
Contribution to Impact Assessment of the revision of the Television Without Frontiers Directive

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Preface

The European Commission, Directorate-General Information Society and Media (DG INFSO), asked RAND Europe to contribute to the Commission's Impact Assessment of the revision of the Television Without Frontiers Directive (TVWF), by assessing all policy documents and related material provided by and for the Commission, and conducting a literature review to refine the problems and issues definitions that form the basis of the Impact Assessment. This is to complement work already undertaken by DG INFSO & Media

This document presents an analysis of the economic and social impacts of the policy options suggested by the Commission. The methodology used follows the Commission's official Impact Assessment Guidelines, SEC(2005) 8 June 2005.

The report assumes familiarity with the debate about revision of the European legislation for video broadcasting. We have included a Glossary and Executive Summary for easier access to the main conclusions for stakeholders. The intention is for this document to be read by an audience of interested stakeholders and regulatory officials at European, and national levels. Whereas the main points are spelled out in the Executive Summary, we urge readers to consider the document as a whole in order to fully appreciate the complexity of trade-offs involved in an Impact Assessment in such a dynamic multi-faceted environment.

The authors are aware that the regulation under review covers a sector that is in continuous and rapid change, which introduces a high level of complexity and uncertainty. This dynamic context affects the ability to regulate and also influences the way impacts are assessed. The Impact Assessment focuses in particular on the effects of the different policy option vis-à-vis the Lisbon objectives¹, and the agenda for Better Regulation ².

This report is completed, and has been peer-reviewed in accordance with RAND's quality assurance standards (see <http://www.rand.org/about/standards/>).

RAND Europe is an independent not-for-profit policy research organisation that serves the public interest by improving policymaking and informing public debate. For more information about RAND Europe or this document, please contact Maarten Botterman, Information Society Director and responsible Project Leader, at maarten@rand.org, or at RAND Europe, Newtonweg 1, 2333 CP LEIDEN, The Netherlands.

¹ European Council (2005) Presidency Conclusions, 22-23 March 2005, Brussels

² Most recently reflected in the Impact Assessment Guidelines (2005) 15 June, SEC (2005) 791 at http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf

Executive Summary

DG Information Society and Media (DG INFSO) of the European Commission contracted RAND Europe to provide input into the impact Assessment of its proposed revision of the Television Without Frontiers Directive (TVWF). There is sufficient reason for the Commission to consider a revision. With the rise of new non-linear digital audiovisual services a growing part of audiovisual supply has become unregulated. New technologies in traditional linear services also require adjustments to allow for more effective enforcement of the rules, and to reduce unnecessary regulatory rigidities. The Commission faces the challenge of instituting appropriate regulation for all audiovisual services, to avoid re-fragmentation of the Internal Market for audiovisual services, to increase effectiveness of existing regulations and to assess where additional or lesser provisions may be opportune. However, this intervention must be proportionate, effective, enforceable, and justified by reference to subsidiarity.

RAND Europe has evaluated the options that the Commission has defined for its review³, and added an option of de-regulation at EU level. It finds that no single option provides all the answers. It should be noted that even drastic de-regulation at EU level would not mean the end of regulation: it means that Member States have to rely on their national regulation, alone. This will lead to a re-fragmentation of the Internal Market and create new jurisdiction problems. This is further explored as Option 1. To leave the current Directive unchanged (Option 2) discounts the fact that the market and technology have changed and that new imbalances have arisen, mainly related to the non-linear domain, which also affects the linear domain. Taking those factors into account is presented as Option 3. National regulation of non-linear services leads to jurisdiction issues, legal uncertainty and a partial fragmentation of the Internal Market. No change also means that current rigidities in advertisement insertion rules will continue to hamper service provider's ability to address changing needs in the advertisement market. Therefore, extending existing regulations to cover new non-linear services, and addressing some of the inconsistency in the Directive caused by the changing environment (Option 4), may be justified and necessary.

Where the revision process introduces an entirely new obligation – such as the right to short extracts - special caution is required. A revision usually is an adjustment to correct and improve the working of existing policy. Introducing new policy must be scrutinised very carefully, given that in earlier years policy makers did not see the need for such a

³ Note RAND Europe has not evaluated the revised Directive: RAND's contribution focused on the different options proposed by the Commission and the (potential) impact of those. As it is the responsibility of the Commission to deliver an Impact Assessment, RAND's contribution is input, not substitute.

provision. There must either be an objective – non-incremental - argument for adding an obligation, or contextual changes such that a new response is called for. It should be noted that in the media environment many changes in context have taken place over recent years.

Under all circumstances the provisions of the proposed extension should be enforceable and make sense in the context of the service: i.e. it should deliver the objective for which it is introduced in an appropriate and proportionate way. The report finds that this must be assessed on a case-by-case basis looking at the best way of dealing with the individual issues that the revision covers. This means in practice that the preferred solutions tend to have elements of different options (mainly 3: Minor revision of linear elements, and 4: addressing some non-linear elements). In a limited number of cases the change-nothing Option 2 is considered most adequate.

Here we highlight the findings that we consider of particular importance. They concern the following issues:

- extension of protection of minors, and protection against incitement to hatred and advertising of legal drugs to non-linear services;
- right of reply in non-linear services;
- minimum rules for European and independent content for digital linear services;
- establishment of a right of access to short extracts.

Extending minimum rules on fundamental rights to non-linear services is justified and comprehensible from a public policy perspective. For instance, protection of minors, protection against incitement to hatred and health-related issues should be guaranteed in new audiovisual services, given the importance of these values to society. However, the report cautions that the laudable objectives of such rules, risk being undermined by the difficulty and cost of implementation and enforcement. Regulation can only be effective with flanking self-regulation and technological and other instruments to protect viewers. Whereas specific regulation – contrasting to existing general legislation - allows public authorities to react more effectively (*ex post*), the monitoring and enforcement of such rules in the fast growing supply of non-linear audiovisual services will be very challenging and nearly impossible without active co-operation of the sector. We expect that the incentives for the sector to effectively self-regulate will be large, mainly due to the benefits from inspiring consumer confidence. For instance, provisions for protection of minors, against incitement to hatred, and on health-related issues would be guaranteed in new audiovisual services, given the importance of these values to society.

The right of reply is fundamental. The question however, is not *if* this right should be guaranteed in non-linear services but *how* this should be done. To make the right of reply an effective instrument to protect the rights of individuals against inappropriate content requires setting up a dispute settlement process and supporting institutions. This is costly and is likely to be a particular burden to small players. The report concludes that this may be disproportionate given existing legal redress options and difficulties in providing a credible independent alternative to regular legal protection.

The current TVWF has minimum requirements for European and independent content on broadcast services. An extension to digital linear and non-linear services could be

envisaged, but is problematic given that linear and non-linear services have entirely different business models. Non-linear services work on the basis of demand rather than by schedules, so that quotas would relate to services on offer rather than broadcasts. Consumer choice determines what content is shown, and not the service provider. Supply may be endless and cater for niche demand. In this context an investment or catalogue quota in non-linear content does not currently seem a proportionate response to new delivery platforms and user-defined content choice.

The market for short extracts of news events released to other broadcasters in non-national markets appears undeveloped. Rights-holders protecting their exclusivity have arranged for some reciprocal access in national markets, but there is no pan-European standard approach. The potential for any Internal Market is therefore reduced by legal differences at Member State level. For viewers, lack of access to another country's exclusive news events (typically national football leagues) requires an alternative that is provided by paid highlights on the Internet or, in the near-future, mobile phones, to those viewers most able to access and pay for the content. For a wider less dedicated audience, such access is unlikely. The decision against or for intervention is a balance of market intervention in favour of consumer welfare, and the possibility that an Internal Market could be created by regulatory harmonisation. In the absence of empirical evidence in order to assess the cost-benefit, we do not consider that definitive answers are possible. Moreover until now there is no concrete evidence of any barriers to the Internal Market that are limiting economic development, as no complaints or infringements have been filed.

The report follows a step approach to the assessment of impacts and weighing of options. Chapters 1 & 2 identify the problem at hand and establish the intervention logic underlying the need for a review. It also includes an assessment of likely trends and developments in the audiovisual and advertisement markets. Against this background the various options for intervention (Chapters 3 & 4) are evaluated by identifying the likely direct and indirect impacts of each intervention option by issue and by stakeholder category (Chapter 5). Following an overview of impacts and an assessment of their significance, conclusions on the most appropriate policy and the likely risks of such a choice will be presented in Chapter 6. The study sets out to identify and value different categories of direct and indirect impacts on a variety of stakeholders in order to draw conclusions on the policy options. The expected adoption and implementation time frame of the revision is 3-4 years and its total life expectancy another 7 years from 2009 onwards. Given the timeframe that needs to be covered and the dynamic context of the new media market, such an assessment is in itself a significant challenge.

