



Proposal by the European Commission for the revision of the 'Television without Frontiers' Directive (Directive 89/552/EC, amended by Directive 97/36/EC) – Consultation by the Government of the United Kingdom

Response from Yahoo! UK & Ireland

September 2006

Introduction

Yahoo! UK & Ireland welcomes the UK Government's commitment to a public consultation on the principles and likely impact of the European Commission's proposal to revise the 'Television without Frontiers' Directive.

Strategic context

The revision of the so-called 'Television without Frontiers' Directive has been presented as a key element of the EU's i2010 strategy which, among other things, aims to deliver a *Single European Information Space*; a single market for information society and media services within the EU. The Commission has recognised the importance of putting in place an appropriate regulatory framework in order to facilitate the transition required to achieve the objectives and it has committed to delivering "*a proactive policy approach....to stimulate favourable market developments*"¹.

We welcome the importance attached to these goals and to supporting the continued investment and growth of the media sector in Europe. However, we remain concerned that i2010 and the revised Directive as proposed by the Commission do not point to the same outcome. We also believe that the draft Directive, in its current form, will have a number of unintended consequences which will damage the credibility of the targets set by the i2010 strategy for the audiovisual sector. We outline our thinking and assessment of the impact in our response below.

Response

This response is presented in two parts. Part A addresses the questions raised in the 'competition assessment' section (section 7) of the partial impact assessment published with the consultation. Part B responds to the specific consultation questions published separately which impact directly on Yahoo!. We have taken the opportunity in both parts to raise other issues which we feel are important to consider as part of the Government's response to the European Commission's proposal. In addition, we recognise that the policy debate has evolved in some areas since the Commission first tabled its proposal and we raise some of these issues in this response also.

¹ Communication from the Commission to the Council, European Parliament and ECOSOC "i2010 – A European Information Society for Growth and Employment", COM (2005) 229, 1 June 2005, p4

About Yahoo! UK & Ireland

Yahoo! UK & Ireland is a subsidiary of Yahoo! Inc., a leading global internet brand and one of the most trafficked internet destinations worldwide. Yahoo! seeks to provide online products and services essential to users' lives, and offers a full range of tools and marketing solutions for businesses to connect with internet users around the world. Yahoo! is headquartered in Sunnyvale, California. Yahoo!'s global network includes 25 world properties and is available in 13 languages

Contact

Please address any questions regarding this response to:

Emma Ascroft
Head of Public & Social Policy
Yahoo! UK & Ireland
125 Shaftesbury Avenue
London WC2H 8AD
Tel: 020 7131 1088
Eml: eascroft@europe.yahoo-inc.com

Part A - Competition assessment

Market structure

Before commenting in detail on the questions raised in section 7 of the partial impact assessment, it is important to first understand the transition from traditional to new media and how the value chain is evolving as a result.

The new media market is characterised by a low barriers to market entry (and exit), low distribution costs and historically limited formal, sector-specific regulation. These factors serve to encourage innovation and entrepreneurship which can see new products and services brought to market in a relatively short timescale. The growth of this business model and the transition from traditional media to new business models are driven by consumer demand and changes in consumption patterns. The absence of regulated market entry assists this change and promotes a dynamic and fast moving market.

The value chain for new media involves a far larger number of inter-dependent players than in traditional media. In the case of Yahoo!, the value chain includes a range of content partners and niche providers such as creative agencies, advertising research companies, media planning and buying agencies, ad serving providers and rich media and design agencies. These companies can be both small and large businesses – niche providers of cutting edge and innovative services or established players with significant turnover – and in most cases these businesses have grown with, and will continue to depend upon, the success of upstream new media service providers.

While consumer behaviour shows a clear direction of travel, the end point is less clear. Players in the value chain continue to trial new services and models of partnership.

Traditional media companies, for example, are developing strategies to respond to consumer demand and manage the inevitable transition to new forms of media distribution and consumption. New media providers are investing heavily in new technologies, such as algorithmic and social search and community-based services, which will establish the norms of media services in the future. Many outwardly successful new services remain relatively small, nascent markets requiring ongoing development and investment to be sustainable and profitable in the longer term. The development of all these business models will continue to rely on regulatory flexibility and a stable and predictable legal framework.

