



department for
**culture, media
and sport**

Consultation on the proposal by the European Commission for the revision of the Television without Frontiers Directive

Summary of Responses

December 2006

Our aim is to improve the quality of life for all through cultural and sporting activities, support the pursuit of excellence, and champion the tourism, creative and leisure industries.

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1. Introduction

Background to the consultation

1.1. The European Commission published its proposal for the revision of the 'Television without Frontiers' (TVWF) Directive (89/552/EC, as amended by Directive 97/36/EC) on 13 December 2005. The proposal would extend the scope of the Directive to on-demand and online services (described as 'non-linear' services) with a lower level of controls and regulation than for traditional television broadcasting ('linear' services), and change the title of the Directive to 'Audiovisual Media Services Directive'. It also suggested changes to the 'country of origin' provisions to reflect recent judgments of the European Court of Justice, and the relaxation of some provisions relating to the amount and frequency of advertising on television. It proposed that product placement in programmes should be explicitly permitted, subject to certain conditions relating especially to editorial integrity and notification to viewers of the presence of product placement.

The consultation

1.2. The Government launched its consultation on the proposal on 6 June 2006. The consultation document set out 25 questions to which the Government invited responses. These are attached at Annex A. The Government also invited comments on any other issues related to the Directive which were of concern to respondents.

1.3. It is important to note that the consultation was conducted on the basis of the Commission's original proposal. Some of the questions refer to a range of options put forward by the Commission. These options were:

- Option 1 – repeal the Directive;
- Option 2 – make no changes to the Directive;
- Option 3 – focus the amendments and clarify the text to make the advertising rules more flexible and to ensure that the Directive covered all linear services which are similar to television;
- Option 4 – amend the Directive to cover both linear and non-linear services, but with different rules applying to the two types of services, with non-linear services subject only to the basic tier of rules; and
- Option 5 amend 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.

Discussions in the Council of Ministers and the European Parliament have resulted in a wide range of further proposals and amendments being put forward by Member States and MEPs. While some respondents also commented on these proposals and the direction of the debate, most confined themselves to addressing the issues raised by the Commission's original proposal.

- 1.4. A total of 48 responses were received from a range of broadcasters and new media service providers, industry bodies, trade unions and civil society organisations. The Government is grateful to all those who submitted responses. A list of respondents is at Annex B. Two of the responses were submitted on a confidential basis. The non-confidential responses are available separately from the Department. All respondents' comments have been considered in preparing this report.

The report

- 1.5. This report represents a summary of the comments received by the Department in response to the consultation. It does **not** represent a statement of the Government's views or the UK position on the revision of the Directive.

Next steps

- 1.6. Discussions on the revision of the Directive are continuing in the Council of Ministers and the European Parliament. The Council agreed a general approach on 13 November, and the Parliament's Culture Committee considered its draft opinion on the same day. The Parliament is expected to adopt its first reading opinion at its plenary session in December, and the Council is expected to adopt a common position in response in spring 2007. The proposal as revised will then be subject to a second reading in the Parliament and the Council. A final text is not expected to be adopted until late 2007 or early 2008. The views expressed by respondents to this consultation have helped to inform the Government's approach to the revision of the Directive and will continue to do so throughout the EU legislative process.

2. SUMMARY OF RESPONSES

2.1. This section summarises the responses to the questions posed in the consultation and other issues raised by respondents. The summaries are given thematically, rather than by individual question, as this is how many respondents chose to submit their views, and in view of the overlaps between the responses to questions on the same topic. Respondents seldom provided detailed data or quantification in support of their arguments. Where the views of particular respondents are cited, they are given as examples only. Other respondents may have made the same or similar points. The choice of views or respondents cited does not indicate any preference for those views or respondents.

Scope, Definitions and Impact

The effect of widening the scope of the Directive (Question 1)

- 2.2. Any Directive covering audiovisual media services needs to offer certainty and predictability for providers and incentives to invest; responsiveness and flexibility in the light of technological developments; and appropriate information and protection for consumers. Many respondents made clear that they were opposed to the extension of the scope of the Directive. ITN, for example, commented that while the existing Directive had neither hampered nor eased market entry for the leading news producer, there was concern that extending its scope would be unhelpful as it could add unnecessary new cost burdens (licensing, compliance, legal etc) to fledgling business ventures that have high investment risk. Aggregator Limited, one of the respondents to the consultation exercise, identified itself as being in this category. Furthermore, there was general concern that without clear guidance on the nature of the services covered by the Directive, the proposed revisions could act to create legal uncertainty in the future. Microsoft noted that this could be a serious impediment to the growth of services.
- 2.3. Of the options put forward for widening the scope of the Directive, most respondents considered option 3, which would make advertising rules more flexible and cover all linear services, to be the least harmful to the UK. More work was thought to be required however, to improve the definition of linear TV broadcasting (regardless of platform). The UK Film Council summed up this position when it commented that both industry and citizens would benefit from some extension of the scope of the Directive, for example to include film-on-demand services, provided that the Directive included workable definitions and flexibility in the way the definitions were applied.
- 2.4. PACT was one of several respondents to note that there were practical difficulties in implementing the proposed extension to non-linear services. It was difficult to distinguish between linear and non-linear. TIVO boxes and IPTV mean that even though the media service provider decides on a schedule, the viewer decides when to view the content. The line between linear and non-linear is likely to blur further as IPTV platforms evolve and viewers become users, accessing email at the same time as watching the news, for example.
- 2.5. SMG Television commented that regulation should be applied to the product rather than the means of delivery. They argued that there seemed to be no convincing reason to justify harmonising regulation where core societal values were concerned (protection

of minors, prevention of incitement to racial hatred) and yet continue to justify different regulation (around advertising rules) when dealing with comparable content, for example the transmission of live sport to the public – whether by linear or non-linear means. The company argued that content is king and commercial broadcasters are in the business of creating product which will draw audiences and attract advertisers. This means that they too must be allowed to innovate and cannot be subjected to unfair discrimination. The proposed Directive risked consigning commercial broadcasters to a non-convergent world.

- 2.6. ntl: Telewest was strongly opposed to the extension of the scope of the Directive as proposed under option 4 on the grounds that the proposals could fundamentally change existing and evolving business plans. However, it was acknowledged that it was extremely difficult to quantify costs here. BT envisaged that option 4 could have a chilling effect on smaller market entrants. This was because any requirement to meet complicated compliance rules before starting operations would remove the element of spontaneity. Given that many businesses start as part-time “hobby” activities, there was a significant risk of new market participants failing to get off the ground
- 2.7. In contrast, the Voice of the Listener and Viewer broadly welcomed the extension of the scope of the Directive to provide linear and non-linear tiers, although it recognised that there could be difficulties in defining hybrid services. Other respondents also supported the creation of a more efficient regulatory framework through clarification and modernisation of the regulatory regime. Ofwatch was in favour of option 2 being implemented as a means of positively encouraging services to migrate to new technologies. It argued that new initiatives in filtering software technology and media literacy should be developed and used as the primary means of regulation on the face of the Directive. The Campaign for Press and Broadcasting Freedom (CPBF) welcomed option 4 of the Commission’s proposals, because it believed that there is likely to be a significant expansion towards watching television through cellular handsets, broadband internet etc. It therefore makes sense to include on demand audio visual material over the internet and mobile phones within the scope of the Directive. BECTU’s preference would be for a combination of options 4 and 5 in order to provide for the extension of the Directive to non-linear services with some detailed rather than basic regulation of these services. They regard the non-linear services as cultural as well as economic services which should be covered by a TVWF Directive rather than the e-Commerce Directive. They argued that once these services were excluded from the scope of the Directive, there was a danger that this would always be the case and they could exert growing pressure for future deregulation within the linear sector as well.