Predictions of business models and products over this time span, in a sector of continuous change, need to be addressed with some caution. Some stakeholders of tomorrow may not exist today, and others are likely to have disappeared. Also the development of usage and usage patterns will lead to adjustments to advertisement, accordingly. Thus assessing the impacts of the revision of the existing TVWF should be seen as the best possible attempt to project current empirical data and scientific understanding into an uncertain future. The projections follow accepted economic practice and assess direct and indirect impacts expected to affect an array of current stakeholders in the period to 2009.

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Changes in technology and in the market for audiovisual services have put the European Union's (EU) existing audiovisual policy under pressure. While a balance has continually to be struck between EU level regulation and Member State regulation, technology and market changes are causing convergence of markets that historically were governed under very different legal frameworks. This means that today some types of services are regulated, and other types of services, delivering comparable and sometimes identical content to citizens, are not. To summarise: to adjust to new requirements and to enable a continued application of the policy's objectives, the current Television Without Frontiers Directive (TVWF) is in need of review.

This review draws on extensive stakeholder consultations and follows from a number of prior adjustments to EU audiovisual policy. It concerns the scope, the definitions and the implementation of the policy; in order to regulate appropriately across all delivery platforms of linear and non-linear audiovisual content services, whilst ensuring that the original objectives of the European Treaty and the original TVWF will be achieved.

This report provides a contribution to the Impact Assessment for the review of TVWF. The structure follows the Commission's guidelines for Impact Assessment. Impact is primarily assessed against the Lisbon objectives⁴ and the European agenda for Better Regulation. In this report, specific attention is given to the forecast economic impacts of the various options for revision of the Directive.

The assessment is based on evidence available in September 2005, from a large number of information sources⁵. Change and uncertainty are key factors underlying this review, as the revised Directive provisionally concerns the period 2009-10 onwards⁶. The revised Directive should therefore provide for sufficient flexibility to absorb continuous

⁴ European Council (2005), Presidency Conclusions, 22-23 March 2005, Brussels

⁵ In particular we rely on the economic evidence presented by stakeholders in response to the questionnaire on impacts sent out in June 2005. We supplement this with independent advice considered the most impartial and authoritative available, the Price Waterhouse Coopers Global Entertainment and Media Outlook 2005-9, and the European Audiovisual Yearbook 2005, together with specialist media sources such as Screen Digest, Deloitte Touche Tomatsu, Zenith Optimedia and Internet Advertising Bureau/PWC projections.

⁶ The draft Directive will undergo the co-decision procedure with the European Parliament during the course of 2006. Based on the time period from the 1997 revision of the original 1989 Directive, it may be expected that the Directive is formally notified in the Official Journal at end-2006/early 2007, and is then implemented in national legislation by approximately 1 January 2009. This assumes no unforeseen delays in either European or national legislation.

development and changing realities in technologies and markets. This poses significant challenges for conducting an assessment of the potential impacts.

The report follows a step approach to the assessment of impacts and weighing of options. Chapter 2 identifies the problem and developments, and establishes the intervention logic underlying the need for a review. It also includes an assessment of likely trends and developments in the audiovisual and advertisement markets. Against this background the various options for intervention (Chapters 3 & 4) are evaluated by identifying the likely direct and indirect impacts of each intervention option by issue and by stakeholder category (Chapter 5). Following an overview of impacts and an assessment of their significance, conclusions on the most appropriate policy and the likely risks of such a choice will be presented in Chapter 6.

CHAPTER 2 **TVWF in the context of developments to 2009**

In this first substantive chapter, we identify and scope the extent of the problem:

“...how changes in the audiovisual environment in the period since the last revision of the Directive have created problems in its application, and will create further difficulties as Internet delivery of video becomes commonplace.”

We analyse how those changes may be expected to impact on existing and new markets in the period to 2009, which is as far as it is reasonable to predict with any degree of likelihood. We then set out the rationale for solving the problems created by the outdatedness of the 1997 revision, and assess the revision prospects against market changes, the intervention logic and regulatory completeness in using TVWF to solve the problem.

2.1 **A changing landscape since TVWF was last revised in 1997**

The changes in technical, service/application, business strategy and policy responses to audiovisual and multimedia convergence have been far-reaching since the 1997 revision of TVWF, and the Convergence Green Paper provided the ‘blueprint’ for the development of the European communications environment.

Progress has been rapid, turbulent and multi-paced, towards a ubiquitous Information Society.⁷ Post-2003 expansion of fixed broadband, digital television and third generation mobile (3G) networks has to some extent recovered from the slowdown in the period 2001-2002 when the investment and regulatory climate lost dynamism, and advertising and investment slumped. Europe now enjoys considerable domestic broadband penetration and 3G deployment. Broadcasting and data casting over mobile networks has been taking place, and peer-to-peer exchanges have supplied the pent-up demand for multimedia content since the phenomenon of Napster, Gnutella, Kazaa, eMule and other incarnations of the same type of service.⁸

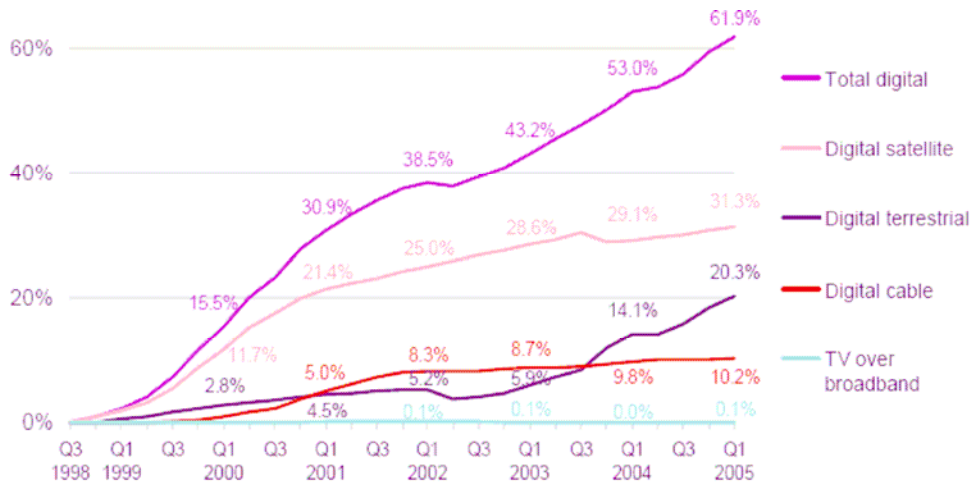
Audiovisual markets in the EU have also changed very rapidly in 1994-2004, and can be expected to change even more rapidly in the next decade. This change was driven by

⁷ Also reflected in the Commission Communication: *i2010 – A European Information Society for growth and employment* COM(2005) 229 final.

⁸ See Noam, Gerbarg and Groebel (2003) and Marsden (2003).

exponential change in channel capacity, especially via digital cable and satellite, increased market penetration of multi-channel homes (with sports and feature film premium content), and an increasing number of platforms⁹. The introduction of digital terrestrial television, largely driven by public service broadcasters, has been delayed but is now successful in Sweden, UK and Germany, amongst others. Switching off the analogue signal will be determined by universal reception of digital terrestrial services.

Figure 1. UK Digital Television Penetration by Household



Source: Ofcom Digital Television Update

Viewers already ‘time shift’ their audiovisual viewing by using now-ubiquitous video recorders, Digital Video Disc (DVD) players and Personal Video Recorders (PVRs). Traditional revenues are increasingly spread amongst multiple platforms and new income streams and business models have emerged.

The market for non-linear audio-visual services is a far younger and much less defined currently, and extremely heroic presumptions are needed to predict future development. The multimedia environment has been changing rapidly, driven by user demands for greater interactivity and ‘pull’ of content – notably in the use of mobile text voting and competition participation in reality television shows, which can also be viewed via computer and mobile handset¹⁰. The pan-European development of ‘Big Brother’ by Netherlands-based independent producer Endemol with its multimedia supports has been a forerunner for interactive cross-format programming. The unpredictable nature of ‘hit’ multi-platform interactive formats is demonstrated by this case study.

The extreme nature of the predictive challenge is due to the unusual volatility of content markets and citizen tastes in media consumption, which rely on network effects to a great

⁹ See generally Brown and Picard (2004) and particularly Marsden and Arino (2004) infra.

