



ISPA UK response to DCMS consultation on the proposal by the European Commission for the Revision of The 'Television without Frontiers' Directive.

ISPA UK

ISPA is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry. ISPA currently has over 150 members, representing around 95% of the UK internet access market by volume.

A full list of our members can be found at http://www.ispa.org.uk/cgi-bin/member_list.cgi

Introduction

ISPA is committed to a regulatory framework which meets the aspirations of the i2010 strategy to achieve a single information space to support vibrant creative industries and attract investment and growth. This strategy acknowledges the global and fast moving nature of the creative media market and the need to make markets more flexible by modernising the regulatory framework, relaxing regulations where possible, and only introducing new regulation where necessary to promote competition. ISPA is concerned that the draft audiovisual media services Directive will not achieve its strategic objectives.

Changes in market structure and technology have shifted the landscape on which the original TVWF Directive was revised in 1997. The introduction of the internet, digital TV and global communications networks as alternative distribution platforms for entertainment services are not well served by traditional regulatory frameworks that were created to address the certainties of the editor-publisher model in broadcasting.

Any directive covering audiovisual media services would need to offer:

- Certainty and predictability for providers and incentives to invest
- Responsiveness and flexibility in the light of technological developments
- Appropriate information and protection for consumers

The proposed Audiovisual Media Services Directive would act to create legal uncertainty in the future.

Traditional regulatory approaches in this space are at odds with consumer attitudes to new media. ISPA firmly believes that regulation should evolve in line with changing consumer behaviour, and empower consumers to use wisely the choices they now enjoy while focusing regulatory efforts on identifying and addressing areas of genuine detriment.

It is crucial that the EU introduces the most appropriate regulatory framework to nurture and grow the creative industries both in the UK, and in Europe/on a European level. It is for these reasons that ISPA continues to believe that in the interest of consumers and the creative industries of the EU, the preferable outcome would be focused amendments and clarification of the text.

Questions

1. To what extent would Option 2, 3, or 4 ease market entry for new providers of audio-visual media services, or prevent it or make it more difficult?

As stated above, the Commission's impact assessment has not identified a consumer detriment which justifies the extension of scope of the TVWF Directive to cover what is termed as 'non linear' content.

Of the three proposed options, ISPA believes that the most favourable outcome would be the proposed focused amendments and clarification of text under option 3.

3. What would be the costs and benefits, both direct and indirect, to the UK generally and across the various audio-visual services?

ISPA remains concerned that the revisions to the Directive will impose disproportionately tight and strict regulation on the Internet industry by seeking to extend broadcast-style regulation to content delivered via the internet.

The proposals as they stand are tantamount to regulating markets that have not yet been developed. ISPA does not believe that regulation should create artificial barriers to entry in existing markets. A level playing field will not be achieved by imposing inefficient regulation on new providers, but by promoting competition and encouraging existing players to innovate and improve their existing offers.

ISPA believes that there would be limited benefits resulting from increased legislation due to the constraints placed on business opportunities, in parallel with the imposition of high costs of compliance.

The extension of the old rules presents a very real threat and danger to nascent and emerging industries, as they do not fit with the development and growth of new markets. A key example of this is the doubt cast on the future of product placement and sponsorship. All signs indicate that these forms of marketing have the potential to become a key means of funding new non-linear types of content. However, if regulation were introduced at such an early stage, we will see new markets being cut off at source before they exist.

4. What impact would the Options have in terms of compliance costs, especially for smaller firms?

We are not able to detail the quantitative costs of compliance that the options would have as this would be individual to all stakeholders in the arena. However, the lack of clarity in the Directive renders it more unlikely that smaller firms and new entrants would take any risks with their compliance, thereby curtailing their ambitions. This would impact the market for both small and large players alike by changing the structure of the market.

An additional obvious compliance cost that would not be welcomed would be the cost associated with pre-transmission monitoring. There is a concern that service providers will have to check content before it is sent out/transmitted. This could entail service providers editorially reviewing every piece of broadcast type content, requiring one man hour for every hour of content. The compliance costs for this would be high, as these would not be simple binary decisions, rather complex judgments to be passed by lawyers.

5. Would any of the Options give rise to a potential for displacement of economic activity as between different parts of the audio-visual services sector? Would it give rise to decisions in this sector to relocate to or invest in non-EU locations?

The economic activity of smaller firms and new entrants may well be displaced by the potential implementation of the Directive as proposed. This would be of detriment to the EU as a whole for a variety of reasons as listed below.

The provision of non-linear services is an emerging market which is not yet dominated by large scale well established firms as in the provision of linear services. As this is a developing area there are many firms that are beginning to establish themselves in this space and furthermore many

potential service offerings yet to be launched. Undoubtedly these will add greatly to the economies that they operate within, but ISPs in the UK believe that there is a very real danger that the implementation of the options as they stand in the proposed Directive would act to ensure that these new firms of the future choose not to locate themselves in, and thereby invest, in the EU. While it is less likely for the established incumbents providing linear services to relocate, it is not unfeasible to imagine regulatory framework influencing the location of new investment and incentivising the smaller newer firms to relocate and grow elsewhere.

Not only would the options give rise to a potential displacement of economic activity between different parts of the audio-visual services sector, but the options would act to decrease investment in Europe by limiting the economic activity of content providers, reducing their ability to choose where to source content from.