Determination of own prices, product characteristics and/or quality standards (Question 2)

- 2.8. PACT made the point that the online world is highly fluid. Unlike traditional broadcasting, the nature of online content sites and channels is not set in stone at the point of delivery. Extending the Directive to non-linear services could mean that services might fall outside the Directive when conceived or launched, but then come under the regulations at a later point. This could limit companies’ ability to develop new services because of additional compliance and reporting costs, restrictions on advertising and regulatory uncertainty. BT was also concerned that the imposition of restrictions on non-linear services will create legal uncertainty. The vocabulary and the

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assumptions which underpin the restrictions were criticised for looking firmly backwards towards the traditional world of broadcasting. The company argued that it was unclear how a prohibition on interference with editorial independence or a ban on inclusion of promotional messages within an audiovisual media service would be applied in a world of interactive content where material can be combined in different windows on the same screen.

- 2.9. The UK Film Council noted that the ability of firms to determine their own prices, product characteristics and/or quality and standards, means of advertising and distribution channels forms the basis of successful markets, provided that the firms comply with the basic rules, trading and advertising standards, and also operate in a transparent way. In the mobile sector, the mobile operators, through their code of practice, already ensure that 18-rated audio visual content (linear and non-linear) is not offered to children. Therefore, there is no expectation that the Directive would significantly affect product characteristics in this area.
- 2.10. One company commented that, under option 2, broadcasters would have to compete with providers of linear and non-linear services via the internet, while the latter would not have to comply with the same advertising rules. This would mean that revenue levels would soon be affected and this could lead to a reduction in programme quality and standards. In the long term a significant proportion of channel distribution will take place via IPTV and the internet. If TV channels delivered over the internet do not have to comply with advertising rules, such channels could in the long-term have greater advertising revenue than TV channels delivered on TV sets. Under option 4 of the Commission's proposals, companies that provide audiovisual media services over the internet would be limited in the way that they determine their project characteristics, standards and means of advertising. As with option 2, if TV channels delivered over the internet do not have to comply with similar advertising rules, such channels could in the long term secure more significant levels of advertising revenue than TV channels delivered on TV sets.
- 2.11. The UK Association of Online Publishers (AOP) summed up its position in rather bleaker terms "without knowing how each Government would legislate to meet the required standards there is no way of knowing what the effect would be".

Costs and benefits (Question 3)

- 2.12. British American Business noted that although option 3 was the least harmful to the UK it was likely that the close economic relationship between the US and the UK would be damaged by its implementation, as US firms would invest in countries with less stringent regulation. The UK ranks as the top destination for US foreign direct investment. For example, in 2004 US investment flows to the UK amounted to \$23 billion, a quarter of US investment in the EU as a whole (total investment was estimated at \$93 billion in 2004).
- 2.13. The Mobile Broadband Group (MBG) commented that UK consumers spend over £13 billion per annum on basic mobile telephony with an increasing proportion of people owning more than one mobile telephone. The market for mobile content had grown from nothing to £1 billion (not all audio visual) in a period of around 5 years and

therefore had potential for further growth. Regulation that entailed high compliance costs for small content providers would have a dampening effect on this market.

- 2.14. Although not universal, there was concern amongst respondents that any increase in regulation would result in higher compliance costs. PACT noted, for example, that with online content creation, budgets were far lower than for television production and therefore additional compliance costs would be proportionately higher. New obligations and costs on the regulator could drive operators currently established in the UK to relocate outside the UK and perhaps outside the EU. It was also possible that new markets could be cut off at source. The CBI commented that in the face of competition from low-cost overseas rivals, UK businesses were developing higher value services and greater customer loyalty through building more sophisticated online services. A CBI conducted survey in 2005 showed that 68% of companies engaged with their customers online, with increased investment in functions and applications like customer relationship and information management systems – this compared with 50% in 2002. Any change in the regulatory regime would presumably have a significant impact on this development.
- 2.15. THUS Plc commented that the biggest effect of the proposed revisions to the Directive would be to curb innovative uses of the Internet. The current proposals brought into question the ability to run social networking sites and the promotion of broadband driven services, such as music and video. It would prevent new programmes which would probably be free to broadcast online and which simply do not make it through traditional TV. This would be to the detriment of both the producers of such content and the consumers of the content. Furthermore, extending the regulations to content delivered over the Internet will place additional unknown burdens on hosting providers who were likely to be liable for infringing content once they were made aware of it.
- 2.16. One positive aspect of the proposed changes was acknowledged however – the creation of a level playing field that would force the audio-visual services operators that were unwilling or unable to comply with the regulatory obligations to move out of the UK. Of course, such companies might simply establish their operations outside the UK while continuing to target UK viewers.
- 2.17. There was some support for the view that companies who were relatively new to the audio visual media services market should be prepared to face some increase in compliance costs. In the past only those broadcasters who were prepared to make significant investments would have been able to offer such services.

Costs and benefits – compliance (Question 4)

- 2.18. Respondents were largely of the view that the extension of the TVWF Directive would favour large firms who were better able to absorb the additional costs of compliance that would arise under both options 3 and 4 of the Commission's proposals. Respondents thought that Option 4 would have a significant impact on small firms' ability to thrive in the EU, dampening the overall level of economic activity in the sector. MBG emphasised the transient nature of the industry it operated within, and that the Commission needed to avoid any activity that encouraged the establishment of creative centres outside the EU.

- 2.19. The Internet Service Providers Association (ISPA) noted that an obvious compliance cost that would be unwelcome was that arising from pre-transmission monitoring. There was concern that service providers would have to check content before transmission, which could mean editorially reviewing every piece of broadcast type content. Costs could be very high here because of the need for complex legal judgements as well as simple binary decisions.
- 2.20. THUS Plc also raised questions about the enforcement of the proposed Directive. It was not sure whether it would be left to the hosting provider to ensure their customers' broadcasts were within the regulations or whether the hosting providers were expected to pre-monitor broadcasts. In line with ISPA, the company thought the latter provision could be expected to generate extortionate costs wholly disproportionate to running the hosting service. Under the e-Commerce Directive, hosting providers are free from liability until they are made aware that the material they are hosting is illegal. Also, Internet providers are free from liability for the material they carry over their networks. It is not at all clear how the proposed changes to the TVWF Directive will be enforced. Not surprisingly THUS Plc is keen to preserve the limitation of liability provision.

Potential for displacement of economic activity (Question 5)

- 2.21. Some respondents including BT and British American Business were concerned that the cost of implementing the Directive, particularly if option 4 applied, could be greater than the cost of moving audio-visual ventures outside the EU. In which case, innovation, investment and employment might well be diverted to non-EU countries. This diversion could affect complementary industries and industries dependent upon the audio-visual services for their business models, considerably damaging the competitiveness of the EU in the global economy.
- 2.22. Several respondents including PACT commented on the need to accept that technical advances mean that physical location is becoming less important. A provider of an audio-visual service, particularly one delivered via the Internet, would have no incentive to locate his/her business in the EU if to do so would subject him/her to a greater level of regulation, and less editorial and commercial freedom. Ofwatch noted that the threshold for transfer outside the EU could be expected to be extremely low.
- 2.23. There was concern that options 2, 3 and 4 could lead to a possible migration by content owners and advertisers from the more regulated linear services to the less regulated non-linear services. But there was no support for the level of regulation for non-linear audio-visual services being increased to the same level as that operating for linear services.
- 2.24. The UK Film Council commented that, so far as film was concerned, they did not believe that any of the options would give rise to decisions to relocate or invest in non-EU locations.

Option 4 - indirect impacts on firms' competitiveness (Question 6)

- 2.25. MBG believes that any additional burdens imposed under a revised regulatory regime would be material to the UK's creative industries. This stance is supported by PACT and the Association for Television Video-on-Demand (ATVOD) which has stated that the imposition of additional costly regulation onto content-on-demand service providers as proposed under option 4 would create a cumbersome and disproportionate regulatory burden that would slow service evolution, subject the content-on-demand industry in particular to an extended period of regulatory uncertainty and restriction, and could quickly become overtaken by the pace of technological change and convergence.
- 2.26. So far as film is concerned, European firms' competitiveness outside Europe is restricted because, with very rare exceptions, European films fare poorly outside their national market. Likewise, European audio-visual service providers rarely operate outside their Member State market, let alone outside Europe. Were the Directive, under option 4, to assist the development of audio-visual services that operated in other national markets, there was an expectation that this could strengthen the ability of European firms to compete outside Europe as well.
- 2.27. In terms of competitiveness, ITN, Flextech Television and S4C voiced strong opposition to the proposed imposition of a 35 minute rule for advertising. The companies argued that such a rule would not assist organisations working on news and children's programming, rather it would weaken the commercial viability of such programmes. ITN supported either the removal of a specific rule for news breaks at European level or the retention of the existing 30 minute rule for news. Flextech Television and S4C were in favour of the rules being lifted entirely.