¹⁰ There are many other important examples: selecting video music clips to play on the plethora of digital and satellite TV music channels, contributing to charities (i.e. ‘bidding’ for Live 8 tickets), Eurovision Song Contest voting, BBC Podcasting etc.

extent (especially in non-linear demand patterns) as well as having extreme economies of scale because of the perfect reproducibility of digital content. This latter factor can have both market-enhancing and market-delaying effects: the peer-to-peer sharing of MP3 files has driven the growth of music downloading. Experimental broadcasting over mobile networks and DVB-H frequencies supports deployment on a commercial basis.

New technologies and business models for audiovisual content delivery are emerging, but they are not expected to make much of an impact on the aggregate audiovisual market before 2009 or even for some time thereafter.

2.1.1 IPTV to 2009

IDC market forecasts predict an increase in Internet Protocol TV (IPTV) revenues from \$62 million in 2004 and \$262 million in 2005 to \$2.5 billion in 2009. IPTV penetration is expected to rise from less than 1% in 2004 to about 6% (c. 10 million households) in 2009. France, Spain and Italy are expected to account for 60% of the European market.¹¹

The development of IPTV and other Internet-based methods of delivery is driven by the increasingly widespread availability and maturity of broadband, by demand for premium content for which consumers are willing to pay, and by the continuous search for new sources of revenue. The latter driver is one of the sources of the emergence of triple-play: offering of one service for broadband, telephony, and audio/video. The main obstacles to its growth are a lack of consumer awareness and consumer acceptance of IPTV as a viable alternative to incumbent channels of delivery and the strong market position and economies of scale of the incumbents.¹²

2.1.2 VOD to 2009

Video on Demand (VOD), in its various forms, is making inroads into the audiovisual market but is also expected to make no more than a marginal contribution to total audiovisual content revenues by 2009 (Table 1). By 2009 total VOD revenues in the Europe/Middle East/Africa region are expected to amount to a mere US\$1.7 billion among 22 million households.

Table 1. Development of VOD/Subscription VOD in Europe, 2001-2009

| | VOD/SVOD households (US\$ millions) | Annual spending per household (US\$) | Aggregate annual spending (US\$ million) |
|------|--|---|--|
| 2002 | 0.6 | 30 | 18 |
| 2003 | 2.0 | 40 | 80 |
| 2004 | 3.3 | 50 | 165 |
| 2005 | 6.4 | 60 | 384 |
| 2006 | 10.0 | 65 | 650 |
| 2007 | 13.9 | 70 | 973 |
| 2008 | 18.0 | 75 | 1350 |
| 2009 | 22.3 | 75 | 1673 |

Source: PwC, Global entertainment and media outlook 2005-2009.

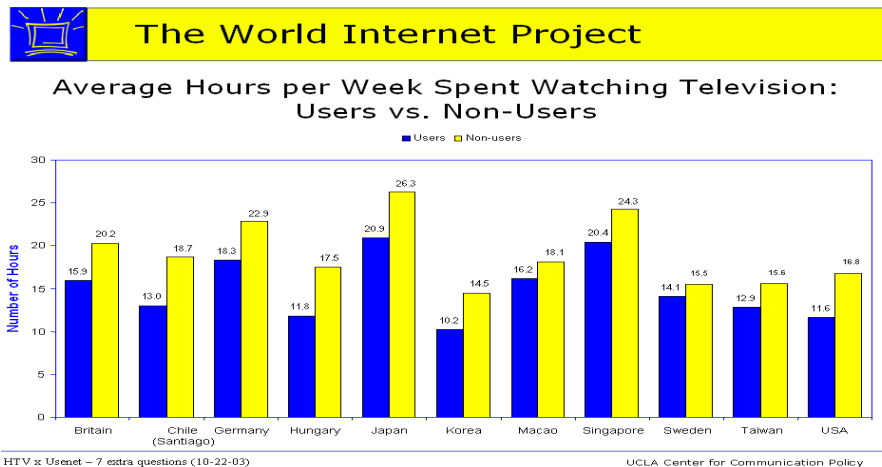
¹¹ IDC Market Analysis Western Europe 2004-2009.

¹²Ibid.

The VOD market is only a few years old, whether delivered by cable, fibre or Digital Subscriber Line. The mobile streaming media market is even younger. In view of the extreme immaturity of these markets, it is impossible to predict with any certainty what impact the streaming video, VOD and mobile video markets will have on traditional broadcast viewing and production in the medium and long-term. Stakeholders have been unable to provide authoritative answers, or even a set of baseline scenarios, that can illustrate with any authority market sizes. Commercially available forecasts are widely divergent in their predictions. The extent of market development is therefore largely unknown in the period to 2009, although PwC data is widely regarded as the most authoritative.

It is clear that different media have converged on the broadband Internet. In particular, video gaming, music distribution, streamed radio stations and online newspaper readership appears to be highly substitutable between their traditional analogue and new digital media of consumption. Internet users claim to use the Internet more than any other medium except television – which includes use of radio and print media via the Internet. Figure 2 shows that television use appears lower amongst Internet users, according to the World Internet Project.¹³

Figure 2. TV Viewing Between Broadband Users and Others 2003 in 11 Countries



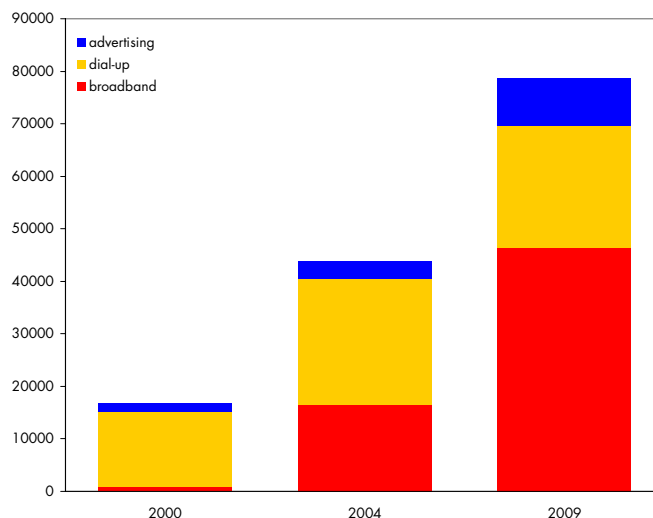
However, Internet penetration has stabilized at about 65-75% by household, and mobile phone penetration at about 85%¹⁴. There is therefore a significant minority of the population that does not intend to use digital media platforms, and there is evidence that this group is both the most vulnerable in society and least likely to change (typically comprising the most elderly, non-formally educationally qualified and/or poorest quartiles). Against this background, any attempt to measure accurately the development of the non-linear audiovisual market over time will be fraught with difficulty.

¹³ Source <http://www.worldinternetproject.net/home.html> for October 2003.

¹⁴ See Oxford Internet Survey (OXIS) February 2005 at <http://www.oii.ox.ac.uk>

According to PwC (Figure 3), Internet revenues in the EU-15 are growing very rapidly (27% per annum in 2000-2004; an expected 12% per annum in 2004-2009). Broadband access is the main driver of growth, while Internet advertising is growing from a low base.

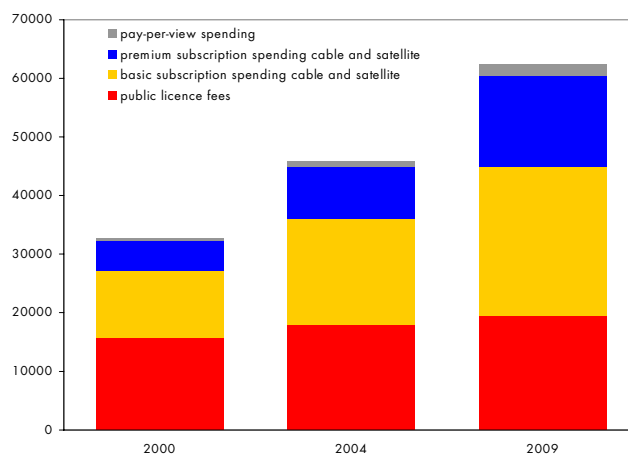
Figure 3. Development of Internet access spending by category in the EU-15, 2000-9 (US\$millions)



Source: PwC, Global entertainment and media outlook 2005-2009.

Pay-per-view is a modest market segment, accounting for about US\$2 billion by 2009 – see Figure 4.

Figure 4. Development of TV revenues by category in the EU-15, 2000-2009 (US\$million)



Source: PwC, Global entertainment and media outlook 2005-2009.

