

## **PARTIAL REGULATORY IMPACT ASSESSMENT**

### ***1. TITLE OF PROPOSAL***

**Proposal by the European Commission for the revision of the 'TELEVISION WITHOUT FRONTIERS' Directive (Directive 89/552/EC, amended by Directive 97/36/EC).**

1.2 The Television Without Frontiers Directive is generally known as the 'TVWF' Directive. Its formal title is the 'Directive of the European Parliament and the Council ... on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities'.

1.3 One of the Commission's proposals is that the Directive be renamed, to replace the words 'the pursuit of television broadcasting activities' at the end of its long title with 'the provision of audio-visual media services (Audio-Visual Media Services Directive)'.

#### *Amending the TVWF Directive*

1.4 The proposal takes the form of amendments to the existing TVWF Directive. Some parts of the Directive would remain unamended. They would remain in force as they stand. Examples are Articles 4 and 5, the 'quotas' which TVWF sets for European and independently-produced TV programming, and Article 23 on rights of reply.

1.5 However, the scope and thus the effect of these parts of the TVWF Directive would be slightly altered. They would apply to what the amended Directive would call 'linear' audio-visual services rather than, as now, simply to television broadcasting. The two concepts are slightly different (paragraph 2.16 below describes what is meant by 'linear' audio-visual services).

#### *Extending the TVWF Directive*

1.6 As well as this, the amendments would extend the scope of the Directive beyond TV broadcasting as generally understood into what the Commission's documents call 'non-linear' – in other words, 'on-demand' - services. These cover a very wide range, and paragraph 2.15 below lists some of the more self-evident possibilities.

1.7 Member States would be required to ensure minimum standards for all such services. These minimum standards are set out at paragraph 2.18 below.

### ***2. PURPOSE AND INTENDED EFFECT***

#### *The existing Directive*

2.1 The TVWF Directive has two purposes. As explained in the Commission's own impact assessment, these are to ensure

- the protection of fundamental public interest objectives in terms of the content of TV programming; and

- the free movement of television broadcasting services within the EU.

2.2 To achieve these aims, TVWF sets minimum standards for the rules which Member States must impose on the television services which they authorise. These rules concern public access to coverage of major events, proportions of European and independently-produced content, advertising, sponsorship and teleshopping, the protection of minors and public order, and rights of reply.

2.3 At the same time, TVWF requires that Member States do not restrict the retransmission in their territory of television programming originating from other Member States, so long as this meets the TVWF rules. This is known as the 'Country of Origin' principle. In this way, the Directive creates a Single Market in the EU television industry.

2.4 Without the rules in the TVWF Directive, Member States could use their own domestic law in ways which could impede the reception and distribution of TV programming from other EU countries, and there would be no guarantee across the EU that programming would meet the standards that the Directive requires.

*The Commission's reasons for proposing changes - the scope of the Directive*

2.5 The Commission have set out their reasons for proposing to amend the Directive in the Explanatory memorandum which accompanies their proposal. They say that while the TVWF Directive *'has succeeded in .... developing the audiovisual market in the European Union, it is no longer adapted to the increasing degree of choice of consumers of audiovisual services in the digital age. At the same time, broadcasters have to compete increasingly with other linear services on other platforms and non-linear (on-demand) services that offer the same or similar audiovisual media content, but are subject to a different regulatory environment. This creates a non-level playing field in the way content is delivered. In line with the principles of better regulation, therefore, a fresh approach is required'*.

2.6 In the period since 1997 an ever-widening range of new technologies - including PVR's (personal video recorders), IPTV (Internet Protocol TV) and other Internet and broadband offers, VoD (video on demand), and an array of mobile services has become available to deliver TV and TV-like products. Some of these products are scheduled services on the model of traditional broadcasting, in which it is the supplier who decides what is broadcast and when. Others consist of what the Commission call 'non-linear' services, in which it is the consumer who determines what, from among the available programme options, is transmitted and when.

2.7 As information society technology has developed, the different platforms are increasingly able to offer the same very wide range of services (the phenomenon known as 'convergence'). The Commission's core concern - see 3.2 of their impact assessment - is that keeping the TVWF Directive in its current form would *'aggravate increasingly unjustifiable differences in regulatory treatment between the various forms of distribution of identical or similar content'*.

2.8 The Commission argue that 'traditional' TV services, delivered by satellite or cable, are subject to the Directive, but other, newer, services with which they increasingly compete operate in a different regulatory environment to which TVWF does not apply. In the UK Government's view, there is room for scepticism about the degree to which new media services are in direct competition with television

services. Indeed the European Commission itself seems to have reached the conclusion, in its investigation of UEFA, German and UK football rights, that new media rights are a separate market to core TV rights, presumably because there is little substitutability between the two.

2.9 Nevertheless, the Commission have concluded that the present scope of EU television regulation imposes a regulatory unfairness, in two directions. First, the newer types of service are not subject to the detailed restrictions on, for example, advertising and sources of content, which are set out in TVWF. Second, they are unable to take advantage of the single market, country of origin, protection which TVWF provides and may therefore be subject to individual Member States imposing their own national controls. There would therefore be no single market in these sectors. The Commission consider (3.2 of their Impact Assessment) that *'the costs of not having an efficient country of origin principle in the area of non-linear services would be significant ....'*

#### *Scope of the Directive - the Commission's solution*

2.10 At present, TVWF applies to *'the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public ....'* (89/552/EEC as amended by 97/36/EC, Article 1a).

2.11 As mentioned above, the Commission propose that TVWF should become an Audio-visual Media Services Directive'. Its scope of application would become (any) *'service as defined by Articles 49 and 50 of the Treaty, the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2a of Directive 2002/21/EC of the European Parliament and the Council'* (Article 1a of the draft Directive).

2.12 The reference to Articles 49 and 50 of the Treaty confines the scope of the Directive, in general terms, to services which are carried out on a commercial basis (including the activities of public service broadcasters such as the BBC). Directive 2002/21/EC, generally known as the e-commerce Directive, defines electronic communications networks - both it and the current Commission proposal cover the Internet, all mobile networks, and all broadcasting networks.

2.13 The effect of the Commission's definition at Article 1(a) would therefore be that the revised Directive would cover all commercial media services offered over the Internet, mobile networks, telecoms networks, terrestrial, cable and satellite broadcasting networks, or any other electronic communications network, whose principal purpose was the provision of moving images to the general public. The Commission calls these 'audio-visual media services'.

#### *Linear and non-linear*

2.14 These audio-visual media services would be divided into two categories, linear and non-linear. Within the basic scope of the Directive, non-linear services are defined (Article 1(e)) as those in which *'the user decides on the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider'*.