The market for new media services is more global than for traditional media, particularly web-based services which are accessible cross-border. However, audiences continue to value content which is edited and promoted locally. While non-EU players emerge in one country and can quickly attract a global audience, the low barriers to market entry and stable regulatory framework still incentivise them to establish and grow properties in different countries which offer local content to a local audience. Yahoo!, for example, has established businesses in the major European markets which provide services tailored for a local audience and reflect local language and culture. There is, however, a delicate cost/benefit trade off in these investment decisions. We discuss this in more detail below.

Cost of regulation

The consultation invites comments on the likely costs if the policy options outlined by the European Commission. It also notes that Rand Europe's contribution to the Commission's impact assessment concluded that quantitative estimates of the compliance, monitoring and enforcement costs are "*largely unavailable*". We agree that costs are difficult to assess in such a dynamic and fast changing market. We can, however, offer some observations on the nature of these costs and where they would fall in the value chain.

The direct cost for media service providers like Yahoo! would flow from the proposed extension of scope envisaged under option 4 to include non-linear audiovisual services. These costs primarily arise from the introduction of a new tier of sector-specific regulation for non-linear audiovisual services and include:

- More extensive legal review of new products
- Additional requirements to localise global products for the European market
- Loss of revenue arising from new advertising, sponsorship and product placement regulation associated with linear content
- Changes to existing business processes and associated staff training
- Engagement with regulator and administrative charges/licence fees arising
- Administration of licence conditions including pre-transmission editorial review of large volumes of audiovisual media content

We also believe that responsibility for some of the additional compliance activity will be pushed further down the value chain and impose new costs. For example, those companies involved in creating, selling and serving advertising would have to be aware of, and apply, different advertising rules for linear and non-linear content. This would

require inventory to be categorised (if possible) by service type and advertising copy to be matched accordingly.

There are also indirect costs associated with option 4. The draft Directive would extend the scope but not clarify how it will interact with existing statutes which providers have relied on until now. A future service – particularly a Web 2.0 service – is not likely to fall neatly within a single definition under the Commission’s proposals and may also fall within the scope of existing definitions in other Directives, the most obvious being the eCommerce Directive. This uncertainty would create an opportunity cost, impacting on business confidence and potentially creating regulatory barriers to the testing of new business models or partnerships and result in some products being launched elsewhere but not in the EU market.

Displacement effect

It is difficult to assess the potential displacement of investment which the draft Directive would cause. A great deal depends on how the Directive is implemented by member states and whether additional measures are introduced at the national level. Investment also depends on a range of factors elsewhere in the value chain including broadband availability, speeds and take up, consumer attitudes and behaviour, general business confidence and a buoyant advertising market. Nevertheless, it is clear that the market for investment in new media is very fluid and global. Money will flow to where shareholders will get the best return. It is entirely possible that a European regulatory framework which is significantly at odds with other regions could cause investment to flow to more favourable markets and influence the location of new investment.

Another factor to consider is audience behaviour and the potential for *disintermediation* of EU-based providers. In traditional, broadcast media an audience’s attention can be controlled locally by a limited choice of channels. In the new media world, audiences have no territorial boundaries to their consumption choices and will quickly follow new investment and services. While regulatory flexibility is a powerful incentive to invest in the EU and develop local audiences, a regulatory framework which introduces additional costs and other barriers to providing services in the EU could tip the balance of costs and benefits in favour of shifting investment towards the provider’s domestic market and away from locally established properties with a low risk of losing significant audience share. This would be detrimental to inward investment in EU economies.

Part B - Consultation questions

Extension of scope

The European Commission has proposed to extend the scope of the existing ‘Television without Frontiers’ Directive to address a ‘problem’ identified as legal uncertainty caused by:

- Unequal treatment of linear services on different platforms, and
- Absence of harmonised rules at EU level for non-linear services.