2.1.3 Three scenarios for changes in audiovisual viewing behaviour towards 2009

The bulk of television revenues will continue to be produced by linear services. Within the linear services there will, however, occur quite considerable compositional shifts. Public licence fees used to account for the greater part of television revenues, but private television

subscription spending is rapidly taking over. Consumers are expected to be more and more willing to pay for normal and premium content (Figure 4). Analogue technology will be replaced by digital technology. The incumbent position of linear television is reinforced by the rollout of High Definition TV, which offers consumers much higher quality than conventional technologies. High Definition TV is only expected to comprise a modest part of the television market, accounting for 8 million out of 200 million European TV households by 2009.

In the next ten years, the completion of digital convergence for platforms means that digital television will be available to all, that urban cable and telephone networks will be upgraded to carry digital video channels, and that mobile networks will carry multimedia content. It is however unclear what effect this will have on the use of communications media by citizens. There are several plausible scenarios¹⁵:

1. **Linear Continuum:** citizen behaviour will change at the margin, but media consumption will remain a largely linear experience for most;
2. **Digital Content Divide:** the digital 'haves' will experience greatly increased interactive media use, while an equal number of digital 'refuseniks' will continue exactly as before, relying on offline media and public service broadcasters;
3. **Time Shifting Linear Consumers:** the great majority of the population will use broadband mobile and in-home devices, time-shift their media to suit their schedule instead of that of the broadcaster, and fundamentally alter the media landscape.

It should be noted that there are two distinct versions of scenario 3 above. Either:

- a. Consumers choose to 'stream' linear video at alternative on-demand schedules, or;
- b. Non-Linear Interactive Users: they adopt an entirely 'pull'-based behaviour, in which content is downloaded as if in a peer-to-peer music file-sharing network, for off-line consumption on demand.

It is extremely difficult to predict with any degree of accuracy which user group – or another yet undefined usage pattern - will be most accurate in which time period for which Member States. However, the split in audiovisual viewing between multi-channel and analogue-only households appears to be a reality already.

2.1.4 Multichannel Projections to 2009

Forecasts for digital television and pay-TV show the steady decline of analogue TV, the rise of digital TV, and the rapid increase in digital pay-TV.

- In 1989 when TVWF was first enacted, non-national satellite commercial television was in its infancy¹⁶ and ICT-based fixed-line methods of service

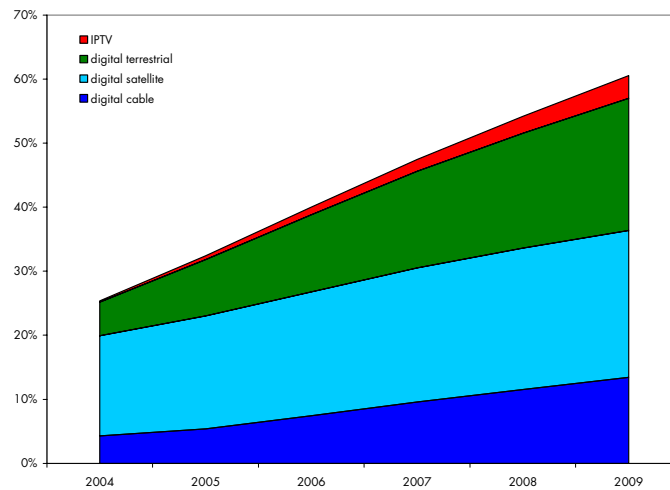
¹⁵ See for instance Arthur Andersen (2002) *Outlook of development of the Market for European audiovisual content and of the regulatory framework concerning production and distribution of this content* at http://europa.eu.int/comm/avpolicy/stat/tvoutlook/tvoutlook_finalreport.pdf

¹⁶ As opposed to reception of signals from neighbouring states via cable or terrestrial, as in the long-standing case of RTL's transmissions.

provision were not ready for market. In the 13 new Member States (both 1994 and 2004 enlargements) there were no commercial channels available nationally.

- By 1997 trans-frontier satellite commercial television was a common phenomenon and terrestrial commercial television held a greater share of viewing than public service broadcasters in most Member States.
- In 2005, trans-frontier satellite commercial television has drawn level with or overtaken local terrestrial broadcasting as the dominant player (with cable systems carrying both).
- The fall of analogue and rise of digital television make television operators increasingly aware of the value of free satellite (free DTH).
- The total number of digital pay-TV subscribers is expected to increase by more than 80% (from almost 30 million in 2004 to c. 54 million in 2008). Terrestrial and analogue pay-TV is expected to decline 25-30%. These developments are driven especially by the success of cable and satellite.¹⁷

Figure 5. Penetration of digital television in Europe, 2004-2009 (% of total TV households)



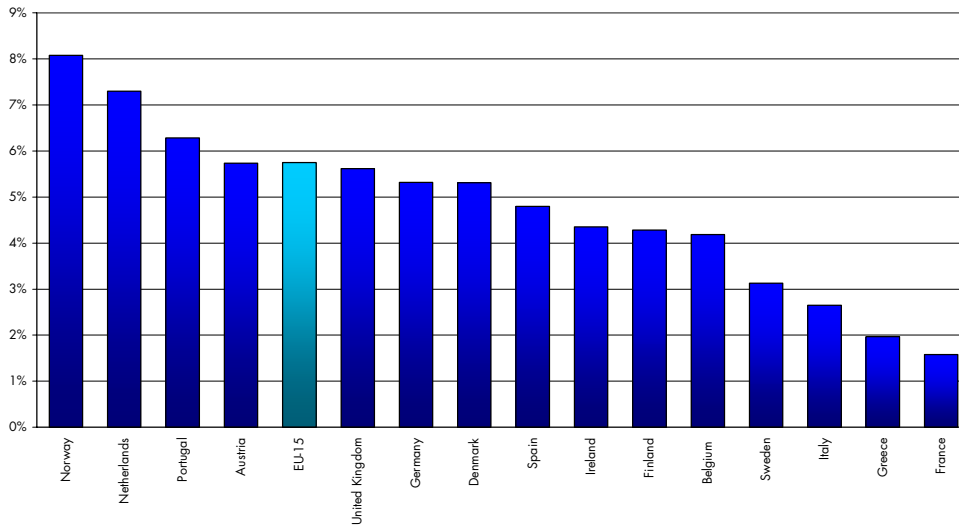
Source: Datamonitor.

- Forecasts for total digital TV penetration (free and pay) between 2004 and 2009 predict an increase in the average penetration in the EU-15, Norway and Switzerland from 25.9% in 2004 to 62.1% in 2009 (Datamonitor; Figure 5). In the Czech Republic, Estonia, Hungary, and Poland the current rate of penetration stands at 9.7% but is expected to increase to 26.6%.¹⁸

¹⁷ Screen Digest (October 2004).

¹⁸ Screen Digest (April 2005).

Figure 6. Compound average growth rate of TV subscription spending per household in the EU-15, 2004-2009 (%)



Source: PwC, Global entertainment and media outlook 2005-2009.

According to PwC, in most EU-15 Member States the increase in television subscription spending per household is expected to be between 4 and 6 % per year between 2004 and 2009. Only three countries will experience higher growth rates, while four countries score well below the EU-15 average (figure 6). This may be a function of market maturity (product awareness and acceptance or willingness-to-pay).

2.1.5 Advertising

The substitution of revenues from traditional media (newspapers and advertising-supported television) to more targeted media (direct marketing, Internet classified advertising, sponsorship and other forms of replacement for display advertising) has been compounded by a split in 2002-2004 between stagnation or decline in advertising revenues in the Euro-zone, compared with strong growth in northern and eastern Member States (table 2). Advertising is predominantly a reflection of consumer spending. This divergence may be expected to continue so long as consumer spending is weak in the Euro-zone.

The growth of television advertising is mainly fuelled by the increase in the number of channels and the number of multi-channel households. Out-of-home advertising grows especially on the basis of new billboard technologies and improved audience measurement. In addition, it has few natural competitors. Magazines continue to serve a steady market, based on economic growth and the introduction of new magazine titles. Newspapers are innovative but have reached a high level of maturity and coverage offline; online growth is rapid. The share of advertising for television may be at the beginning of a long-term slow decline in earlier liberalising countries, with that of offline newspapers stabilising (but not in late liberalisers where growth is still rapid). Internet advertising and computer games

revenues are the fastest growing share of media spending and are expected to continue to grow rapidly¹⁹.