2.15 This formulation appears to cover a very wide range of services, including video on demand but also, for example (if they carry moving pictures)

- weblogs with charging mechanisms for access or which carry paid advertising
- news agency websites
- charity websites
- game websites if offered commercially or carrying advertising
- gambling websites; and
- online advertising services.

2.16 Linear services are not specifically defined, but would be broadly comparable to scheduled TV broadcasting. Article 1(c) says '*television broadcasting*' or '*television broadcast*' mean a linear audio-visual service where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule'.

2.17 The Directive would not cover sound-only services, and so would exclude radio (the existing TVWF Directive equally does not cover radio).

*The Commission's proposed rules for linear and non-linear services*

2.18 The Commission's proposition is that all audio-visual media services, linear and non-linear, should be subject to a 'basic tier' of regulation, whose details are set out at Articles 3c to 3h of the proposed revised Directive. These Articles would require Member States to ensure that audio-visual media services under their jurisdiction

- allow customers to identify who they are, and where they are from, easily and directly;
- do not carry material which might seriously impair the mental, physical or moral development of minors;
- do not carry material which contains incitement to hatred on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
- promote, where practicable and by appropriate means, production of and access to European-produced work;
- meet basic requirements in terms of the content of advertising and of product placement.

2.19 With the exception of the requirements in respect of identification and product placement these basic rules effectively mirror, to some extent in a simplified form, existing rules on these issues which are already in TVWF (see Articles 22 (protection of minors), 22a (incitement to hatred) and 4 (European works). (There is no rule about identification in the current TVWF, while product placement is implicitly prohibited by it).

2.20 As well as this 'basic tier' of rules for all audio-visual media services, the effect of the Commission's proposal is that linear services, but not non-linear ones, should be subject to requirements about the coverage of major events, quotas of European and independently-produced programming, advertising, and rights of reply which are

similar to those which the TVWF Directive already imposes upon television broadcasting services (in Articles 3 and 3a, 4 and 5, 10 to 20, and 23 respectively).

#### *The Commission's reasons for proposing changes - advertising*

2.21 The Commission's proposals would significantly simplify the rules in the TVWF Directive that relate to television advertising. They would also allow for Member States to permit broadcasters and other audio-visual media service providers under their jurisdiction to allow 'product placement' so that advertisers would be able to pay them to show their goods (for example, as props) in the content they make and transmit.

2.22 The Commission cite two reasons for these changes. First, technological development now offers broadcasters new opportunities for advertising techniques which the existing complex controls in TVWF disallow. Second, there is a need for broadcasters to expand their range of techniques to compensate for the increasing ease with which viewers can evade traditional spot advertising by the use of devices such as personal video recorders (PVR's).

#### *Implementing the Directive*

2.23 Directives are not implemented directly by the European Commission but by Member States through their own law or administrative arrangements. The existing requirements of the TVWF Directive are implemented in the UK by a variety of means including in particular the Broadcasting and Communications Acts and the licensing and regulatory arrangements overseen respectively by OFCOM and the Governors of the BBC.

2.24 We anticipate that the requirements for 'linear' services which are set out in the Commission's proposals would need to be implemented by an adaptation of these existing arrangements. On the basis of the Commission's current proposals we consider that there might well need only to be a fairly slight extension, into a possibly very small number of scheduled services which differ from those currently caught by the existing arrangements for regulating TV broadcasting only by virtue of their means of delivery.

2.25 The position in respect of non-linear services however would be very different. Here, the Commission's proposals appear to imply a significant extension of regulation. It seems clear that the language of the proposed Directive – which is that Member States are to 'ensure' that non-linear services meet the standards listed at paragraph 2.19 above – do not permit member States to rely on industry self-regulation in these areas.

2.26 At a minimum, it is likely that a 'co-regulatory' system would be required. This would involve standards being agreed between Government and/or the regulator and policed by the industry, but with legislative reinforcement of some kind which could come into play if the industry arrangements proved ineffective in particular cases.

### **3 CONSULTATION**

3.1 The Commission published these proposals for the first time on 13 December 2005 and the UK Government has not yet formally consulted about them. There has however been a great deal of informal consultation within the UK.

3.2 We have (jointly between the Department for Culture, Media and Sport, the Department of Trade and Industry and the Office of Communications - DCMS, DTI and OFCOM) set up a UK based stakeholder group that embraces a very wide range of interests with specific concerns about TVWF and what the Commission are now proposing to do with it.

3.3 As well as broadcasters, the group includes internet service providers, mobile phone operators, the software industry and civil society groups such as the Voice of the Listener and Viewer and the RNID. This group first met in 2004 and we have convened meetings throughout 2005 as the Commission's thinking has developed. There have been 5 meetings of the group to date, most recently on March 10<sup>th</sup> 2006. It has a current mailing list of 200.

3.4 There has not been any formal output from this group, though the commentary on options below to some extent reflects discussion in it. Now that the Commission has published its proposals, we will be carrying out a formal consultation exercise on them and will use this partial regulatory impact assessment to inform that.

3.5 The Commission began their own consultation on the proposal in 2002, when they sought comments from Member States and others. The results of that can be found on their website. The UK responded to this consultation, and our response can be found on the Department for Culture, Media and Sport website at [www.culture.gov.uk](http://www.culture.gov.uk).

3.6 The Commission's consultation process continued with their publication of 'issue papers' on six key TVWF issues on July 11 2005. The six issues were

1. Rules applicable to Audiovisual Content Services
2. Rights to Information and Short Extracts
3. Cultural Diversity and Promotion of European and Independent Audiovisual Production
4. Commercial Communications
5. Protection of Minors and Human Dignity, and the Right of Reply
6. Media Pluralism

3.7 The Commission sought comments on these papers by 5 September 2005. The papers were then discussed at a major international broadcasting conference specifically on TVWF which the UK Presidency of the EU organised, jointly with the Commission, in Liverpool from 20 to 22 September.

3.8 Earlier in 2005, OFCOM, with support from DCMS and DTI, had commissioned an independent assessment of the impact of the Commission's proposals, as they were then understood to be, from Indepen, Ovum and fathom. Their report, published in September 2005, is available on the OFCOM website ([www.ofcom.org.uk](http://www.ofcom.org.uk)).

3.9 OFCOM's consultants carried out their work on the assumption, which was current around the EU until after the September UK Presidency broadcasting conference in Liverpool, and reflected discussion in the Commission's July 11 issue papers, that the Commission would be proposing to extend the scope of the Directive to *all* networked audio-visual media services rather than just to those whose principal purpose was their 'provision ... in order to inform, entertain or educate, to the general public' (see para 2.11 above). There is nevertheless

significant overlap between the work carried out by OFCOM's consultants and the Commission's eventual substantive proposals.