6. Would Option 4 have any indirect impacts on firms' competitiveness in audio-visual services, or more generally?

This has been answered in the response to questions 4&5.

9. Are there any instances in which the current lack of harmonisation of controls on non-linear audio-visual services among Member States is limiting competition in this sector ?

ISPA does not believe that there are any instances in which the current Directive limits competition.

The country of origin principle as it currently stands is very important to broadcasters and service providers alike. The country of origin provisions in the eCommerce Directive have proved to be a highly effective method to overcome the various barriers that Member States can restrict free movement of e-commerce services provided by enterprises based in another Member State. This is a key tool in making a single market for services in the EU a reality. ISPA is concerned that the proposed extension of scope to the Television without Frontiers Directive may in reality *create* uncertainty, and stifle Europe's e-potential and conflict with the strategic goals of the European Union.

11. Would the rules proposed in Article 2.3, for establishing which Member State has jurisdiction over any particular non-linear service, provide clear and effective jurisdiction in this sector?

The rules proposed in Article 2.3 would not provide clear and effective jurisdiction in this sector, and would be contrary to the stated aims of the draft Directive.

ISPA is concerned that a new directive on AVMS would result in the potential for enforcement action being brought against a non-linear content originating in another member state. ISPA believes that such content should continue to be regulated under the country of origin principles as set out in the eCommerce Directive. Service providers have relied on these provisions for some time and they have not yet been invoked by a member state. Until they do, we see no case to create additional, sector specific rules for non-linear audiovisual services. In line with ISPA's answer to question 9, ISPA believes that any change to this status would be of detriment to, and act to stifle Europe's e-potential thereby threatening the strategic goals of the European Union.

12. Article 3d of the Directive would require member states to ensure that audiovisual services within their jurisdiction do not carry material which might seriously impair the mental, physical, or moral development of minors. However, this Directive will not give the EU or Member States any greater powers than they have now in respect of undesirable Internet services from outside the EU, and would remove their ability, under the e-Commerce Directive, to enforce their own standards on non-linear services from other Member States.

In view of this, would Article 3d give consumers adequate protection from services which might be harmful to minors?

As no Member State has yet used this derogation, there is no evidence to suggest that a new provision in the proposed Directive is necessary or proportionate.

ISPA does not believe that the revisions to the Directive would act to raise the protection of minors. There are already existing effective protection mechanisms and legislation securing the protection of minors which could be undermined by the proposed changes to the Directive.

Protective mechanisms involve a range of solutions including legislation, self regulation and technical tools. These include the provision of parental controls, and the Internet Watch Foundation (IWF) hotline for internet users to report online child abuse images hosted in the UK to.

13. Would Article 3e give consumers adequate protection from services which might contain incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation? These prohibitions go much wider than current UK law. What consequences would this have for freedom of speech?

There are already existing regulations on incitement to hatred at member state level which cover all services, including audiovisual media services. ISPA believes that the existing regulations provide adequate protections in this area and is concerned that additional sector-specific regulations could result in a conflict of laws in some areas. We believe that it would be better to leave these matters to local law and horizontal EU harmonization where appropriate. Any extension of the existing regulations would add to the compliance cost and potentially legal uncertainty for ISPA, through the context based judgements this would entail being made.

22. The right of reply at Article 23 of the existing TVWF Directive will remain, but with its scope extended to cover 'linear' (but not 'non-linear' services. Is this right? What is the case for or against extending this right of reply to all 'audio-visual media services?

ISPA does not believe that rights of reply should be extended to Internet content. The Internet is very much a democratic medium, affording all participants a timely right of reply through chat fora, message boards and through the creation of new websites.

Online service providers host millions of web sites, carrying many types of content, from personal homepages, to commercial e-commerce sites and information sites. Potentially any web site could carry material about individuals that could qualify for the right of reply, be they personal comments on a personal website, a blog or an online version of the printed media (newspapers, magazines, etc.). ISPA believes that a clear distinction between 1st and 3rd party content needs to be made.

23. Article 3f2 of the Directive would require Member States to ensure that audio-visual media services do not transmit cinematographic works outside the periods agreed with their licence holders. This re-enacts Section 7 of the existing TVWF Directive, but applied to audio-visual services as a whole rather than simply to television broadcasters. Would this provision achieve anything, given the existence of copyright law?

This is already covered by copyright law and does not need codifying in the Directive.

25. Article 3f requires Member States to ensure that media service providers under their jurisdiction promote production of and access to European work. No specific quota is set. What would be the most effective ways for the Government to meet this obligation?

ISPA believes that the Internet acts to facilitate the dissemination and consumption of European work. Content producers no longer experience barriers to the distribution of their work as they do in a spectrum scarce environment. For the same reason, consumer choice is no longer limited to a

small number of available channels. The “long tail” effect, which is evident in many areas of online service provision, actually acts to enhance distribution of European work due to multiple distribution channels. This is assisted by algorithmic and social search tools which aggregate audiences around particular tastes and interests. We understand that member states are concerned about the production of quality content. Individual member states wishing to support production can do so by direct subsidies or tax incentives at national level rather than through the Directive. Such options have the benefit of not distorting the single market and allowing the new media business model to develop organically and for niche providers to emerge.