Table 2. Share of multichannel advertising in total television advertising, 2000-2009 (%)

| | 2000 | 2004 | 2009 |
|----------------|------------|------------|------------|
| Austria | 10% | 19% | 27% |
| Belgium | 88% | 87% | 88% |
| Denmark | 26% | 34% | 43% |
| Finland | 2% | 4% | 11% |
| France | 4% | 5% | 7% |
| Germany | 6% | 8% | 10% |
| Greece | 0% | 1% | 1% |
| Ireland | 5% | 11% | 16% |
| Italy | 1% | 3% | 10% |
| Netherlands | 78% | 76% | 78% |
| Norway | 34% | 36% | 40% |
| Portugal | 5% | 7% | 11% |
| Spain | 2% | 7% | 11% |
| Sweden | 41% | 46% | 51% |
| United Kingdom | 17% | 20% | 28% |
| EU-15 | 12% | 15% | 19% |
| Czech Republic | 1% | 2% | 6% |
| Hungary | 15% | 17% | 20% |
| Poland | 4% | 6% | 9% |
| Romania | 0% | 3% | 6% |

Source: PwC, Global entertainment and media outlook 2005-2009.

Television and the Internet are gaining ground in the advertising market, both within Europe and on a global scale. The growth of Internet advertising is particularly vigorous (Table 3). The relative growth potential of the various media is related to the degree of technological innovation and the possibility of market expansion.²⁰

Internet advertising is highly innovative, using sponsored keyword search (e.g. top of a Google search query) and rich-media advertising. The continuous increase in the number of Internet users, broadband households, and eCommerce transactions mean that advertisers can reach a rapidly growing, sophisticated audience.

¹⁹ See Zenith Optimedia (2005) *Advertising Expenditure Forecasts*, July at zenithoptimedia.com

²⁰ PwC, *Global entertainment and media outlook 2005-2009*, p. 18.

Table 3. Compound average annual growth rates of advertising revenues in Europe 2005-2009 (%)

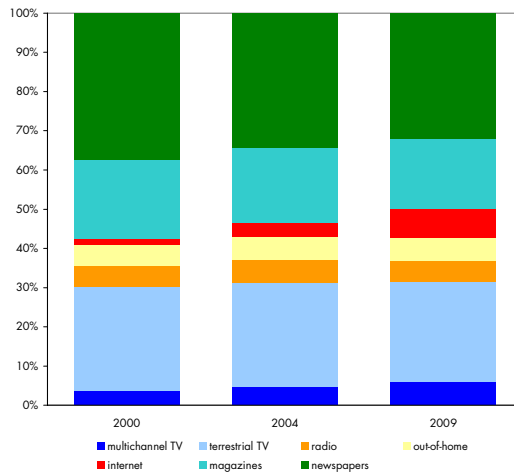
| | |
|-------------|------|
| Television | 6.4 |
| Internet | 22.2 |
| Magazines | 4.6 |
| Newspapers | 4.2 |
| Radio | 5.6 |
| Out-of-home | 5.6 |

Source: PwC, Global entertainment and media outlook 2005-2009.

The composition of European advertising revenues is changing accordingly (

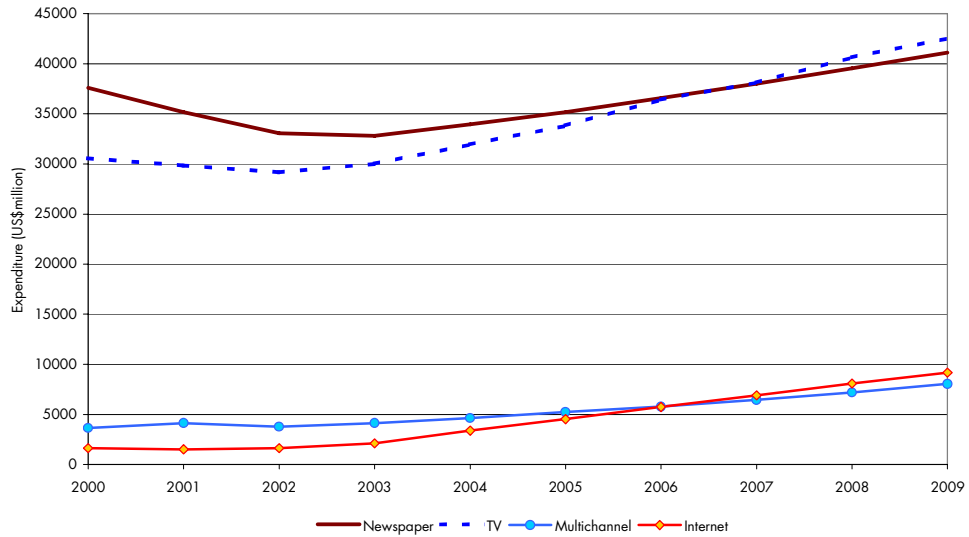
Figure 7). As a result of the difference in growth rates, the market share of newspaper advertising will experience a steady decline. Advertising revenues will, however, continue to increase. Magazine, radio and out-of-home advertising revenues maintain a steady share. Terrestrial television advertising is still newspapers' main competitor, but it is gradually being replaced by multi-channel TV advertising. Internet advertising is very much on the rise.

Figure 7. Advertising revenues in the EU-15 by segment of the media market, 2000-2009²⁰



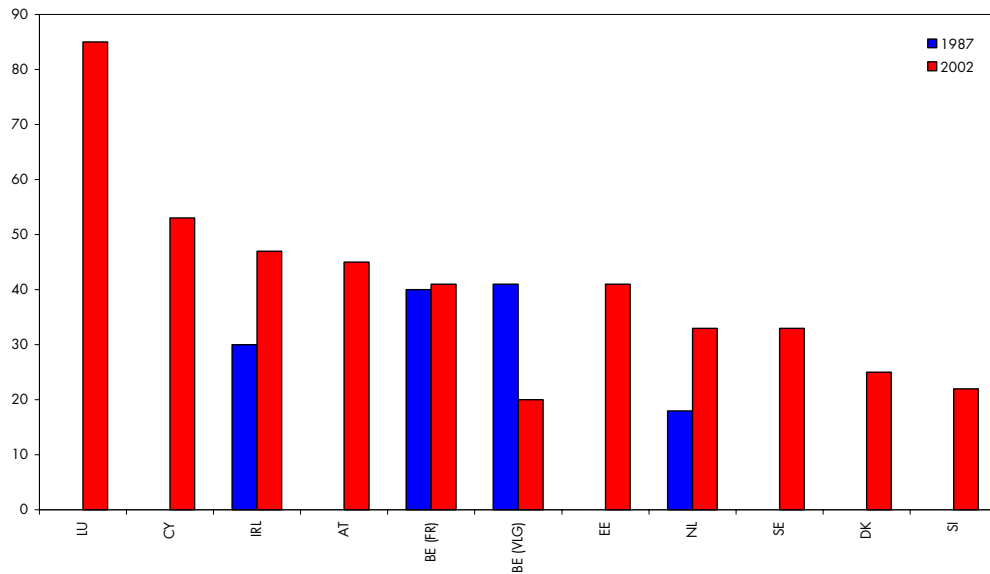
Newspaper advertising may be losing market share (a relative development), but after a decline between 2000 and 2002 its revenues have steadily increased and are expected to continue doing so until 2009 (Figure 8). Terrestrial television advertising follows the same pattern, at a slightly higher rate of growth. At a much lower level, multi-channel TV advertising and Internet advertising are making headway, but they will only begin to make a significant impact on the advertising market well after 2009, assuming that current conditions persist.

Figure 8. European advertising expenditure in newspapers television and Internet 2000-2009 (US\$million)



Digital television was first introduced via satellite and cable in the mid-1990s, then by terrestrial in 1998. By 2010-14 (i.e. within the lifetime of the revised Directive), most Member States are expected to have switched off the analogue signal in favour of digital, permitting much greater channel choice for all. This development has been accompanied by a vast increase in potential consumer choice. Cable and satellite television have multiplied the number of pan-European channels available to the average European consumer (figure 9).

Figure 9. Transfrontier television, 1987 and 2002



Note: Share of foreign channels on domestic markets. Source: European Audiovisual Observatory 2005.

2.2 Rationale for revision of TVWF

The market for European TV services has changed dramatically through the convergence of techniques and markets. These changes have been substantial, and by “just” continuing to keep TVWF “as is” the broadcasting services remain regulated, but have to compete increasingly with other linear and non linear services that offer content in many ways comparable with TV, that competes for time of consumers, and, consequently, for advertisement revenues.

We distinguish three classes of audio-visual media providers, relevant for the revision of TVWF: Broadcasting; other linear services (like web streaming, etc), Non-linear services (video files on demand).

The following overarching issues lie at the heart of the Impact Assessment’s logical organisation:

Better Regulation by reducing unnecessary regulatory burden and by responding to changing socio-economic conditions

- The 1997 Directive has -as predicted in policy discussion in the European Parliament and elsewhere during the 1997 revision- been overtaken by technological and market developments and has to that extent become obsolete. Adaptation to the new and further developing reality of converging technologies and markets needs to be addressed.