3.10 The UK published its response to the Commission's July 11 papers in November 2005. It is available from the DCMS website ([www.culture.gov.uk](http://www.culture.gov.uk)).

#### **4. OPTIONS**

4.1 The Commission's impact assessment (section 5) identifies five policy options for 'addressing the review' of the TVWF Directive. These are

*Option 1* - repealing it;

*Option 2* - making no changes to it;

*Option 3* - focussing the amendments and clarifying the text to make the advertising rules more flexible and make sure that it covers all linear services which are similar to television;

*Option 4* - amending the Directive to cover both linear and services, but with different rules applying to the two types of service, with non-linear services subject only to the basic tier of rules (this is the option the Commission has chosen to propose); and

*Option 5* - amending the Directive to cover both linear and non-linear services, but with both the basic tier and the more detailed linear rules about the coverage of major events, quotas of European and independently-produced programming, advertising, and rights of reply applying to the two types of service.

4.2 The Commission rejects the first and last of these options. The UK agrees that repealing the TVWF Directive would be a retrograde move - the TV broadcasting market in the EU has benefited from the single market Country of Origin principle which TVWF embodies, and the detailed rules in TVWF about, in particular, the protection of minors and incitement to hatred have offered viewers throughout the EU a fundamental guarantee as to the nature of the material which is available for them to watch.

4.3 Similarly, the UK agrees with the Commission that applying the full range of TVWF controls across the full range of audio-visual media services, whether linear or non-linear, scheduled or not, would be a grossly excessive move that would impose a raft of unnecessary regulation on the sector, which will benefit instead from a light touch.

4.4 As regards the other three options, the UK Government view is that the Directive is, as the Commission say, becoming outdated and is in need of revision. But it does not follow in our view that it is right to extend it to non-linear services. In broad terms, the UK would therefore be in favour of the third rather than the fourth of the Commission's options as set out at 5 of their impact assessment.



France	4	3	4	116	13	37	2	13	110	25
Germany	2	11	12	76	5	8	13	13	149	21
GB	3	2	18	203	10	116	1	15	12	6

Source: European Audiovisual Observatory paper on transfrontier television for Ministerial conference on 1-3 March 2004

5.4 The Observatory's 2004 study also showed that a significant number of foreign channels were available to subscribers as part of the packages offered by cable and satellite operators. There was a large variation between the three national markets. In the UK, channels originating from other Member States amounted to between 2% and 4% of those on offer, but the corresponding figure in Germany was over 40%. See [Table 2](#).

[Table 2](#): Number of TV channels made available as part of the offer of main cable-operators and satellite packagers in France, Germany and the UK at February 2004

			National Channels	Foreign Channels	Total	% Foreign Channels
France	Noos Canal	Cable	93	27	120	22.5
		Satellite	75	22	97	22.7
	TPS	Satellite	62	10	72	13.9
Germany	Kabel Deutschland Premiere	Cable	80	56	136	41.2
		Satellite	28	0	28	0.0
GB	NTL Sky	Cable	125	5	130	3.8
		Satellite	131	3	134	2.2

Source: European Audiovisual Observatory paper on transfrontier television for Ministerial conference on 1-3 March 2004

5.5 Channel numbers available are, of course, a very poor indicator of impact. The European Audiovisual Observatory have also published information about the audience share for non-domestic channels in each of the Member States. Data are summarised in [Table 3](#).

[Table 3](#) -TV audience market share of foreign channels in % (2004)

Country	Total foreign channels
Austria	33.3
Belgium	66
Switzerland	19.2
Cyprus	53.3
Czech Republic	-
Germany	0.9
Denmark	21.9
Estonia	15.6
Spain	-
Finland	-
France	-
UK	0.2
Greece	0.0
Hungary	3.3
Ireland	45.2
Italy	-
Lithuania	19.3
Luxembourg	85.6

Latvia	34.1
Netherlands	-
Poland	16.4
Portugal	-
Sweden	28.4
Slovenia	25.9
Slovak Republic	26.9

Source: OBS - European Audio Observatory Yearbook 2004

5.6 Clearly the audience for foreign channels varies dramatically between Member States. In the major European markets the share of foreign channels is limited and may largely reflect pan-European channels such as Eurosport and BBC Worldwide.

5.7 Foreign channels sometimes have significant market shares in smaller countries, which in general have high cable penetration rates. Three distinct scenarios can be identified:

- Member States (Luxembourg, Belgium, Ireland, Cyprus) in which there is significant viewing of channels from larger neighbouring countries broadcasting in a common language;
- Member States (Denmark, Sweden, the Netherlands) in which non-domestic channels are available which are specifically tailored to the recipient MS's market; and
- Channels from larger countries which have advertising windows aimed at markets in smaller neighbouring territories.

Weighting the share of foreign channel viewing in Table 3 by national TV household population across the Member States in 2003/2004 for which data on both are available (ie 98.6 million TV households in 12 Member States) gives an aggregate share of 10.2% of viewing accounted for by foreign channels. This provides a more comprehensive indication of the size of the existing pan-European market in television broadcast services beyond the three major national markets covered in Table 2 above. Though the pan-European market is not massive, it is clearly significant<sup>1</sup>.

5.8 The data set out above clearly shows the range of channels that are available in different Member States and supports a contention that the country of origin principle in the TVWF has contributed to the increase in the range of services available. However, it remains the case that most broadcasting markets remain national in scope for linguistic and cultural reasons. For instance, in a number of investigations into competition complaints and mergers cases carried out at both a European and a national level, competition authorities have tended to define product markets in the television sector on a national basis<sup>2</sup>. There may well be some specific product markets for television services which could be international in scope – perhaps in the case of linguistically homogenous multi-country areas - but overall the majority of markets are likely to be national in scope.

<sup>1</sup> Unfortunately the available data excludes several of the larger Member States including France with over 23 million, Italy with 21 million and Spain with over 12 million TV households.

<sup>2</sup> For instance, in the Telecom Italia/News Television/Stream merger (COMP/M.1978) the Commission stated:

"The pay-TV market is still a national market due to language differences throughout the Community which continue to hinder a wide expansion of television channels outside their home countries and distinct cultural and political interests of the respective national audience ..."

## The wider Audio Visual sector

5.9 The latest available data <sup>3</sup> (for 2003) show that the net revenues of the European audio-visual market were worth €104.8 billion. Of that 67.7% was taken up by radio and TV broadcasters and 31.2% by retailers of such services as films, DVDs and records. Net revenues of TV broadcasters (ie linear services) amounted to €64.5 billion. Of that, public broadcasters contributed 42.4%, private TV (including home shopping and pay TV) 41.4% and other TV-based audio-visual media 21.2%. Non-linear services have not been separately estimated.