Concerns about using these assertions as a basis for proposing a new Directive are by now well rehearsed. It is entirely proper that policy action at EU level is pursued to help

address legal uncertainty, but it can only be a worthwhile exercise where such uncertainty exists. Media services providers operating in the very area of the market where the Commission claims the most uncertainty lies (i.e.: non-linear services) have *not* experienced any legal concerns. The draft Directive does not improve on the provisions of the eCommerce Directive in the most crucial areas and in some instances even *adds* to the legal uncertainty. This will not serve to support the objectives of i2010.

With regard to harmonised rules, this is presented as an end in itself yet there has never been a level playing field for media services per se. Television, radio and print media have historically been regulated differently and in a way which reflects their unique characteristics and origins. Non-linear audiovisual services represent another media platform in the same sense and should be examined and understood as such. A new Directive as it is currently proposed would result in a level playing field of a kind but for its own sake and would not deliver the future certainty and predictability which the Commission aims to achieve. This will not create a favourable environment in which cross border trade in audiovisual services can flourish.

The approach proposed in the draft Directive to regulate non-linear content largely mirrors the framework already in place for linear broadcasting. While the development of non-linear audiovisual services does pose challenges for public policy going forward, we agree with concerns expressed in the consultation document that a regulatory approach designed for linear media is not an appropriate starting point.

Developments in the market show that:

- The transition away from old media to new forms of content distribution and consumption is driven by consumer demand and behaviour. New media services empower consumers and give them greater control of their media experience. Consumer expectations are evolving accordingly.
- Content services in the future will be 'mixed media' in nature. That is, they will bring together licensed, original and user-generated content with community and other services (such as email, instant messenger and search) in a single, user-controlled environment. Non-linear audiovisual content is therefore consumed in a range of contexts outside the control of the media provider. This makes contextual regulation of the kind applied to broadcasting inappropriate for on-demand audiovisual services.
- Editorial responsibility for content today resides in different levels of the value chain and not wholly in the hands of the service provider as it does in traditional broadcasting. In some cases, it is controlled by the user. Responsibility is also *shared*. It is not practical or feasible to mirror broadcasting regulation which makes the provider accountable for *all* aspects of a service.
- Broadcasting is a mature and stable medium. New media on the other hand is dynamic, innovative and fast-moving, and there is a great deal of transition taking place in between. The shift from first generation to so-called *Web 2.0* services will further blur the distinction between new and old media such that we would expect a new Directive will be out of date by the time it is implemented. Alternative, more flexible regulatory approaches would be more suitable in some areas.

These characteristics of new media point to a new and more creative response to the public policy issues these services raise, based on how non-linear services are being consumed and how consumers are actually behaving. It is still early days for some services but some helpful approaches and alternative regulatory models are now in place, for example:

- The ASA code of advertising practice applies to all non-broadcast media and is regularly reviewed to take account of new advertising methods. Similar approaches have been developed in other EU member states.
- The ATVOD code regulates current generation video-on-demand services and is being reviewed to adapt it to new services including web-based VoD.
- The PEGI system for the rating of off-line electronic games is being adapted to cover on-line games. This is an EU-wide code supported by service providers, console manufacturers and games developers.
- There is a vibrant market for technical tools which allow consumers to manage their internet experience. These include web filtering software and parental controls. It is becoming good industry practice to provide these tools with internet access.
- A partnership approach is emerging between different players in the value chain to promote media literacy across the board and support the most vulnerable consumers of new media services in particular.
- Some providers are experimenting with user-moderation and other models as a means of setting content and service standards in non-linear services.

There is an appetite among all stakeholders to explore how self-regulation, industry good practice, media literacy and other approaches can be developed to further empower consumers and protect the vulnerable. These focus on content standards, consumer information and protection of minors. This is an iterative process which will develop over time. It should not be surprising that there is some anxiety within the new media sector that formal regulation at EU level may detract from the good progress being made and the relationships being built across the value chain to underpin these initiatives. We feel, on balance, that it would be better at this stage to limit the scope of the draft Directive to linear services in order to update the Directive where required to ensure legal certainty and clarity for linear broadcasting services and deregulate broadcast advertising rules.