Impact of extending Directive to mass-media video-on-demand services only (Question 7)

- 2.28. There were mixed reactions to this area of consultation. Some respondents expressed the concern that in a rapidly changing environment any definitions outlined at present could quickly become outdated. The inclusion of video-on-demand services would contribute to legal uncertainty and in consequence fail to bring benefits to the industry and the consumer. Other respondents thought that there could be merit in extending the scope of the Directive to video-on-demand, which was an adjunct to existing linear forms of distribution. Clear definitions could be expected to lead to lower costs and greater benefits.

Market structures (Question 8)

- 2.29. Few respondents attempted to identify the various sub-sectors covered by the draft Directive and the overlaps between them, probably because many of the structures and sectors are currently converging. But the following definitions did emerge:

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Linear services - TV channels delivered via the traditional TV distribution covered:

- TV channels specifically created for distribution on the internet – it was not clear how many of these channels were likely to emerge;
- TV channels specifically created for distribution on mobile phones; many traditional broadcasters had created versions of their main TV channels with a schedule that included mainly their own productions and programming for which they held rights for 3G distribution;
- Near video-on-demand services via satellite, which were between linear and non-linear services; the schedule was decided by the provider, but the subscriber paid a fee per viewing; the fact that the provider offered a selection could bring the service closer to video-on-demand, but the prescheduled feature made the service seem closer to linear services.

Non-linear services covered:

- Video-on-demand over xDSL/IPTV;
- Video-on-demand services over the internet;
- Subscription video-on-demand services over xDSL/IPTV (the viewer pays a monthly fee rather than a fee per programme);
- Subscription video-on-demand services over the internet (the viewer pays a monthly fee rather than a fee per programme).

Overlaps between the sub-sectors of the draft Directive:

Traditional broadcasters were keen to stream their programmes over the internet, but for the moment, at least, clearance rights were preventing them from doing so. Studios were reluctant to give such rights because they were more interested in exploiting their programmes on the internet themselves using their own services or partnership websites. There were also security considerations. In terms of subscription video-on-demand services, particularly where there was a low subscription fee, companies would compete directly with pay and basic TV linear channels.

2.30. In terms of mobile content, while not all of the services would fall within the scope of the Directive, it was thought likely that many of the higher value services and those with the greatest growth potential would. If the Directive brought significant compliance costs to service providers, the most dynamic segment of the market, mainly small entrepreneurial companies seeking to provide an array of new services to consumers, would be the hardest hit.

2.31. PACT noted that the independent production sector was growing year on year with total turnover rising from around £1 billion in 2003 to more than £1.7 billion in 2006. Most of PACT's membership was involved in content creation primarily for television and film. However, more and more companies were diversifying across different genres and types of content as the sector matured and interactive media was a rapidly growing part of their businesses.

2.32. Yahoo! had defined the characteristics of the new media market as being dominated by low barriers to market entry (and exit), low distribution costs and (historically) limited formal sector specific regulation. These factors had served to encourage innovation and entrepreneurship which could see new products and services brought to market in a relatively short time-frame. The growth of this business model and the transition from traditional media to new business models were driven by consumer demand and

changes in consumer patterns. The absence of regulated market entry assisted this change and promoted a dynamic and fast moving market. The value chain for new media involved a far higher number of inter-dependent players than in more traditional media. These could be both large and small businesses, which in many cases would have grown with, and would continue to depend upon, the success of upstream new media service providers. Yahoo! noted that many outwardly successful new services remained relatively small nascent markets requiring ongoing development and investment to be sustainable and profitable in the longer term. The development of these business models would continue to rely upon regulatory flexibility within a stable and predictable framework.

Country of Origin, Jurisdiction and Derogation (Questions 9-11)

- 2.33. Respondents were overwhelmingly in favour of the existing 'country of origin' principle for determining which Member State had jurisdiction over a service. Many were concerned about proposals from other Member States and MEPs, which it was feared would undermine the country of origin principle by enabling Member States to impose stricter rules on services received from other Member States and could lead to service providers being subject to more than one jurisdiction depending on the primary destination of each of their services. Several respondents urged the UK Government to resist any amendments designed to weaken the country of origin principle.
- 2.34. Flextech Television welcomed the regulatory clarity that the country of origin principle provided. The British Screen Advisory Council considered that allowing one Member State to regulate an audiovisual media service based in another could lead to undesirable censorship and a restriction of the public's right of access to education, entertainment and information and could result in services and investment relocating outside the EU while continuing to serve markets within the EU. Aggregator Ltd. were concerned that determining jurisdiction on the basis of revenue or the location of staff (as some had proposed) would create the potential for jurisdiction to change from year to year without any change to the location of the head office or the management structure. The Satellite and Cable Broadcasters' Group observed that companies would not be prepared to run or launch channels if they were subject to varying regulations depending on the country of reception or if the regulatory environment was too uncertain because of new provisions allowing receiving States to complain about services. There was a risk that companies would reduce their operations, investment and employment in the UK and that ultimately some might decide to establish themselves outside the UK and probably outside the EU.
- 2.35. Most respondents agreed with the Commission's amendments to bring the provisions on country of origin and jurisdiction into line with recent ECJ jurisprudence. However, some expressed concerns about aspects of the wording of both the current and proposed new text. The Direct Marketing Association considered that the terms "significant part of the workforce" and "stable and effective link with the economy of the Member State" were not sufficiently defined and that there would be uncertainty for businesses until the ECJ clarified their meanings. MTV considered that the term "abuse" in the proposed new Article 2.7 needed clarification. The Satellite and Cable Broadcasters' Group was concerned that the Commission's proposal had opened the way for those who wanted to weaken the country of origin principle, and that the phrase "abuse and fraudulent conduct" was open to different interpretations. However, the Group expressed qualified support for the recent proposal from the Finnish Presidency,

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provided that it was amended so that measures could be taken by the receiving Member State only in cases where it could be shown that avoidance of stricter regulation was the only or principal factor in the service provider's decision to establish themselves in another Member State.

- 2.36. A number of respondents thought it would be difficult to apply the rules on jurisdiction to non-linear services. Ofwatch thought it would not be possible to apply terms such as "head office" and "work force" to many small operators. Microsoft observed that online media services could be provided from multiple locations and have decisions about content made by several parties. Orange also thought that it would be more difficult to identify and regulate online services. PACT, Microsoft and MTV noted that service providers that wanted to avoid regulation would establish themselves in a more amenable jurisdiction, possibly outside the EU.
- 2.37. No respondents were aware of any instances where the current lack of harmonisation of controls on non-linear services was limiting competition. Nor did any consider that the current derogations allowed under the e-Commerce Directive had harmed business and several noted that they were unaware of any Member State making use of these derogations. Yahoo! considered that the e-Commerce Directive had provided a sound legal framework within which providers of new media services could flourish, and thought that the Commission's proposal did not improve on it. The Internet Service Providers Association thought that the country of origin provisions in the e-Commerce Directive had been effective in overcoming barriers to the free movement of e-commerce services between Member States and were a key element in making the single market for services a reality. However, Voice of the Listener and Viewer opposed attempts to rely exclusively on the e-Commerce Directive to regulate non-linear services, but was concerned about the lack of clarification on the range and extent of any future overlap between the two Directives.
- 2.38. Some respondents were concerned about the scope of existing, and possible future, derogations, and most were opposed to the inclusion of derogations for non-linear services in the revised Television without Frontiers Directive. Voice of the Listener and Viewer noted that the ability to derogate was an exception to the country of origin principle on which both the Television without Frontiers Directive and the e-Commerce Directive were based and it should be used sparingly. It would be wrong to deny users access to a service which had been approved in another Member State and would contravene the principle of free trade within the EU. ISBA considered that the effect of extended derogations would be to discourage cross-border services, especially by smaller providers and advertisers, because of the disproportionate cost of seeking legal advice on up to 25 different sets of national rules. BT was also concerned that the proposed derogations would have an adverse effect on the provision of cross-border services, establish an undesirable precedent for other single market legislation, and allow measures to be taken against cross-border services on grounds of non-compliance with obligations which were flexibly defined. MTV would welcome a reduction in the wide scope for derogation under the e-Commerce Directive, but felt it was not clear why that should not be done by amending the e-Commerce Directive rather than including new provisions in the Television without Frontiers Directive. On the other hand, PPL/VPL wanted to add a new derogation for copyright to address a perceived conflict between the Commission's proposal and the Copyright Directive.