5.10 Like many other creative industries, the audio visual services markets display a complex and highly inter related business structure. A recent review undertaken for the EC's own Director-General for Research on the future of creative industries pointed out that ".....creative industries are less national and more global and local/regional. Their characteristic organisational mode is the micro-firm to small to medium-sized enterprise (SMEs) relative to large established distributions/circulation organisations" , Marcus (2005)<sup>4</sup>. The "profit seeking sector" of the creative industries is increasingly dominated by large conglomerates with functions both in the processes of production and distribution of the complex creative goods – such as films, books and records, Cunningham (2001), p6 <sup>5</sup>. Big companies like Sony, Disney, or Time Warner deal with large scale production and production and distribution of creative goods on an increasingly international level. Balancing this, there are small firms involved mainly in discovering new talents and promoting them in the creative markets. Marcus (2005), p5, notes that large international corporations tend to cover more than one sector of the creative industries. For instance, of Disney's US\$ 23bn turnover in 2004, some 27% came from film and programmes, 40% from broadcasting and cable programming, about 9% from publicity and the remaining 24% from "other" activities<sup>6</sup>. But there are also small or independent companies performing a "gate keeping" function for the new talents. See Marcus (2005), p7.

5.11 Another feature of the Creative Industries is the heavy reliance on outsourcing of manufacturing etc to specialist contractors and service providers. ICT and its digital coding are leading to the creation of a new, wider and more complicated value chain linking production, distribution, finance and consumption. The changing nature of the value chain creates the need for new business models. Marcus (2005), p 28. Indeed, " a particular area of major interest in the near future will be how to combine the need to support bottom-up production, creativity and consumer rights at the same time as innovation and the intellectual property rights of producers and distributors" Marcus (2005),p28.

5.12 As Rand Europe's contribution to the European Commission's impact assessment notes, quantitative estimates of costs of compliance, monitoring and enforcement are "largely unavailable"<sup>7</sup>. Such an evidence vacuum makes policy instrument design extremely challenging and the choices between policy options especially difficult. As Rand Europe notes in a separate inception report for new IS

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<sup>3</sup> European Audio Visual Observatory: 2005 Yearbook Volume 1, pp26-27.

<sup>4</sup> Marcus C (2005), Future of Creative Industries implications for research policy. Working Document EUR 21471 Foresight working document. DG Research. Brussels:EC.

<sup>5</sup> Cunningham S (2001), From Cultural to Creative Industries: theory, industry and policy implications. Creative Industries Research and Application Centre, Brisbane: QUT.

<sup>6</sup> European Audio Visual Observatory (2005) 2005 Yearbook Volume 1, Strasbourg: Council of Europe, pp 26-27.

<sup>7</sup> Rand Europe (by Morlings E et al) (2006). Contribution to Impact Assessment of the revision of the TVWF Directive. Laiden, Rand Europe.

policies, the Commission has three types of instruments to choose from: regulation and directives, rewards and incentives and soft instruments (which might for instance inform and guide stakeholders, reveal possibilities, or benchmark performance<sup>8</sup>). The lack of clear evidence about costs means that the risk of each of the five options identified by the Commission cannot be quantified. Faced with such policy uncertainties, a prudential, precautionary approach needs to be applied. In the audio-visual context this means that changes to the Status Quo (Option 2) should be undertaken on a detailed sector by sector basis where it can be shown that costs are likely to be reduced or benefits increased and only where there is a low assessed risk of incoming (negative) unintended consequences.

5.13 Moreover, as Rand Europe also note, the expected adoption and implementation time of AVMS is 3-4 years, and its total life expectancy around 7 years from 2009, so in terms of the costs and benefits of the various options, "given the timeframe that needs to be covered and the dynamic context of the new media market, such an assessment is in itself, a significant challenge". These complexities again reinforce the need for the precautionary principle (as stated above) to be applied by policy makers in this area.

5.14 In short the sector is subject to substantial technological change with the result that a variety of business models and sub-markets are in the process of development. Many of the sectors are highly interdependent with the result it is difficult to isolate the likely effects of the Directive on sectoral business costs. The effect of the Directive on business incentives and innovation is particularly problematic with the possibility that negative unintended consequences might result from precipitant regulation. In addition, consumer demands are in the process of crystallising, particularly in the non-linear area.

5.15 As a major independent report commissioned by Ofcom points out across the EU there were only 1 million users of IPTV and only 100,000 of internet TV compared to 239 million viewers of traditional TV and 181 million audio listeners<sup>9</sup>. Thus, while any immediate impacts on new audio visual services like IPTV will necessarily be modest because the services are little used today, we know little about how they may evolve.

5.16 There is a wide range of estimates of future market significance. By 2009, Video on Demand (VOD) revenues in the Europe/Middle East/Africa region are expected to reach US\$1.7 billion according to PWC, but the European Information Technology Observatory (EITO) makes a far more conservative estimate of €235 million in Western Europe by 2008<sup>10</sup>.

5.17 Moreover, as with any new technology mass market penetration would not be expected within at least 5 years after the service was launched. So even with rapid growth from the low visual 2005 base all the new media will have relatively low use in 2010 with the exception of IPTV <sup>11</sup>.

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<sup>8</sup> Rand Europe (by Dartiguepeynon C et al) (2005) A Dynamic Framework for ex-ante evaluation and assessment of new IS policies. Leiden:Rand Europe.

<sup>9</sup> Indepen, Ovum and Fathom (2005) Extension of the Television without Frontiers Directive. An Impact Assessment. Final Report for Ofcom. London: Indepen. September p.31. Internet TV figures excludes downloading of video clips.

<sup>10</sup> See EC (2005) Impact Assessment - Draft AVMS Directive Com (2005) 646 final. Brussels EC, p8.

<sup>11</sup> Indepen, Ovum and Fathom (2005), p7. Internet audio downloads and streaming will also be relatively well utilised but fall outside the scope of the draft AVMS Directive.

5.18 As a consequence, any estimate of consumer costs and benefits is highly conjectural. This is particularly true because of the significant danger of stifling innovation especially if regulation is wide in scope and is not of a self regulating nature.

### Summary Assessment

5.19 Table 4 sets out our provisional assessment of likely costs and benefits to the UK. This compares the costs and benefits of adopting what the European Commission has identified as Options 3 and 4 (as listed at paragraph 4.1 above) with the alternative option of making no changes to TVWF whatever (which the Commission identify as Option 2). The Commission regards deregulation (Option 1) and full harmonised regulation across all audio visual sectors (option 5) as unfeasible. We have for this reason concluded that discussion of these options here would simply complicate the assessment without any gain. In Table 4, no change is indicated by =, a net increase in benefits by +, and a net decrease by -. The Table uses ? where we have concluded that no judgement of net costs and benefits can at present be made.