Support of the Lisbon objectives of sustainable growth and employment through further harmonisation of the Single European Market

- In order to provide an effective single market for audiovisual content, it may be necessary to reduce the regulatory burden on broadcasters while ensuring minimal standards for all audiovisual providers taking advantage of the country-of-origin principle and legal certainty of a revised Directive.

Responding to greater consumer choice and empowerment

- Consumers are now accessing content in more interactive and varied forms, whether
 - via television (using PVRs, digital television, subscription and pay-TV services),
 - via broadband Internet (streaming, on-demand and other types of video including interactive games), and
 - via mobile (where 3G networks now regularly offer a menu of streamed broadcasting as well as on-demand content).

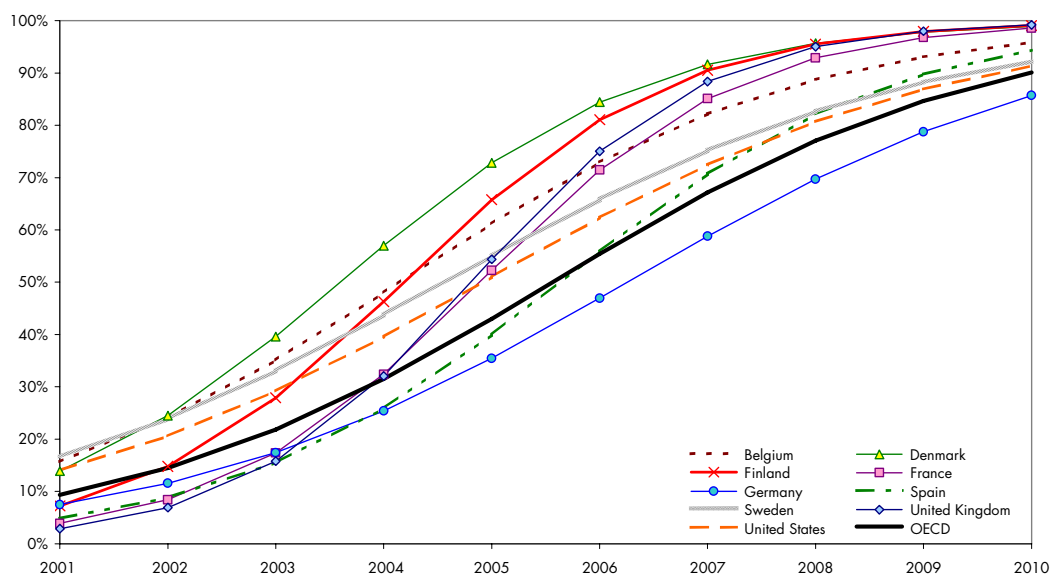
It may be appropriate to adopt a graduated approach according to the degree of choice and the legitimate expectation of the user, rather than regulate all audiovisual content in the same way.

2.3 The context for the TVWF Directive revision in 2006

Broadband adoption

One of the important markets that are influenced by the delivery of content is broadband. Non-users of the Internet indicate a variety of reasons for non-adoption of broadband, amongst them cost, simplicity of use, and harmful or misleading content. Their reasons for adopting broadband can be anticipated to diverge from those of existing narrowband users, and be more compatible with the public safety measures in the Directive than existing narrowband users²¹.

Figure 10. Growth of broadband penetration towards saturation 2000-2010



Source: RAND Europe Projections based on 2005 OECD dataset. Saturation of Internet population estimated at 1 citizen in 3 over the age of 18. In most European households, 2.4-2.7 adults inhabit. Taking account of the 10-20% of adults who have not used, nor intend to use the Internet, 1 in 3 is saturation of the adult Internet population.

Figure 10 demonstrates that for several major Member States, saturation will be achieved by 2008-2010. Under this assumption it is not likely that a revised Directive²² will affect broadband adoption by existing Internet users.

²¹ See for example Oxford Internet Survey (2005) at http://www.oii.ox.ac.uk/research/oxis/oxis2005_results.pdf

This is part of the 24-country academic survey, the World Internet Project, led by the Pew Center: <http://www.pewinternet.org/trends.asp>

²² Broadband speed demand is impacted by rich media application use as well as other factors. A 1Mb/s connection is obviously less useful for video files than 100Mb/s. However, guaranteeing speed throughout the IP transport is a highly technically challenging task that head-end theoretical access speed only partially reflects.

Better Regulation responding to changes in interactive advertising techniques

- The development of new advertising techniques and marketing innovations has led to proposals to offer greater flexibility and more effective opportunities for commercial communications in broadcast services, in order to better compete ‘on a level playing field’ with non-linear innovations.

Better Regulation in monitoring, enforcement and compliance

- Monitoring (especially under Articles 3,4,5) and enforcement of European and independent content production have to be made easier and more effective, where there are over 1000 European television channels and potentially millions of hours of archive available for on-demand distribution via various media, including emerging broadband and mobile IP networks. In particular, genre-based sites such as music, sports, teleshopping, computer gaming, gambling, news, and pornography might be excluded from such rules.
- Compliance has to be facilitated by consultation, leading to lowering the average administrative and regulatory burden on all stakeholders in line with the Better Regulation agenda. This includes particular attention to monitoring and compliance burdens on SMEs and new market entrants.

Creation of new Pan-European markets

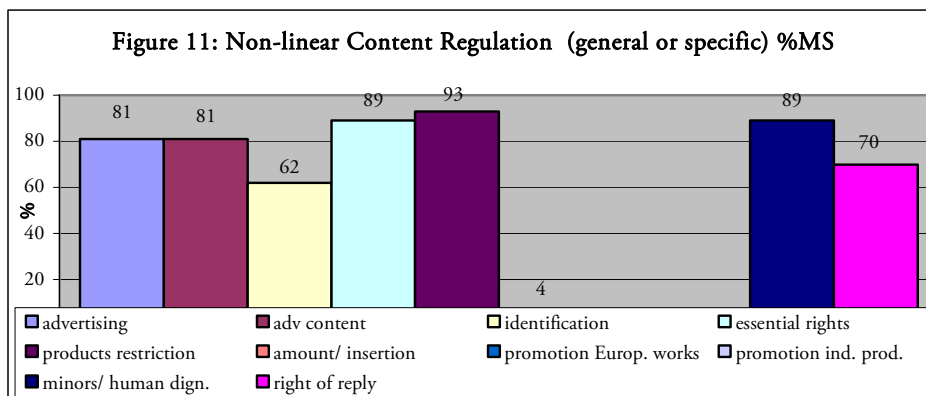
- New European markets may be developed using short extracts for non-national European news coverage. Non-national news suppliers and broadcasters do not appear to have made a compelling commercial offer to rights holders. Is it necessary for the EU to intervene to enforce access, when there is no proven market failure and consumers can draw their information from a host of different national channels broadcast on pan-European services?
- There are divergent Member State regulations for non-linear audiovisual services, with 19 out of 25 Member States having some form of regulation. Without a harmonised European approach, pan-European offers will suffer from a lack of legal certainty and may choose to offshore. Equally, where regulation is not imposed or consequently not enforced, regulation in this field might prove precipitate and motivate offshoring²³.

Existing legislation on non linear content in EU Member States

In order to understand how non-linear audiovisual services are currently regulated in the Member States, the European Commission conducted a survey of Member States, which produced a 96% response. The questionnaire asked whether legislation currently provides for regulation of the Internet in various issue areas. Figure 11 shows the results based on the 24 Member States which responded, which illustrates that while no Member State

²³ It is especially problematic that the data used in the most comprehensive sectoral inquiry by DG COMP, the 3G Premium Sports Rights investigation, could not offer any projections for substitution between markets in the period which interests us, 2008 onwards; DG COMP (2005). Whether online is in the same market as offline is an even less certain thesis. Furthermore, the survey of Member States regarding non-linear services establishes that legislation exists to regulate, but not whether any degree of enforcement activity takes place.

impose requirements on independent or European production, and only one on advertising limits, other basic requirements on advertising, protection of minors and human dignity are theoretically regulated. There is a non-linear right of reply in 14 out of 25 Member States, according to this survey.



Source: European Commission 2005

2.3.1 Challenges to TVWF in view of changed market conditions

The crucial questions that arise from changing market conditions are:

- Has the market changed from a suppliers’ market to a buyers’ market in which viewers and users have control of their viewing?
- Has the increase in consumer choice and channel capacity made the Directive’s provisions on broadcasting quota, independent producers, and commercial communications obsolete or impossible to enforce except via greater flexibility and co- and/or self-regulation?
- If linear streamed IPTV services and Internet-based content services such as VOD are drawn into the Directive, will consumers gain more power over their audiovisual consumption, will producers of European content gain better access at lower costs, and will the need for *market* intervention diminish?