Protection of Minors (Question 12)

- 2.39. Although respondents were supportive of the aims of the provision on protection of minors, most were sceptical that it would have any real impact and some were concerned that it would undermine existing systems of self-regulation, be subject to different interpretations in different jurisdictions, and unnecessarily restrict content intended for an adult audience because of the risk that it might be seen by minors. Only BECTU and Voice of the Listener and Viewer gave the provision unqualified support.
- 2.40. A number of respondents noted that the e-Commerce Directive already provided a right of derogation for Member States who wished to take action against an online audiovisual media service originating in another Member State for infringing national regulations and standards, and a process for doing so. Yahoo!, Orange and the Internet Service Providers Association observed that to date no Member State had invoked this derogation, and there was therefore no evidence that a new provision was required in another Directive. Yahoo! was further concerned that the Commission's proposal offered two different derogation processes, one in Article 2 (paragraphs 7 to 10) which was not limited to areas co-ordinated by the Directive, and one in Article 2a which mirrored the e-Commerce Directive and was limited to areas co-ordinated by the Directive. The choice of process would make a material difference to the impact on the single market.
- 2.41. Several respondents were concerned that there were different views across the EU of what might or might not cause serious harm to minors. Ofwatch noted that content which one Member State considered to be seriously harmful might be legally licensed in another which took the view that the same content was not seriously harmful. ISBA felt there was a danger that Member States might use stricter interpretations to exercise their rights to derogate and put in place a *de facto* country of destination system. MTV took the view that this risk already existed under the e-Commerce Directive, but thought that it would be better to address it by amending that Directive rather than including new provisions in the Television without Frontiers Directive.
- 2.42. Some respondents were concerned about the implications for freedom of expression, and many thought that existing national legislation and regulatory arrangements were already sufficient and that there were other, better ways of protecting minors from harmful content. Some were concerned that existing legislation and regulation could be undermined. The Newspaper Society was concerned that new legislative controls would unduly restrict news and other content primarily intended for and read or viewed by an older, adult audience. Microsoft felt that it did not adequately ensure that Member States would implement it in ways which were most suited to protecting freedom of expression. BT, ntl: Telewest and the Mobile Broadband Group were among those who preferred industry self-regulation wherever possible. The successful ATVOD, CAP and BCAP, and mobile operators' codes were highlighted. Ofwatch considered that the best way to protect minors from harmful content was to ensure that suitable filtering software was installed at the point of consumption, that it was robust and easy to use, and that adults were empowered to use it effectively. Microsoft agreed that it was important for consumers to be given the tools and information that would allow them to manage their online experiences, including content filters and parental controls.

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2.43. PACT noted that the provision would not protect consumers from services originating outside the EU, and expressed concern that an increased level of regulation might encourage some services to migrate to non-EU countries, thereby diminishing the sector in the EU without giving consumers any greater protection. The Mobile Broadband Group noted that service providers that wanted to protect their customers would behave responsibly in any case, while those that did not would operate from outside the EU beyond the reach of EU and Member States' legislation.

Incitement to Hatred (Question 13)

2.44. Many respondents raised concerns about the provision on incitement to hatred which were the same as, or similar to, the concerns about the provision on protection of minors. While three respondents supported the provision on incitement to hatred and another welcomed the inclusion of the factor which particularly concerned them, most were sceptical about its impact and concerned about the implications for free speech, interpretation in different jurisdictions, and compliance costs for businesses.

2.45. Those in favour of the proposal considered that it was an appropriate measure within a balanced approach to all human rights and that it was right to extend it to the non-linear sector. Voice of the Listener and Viewer considered the prohibitions to be timely, proportionate and necessary in view of the increased movement of people from different races and ethnic groups and with varying religious beliefs and attitudes to age, gender and sexual orientation. They would help to ensure public safety and prevent public disorder.

2.46. The British Humanist Association welcomed the inclusion of "belief" in the provision, but was concerned that it should be made clear that hatred is different from mockery and contempt, and that the provision offered protection to people and not to religions or beliefs themselves. The Mobile Broadband Group also noted that the test should be incitement to hatred as opposed to simply challenging particular views. ITV, Channel 4 and Five noted that it was not clear what "belief" referred to: if it went beyond religious belief, it was not clear where the definition would end and the provision could have a chilling effect on free speech without any real justification.

2.47. A number of other respondents also raised concerns about the impact on free speech, and several questioned why a sector-specific provision at EU level was necessary. The Newspaper Society was concerned that the extension of incitement to hatred offences could have a chilling effect on the media, even though the media's objective was not to provoke hatred. Interest groups would seek to exploit any new controls to prevent unwelcome media investigation, reporting and publication of news, information, comment and opinion, which could unduly restrict the media's legitimate role, including that of prompting public examination and debate. Yahoo! and the Internet Service Providers Association considered that the provision addressed matters which were already covered by horizontal, national legislation in the Member States, and which were best determined by the Member States themselves and should not be subject to sector-specific measures in an EU Directive. The Newspaper Society pointed out that UK civil and criminal law already prohibits incitement to racial and religious hatred, incitement to violence and discrimination on a number of grounds. MTV questioned why audiovisual media services should be subject to a requirement which did not apply to newspapers and radio. ITV, Channel 4 and Five considered that it was not clear whether there was a robust Treaty basis for the provision.

- 2.48. Concerns were also raised about the interpretation of the provision. ISBA and PACT were concerned that the provision would be interpreted differently in different jurisdictions. The Internet Service Providers Association and BT noted that context-based judgements would be required to determine whether material constituted an infringement or not, and this would increase the potential legal uncertainty and compliance costs for businesses. Orange was also concerned that anything that went beyond existing requirements would increase compliance costs.
- 2.49. As with the protection of minors provision, some respondents were concerned that this provision would not protect people from services based outside the EU, and that other ways of protecting people from harmful content should be considered. The Mobile Broadband Group expected those offending against the provision to operate from outside the EU and noted that in the UK, the Internet Watch Foundation rarely issues a notice requiring a provider to take down a website because offending services are usually hosted outside the UK. The UK Film Council commented that prohibitions of certain types of content needed to be accompanied by initiatives to promote beneficial content and to enable people to access and engage with that content.

Advertising, Sponsorship and Product Placement (Questions 14-21)

Advertising – qualitative controls

- 2.50. Respondents were mostly supportive of the aims of the qualitative controls on advertising, but many felt it was not appropriate or necessary to include them in the Directive and some were concerned about the way in which they would be interpreted.
- 2.51. MTV considered that the provisions raised issues of public policy and were better addressed by general law applicable to all media. Orange and Yahoo! observed that they were already covered by existing self-regulatory codes. PACT noted that basic protection for consumers in the non-linear sector was already provided under national law and the e-Commerce Directive and felt that another level of regulation risked creating legal uncertainty. Microsoft considered that it was unlikely that Member States would be able to implement the controls in a way that was fair and consistent across the full range of services and advertising models, and this would restrict commercial opportunities for advertisers and service providers to syndicate advertisements across services. The Advertising Association was concerned that Member States should not be able to interpret the provisions in such a way as to allow them to block services from other Member States which contained advertising to children on public health grounds. The British Humanist Association expressed reservations about the provision requiring audiovisual commercial communications not to be “offensive to religious or political beliefs”: it was not clear what was meant by “offensive”; the provision did not include non-religious beliefs; and the inclusion of political beliefs risked stifling legitimate criticism and debate. Which? was concerned about the lack of controls on the advertising of foods containing high levels of salt, sugar and fat at times when children were most likely to see them.