5.20 This approach deliberately mirrors that of the EC impact assessment and the Rand Europe contribution to that assessment. It does of course have clear limitations. A net global + may reflect major improvement or a minor gain. When there appear to be major differences in relative terms between the options, we have indicated this by the use of multiple plus or minus signs<sup>12</sup>.

5.21 Moreover, a + or - may reflect a net (small) balance between large gains and losses, or a spread of gains and losses. Ideally, as the Commission has observed "impacts should not be aggregated. Negative or positive impact should be stated next to each other, even when an overall impact is positive, care should be taken to avoid the impression that impacts are at zero or are low when, in fact, it is a case of significant positive and negative impacts of the same type having simply cancelled each other out<sup>13</sup>".

5.22 But as the Commission have themselves concluded, the current position in this area is that "consistent and exhaustive qualitative estimates of the risks, costs and opportunities and benefits of compliance and monitoring are, unfortunately, largely unavailable". That is why the Commission's analysis "is restricted to an assessment of direction (plus or minus)<sup>14</sup>".

5.23 The Commission's own assessment of the impact of their proposals consists of an analysis of impacts for 6 policy elements across 12 stakeholders for the Status Quo Option 2 and Options 3 and 4. The various comments regarding particular stakeholder views on particular options are valuable, but the quantitative comparison of options focuses on simple addition of the +, - and = outcomes across the 72 cells (12 stakeholders for 6 issues)<sup>15</sup>, without any weighting of them.

5.24 Thus, Option 2 is said to have a neutral effect on stakeholders in 34 cases, "negative consequences on a considerable number of other cases (31)" and only "a few cases(7)" where stakeholders benefit. Given the lack of hard information

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<sup>12</sup> EC (2005) Impact Assessment Guidelines SEC (2005) 791. Brussels: EC, 15 June, p 40.

<sup>13</sup> EC (2005), p 39.

<sup>14</sup> EC(2005) Impact Assessment –AVMS, Directive Com 2005 p 646, Brussels: EC

<sup>15</sup> EC (2005) p.44.

available, an unweighted approach of this kind is possibly the best way of assessing the position, but it cannot be regarded as persuasive in balancing the differing effects on stakeholder groups and sectors or the three main policy options.

**TABLE 4  
COSTS AND BENEFITS TO UK OF PROPOSED AVMS DIRECTIVE**

	<b>OPTION 2</b> Status Quo TVWF	<b>OPTION 3</b> Improved Linear Regulation	<b>OPTION 4</b> Incorporation of Non-Linear
<b>BENEFITS</b> (+/- indicates an increase/decrease in benefits) relative to TVWF			
Consumer Benefits:			
Increased Trust		=	-
Enhanced Protection of Minors		=	-
Enhanced Dignity		=	-
Increased Diversity		=	-
Removal of Restrictions: Advertising flexibility			
		+	+
Static Gains		=	?
Dynamic Gains		?	-
<b>COSTS</b> (+/- indicates an increase/decrease in costs) relative to TVWF			
Increased Regulatory Costs		+	++
Consumer Protection		-	-
Increased Uncertainty:			
Definitional Issues		-	+
New Media encouraged		-	-
Broadband Uptake		-	--
Newspapers Online		+	+
<b>DISTRIBUTION EFFECTS</b> (+ indicates likely effect)			
Encouragement of EU Companies		+	+
Diversion of Activity		+	++

### **Benefits**

5.25 Three different broad categories are analysed: consumer benefits, increased diversity, and removal of restrictions.

### **Consumers**

5.26 The first benefit category includes benefits to consumers of TV and AVMS. These include increased trustworthiness in terms of identifying service providers, protection of minors and human dignity and carriage of material inciting hatred for non-linear services mainly in line with existing broadcasting service requirements under the TVWF Directive. The UK already has a number of measures in place to

provide these advantages, and so their positive effects will already be felt in the EU when UK service media content is consumed.

5.27 Under Option 3 the advantages of the existing TVWF regime will mainly be maintained so benefits broadly replicate those of the Status Quo, albeit with some extension to TV broadcasting like linear services and IPTV. However, the extension of such provisions to non-linear services carries with it the risk that at least some service provision may be relocated to servers outside the EU, leading to a reduction in the trustworthiness and quality standards of service to EU consumers, especially since the geographical location of the service provider is often unclear in a virtual non-linear globalised world.

### ***Increased Diversity***

5.28 The EC argue that minimum standards regulation of AVMS will create a "level playing field" allowing an increase in the number and variety of services available to EU consumers. The UK already has many TV channels as well as access to a global network of AVMS across which English is the overwhelmingly dominant language. Indeed, it could be argued that the existing proliferation of non-linear services reflect the relatively light touch regulation regime currently in force. Increased regulatory requirements may create an impediment to the entry of new AVMS providers located inside the EU, so restricting consumer choice and competition. Such regulation would be less of an issue for established incumbents and the existing TVWF covered services.

### **Removal of Restrictions**

5.29 The current linear service providers face challenges from new media advertising services which currently do not have to meet TVWF standards or, in some cases, provide service obligations. Moreover, technical innovations such as PVRs which enable advertising breaks to be skipped may undermine the basic advertising based FTA business model, which provides about one third of revenue in the UK television sector. Option 3 (and indeed Option 4) would allow greater flexibility in advertising provision as well as paid for product placement. Improved flexibility holds the prospect of improved revenue streams. In the USA sponsorship accounts for 10% of revenues from advertising against 2% in the UK where existing TVWF restrictions apply. The EC itself notes that product placement in particular could generate additional resources for the AV value chain "starting from linear providers" and "estimates indicate such resources could amount to Euro500million"<sup>16</sup> although unfortunately no geographical coverage or time period is specified.

5.30 Potential service gains rely upon improved resource allocation and economies of scale and scope within existing technologies, in the single European market for TV and AVMS which the Country of Origin Principle produces. As noted above, even by 2004, on the limited evidence to hand, the actual audience share of foreign TV channels across the EU as a whole remained limited. The EC has not quantified either the existing single market or the potential size and character of the market falling under the proposed AVMS Directive. Moreover, most economic analysis of "static" (one time period) policy implementation produce only relatively small (marginal) gains. This even includes major policy shifts like abolition of monopoly power and the creation of the original six-member Common Market.

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<sup>16</sup> EC (2005) Impact Assessment (2005) 646 p 19.

5.31 It is difficult to ascertain let alone quantify any major static gains from Option 3 over the existing Status Quo. So the options are judged equal. There is far too little information on the gains likely to come from the more radical Option 4 proposal to come to a reasonable conclusion vis-a-vis the Status Quo. Most policy analysis explains the importance of improved resource allocation and unleashing market forces, innovation and incentives promoting increased economic growth over time - the so called "dynamic" aspects.