Question 7 specifically asks about the relative costs and benefits of extending the scope of the Directive in a limited way to include only VoD services of the kind currently available. This raises a number of practical and legal issues which we believe will result in greater costs than benefits:

- Our legal advice and discussions with officials at national and EU level have shown that it is extremely difficult to arrive at a legally robust definition which clearly identifies what we recognise as VoD services “*of the kind currently available*”.
- Where legal uncertainty cannot be achieved, there is a risk of the definition inadvertently capturing other types of content which are intended to fall outside the scope of the new Directive. It may, for example, capture ‘mixed media’ services of the kind described above by virtue of them having a VoD-like element. This risks capturing user-generated content and other service elements which are

not suited to broadcast-type regulation. We believe it could also capture adverts made available on-demand as downloadable video files.

- Definitions with this level of uncertainty and unpredictability will not establish a favourable investment climate for new media businesses.
- Industry is developing self-regulatory structures for on-demand services. As mentioned above, ATVOD has established a code for current generation VoD services and is reviewing its code in the light of new VoD services. It strikes us as counter-productive to consider extending the Directive to include these services at this time.

This section of the 'consultation questions' document also asks about the impact of the proposed extension of scope on compliance costs, investment and market entry. These issues are addressed in Part A above.

Country of origin

The Commission's impact assessment asserts that the absence of minimum harmonisation of controls on non-linear audiovisual services limits competition in this sector. We have experienced no such barriers. We, and other providers in this sector, have relied on the eCommerce Directive for some time and it has proved a sound legal framework in which the providers of new media services can flourish.

Specifically on the matter of Article 3 derogations, the eCommerce Directive, together with the Transparency Directive, provides for a robust mechanism for member states to raise concerns about non-linear content services originating in another member state. The Commission's impact assessment points out that this mechanism has the potential to create barriers to the single market. However, no member state has yet invoked this derogation and, until they do, the risk the Commission points to is a wholly abstract one. Indeed, the European Commission's impact assessment shows that it has not been possible to identify or quantify any consumer detriment arising from this risk.

If a member state were to raise an issue in the future, the proper way to address it would be via the procedure provided for in the eCommerce Directive. Proposing an entirely new Directive to address a theoretical legal uncertainty strikes us as wholly disproportionate and at odds with the principles of better regulation.

Protection of minors

Article 3d of the draft Directive would require member states to ensure that audiovisual services in their jurisdiction do not carry material which might seriously harm minors. The consultation states that this provision gives member states no additional powers than they already enjoy. The consultation also states that Recital 10 of the draft Directive proposes to remove member states' right to derogate from the country of origin principle in Article 3 of the eCommerce Directive in certain areas including the protection of minors. On a policy level, this raises two issues:

- The derogation in the eCommerce Directive already provides for a robust process, overseen by the European Commission. As mentioned above, no member state has yet invoked this derogation with respect to non-linear audiovisual services originating in another member state and there is no *prima*

- facie* case for removing this derogation and replacing it with a sector specific measure in another Directive. It is far from clear what value this proposal adds.
- If this derogation were replaced by a separate measure in the proposed new Directive, it is not clear which approval process would apply – i.e.: Article 2(7) to 2(10) or Article 2a. The choice of process makes a material difference to the impact the Commission’s proposal has on the single market:
 - Article 2(7) to 2(10) does not limit member state’s discretion to areas which fall within the coordinated field and allows member states to introduce national measures without the prior approval of the European Commission. This process would in practice give member states significantly greater powers than they have today.
 - Article 2e, on the other hand, is both limited to areas within the coordinated field *and* requires the European Commission to give such prior approval *before* a member state can exercise the derogation. This mirrors the process set out in the eCommerce Directive but, as above, it simply replaces an existing provision which has not been shown to fail.

The principles of better regulation aside, the consultation specifically asks whether Article 3d would “*give consumers adequate protection from services which might be harmful to minors*”. We describe above how the characteristics of these services require a more creative policy response. This is not easily reflected in a legal instrument and Article 3d is very broad and depends heavily on how individual member states interpret such a provision. If member states were inclined - or encouraged - to provide for a nuanced policy approach of this kind in their national transposition, the welfare of minors could be enhanced. But if they were to transpose this provision with the intention of exercising the derogation against non-linear content originating in other countries, there may be little tangible benefit to minors because the focus would be on *what* services are provided rather than *how*. The derogation is a blunt instrument with which to protect minors in the non-linear environment. As outlined above, the policy issues in our view require a more nuanced and creative approach.

