of the niche offering. With a reference to the necessary practicability of the quotas regime - and proportionality - this leads to the conclusion that for new services (or emerging markets) the quota requirements should not apply. For the

cable sector this is a crucial issue since the success of digital TV depends heavily on “new services” such as niche channels and interactive television.

In the perception of the public both near video on demand (NVOD) and video on demand (VOD) services are, if not identical, very similar.

Nevertheless, under EC regulation both services are subject to different legal regimes. NVOD is subject to the more stringent regime of television regulation, whereas VOD is subject to the more liberal regime of Information Society services.

There is an urgent need to carefully reconsider the proportionality principle for the application of the TVwF requirements in particular with regard to NVOD. Does any policy objective require that NVOD is made subject to the TVwF requirements, in total or partially?

A balance should also exist between these objectives and other EC policy objectives such as the promotion of broadband and new broadband services as NVOD and VOD. The Commission should seek to encourage member states to ensure their regulatory environments facilitate the introduction of such services.

Broadband and broadband services cannot afford a fragmented market. Investments require a market with a large footprint, which the EU can deliver through harmonised regulation. From this perspective, ECCA welcomes the Commission's recent Communication "i2010 - A European Information Society for growth and employment" (COM(2005) 229 final).

Non-extension of quota provisions to non-linear services

To be clear, we cannot however support any calls (even if it only amounts to a ‘political signal’) that “non-linear” services should be expected to contribute to the promotion of European works.

“Non-linear” services are on demand services and thus by definition chosen by individual consumers. Access to content follows a conscious decision by users to view that content. Regardless of the percentages of EU content a service provider has available in his catalogue, it is the consumer who ultimately decides whether or not to access that content. Thus the idea that regulators can further increase the circulation and exposure of EU works by imposing investment or catalogue quotas on non-linear service providers is fundamentally flawed since, unless the consumer actively chooses to view that content, it will never get air time.

This theory was also supported by one of the main findings of a recent study prepared by DGA for the European Commission, which stated that there was no “clear-cut conclusions as to the impact of Articles 4 and 5 on the scheduling of European works and works by independent producers....No clear link between cause and effect could be established.”

If such a link between the cause and the effect cannot be shown, it is likely that the restrictions imposed by the quotas rules on the freedom rights of Article 10 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are disproportionate.

To take the example of video on demand (VOD) services how can DG InfoSoc justify imposing such obligations on video on demand service providers, while similar obligations have never been imposed on video rental stores? The only difference between the two lies in the fact that one has his video delivered to his television while the other has to physically collect it from the video store. At the end of the day the product is the same but treated very differently on a regulatory level. Surely should DG InfoSoc pursue with its proposals to introduce quotas for VOD, this will completely undermine the viability of this content offering and overburden service providers with content that is neither wanted nor viewed.

Concept of independent producer

We do not agree with the inclusion of this section in the Issue Papers since we believe this is an issue relating to copyright law and as such falls outside the scope of this Directive.