5.32 Given the absence of clear static efficiency gains under Option 3 and the lack of any clear policy rationale, no clear judgement can be made on these dynamic benefits. For the most radical Option 4 the lack of information about static gains, combined with the possibility of barriers to entry and reinforcement of the market position of existing incumbents points towards a net disbenefit.

### **Costs**

5.33 The EC argues that minimum regulatory standards in place of fragmented Member State based provisions currently applying to non-linear services will lead to a simplified and standardised framework as the basis for a single European market. The current TVWF regime covered some 1500 TV channels across the EU15 in 2001. Applying the TVWF to other non-traditional TV linear broadcasters such as IPTV will extend regulatory coverage and compliance costs to a limited extent<sup>17</sup>. Coverage of the non-linear AVMS services could bring tens of thousands of providers into the draft Directive's scope. Even with a light-touch -two -tiered approach the reach of the regulatory environment and regulatory costs would expand by orders of magnitude.

5.34 The EC have not quantified either compliance costs to service providers or the regulatory bodies (whether sole, co or self). However, on grounds on sheer scale, Option 4 appears likely to involve much higher costs (hence rated ++) than the relatively modest extension involved under Option 3 (rated +).

### **Consumer protection**

5.35 Both Options 3 and 4 of the draft Directive seek to protect consumers from harm and offence via minimum pan-European standards from which Member States cannot derogate, as they currently can under some circumstances under the e-commerce Directive. The core issue here is once again the sheer portability or global nature of the non-linear AVMS sector. Other things being equal, if enforcement costs are greater than the costs of relocating to service bases outside the EU, consumers will receive less effective protection compared to that given immediately to date under Member State based systems.

### **Increased Uncertainty**

5.36 The draft AVMS Directive introduces at least four sources of uncertainty into the sector, which do not exist at present under the existing TVWF and e-Commerce Directives. Doubts exist over which media are to be classed "linear" and those to be called "non-linear", there may be differential effects on different media, broadband

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<sup>17</sup> Even with the relatively well understood traditional TV sector the development of appropriate regulatory structures is complex and requires careful planning and coordination eg the recent move of TV advertising from Ofcom to a co-regulation Ofcom and Advertising Standards Agency (Broadcast) regime at the end of 2004.

uptake could be adversely affected with consequent flow on effects to many other services. To add to this, the creation of a new vehicle for EU regulation in this area will itself create a degree of uncertainty which can have an impact upon the planning and development of new services in the EU. These uncertainties individually or in combination are likely to adversely affect investment in, and innovation by, EU audio-visual services. As a consequence, the stated aim of the Directive of "encouraging the growth of a strong, competitive and integrated European audio visual industry" may be undermined.

5.38 Under Option 3 the slight widening of television-type broadcasting to include similar "linear" services like IPTV is a useful clarification which reduces uncertainty. However, the linear vs non-linear distinction under Option 4 has the opposite effect.

5.39 Increased uncertainty will tend to deter investment and innovation in the terms of both new market entrants and new service innovations. This in turn leads to the largest indirect impact of the draft AVMS Directive i.e. on broadband roll out.

5.40 The last 40% of broadband penetration is a key issue. Slower AV content development may undermine a key driver of broadband take up. If as a result EU has slower broadband development compared to the US and Japan then the EU's competitiveness will be eroded.<sup>18</sup>

5.41 A single year delay in broadband adoption could result in the loss of GDP to a present value of £15 billion over the ten years 2005-2015. Given the UK accounts for around one sixth of EU GDP, the total EU losses could reach £90 billion or Euro 125 billion for a one year delay.<sup>19</sup>

5.42 It seems reasonable to conclude that broadband take up could be significantly restricted by the proposed AVMS Directive, with far more significant likely effects occurring in the case of the more radical all embracing Option 4.

### **Distribution Effects**

5.43 Two significant distribution effects of the Directive can be identified. They are encouragement of EU work and diversion of EU activity.

### **Encouragement**

5.44 It is hoped that the Directive will, through the rationalisation of the EU audiovisual market promote European works for non-linear services. It is argued that this will occur because the disadvantage compared with non-linear services under which existing broadcasters currently labour would disappear under Option 4. In addition, the overall efficiency gains from reduced and standardised pan-EU regulation will increase demand for content. None of these effects have been quantified. Moreover, the Commission has not produced evidence that the law of Member States need to be harmonized at present. The argument appears to rest upon the theory that national controls might be imposed which might act as a barrier to AVMS trade by distorting the market. But it does not acknowledge, even in theoretical terms, the potential impact of regulation in stifling market forces and innovation by discouraging new entrants and reinforcing the position of incumbents.

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<sup>18</sup> Indepen, Ovum and fathom (2005) p75

<sup>19</sup> Indepen, Ovum and fathom (2005) p. 75

5.45 In any case in the non-linear sector the concept of a pan-European market is of doubtful validity. Internet based systems tend to operate at a nation and/ or global level – the latter being the whole point of the World Wide Web.

### **Diversion**

5.46 If the costs of regulation especially under Option 4 is greater than the cost of moving audio-visual operations outside the EU there may be considerable diversion of innovation, investment and employment from the EU to other countries, in particular to the US and Japan or to non-EU and EEA territories within and around Europe. The cost of moving operations to jurisdictions outside the EU might well be relatively low in many cases, especially where the provider in question already operates on a multinational basis. The fundamental test, as set out at Article 2.3 of the revised Directive, would be whether the provider had a head office or employed 'a significant part' of their related workforce in an EU Member State.

5.47 Whatever the extent to which existing European operations are moved out of the EU, it seems likely that the existence of new rules of the sort proposed would create a disincentive for new providers to establish themselves in the EU, and they might also pre-empt the possibility of EU global leaders becoming established. All this in turn may act to stifle the development within the EU of new industries complementary to audio-visual services or which use such services in their supply chain. Again quantitative information is very limited. However, bigger (usually) incumbent providers can avoid regulation more easily by locating their services outside the EU if necessary, and will be in a strong position to bargain for more favourable terms for such relocation. Small and new firms will not be so well placed. Indepen estimates that effective cost of "back haul" between Sweden and the US is Euro 7 per hour for AV content. So small firms will face the choice of paying such charges or meeting the regulatory costs of an EU location.<sup>20</sup>

5.48 As noted at the beginning of this section it is not possible to make a formal overall assessment of Options 3 and 4, because there is no obvious weighting of the various costs and benefits. However, compared to the existing TVWF Status Quo Option 3 – improved linear regulation – does offer some limited benefits, notably in advertising rules flexibility and extending coverage to TV type "linear" services at relatively modest increased cost.