Advertising – quantitative controls

- 2.52. Many respondents welcomed the proposed liberalisation of the rules governing the amount and frequency of advertising allowed on television, although most also felt that the Commission could and should have gone further, and there were a number of concerns about the proposals as they stood. There was no support for the proposed '35 minute' rule for advertising breaks in films, news and children's programmes;
- 2.53. The proposal to allow isolated advertising and teleshopping spots in sports programmes while making them the exception in other programmes was generally felt to be beneficial in so far as it would create additional opportunities for broadcasters to generate revenue from advertising. However, many respondents were disappointed at the level of constraint that would remain and some felt that the restrictions on isolated spots should be abolished altogether.
- 2.54. PACT considered that viewers of sports programmes were already used to seeing more commercial references than in other programme genres and were unlikely to be put off by isolated advertising and teleshopping spots. There would be a positive effect from increased revenue and investment in sports programming. The Advertising Association considered that single advertising spots could give content providers greater flexibility in scheduling advertising, but maintaining the current arbitrary constraint would inhibit flexibility for no clear public purpose. Moreover, maintaining the constraint while abolishing the '20 minute' rule could lead to an anomalous situation in which a commercial break with two 15-second advertisements was permitted, but one with one 30-second (or longer) advertisement was not. ITV, Channel 4 and Five agreed that the rule on isolated spots placed an artificial limit on broadcasters' ability to try out flexible new break patterns. They were also concerned that what constituted an "exception" was open to wide differences of interpretation across Member States. The Satellite and Cable Broadcasters' Group considered that isolated advertising spots should be allowed in all programmes, possibly with specific rules governing their use in news and children's programmes. MTV agreed that broadcasters should be able to decide for themselves whether isolated spot advertising was editorially justified in any particular programme.
- 2.55. Most respondents welcomed the proposal to remove the limits on the amount of teleshopping allowed on channels not exclusively devoted to teleshopping. The Advertising Association considered that it was reasonable to give broadcasters more flexibility over the use of commercial airtime and sensible to allow the market to determine the frequency of teleshopping spots. MTV agreed that it should be left to broadcasters to decide how much time to devote to teleshopping, and Ofwatch felt that it would make little difference as viewers would continue to channel-hop until they found content of interest and any non-teleshopping channel which became filled with teleshopping content would quickly lose viewers. However, some respondents were concerned about the potential impact on revenues from teleshopping if it were allowed to grow unchecked and favoured a more limited extension of the daily limit.
- 2.56. The proposed changes to the rules governing the frequency with which programmes could be interrupted by advertising and teleshopping generated considerable comment, much of it critical. There was no support for the proposal that advertising and teleshopping in films, news and children's programmes should be limited to one break for every period of 35 minutes, which many felt failed to take account of existing programme lengths and business models, and would reduce revenues from advertising

and discourage broadcasters from showing and investing in films, news and children's programmes. Some suggested 30 minutes as a possible alternative, though it was noted that this would still mean a reduction in the number of breaks permitted in longer news and children's programmes. ISBA noted that most news and children's programmes were made to fit a 30-minute scheduling framework, and MTV was concerned that if this changed to 35 minutes it would make programmes more difficult to sell in the rest of the world. CNBC Europe considered that the proposal did not correspond to any of the logical points at which to insert a break in programming and would upset the natural rhythm of news programmes, leading to a reduction in revenue and investment. ITN and the Satellite and Cable Broadcasters' Group also thought that it would weaken the commercial viability of news programmes and news channels and ITN observed that there was no evidence of viewer dissatisfaction with the operation of the current rules. ITV, Channel 4 and Five were concerned that the restrictions would lead to broadcasters struggling to fit content round advertising, instead of the other way round, which would damage the integrity of programmes and the viewing experience; and that there would be more pressure on broadcasters to commission and transmit shorter programmes so as to include advertising in the breaks between them. They and the Advertising Association wanted the "scheduled duration" provision of the current Directive to be retained in any revised provision.

- 2.57. Some respondents questioned the need for rules governing breaks in programmes to be included in the Directive at all. Ofwatch considered that it was superfluous regulation that would create additional work and costs but provide little benefit to anyone. The Advertising Association felt it should be left to Member States to decide on rules for advertising breaks in specific types of programmes. The British Screen Advisory Council questioned how a blanket provision across the EU advanced consumers' interests and considered that it might be better to have longer news programmes with centre breaks, rather than fewer news programmes of lower standard and shorter duration, and a wider range of films with more and shorter advertising breaks than a narrower range with fewer and longer breaks. ISBA considered that advertising breaks in films should be scheduled by broadcasters using their appreciation of the audience and the nature and flow of the content. The UK Film Council thought that abolishing the restrictions on advertising breaks during films would give broadcasters a financial incentive to show a greater range of European films. Finally, Orange noted that the proposals failed to recognise that new technologies and advertising models would give viewers greater choice and control over when and how to interact with advertisers, while the Mobile Broadband Group thought that rules for traditional television did not make much sense when applied to mobile television.
- 2.58. A few respondents were concerned about greater liberalisation of advertising rules. BECTU was opposed to excessive deregulation, particularly if it resulted in a reduction in the transmission time for original programming. Equity considered that it was not appropriate to interrupt films with advertising every 35 minutes, even if the hourly limit on advertising was maintained, and was concerned that relaxing the advertising rules would have an adverse effect on performers' rights, in particular their moral rights in relation to their work. Allowing product placement and abolishing the 3 hour advertising limit and the 20 minute minimum between advertising breaks in any one programme would provide broadcasters with sufficient compensation for any potential loss of earnings from the stricter 45 minute rule for films in the current Directive. Voice of the Listener and Viewer supported the abolition of the minimum interval between advertising breaks in a programme, provided the overall limits were retained, but was opposed to an increase in the number of advertising breaks in feature films.

Sponsorship

- 2.59. Respondents were generally in favour of the provisions on sponsorship as they related to traditional television broadcasting, but opposed to their extension to non-linear services. Views on sponsorship were often similar and closely related to views on product placement.
- 2.60. Several respondents questioned how the provisions would be applied to new media and non-linear services. Yahoo! noted that in new media services sponsorship is more like advertising and the business model is different from that of traditional broadcasting. The proposed regulations would damage the business model without providing any obvious benefit for consumers beyond the protections already provided by existing non-broadcast advertising regulation and the Advertising Standards Authority's code of advertising practice. BT questioned how a prohibition on interference with editorial independence or on the inclusion of promotional messages would be applied to interactive content where material could be combined in different windows on the same screen and users might have the choice of whether or not to access promotional messages. Orange felt that consumers would be sufficiently well-informed to choose the services that best suited them and that competition would shape the market to ensure that customers were satisfied. PACT considered that, while the proposed rules were sufficient in relation to linear services, they should not be extended to non-linear services, as these were already subject to the e-Commerce Directive which requires commercial communications to be clearly identifiable as such.
- 2.61. Most respondents agreed that news and current affairs programmes should not be sponsored. However, CNBC Europe considered that sponsorship should be permitted for purely current affairs programming, as this was no different from any other factual programming which could be sponsored and would be subject to the same rules on editorial integrity; and that a distinction should be drawn between general news programmes and specialist business and financial services. The latter had different content, were viewed by a media literate, informed audience, and could not afford to risk their position by including any inappropriate sponsorship.
- 2.62. A small number of respondents commented on the requirements for identifying sponsorship. The Mobile Broadband Group considered that further clarification was needed as to how the requirement to identify sponsorship would be implemented and how clear any signposting would need to be. The Advertising Association wanted a flexible approach to identification, for example requiring an announcement at the beginning of, during, or at the end of a programme.