Incitement to hatred

Article 3e aims to give consumers protection from services which might contain incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The consultation documents note that these prohibitions go much wider than current law in the UK. This is also the case for other EU member states. These are matters which are already comprehensively covered by horizontal, national laws in all EU countries and have not been subject to much EU harmonisation to date. The inclusion of these provisions in the draft Directive therefore presents service providers with a real risk of a conflict of laws in the future. While it may be appropriate to reference the existence of national statutes regarding incitement, we feel on balance that these are matters best determined at member state level and not subject to additional, sector-specific measures in this Directive.

Advertising

The proposals for the regulation of advertising in audiovisual services are designed with traditional broadcasting in mind. Our concern in proposing to extend the scope of the Directive to include some non-linear services raises significant practical issues of how

the advertising rules in a revised Directive would interact with existing self-regulatory regimes and, in some cases, unnecessarily duplicate or conflict with them.

All online advertising carried by new media companies in the UK such as Yahoo! is currently regulated by the ASA's code of advertising practice (CAP) which covers all non-broadcast media. This is a successful and well-respected code which is regularly reviewed and adapted to account for new advertising techniques as technology and delivery methods change². All new media companies operating in the UK will, like Yahoo!, have developed internal policies and advertising sales and operations processes around the requirements of the CAP. This situation is repeated in other member states where there are similar self-regulatory regimes in place.

Providers in this sector offer users fully-integrated 'mixed media' services – i.e.: audiovisual, music, games and other services – some elements of which would be covered by the proposed Directive, others not. It is not practicable to separate the audiovisual element from others that make up the service or to identify the advertising associated with it in a way which would allow a regulator to apply the appropriate regulation as the draft Directive intends.

The impact assessment does not consider such practical issues associated with enforcing new regulations which arise from an extension of scope. It also does not acknowledge that there is an established direction of travel for new media platforms in favour of greater self-regulation. The proposal to introduce traditional broadcast advertising regulation in to new forms of advertising delivery by service type is a retrograde step. The impact of this is hard to quantify in absolute terms, but they potentially include:

- Legal uncertainty for advertising channels arising from overlapping or conflicting regulations, and the associated legal costs
- Introduction of new advertising sales and operations processes, and the associated staff training costs
- Knock on effects of certain elements of broadcasting regulation extending to non-linear services – e.g.: pre-clearance of adverts would add to online advertisers' costs (this is particularly damaging for small businesses who find advertising in new media very cost effective and responsive to their business and budgetary needs)

Sponsorship

Question 18 asks whether the rules on the sponsorship of audiovisual media services set out in Article 3h are necessary and sufficient to safeguard the integrity of the services that are sponsored. Although these provisions extend to all audiovisual media services – i.e.: linear and non-linear, as defined in the Commission's proposal – they appear to have been written with broadcasting in mind. The proposed extension of scope means that these rules would extend to some new media services where the business model is quite different. Thus, although the Commission's proposals are presented as a liberalising measure, we believe they will have the opposite effect for non-linear services.

² The next review is planned for 2007

Sponsorship in a new media environment is more akin to, and closely associated with, advertising. For example, a live webcast of a music concert may be sponsored by a particular brand. The association of the sponsor with the event is clear to the user and banner or other advertising spots around the webcast are clearly identifiable as such. The advertising may include a call to action or encourage a user to click through for more information about the sponsor and/or specific products in their range. Moreover, the scheduling of these events is usually decided between the media service provider and the sponsor, together with the organisers of the event, as an integral part of the commercial negotiation. The rules proposed in Article 3h would damage this business model with no obvious benefit to the consumer over and above the protections already provided by general, non-broadcast advertising regulation and the CAP in particular.

Product placement

The consultation questions the impact on service providers were the UK not to allow product placement in programming.