5.49 The more radical Option 4 appears to lack policy rationale and imposes significant costs, especially in terms of regulation and increased uncertainty. Given the predominantly global basis for such services, there is a significant potential for AVMS services providers to re-locate outside the EU rendering the proposed Directive ineffective and in practice reducing protection for and safety of EU consumers. Moreover, impacts on new firm market entry and innovation may have indirect impacts on broadband take up and hence general EU global competitiveness as well as the public policy objectives such as e-Government.

## **6. SMALL FIRMS IMPACT TEST**

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<sup>20</sup> Indepen, Ovum and fathom (2005) p 71. The price of a 34 M/bits half circuit from Sweden to US is Euro 15,000 a month.

6.1 The Government has not yet carried out a small firms impact test on the Commission's proposals, which were published only in December 2005. We will perform a preliminary assessment of the impact on small firms within the UK on the basis of this present consultation.

6.2 The issue is of some concern. The analysis of (what were then thought to be) the Commission's proposals which was carried out for Ofcom by Indepen, Ovum and fathom in 2005 observed (1.5.1.2) that extending the Directive in the way then envisaged would 'strengthen the position of incumbent service providers by making entry more costly', and pointed out that, by contrast, that the overall EU framework for regulating electronic communications networks 'provides for new entrants ... to be treated differently from incumbents .... because of differences in market importance and influence'.

6.3 The formal proposals with which the Commission has now come forward are less radical than those which were assumed when OFCOM's consultants made their analysis. Nevertheless the UK Government considers that this concern about differential effect on small firms remains a valid one. It is an issue which we shall explore.

6.4 The extension of scope of the TVWF to audio visual services is likely to bring a large number of small companies within the ambit of the Directive. As discussed in paragraphs 5.9 to 5.11, the audio visual sector comprises large numbers of small-to medium-sized creative enterprises across a range of different specialisations. By and large, beyond standard company reporting requirements, these companies are not likely to be subject to any systematic regulatory oversight. Extending the scope of the Directive will therefore impose additional costs on such companies. The impact of the additional compliance burden on these companies will tend to depend on the size of the company. For instance, a medium-sized company might be more likely already to have staff that could take on the additional responsibilities that ensuring compliance with the new Directive will require without the need to take on additional staff. However, for a smaller company, there could be the need to consider employing specific regulatory specialists/compliance officers for the first time and so the impact of extending the scope could be felt disproportionately on the large number of smaller companies that operate in the audio-visual sector.

6.5 It is obviously difficult to quantify the costs that would be incurred by companies to set up compliance systems and to ensure on-going compliance with the requirements of the new Directive. Based on data provided by Ofcom, the direct staff costs of employing an additional member of staff to deal with compliance issues could be in the range £30-60,000 depending on the seniority and experience of the person employed. There would then be additional indirect costs associated with employing an additional member of staff.

6.6 We would welcome comments from respondents on the impact that the new Directive would have in terms of additional costs that respondents are likely to incur in order to ensure compliance with the Directive.

## **7. COMPETITION ASSESSMENT**

7.1 The future competitiveness of the United Kingdom and of the EU as a whole in relation to developments in the non-linear audio-visual media, as defined in the Commission's proposal, is at the core of the UK's concerns about the Commission's proposals. The Commission argue in 3.2.1 of their impact assessment that a lack of

EU co-ordination of the rules which apply in this area will result in Member States setting their own rules, with '*obstacles for the free cross-border movement of media service providers*'.

7.2 The Commission also argue here that this will, within the EU, put the providers of linear services at a relative advantage to the providers of non-linear services. However, as these dynamic, rapidly developing non-linear industries are highly portable between the EU and other jurisdictions, a more important issue is the impact of rules of this kind on the EU's competitiveness and attractiveness as a venue for the development of new media industries and start-ups.

7.3 Again, given that the Commission published its formal proposals only in December 2005, it has not been possible as yet to assess its implications for the competitiveness of UK industries. As with the small firms impact test, the Government will make this assessment in the light of the formal UK consultation on these proposals which will now take place.

7.4 Within the limits imposed by the ONS Annual Business Inquiry's Standard Industrial Classification, it appears that some of the sectors covered by the draft AVMs Directive are highly concentrated – most notably the traditional television element already covered by the existing TVWF regime. However, the picture elsewhere is mixed.

7.5 Concentration ratios are often used to measure market power in a defined and stable structured market so that some inference on competition level can be drawn. Generally speaking, the lower the level of concentration the greater the likelihood of open competition in the industry concerned. In terms of the share of the top 5 firms in national industrial output (measured by Gross Value Added) the range of Creative Industries coming under the scope of the draft AVMS Directive display a variety of results. For the year 2002 motion picture and video production and advertising had low ratios at 15% and 17% respectively. At the other end of the scale, in motion picture and video projection, radio and television activities and publishing and newspapers top 5 firms had from ratios of 82%, 77% and 76% respectively indicating relatively high concentration<sup>21</sup>.

7.6 Herfindahl indices provide a summary measure of competition within a market with higher indices indicating supply (measured by Gross Value added) is concentrated in the hands of fewer firms. In broad terms once the Herfindahl index reaches 1,000, the Office of Fair Trading (OFT) is likely to define the market as "concentrated" and at 1,800 that is "highly concentrated. In 2002, the indices of the UK in radio and television activities was 1,800, just above that for motion picture projection at 1,697. Newspaper publishing also had a relatively high rating of 1,077.

7.7 The data on concentration ratios indicates that – at the level of aggregation of SIC codes – a number of these markets are relatively concentrated. However, as referred to above, it is not automatic that SIC codes are consistent with definitions of the relevant economic product markets: it is possible that economic product markets could be narrower in scope than those covered by SIC codes and the dynamics of competition could be very different. There should therefore be a presumption against assuming that these markets are not already effectively competitive.

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<sup>21</sup> DCMS (2004) *Creative Industries Economics Estimates Statistical Bulletin*, London: DCMS, Table 5.

7.8 Again, as referred to above, a feature of many audio-visual content creation markets is that they tend to be characterised by a distribution of firms of different sizes. For instance in the UK, the television production sector contains a large number of production companies ranging from at one end the in-house production businesses of the main terrestrial broadcasters such as the BBC and ITV through a limited number of medium-sized independent producers with a turnover in excess of £12m per annum to a large number of very small producers with turnover of less than £1m at the other end<sup>22</sup>. Although this market might appear to be relatively concentrated, barriers to entry are very low and the structure of the market provides for a clear entry and growth path strategy for firms wanting to enter this market. For instance, it would be possible to enter on a very small scale, to secure one or two commissions from broadcasters which would provide immediate funding and over time to develop an asset base around the secondary and ancillary rights in the programmes that they have made. This would mean that going forward the producer would be able to invest in development funding, take on larger commissions and indeed to develop alternative sources of finance for their productions.