Product Placement

- 2.63. Industry respondents were in favour of permitting product placement subject to appropriate safeguards, and there was general agreement that product placement should not be surreptitious, should not be allowed to affect editorial integrity or appear to do so, and should not receive undue prominence. However, there were differing views on the genres of programming in which product placement should be permitted or prohibited and on the safeguards which were required. A few respondents sought tighter restrictions in specific respects, but many felt that the Commission's proposal was too restrictive and prescriptive and wanted greater flexibility.

- 2.64. A small number of respondents opposed product placement. The Campaign for Press and Broadcasting Freedom considered that advertising and editorial content should be clearly separated and that users should always be aware when they were in a selling environment. The National Union of Journalists was concerned about what it regarded as the existing failure to distinguish between programme content and commercial operations and felt that allowing product placement would further erode the differentiation between editorial content and advertising and commercial activities. Which? felt that the proposed safeguards would not be sufficient to protect viewers, many of whom regularly switched between channels and would be likely to miss warnings about product placement, and would not protect children from product placement in programmes not specifically aimed at them. BECTU considered that there should be precise identification of advertising and clear separation from editorial content. The Voice of the Listener and Viewer agreed that product placement should be permitted at European level so that where it currently exists, notably in Austria and Spain, it could be brought within an appropriate regulatory framework; but that it should remain possible for individual Member States to prohibit it.
- 2.65. A number of respondents considered that product placement would provide an alternative source of revenue for service providers and content producers as revenue from traditional advertising declined. Many were concerned about the potential implications if the UK continued to prohibit product placement and other EU Member States moved to permit it. S4C, PACT, Orange and the Direct Marketing Association were among those who considered that this would put UK companies at a competitive disadvantage compared with their European counterparts. Yahoo! was concerned that it would damage new media services, some of which already use product placement as an established revenue stream, and other developing or future media services. The CBI noted that European content producers and broadcasters have hitherto been at a disadvantage in relation to international competitors in countries where product placement is permitted and felt that permitting product placement reflected current commercial realities. However, Equity considered that product placement should not be permitted for public service broadcasters and that performers should be able to refuse consent to product placement if they so wished.
- 2.66. Several respondents noted that UK audiences are already exposed to product placement in programmes imported from the USA and in feature films, and considered that any restrictions should not apply to such programmes. The UK Film Council wanted the current exception for films to be maintained in any new regime. The Satellite and Cable Broadcasters' Group felt that any restrictions should apply only to programmes commissioned or produced by a media service provider. ITV, Channel 4 and Five considered that rules on product placement should not extend to 'prop' placement, which is currently permitted in the UK.
- 2.67. There were differing views about the genres of programmes in which product placement should be permitted or prohibited. Equity considered that it should be prohibited in children's programmes, news and political information programmes. The Satellite and Cable Broadcasters' Group supported the prohibition for news and current affairs programmes, but not for fiction and 'factual entertainment' programmes; and considered that product placement should be allowed in all programmes where it was not surreptitious, did not affect editorial integrity or appear to do so, and did not receive undue prominence. They and ITV, Channel 4 and Five were concerned that the definition of 'documentary' was too broad and needed to be clarified. MTV thought product placement should be permitted in all genres of programming except news programmes. However, CNBC Europe considered that it should be permitted in

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specialist news and current affairs, in situations where it did not have any editorial influence and could not be perceived as having any. MTV, ITV, Channel 4 and Five questioned the need for a prohibition on product placement in children's programmes, given that they are already extensively commercialised through programmes based on products and vice versa, and were concerned that a prohibition would further undermine the commercial viability of children's programmes. The Advertising Association thought that product placement should be permitted in programmes for teenagers who have more developed media literacy skills.

- 2.68. Some respondents were concerned about how the restrictions and safeguards would work in practice. BT felt that it was unclear how they would be applied to interactive content and was concerned that the provisions could prevent the creation of new non-linear genres and formats which aimed to inform, educate or entertain as their principal purpose but involved the promotion of products and services. Voice of the Listener and Viewer considered that where product placement was allowed viewers should be clearly informed of it at the beginning, during, and at the end of a programme, and that information about product placement should be presented in a standard form across all Member States. However, the UK Film Council considered that stringent controls to identify product placement in feature films were neither necessary nor desirable and could be counter-productive. Flextech Television considered that the requirement to identify product placement at the start of a programme would diminish the impact of paid sponsorship and could draw more attention to products than would otherwise be the case. MTV thought that identifying product placement at the start of a programme would be cumbersome, editorially unattractive and would create a sense of corporate advertising.
- 2.69. Several respondents argued that decisions about the safeguards should be left to Member States or to the broadcasters themselves. The Advertising Association considered that product placement should be transparent and appropriately identified, but the method of identification should not be prescriptive and should be left to Member States to determine. ITV, Channel 4 and Five shared this view. MTV felt that market mechanisms would provide an adequate safeguard: viewers would switch to another programme if a broadcaster or service provider exceeded what they considered to be reasonable limits. The Mobile Broadband Group agreed that if product placement was transparent, consumers would be able to make informed decisions about content.

Surreptitious and subliminal advertising

- 2.70. Respondents who commented on these points agreed that surreptitious and subliminal advertising should be prohibited and most felt that there was no need to define surreptitious advertising further or to provide a definition of subliminal advertising.
- 2.71. Respondents from the advertising industry, ITV, Channel 4 and Five supported the proposed definition of surreptitious advertising. However, MTV and the National Assembly for Wales considered that a clearer distinction between surreptitious advertising and product placement was needed, and Voice of the Listener and Viewer felt that the definition should be extended to apply to all providers of audiovisual media services and to make the sole criterion that of misleading the public as to the nature of the representation. MTV also noted that the prohibition in the Commission's proposal applied only to moving images, so that surreptitious advertising by way of still images would be permitted for media service providers within the scope of the Directive but not for information society service providers covered by the e-Commerce Directive.

- 2.72. On subliminal advertising, respondents from the advertising industry, ITV, Channel 4 and Five saw no benefit in including a definition. The Advertising Association felt that a definition would rapidly become out of date and the Direct Marketing Association noted that leaving subliminal advertising undefined would ensure that new techniques developed in the future, particularly in new media services, would be caught by the term. However, MTV and PACT felt that a definition of subliminal advertising should be included.

Right of Reply (Question 22)

- 2.73. Most respondents agreed that the Commission had been right not to extend the right of reply to non-linear services. Many considered that it would be impractical, if not impossible, to apply a right of reply to non-linear services in any meaningful way. The BBC noted that replicating equivalent contexts and similar audiences for the reply would be much more problematic in non-linear than in linear services. THUS plc observed that users would not necessarily visit the same services again, and so would be less likely to see any correction or response. BT considered that preventing a programme's future distribution would be more important than issuing a correction or allowing a right of reply. A number of respondents commented that the online environment already provides opportunities to reply. The Internet Service Providers Association noted that people already have a right of reply through chat forums, message boards and the creation of new websites. Orange noted that many online services already provide the ability to submit comments and responses or other alternatives to a right of reply.
- 2.74. Some respondents considered that a right of reply in non-linear services could be a threat to freedom of expression, and that defamation and libel laws were a better way of providing a remedy for aggrieved users. The Newspaper Society considered that it could create editorial, legal and administrative problems, and discourage the media from reporting controversial issues or anything which would otherwise benefit from common law and statutory privilege under defamation laws. Yahoo! and PACT noted that national defamation and libel laws applying to locally established service providers already offered protection and provided a legal remedy. Ofwatch considered that, if the case for regulating written publications was not strong enough, there was no justification for regulating non-linear services either. Those who wished to evade regulation would base themselves outside the EU.
- 2.75. Only three respondents supported extending the right of reply to non-linear services. This was felt to be a fair measure, putting linear and non-linear services on an equal footing. Voice of the Listener and Viewer considered that it would empower users by enabling them to have access to both sides of an accusation about the behaviour or the views of an individual. The Campaign for Press and Broadcasting Freedom considered that the right should be extended across all media in line with the Council of Europe Recommendation (2004)161 on the right of reply in the new media environment; and that Member States should ensure that the right of reply or equivalent remedies could be adequately exercised. However, the implementation of the right should not be allowed to restrict media diversity and freedom of expression and should impose minimum financial obligations on non-professional and small scale information providers except in cases of sustained failure to ensure an adequate right of reply.