Compliance is also a major issue. European broadcasting quotas are often not reached despite some improvements in the period since 1997, which is also true for independent productions²⁴. Potential alternatives to allocating more resources and regulation to monitoring and enforcement that may achieve a net social benefit, could be measures like market investment and targeted public subsidy for public service production.

2.4 What drives the problem?

The following drivers for change were identified as potentially being relevant for the TVWF revision:

²⁴ David Graham Associates (2002)

- Technological innovation (e.g. innovations in service delivery such as VOD).
- Convergence of technologies and services towards an Internet Protocol platform delivery with linear broadcast and non-linear VOD interwoven in the same content display.
- Divergence and household proliferation of reception devices, including PVRs, Personal Computers, digital decoders, mobile handsets, games consoles.
- Economic developments, for instance new business models such as those from peer-to-peer distribution, Internet video searches such as Google, and self-created content using consumer digital video equipment, hosted on websites and blogs.
- Search-related adverts (40% of all Internet advertising²⁵), direct response advertising (click-through), referral fees and other techniques that are more effective than broadcast advertising on a cost-per-thousand basis. (see Figure 9 and Zenith Optimedia 2005).
- Social and cultural changes e.g. new customer preferences in response to technological opportunities. The use of remote controls, ubiquity of video recorders, introduction of PVRs, and number of channels enables consumers to make their own choice about which content to watch and whether to interact with content using email, text or avatar.
- Lack of oversight and control on what children are viewing, without sitting next to them when they go on-line. The V-chip and similar age verification procedures and filtering are only in place in a minority of channels and households²⁶.
- Fragmentation of audiences is based on genre choice of viewing: sports, drama, news, documentaries, history, children's, archive, teleshopping, adult, music, fashion, consumer affairs, cinema. The minority trend towards pan-European content is reflected in the success of channels such as MTV Europe, Eurosport and Euronews.

2.5 Intervention logic

There are essentially two general reasons for public intervention:

- “Market failures” and “Regulatory failures”, which requires better regulation, and which concerns those things that, when left to the market, will not be provided, will have adverse effects, or will lead to external diseconomies or a skewed distribution of costs and benefits.
- Achieving fundamental goals of society, such as those explicitly expressed in the “Lisbon review”, including sustainable growth and employment, but also the

²⁵ See IAB/PWC (2005).

²⁶ See for instance SAFT Online <http://www.saftonline.org/latestnews/1373/> and <http://www.children-go-online.net/>

protection of fundamental human rights, especially for vulnerable groups such as children, minorities and the disabled.

In addition to this, EU policy makers are faced with two questions, namely whether or not it is necessary to regulate on a EU level and how far such regulation should go. These questions can be answered on the basis of five tests:

- *Treaty basis*: Does the EU Treaty give legal permission to the EU to take action?
- *Subsidiarity*: Can the problem be sufficiently solved by the Member State? At the EU level, the (potential) distortion of competition on the Single Market created by diverging national regulations is taken as the central rationale for EU regulation.
- *Added-value test*: can the EU better achieve the objectives?
- *Boundary test*: What can Member States achieve satisfactorily and what can the EU do better?
- *Proportionality*: One of the over-arching general principles of European law explicit in Article 5 of the EU Treaty, proportionality requires that the extent of regulatory intervention should not be more than is required to achieve the aim in question. This test demands an in-depth analysis of the service or measures concerned.²⁷

Barriers to competition as a reason for intervention

Example: The Single Market

Community action is often justified by the perception that differences in national regulations create barriers to competition on the Single Market. While these differences can mean that firms face different competitive conditions, the smooth functioning of the Single Market does not require that everything be harmonised, so this in itself is not sufficient grounds for a Commission proposal. To make the case for Community action you need to show that

- (1) the differences in national regulations lead to unfair competition on the Single Market, so that firms no longer face a “level playing field”
- (2) Member States acting alone are unlikely to remove the differences (perhaps because it is not in the interest of any one of them to make the first move)
- (3) the advantages of change outweigh the disadvantages (for example, costs of changing national regulations, costs to firms of changing production techniques or product specifications).

Source: EC, *A handbook for impact assessment in the Commission: How to do an Impact Assessment* (2004)

²⁷ European Commission *Communication: Principles and guidelines for the Community's Audiovisual policy in the digital age*, COM (1999) 657 final, 14 December 1999, 10.

2.5.1 **Specific application to broadcasting**

Why is it necessary to intervene in the audiovisual industry? Two elements are critical to understanding the intervention logic and functioning of audiovisual policy:

- Choice and Control
- Competition and Complementarity

Audiovisual content is a non-rivalrous product, as with all digitally reproducible products. Free-to-air terrestrial broadcast programming is perfectly non-rivalrous, which means that an additional unit of consumption by one consumer does not diminish the amount of available content for other consumers nor increase the cost of distribution.

As content will become more and more available on linear and non-linear services, access to these services will become easier to those who can afford both ways of access. It is expected to lead to a restriction of choice for those who have less to spend. Furthermore there is a restriction of choice due to services available within a specific geographic area.

The ability to remove these barriers to perfect choice and access via broadband networking will depend on:

- constraints on digitally secured rights management and clearance,
- availability of micro-payment, packaging and market supply,

There are therefore barriers to perfect competition in broadband access and content, which means that streaming and on-demand audiovisual content will face significant constraints in development as an alternative to traditional broadcasting, where those barriers don't exist.²⁸

2.6 **Regulatory completeness**

It is important to take into account the relationship of the Directive to other EU legal acts and initiatives. Several legal acts and initiatives apply, and the boundaries between one and another are not always clear, and sometimes fading because of market and technology developments. Annex 2 provides an overview of other European and international legal instruments relating to the Directive. It indicates how the Directive fits within the existing EU legislative framework, and where other Regulations and Directives of the EU touch upon the objectives of the Directive. It is important to consider whether the Directive is complementary to other EU regulatory measures, or not. Is there regulatory overlap or are there regulatory gaps?

²⁸ See generally Noam, Gernarg and Groebel (eds)(2003) *Internet Television*.

According to the Commission, there are primarily Internal Market objectives for the Directive, and the options in the six Issues Papers (IPs) prepared by the European Commission on this in July 2005 flow from the identification of those objectives in harmonising the Internal Market. This Chapter lays out the aspects and options identified by the Commission, and explains why RAND Europe chose to broaden the scope by considering one further option: deregulation at European level.

The six Issues Papers to which the remainder of the report will refer, which form the basis for the Commission's analysis and the options they chose, are:

IP1: Rules applicable to Audiovisual Content Services (Further developed under section 3.2.1: Scope: definitions);

IP2: Rights to Information and Short Extracts (Further developed under section 3.2.2: Access to information);

IP3: Cultural Diversity and Promotion of European and Independent Audiovisual Production (Further developed under section 3.2.3: European and Independent production of TV programmes);

IP4: Commercial Communications (Further developed under section 3.2.4 under the same title);

IP5: Protection of Minors and Human Dignity (Further developed under section 3.2.5: Protection of Minors and control of incitement to hatred), Right of Reply (Further developed under section 3.2.6 under the same title);

IP6: Media Pluralism

Media Pluralism is not discussed further, as there is no proposal from the Commission to address legislation (this is left explicitly to individual Member States).

3.1 **Basic aims of the Directive**

TVWF imposes requirements on market parties that supply pan-European audiovisual content services. It only covers commercial moving images (including public service television) and excludes all forms of non-commercial communication, private communication including the printed press and Internet websites, audio-only (radio, music, speech) and individual communication.

The Directive's requirements serve primarily Internal Market aims:

- a. Providing legal certainty for pan-European broadcasters based on the country-of-origin principle, thus harmonising existing national regulation;
- b. Encouraging the growth of a strong, competitive and integrated European audiovisual industry, complementary to the Lisbon goals;
- c. Supporting the growth of commercial communications' use of audiovisual as a medium;
- d. Supporting the development of independent European producers.

The provisions on basic identification and the country-of-origin principle support these Internal Market primary aims by requiring the audiovisual content provider to identify himself and by establishing jurisdiction to a provider within the boundaries of the freedom of establishment.