Again, the Commission's proposals are presented as a liberalising measure but are likely to have the opposite effect. Even if the scope were unchanged, it would impact on the development of new business models in Europe involving partnerships between broadcasters and new media providers. A number of models have already been piloted in other markets, particularly the USA³, which create valuable new revenue streams for broadcasters and independent producers but cannot be tested in Europe because of the regulatory barriers. An extension of Directive's scope to include non-linear services would, in addition, significantly impact on the advertising industry and revenue streams on which a number of new media providers currently rely. Product placement is, for example, an established revenue stream for a number of new media services including short films and online games. As they are currently drafted, the definitions of non-linear services would capture these services. A decision by the UK not to allow product placement would potentially damage these and other developing or future media services.

Promotion of European work

Article 3f introduces an obligation on member states to ensure that all media service providers operating in their jurisdiction promote the production of and access to European works. The underlying objective – to ensure that quality European works are produced for distribution on new media platforms as they are on traditional media – is a legitimate one but we are concerned that the formulation of this provision will encourage measures which impact on the functioning of the single market.

This provision places the onus on (apparently, all) media service providers to deliver the objective just like broadcasters have done so to date. This misunderstands the new media market in three ways:

³ For example, *The Apprentice* TV series which attracted sponsorship and product placement spend both online and in the original TV programme. This benefited both the broadcaster and producer see <http://apprentice.tv.yahoo.com/trump/05/>

- In a spectrum-scarce environment, it is reasonable to focus on the channels to market in this way but no such scarcity exists in the non-linear world and non-linear content does not face the same barriers to distribution.
- By the same token, consumers do not face barriers to accessing non-linear content nor do they have difficulty finding it. Algorithmic and social search have the power to aggregate audiences around very specific genres of media such that the largest range of content will find its audience both nationally and globally (the so-called 'long tail' effect).
- Service providers in a non-linear world are more likely to be content aggregators than they are producers of original content. Placing an obligation on providers outside these norms risks distorting the business model.

By their very nature, new media platforms such as the internet can reach a far wider audience than traditional broadcasting and establish markets for European content. These platforms have the potential to make the biggest contribution to Europe's cultural diversity by promulgating European content to a global audience and drawing together the European diaspora around common cultural tastes in a way which is not possible in traditional media. We had understood that this was the outcome Commissioner Reding had in mind when she specifically ruled out regulation by stating, "*we will not achieve cultural diversity by means of regulation, it will impose itself*"⁴.

Artificially regulating the provision of European content in all media markets rather than allowing specialist providers to emerge to meet consumer demand is likely to be counter-productive. If member states are concerned about the availability of European content *per se*, measures could be taken to encourage the *production* of quality content. This objective can be easily achieved at national level without distorting the single market for non-linear audiovisual media services, for example by direct subsidies to producers or tax incentives.

Right of reply

The consultation asks whether it is right that Article 23 remains limited to linear services only. We believe it is. In nearly all cases, broadcasters commission and/or produce the content they transmit and retain full editorial control. However, service providers in a non-linear environment do not always have editorial control over content. For example, it may be served by a third party under contract or other partnership arrangement or it may be user generated. The degree of editorial control can also vary by service, as discussed above.

Given the plurality of provision in non-linear audiovisual media, a blanket provision of this kind is inappropriate. This would mean, for example, Yahoo! having an obligation to offer users a 'right of reply' over content provided by its news partners when the partners who would wish to consider any complaint about their news content themselves. It is better that a 'right of reply' is provided for nationally in a horizontal legal instrument. In all member states, users already have recourse to a legal remedy in defamation and libel laws which also apply to locally established service providers.

⁴ Speech by Commissioner Viviane Reding to the i2010 Conference, London, 6.9.2005

Film rights

The consultation asks whether Article 3f(2) would achieve anything given the existence of copyright law. We believe that this provision is adequately covered by the EU Directive on copyright and related rights and is therefore redundant. Any media services provider transmitting films outside the periods agreed with the licensor would be subject to action by them for breach of the licence and/or breach of contract under civil proceedings. The provisions of Article 3f(2) bring no additional, material benefit to either party.