Film Rights (Question 23)

2.76. Most respondents who commented on this question considered that the provision in the Commission's proposal was superfluous and would have no impact, given the existence of contracts and copyright law. However, PPL/VPL considered that there was a direct impact on copyright legislation and that it should be made clear in the Directive that it was not intended to alter copyright legislation. Equity welcomed the provision as helping to reinforce existing rights and felt that the Directive should also acknowledge that content can be the intellectual property of performers and other creators whose rights also need to be respected, protected and enforced.

Short Reports (Question 24)

2.77. There was a fairly even division of opinion on this question, with roughly equal numbers of respondents in favour of the proposal and against it. In broad terms, news agencies, smaller broadcasters and viewers' organisations supported the proposal, while larger broadcasters and sports organisations were opposed.

2.78. Voice of the Listener and Viewer supported the proposal as it would enable UK viewers to have access to short reports of major events from other Member States. Reuters considered that the proposal struck a fair balance between freedom of information and the public's right to see news coverage of important events on the one hand, and the rights of sports organisations and rights holders to maximise revenue from the sale of rights on the other. A right of access for a short report would not affect the value of the rights for the full event, and the proposal would help smaller broadcasters which did not have the resources to buy exclusive rights or cover large numbers of events to compete with larger, better-funded broadcasters. However, the provision should apply to all Member States and needed to be able to cope with unpredicted news events.

2.79. Against the proposal, the Institute of Professional Sport considered that it would create legal uncertainty for rights owners and licensees and lead to the creation of a secondary rights market for news, with news content becoming subject to market prices rather than being made available free of charge; and that the existing framework based on copyright law, together with the UK's voluntary code governing the use of short extracts for news programmes, had worked well and should continue. The Sports Rights Owners Coalition saw no history or evidence of abuse to justify the proposal and was concerned that it would create overlap and confusion with existing copyright law, give global and pan-European agencies power to determine what should be news in EU Member States, and allow commercial organisations to create sports entertainment programming under the guise of news programming. Both organisations were concerned that it would reduce the value of media rights and make it more difficult for sports bodies to raise revenue from rights to invest in sports development.

2.80. Amongst broadcasters, CNBC Europe agreed that the right should be available to broadcasters in all Member States and not restricted to Member States which allow access to footage to their own broadcasters, and S4C noted that access to footage of major events was essential for it to fulfil its public service remit. However, MTV was concerned that the scope of material which could be accessed under the proposal was too wide and, in the current market conditions, the proposal favoured public service

broadcasters. MTV, ITV, Channel 4 and Five agreed that there was no evidence of a problem which needed to be addressed, and considered that the provisions in the Copyright Directive were sufficient to ensure access for news reporting. The BBC felt that existing legislation and regulation should form the basis for addressing any problems in news access, rather than creating a new right; and that any new right should be limited to off-air access only, for footage relating only to events covered by exclusive rights, and should be extended to intermediaries only in exceptional cases where for specific proven technical or practical reasons a broadcaster had no other means of obtaining access to the required footage. The BBC, ITV, Channel 4 and Five were concerned that any new right should not include physical access to premises where events were held, as this would undermine the rights to exclusive coverage.

European work in non-linear services (Question25)

- 2.81. Respondents who commented on this issue were fairly evenly split between those who supported the Commission's proposal and those who opposed it. A number of respondents commented, but did not take a clear position on either side. Although not strictly part of the Commission's proposal or covered by the question, some respondents also commented on the quotas applicable to linear services and the definitions of European and independent works.
- 2.82. Those in favour of the proposal felt that it would help to support production of European work and improve access and choice for viewers and users. Voice of the Listener and Viewer considered that the provision would encourage non-linear providers to offer access to older European works which are no longer shown in cinemas, not available on DVD and rarely if ever shown on television. However, there was some concern that Member States and service providers could too easily evade requirements they regarded as too onerous. BECTU, Equity and PACT wanted the "where practicable" qualification to be dropped; Voice of the Listener and Viewer noted that it would allow Member States to sidestep the imposition of onerous production requirements on media service providers within their jurisdiction; and PACT took the view that it was already used by broadcasters to avoid their responsibilities under the current Directive and there was no reason to assume that non-linear services would behave any differently.
- 2.83. In addition, BECTU considered that the hours-based quota for European work in linear services should be increased from 50% to 60% and that a quota for non-linear services should be considered. A quota based on investment in European work should be introduced as a complementary requirement. Equity proposed a requirement to make available a proportion of European works on non-linear media services, and suggested a percentage of the turnover of non-linear media service providers should be used for independent European production. BECTU felt that the Directive should give clear criteria for the definition of an 'independent' producer, while Equity wanted to exclude talk shows and generic reality television from the definition of European work.
- 2.84. Broadcasters and service providers were generally opposed to the provision. Most argued that it should be left to the market to provide what consumers wanted and that regulation could be counter-productive. Flextech Television considered that individual channels should be able to determine their own target levels of original and European content. MTV regarded quotas as a disproportionate restriction on broadcasters' scheduling freedom, anti-competitive and a barrier to entry for some potential new

market entrants. BT was concerned that regulation of European content was likely to be counter-productive, and noted that a higher market share for European work did not preclude lower overall consumption and production of such work. However, there was evidence to suggest that work which was previously excluded from the broadcast schedules would find a place in the catalogues of new service providers, and that it would attract an audience sufficient to stimulate the production of new similar work. The Internet Service Providers Association noted that, through the internet, content producers no longer faced barriers to dissemination and consumer choice was no longer limited to a small number of channels: audiences could now be aggregated around particular tastes and interests. Yahoo! agreed that specialist providers should be allowed to emerge to meet consumer demand. Ofwatch observed that, if consumers valued European work, there should be no need for this provision; and if they did not, then forcing service providers to provide European work would drive consumers to other non-EU services, particularly on non-linear platforms.

- 2.85. Some respondents suggested that, if there was a concern about the availability of European content, it could be addressed by measures to encourage production without distorting the single market for non-linear services. The Internet Service Providers Association considered that production could be supported at national level through direct subsidies and tax incentives. The UK Film Council called for the Government and Ofcom to give more support to bodies which negotiate with media service providers for production of and access to creative, innovative and diverse content.

Other Issues

Co- and self-regulation

- 2.86. As is clear from the paragraphs above, many respondents were concerned about the level of regulation required or implied in the Commission's proposal and wanted to avoid additional regulation wherever possible. For Ofwatch, regulation was increasingly a barrier preventing people from accessing content they wanted to see, rather than something which helped them to avoid content they did not want to see. Yahoo! considered that industry was keen to develop self-regulation, good practice, media literacy and other approaches to empower customers and protect vulnerable people. Microsoft agreed that consumer education, self-regulation, technological development and support for law enforcement were better ways of ensuring protection for consumers.
- 2.87. Many respondents considered that where further regulation was necessary, co- or self-regulation should be preferred, and that the Directive should avoid disrupting existing successful co- and self-regulatory systems. Microsoft noted that the UK was already a leader in the field of self-regulation of online audiovisual content, with a number of successful self-regulatory schemes in operation, and the Association for Television-on-Demand considered that its achievements in self-regulation to date supported the argument that additional statutory regulation was unnecessary. The Advertising Association considered that the way in which the Directive was implemented in each Member State should be a matter for subsidiarity, and that both co- and self-regulation should be available as options, and the British Screen Advisory Council agreed that Member States should be able to determine the most appropriate means of implementation and regulation in accordance with their political, economic and cultural circumstances. ntl: Telewest favoured an approach which would allow existing self-

regulatory models to work wherever possible, with a legal backstop in case self-regulation failed, and felt that co-regulation in the formal sense should not be the only option. ITV, Channel 4 and Five were strongly in favour of a co-regulatory regime for broadcast advertising. Voice of the Listener and Viewer considered that properly constituted co-regulatory arrangements could respond to changes and new requirements just as quickly as self-regulatory systems.