7.9 Increasing regulation in such markets - particularly in terms of imposing new regulatory burdens on the smaller companies in existing markets - runs the risk of increasing the barriers to entry and deterring entry. There is thus a need to consider the impact on the incentives of the smaller firms which often provide a key dynamic aspect to competition in existing markets in this sector.

7.10 It is important to note how sectoral definitions affect the results. Elsewhere in the publishing sector, particular sub-categories have widely differing structures. News agency archives has a massively concentrated Herfindahl of 3,140 compared to 149 for publishing and 142 for publishing of journals and periodicals. Advertising had a relatively low index of 78<sup>23</sup>.

7.11 The proposed AVMS Directive would impose substantially higher regulation costs on some suppliers, notably by extending linear service provider provisions beyond TV broadcasting and regulating non-linear AVMS providers, especially if anything other than self regulation is applied to the latter. The regulations would impact on market structure, for instance by creating a "level playing field" for non-linear AVMS across the EU under the Country of Origin Principle, while liberalising advertising opportunities for linear service providers to increase advertising slot flexibility and include paid for product placement.

7.12 Very rapid technological change is occurring in the relevant market sectors as the long anticipated digital "convergence" arrives. Indeed, the existence of such change underlies the rationale for the new AVMS Directive. However, there is a high degree of uncertainty surrounding how markets and products will evolve from often rapidly growing but still small nascent bases. Thus, there is a significant risk that regulation may restrict innovation, especially when such innovation comes from newly established firms.

7.13 New firms and potential market entrants would face higher set-up costs than without the AVMS Directive. While both new and incumbent firms would operate on a "technologically neutral" level playing field, regulatory costs will be more

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<sup>22</sup> Source: *Review of the television production sector*. Ofcom: January 2006.

<sup>23</sup> The Herfindahl figures are produced by summing the squared market shares of each firm in the designated Standard Industrial Classification sector. See DCMS (2004) *Creative Industries Economic Estimates Statistical Bulletin*, London: DCMS, Table 6.

significant for the new (mainly smaller) firms. Elements of regulatory compliance costs and fixed costs cannot be spread across the established administrative systems of (usually larger) incumbents. Apart from the cost pressures imposed on firms through regulatory compliance and hence, depending on market forces, the prices charged to the consumer, the draft AVMS Directive places a range of restrictions on the ability of organisations to choose the quality and range of products offered. Imposing minimum standards prevents firms from selling lower quality services eg requirements to provide supplier information and right of reply for non-linear services and there are the remaining (if more flexible) advertising limits on linear services. Such lower quality and lower cost services may be supplied from non-EU sources.

7.14 There is the potential for significant competition effects arising from the Directive and as comprehensive as possible a competition assessment for the affected markets will be carried out. This will attempt to analyse in greater depth the potential and as yet, unidentified and unquantified competition impacts of the type identified above.

7.15 From the point of view of the UK's attempts to shape this Directive during the negotiation process, important questions are:

- The way in which the options proposed will limit the freedom of firms active in the relevant markets to determine their own prices, product characteristics and/or quality and standards, means of advertising the product and distribution channels;
- How the options will affect firms already active in the markets concerned in different ways;
- How the options will prevent or make difficult market entry for new providers;
- The impact of the licensing regimes on market participants;
- The effects of the requirements for suppliers to exchange or publish information (on prices, capacity, output etc) either directly themselves or through a regulatory body;
- The effects on technological innovation for suppliers in the sub-sectors of the emerging AVMS market;
- The effects of the Commission's proposals in terms of their possible impacts on UK business; and
- What sort of offsetting measures might be appropriate.

7.16 Several important questions arise from the draft Directive and it would be especially helpful if consultee responses could provide information to fill the key gaps in existing knowledge. These are:

- Costs and benefits, both direct and indirect (for instance in terms of regulation) to the UK generally and across the various sectors;
- Market structures in the various sub-sectors covered by the draft AVMS Directive and overlaps between these;
- Likely revenue impacts of extension of Country of Origin Principle to wider range of services and greater flexibility in advertising/sponsorship regulations;
- To what extent the additional regulation that would be required by the proposed Directive would raise barriers to entry in existing markets in the audio-visual sector;

- Likely cost of regulation to new and established providers in the various sub-sectors under each of the tiers of regulation proposed in Options 3 and 4;
- Instances when the position of particular audio visual services and delivery mechanisms is uncertain under the various options;
- Instances where lack of harmonisation in controls by Member States is limiting competition in non-linear audio visual services;
- Potential displacement of economic activity between sub-sectors within the EU and decisions to relocate to/invest in non-EU locations;and
- Indirect impacts on global EU competitiveness in audio-visual services and more generally.

## **8. IMPLEMENTATION AND DELIVERY PLAN**

8.1 The TVWF Directive and the Commission's proposed revision of it are addressed to Member States, and it will ultimately be for the Government to see to it that whatever changes are necessary are made in the UK . As discussed above, the UK Government takes the view that , in as far as the Directive is to be applied to what the Commission call 'non-linear' services, many of the requirements could best be achieved by industry self-regulation. There is a specific reference to self-regulation at recital 25 of the Commission's draft amending Directive.

8.2 The Commission's proposed amendments to the Directive, however, are drafted in terms (c.f., at Articles 3b, 3c, 3d, 3e, 3f, '*Member States shall ensure that audiovisual media service providers under their jurisdiction shall.....*' ) which point in the direction of implementation by administrative action (whether involving co-regulation between the industry and the regulator (OFCOM), or action by the regulator only). Although effective implementation of a Directive depends on the individual facts and circumstances, it seems that such administrative action would need to have some form of legislative backstop. The consensus of legal opinion is that pure self-regulation (ie voluntary regulation with no legislative backstop) cannot implement a Directive which requires a Member State to ensure certain aims are achieved.

8.3 Beyond that, the proposed expansion of the scope of the Directive seems, if accepted by other Member States and the Parliament, to imply a significant widening of OFCOM's responsibilities in terms of the licensing of audio-visual services. That would require amendment to the provisions of the Communications Act, 2003, under which OFCOM operate.

## **9. ENFORCEMENT, SANCTIONS AND MONITORING**

9.1 In terms of EU law, the Commission would be able to bring infraction proceedings against any Member State, including the UK, which had not met the Directive's requirements on Member States to 'ensure' that audiovisual media service providers under their jurisdiction. The Commission propose a two-yearly review of the implementation of the Directive by Member States (the proposed new Article 26).

9.2 In the UK, it would be for OFCOM to take the lead in applying the Directive, once implemented. This would involve the licensing work and in the development, in discussion with the industry, of licensing conditions and codes of practice.

## **10. POST-IMPLEMENTATION REVIEW**

10.1 The UK would undertake its own review of the implementation of the Directive in advance of the Commission's regular two-yearly reviews.