- 2.88. Some respondents noted that the Commission's proposal failed to mention self-regulation, and some also felt that the reference to the Inter-Institutional Agreement on Better Lawmaking (IIA) was unhelpful and should be deleted. The Advertising Standards Authority considered that the wording of the Commission's proposal appeared to prohibit self-regulation and permit only a narrow form of co-regulation, which would inhibit the continued operation and development of effective systems of self- and co-regulation for advertising in the UK and across the EU. The Advertising Association agreed that the wording of the proposal would undermine the existing system of self- and co-regulation of advertising in the UK. ISBA observed that the IIA did not allow for co-regulation as it was understood in the UK, and Microsoft was concerned that the proposal would undermine self-regulation and that the definition of co-regulation was too narrow and insufficiently flexible. The CBI felt that the definitions of self- and co-regulation in the IIA could reduce the flexibility required by self- and co-regulatory bodies to respond to technological changes. However, Voice of the Listener and Viewer considered that the requirement in the IIA to establish self-regulatory arrangements at EU level was an incentive to harmonise self-regulatory arrangements across the EU, without which there would be different standards of consumer protection and a failure to establish common EU standards in the areas of public policy covered by the Directive.

Media Literacy

- 2.89. Closely linked to concerns about the appropriate level and form of regulation was the issue of media literacy. Microsoft and Yahoo! (cited above) both saw media literacy as an important element in enhancing consumer protection. The UK Film Council considered it to be an essential complement to regulation as a means of ensuring that people would see the content they wanted to see and were not exposed to things they did not want to see. However, more resources were required in order to develop media literacy, and the Directive needed to recognise the importance of media literacy initiatives. Ofwatch considered that encouraging consumer use of effective and flexible filtering software was the most effective way of protecting children from unsuitable content. However, the only reference to filtering software in the current Directive would be removed by the Commission's proposal. The CBI noted that the Commission's proposal did not recognise the increased level of individual responsibility in the online environment. Flextech felt that young audiences were more media literate than previous generations.

Access for disabled people

- 2.90. The RNIB and RNID called for the revised Directive to include measures to promote access to audiovisual content for disabled people. They noted that the Charter of Fundamental Rights of the European Union and the European Commission's 2005 Communication on e-accessibility both recognised the rights and needs of disabled people and that the European Parliament had called twice for the Directive to include

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accessibility for disabled people. They also noted that the UK already has a good record and the highest legal requirement for levels of audio description and subtitling amongst EU Member States and considered this to be a good opportunity for the Government to take a lead in the EU and champion access for disabled people at a European level.

Creators' Rights

2.91. BECTU and Equity both considered that individual creators' rights should be acknowledged within the revised Directive. BECTU noted that individual creators may be compelled to assign rights to independent producers, in the same way that the latter may be compelled to assign rights to broadcasters. Equity felt that the rights of individual creators and performers were too often neglected. Both considered that, as the audiovisual sector ultimately relies on individual creators, their interests in intellectual property should be protected and respected.

Employment

2.92. BECTU considered that promotion of employment should be added as an underlying objective of the revised Directive, and that employment trends should be monitored and included in the regular reports submitted by Member States and compiled by the Commission on the application and implementation of the Directive.

Media Ownership

2.93. BECTU also considered that measures to promote media pluralism and restrict commercial media concentration should be included in the Directive. It was not sufficient to regulate media ownership through EU competition law on a case-by-case basis, as this took no account of the contribution of the media to the democratic and cultural well-being of Member States.

ANNEX A**CONSULTATION QUESTIONS****General - the effect of widening the scope of the Directive**

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?
2. To what extent would Option 2, 3 or 4 limit the freedom of firms active in the markets which are affected to determine their own prices, product characteristics and/or quality and standards, means of advertising the product and distribution channels?
3. What would be the costs and benefits, both direct and indirect, to the UK generally and across the various audio-visual services?
4. What impact would the Options have in terms of compliance costs, especially for smaller firms?
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?
6. Would Option 4 have any indirect impacts on firms' competitiveness in audio-visual services, or more generally?
7. If the AVMS Directive were extended to add only mass-media video-on-demand services of the kind currently available - so excluding all other forms of 'non-linear', on-demand services - what would the costs and benefits be?

Market information

8. What are the market structures in the various sub-sectors covered by the draft AVMS Directive, and what are the overlaps between them?

Country of origin

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?
10. Specifically, have businesses felt that the current derogations under Article 3 of the Electronic Commerce Directive harmed their business and thus whether the inclusion of their services under this proposed new Directive would be beneficial?

Place of establishment, jurisdiction, and derogation

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?

Protection of minors

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?

Incitement to hatred

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?

Advertising – qualitative controls

14. Articles 3g(c)(iii), 3(d), and 3(e) contain controls on advertising via any audio-visual service which bear on health and safety. They are supplemented, for linear services only, by Articles 14 and 15. Would these controls between them be effective in achieving the right balance between commercial freedom and public health?

Advertising - quantitative controls

15. What will be the impact of allowing for isolated advertising and teleshopping spots in sports programmes (Article 10.2)?
16. What will be the impact of removing the prohibitions in Articles 18 and 18a that put a limit on the amount of teleshopping allowed on a channel that was not 'exclusively devoted' to teleshopping?
17. What will be the impact of the rule (Article 11.2) that films made for television, cinematographic works, children's programmes and news programmes may be interrupted by advertising or teleshopping once for every period of 35 minutes?

Sponsorship

18. Are the rules on sponsorship of audio-visual media services set out at Article 3h necessary and sufficient to safeguard the integrity of the services that are sponsored?

Product placement

19. OFCOM have consulted on the possibility of allowing product placement on TV services within the UK if the EU – as a result of this draft Directive – removes the current implicit EU-wide prohibition of it. But the UK will retain its discretion not to allow product placement in programming made by and for UK broadcasters whatever the outcome of the EU discussion. If the UK were to continue not to allow product placement, but the EU allowed it, what practical impact would that have for UK broadcasters, UK programme makers, and the UK advertising industry?

Surreptitious and subliminal advertising

20. Is the definition of surreptitious advertising at Article 1(h) sufficient to catch all possible forms of abuse?
21. Should there also be a definition of the 'subliminal techniques' which are to be banned (Article 3g(b))?

Right of reply

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'?

Film rights

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?

Short reports

24. Article 3b offers a limited trans-frontier right of access to footage of major events, including (and especially) sports events for television news purposes. Does this strike a fair balance between the respective rights of the rights holders, broadcasters, news agencies, sports organisations and other event organisers, and the interests of the public? Should this right be available to broadcasters in all Member States, or should it be available only in Member States that already allow such access to footage of major events to their own domestic broadcasters?

Promotion of European work

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?

ANNEX B

LIST OF RESPONDENTS

Non-confidential responses to the consultation were received from:

- Advertising Association
- Advertising Standards Authority
- Aggregator Ltd.
- Association of Online Publishers
- Association for Television On Demand
- BBC
- British American Business
- British Humanist Association
- British Screen Advisory Council
- British Telecommunications plc
- Broadcasting Entertainment, Cinematograph and Theatre Union (BECTU)
- Campaign for Press and Broadcasting Freedom
- CNBC Europe
- Confederation of British Industry
- Direct Marketing Association
- Entertainment and Leisure Software Publishers Association
- Equity
- Flextech Television
- Institute of Professional Sport

- Internet Service Providers Association
- ISBA
- ITN
- ITV, Channel 4 and Five (joint submission)
- Microsoft
- Mobile Broadband Group
- MTV Networks Europe
- National Assembly for Wales
- National Union of Journalists
- ntl: Telewest
- Ofwatch
- Orange
- Periodical Publishers Association
- PPL and VPL (joint submission)
- Producers Alliance for Cinema and Television (PACT)
- Reuters
- RNIB and RNID (joint submission)
- S4C
- Satellite and Cable Broadcasters Group
- Scottish Media Group
- Sports Rights Owners Coalition
- The Newspaper Society

- THUS plc
- UK Film Council
- Voice of the Listener and Viewer
- Which?
- Yahoo! UK and Ireland



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