In addition, as a balance for Member States' needs to regulate audiovisual content and to provide a minimum common denominator for specific safeguards for the rights of individual viewers, the Directive also provides for:

- (2) *Social aims*: Protecting European cultural heritage and diversity, and promoting cross-cultural exchange and European content, where practicable.
- (3) Ensuring the protection of fundamental human rights as laid down in the EU Treaty. This concerns such rights as freedom of expression and freedom of establishment, but also includes access to information as well as the protection of minors and public order.
- (4) Consumer protection in terms of prevention of abuse of commercial communications as well as editorial abuse. Masthead or watershed requirements²⁹ and limitations and clear delineations on advertising are intended to make sure that viewers are not confronted with commercials inserted into editorial, biased, inappropriate or harmful images, or those that tend to incite hatred.
- (5) The right of reply provides citizens with the possibility to take action against unfair and inaccurate broadcasts without recourse to private legal action.

See Annex 3 for an edited version of the European Commission's specific objectives.

3.2 Proposed revisions

Based on publicly available data, we set out in this chapter the key differences between the 1997 Directive and the Issues Papers of the European Commission that were published in July 2005. The extension of various provisions in the Directive to areas other than traditional broadcasting, while simplifying and to some extent deregulating those

²⁹ Masthead refers to 'banner' advertising - the advertising provided across the top of a newspaper page, and now web page. Watershed refers in this context to the time of the evening (often 9pm) after which television viewing is expected to be under strict adult supervision, and after which time adult content may be presented.

traditional broadcast markets, are the major changes proposed to the Directive. Before analysing the problematique and identifying options for change in detail in Chapters 4 and 5, and the risks and threats to those options, we identify the object of the proposals: the specific Issues Papers' subject matter (see sections 3.2.2 – 3.2.8), and the vital issue of the scope of the Directive revision (see below, section 3.2.1).

3.2.1 **Scope: definitions**

For reasons of legal security it is essential to define as clearly as possible what the scope of the Directive and the proposed amendments shall cover. Table 1, Annex 1 discusses the underlying definitions of the proposal to ensure full transparency at the outset.

TVWF determines which Member State has jurisdiction over an audiovisual service and its provider in case of cross-border activity, instituting the country-of-origin principle without which broadcasters would need to comply with non-harmonised and fragmented rules for the several national markets they wish to serve. With changes in technology and market developments the system has become outdated. Non-linear services challenge current jurisdiction criteria, and Member State' ability to apply stricter rules or permit different advertisement techniques. There is evidence that Member States are imposing divergent rules on on-demand video content³⁰ and that a fragmented market for on-demand content may also therefore develop, for which harmonisation and the country-of-origin principle would provide legal certainty for pan-European services. The case for differential regulation of on-demand services due to the greater element of user choice may reduce the typically strong audience effect of linear audio/video services and thus could justify less regulatory barriers³¹.

The jurisdictional objectives of the review are:

- (1) to simplify administrative procedures and jurisdiction rules for Member States to implement and enforce TVWF;
- (2) to provide sufficient legal certainty to linear and non-linear audio/video service providers;
- (3) to modify existing criteria for linear services to accommodate technical development of digital satellite television;
- (4) to develop more suitable jurisdiction criteria for non-linear services;
- (5) to determine jurisdiction of competent Member States for non-established audio/video service providers and finally;
- (6) to provide legal certainty where companies hide behind the country-of-origin principle in order to circumvent national measures.

³⁰ See MS responses to Commission questionnaire on on-demand services, issued in Staff Working Paper July 2005.

³¹ See James Murdoch speech 21 September 2005 at the Liverpool Audiovisual Conference

3.2.2 Access to information

Access to information concerns measures for access to audiovisual information about events of major importance, and about access to short extracts.

3.2.2.1 Events of major importance

The Directive provides for a possibility for the Member States to adopt measures to ensure that a majority of the population has access to broadcasts of events of major importance on free television. However there have been problems with the interpretation of the provision that defines the Commission's role in the inspection of Member State lists of major events. Therefore the review has considered a possibility of introducing a provision stating that the Commission should endorse the national provisions setting out rules for the broadcasting of events of major importance to society, as notified by the Member States, by a formal decision and whether the concept of "a substantial proportion of the public" should be harmonised³².

3.2.2.2 Short extracts

The use of short extracts from a signal received in another Member State is a current practice in broadcasting, but regulations are not harmonized. Legal uncertainty acts as a barrier to the non-national use of short extracts, and where negotiated conditions exist, they can be expected to favour the stronger party (e.g. to the detriment of broadcasters that do not have the technical or financial resources required for buying short extracts)³³.

If a pan-European information right is to be introduced, the question is how, when and under which technical and economic conditions extracts should be released to non-national EU broadcasters. This needs definition and assessment against copyright and competition regulatory goals.

3.2.3 European and independent production of TV programmes

Independent and non-national European investment in programming can be seen to meet the Lisbon and i2010 agenda for European competitiveness³⁴. Issues arise regarding the indirect effects of fostering industrial competitiveness by regulation, not direct or tax-based incentives to invest³⁵. The key question here is whether an investment or catalogue quota in non-linear content is a proportionate response to new delivery platforms and user-defined content choice³⁶.

3.2.4 Commercial communications

Flexibility in commercial communications can substitute for long-term predicted decline in relative (not absolute) share of traditional TV advertising in the face of pay-TV

³² See responses to Issues Paper 2.

³³ See public service broadcaster and news agency submissions to the Issues Paper 2.

³⁴ See Commissioner Reding speech 22 September 2005 at the Liverpool Audiovisual Conference.

³⁵ See BBC response to the Issues Papers, and speech of Mark Thompson, Director General, at the Liverpool Audiovisual Conference.

³⁶ See Canal+ speech 21 September 2005 at the Liverpool Audiovisual Conference

subscription, PVR and Internet-based business models³⁷, as well as direct marketing, which have greater effectiveness in targeting niche audiences than broadcast advertising. This flexibility can include abolishing detailed minutage rules, permitting product placement and sponsorship for non-news/children's programming, and permitting deregulation of dedicated teleshopping channels.

Questions that the review must address are:

- Is this assumption justified by predictive trends?
- Under what conditions should product placement be accepted?
- Is non-linear commercial communications to be regulated in same way as linear – if the viewer chooses to request an alcohol advert, for instance?
- Is the liberalisation of rules for audiovisual to the detriment of the publishing industry's display advertising revenues?³⁸

Regulating teleshopping provides further challenges: Given the plethora of video-supported commercial websites, should teleshopping in non-linear media be regulated? Is greater flexibility required in linear teleshopping?

3.2.5 **Protection of minors and control of incitement to hatred**

The review's objective is to establish minimum rules for non-linear services in view of the same public policy objectives, that is, to make the protection independent of the mode of transmission or the platform that is used to offer audiovisual content services. The regulation should find the right balance between protection and freedom of expression. It must also determine what services it will cover: for instance video blogging supported by syndicated advertising is a US business model that is developing – should such innovative content types be subject to a basic tier of rules?

The number of programming channels of delivery has increased to the point where it is no longer possible to systematically control everything that is offered via linear and non-linear channels. The Commission monitors the proportionality of measures taken to implement TVWF's provision on the protection of minors. Parental control over and knowledge of children's viewing behaviour is declining as:

- children watch more television without supervision,
- children increasingly watch genres (e.g. music, lifestyle, drama) other than those specifically targeted at them, and
- access to content is individualizing through private access to audiovisual content over: additional household television sets, the Internet, and Internet- and/or video-enabled mobile phones.

The same increase in choice made possible by digital technologies hinders regulatory authorities in their control of incitement to hatred. The overlap between the Protocol to

³⁷ See ITV Chief Executive Charles Allen speech 22 September 2005 at the Liverpool Audiovisual Conference

³⁸ Note that publishing has seen a substitution of its classified advertising revenues by online competitors, including subsidiaries of publishing companies. It also is experiencing a long-term trend towards targeted controlled circulation (i.e. free) publications, in both business-to-business and consumer markets, including metropolitan and weekly newspapers. There is therefore substantial churn in this market.

the Cybercrime Convention³⁹ and its implementation in national criminal law, and the protection against incitement to hatred, is problematic in various jurisdictions where regulatory controls on such speech are illegal.

3.2.6 Right of Reply

Like the protection of minors the right of reply is considered a basic requirement. However it is not yet guaranteed in non-linear services on a European level. Enforcement costs are still a major barrier to exercising individual and broadcaster rights. It is considered to extend the right of reply to all providers of audiovisual content, linear or non-linear.

3.2.6.1 Identification and masthead provisions

In order to be able to reply, it is important to know where you get your information. The Electronic Commerce Directive (ECD) 2000/31/EC⁴⁰ contains provisions obliging webmasters to display the name, address and contact details for providers of e-commerce services. There is a substantial lack of awareness among Internet operators in the EU of the requirements regarding the provision of a service provider's identity and place of establishment, even though the ECD has already defined this requirement and Member States and European Economic Area countries have transposed it literally. Compliance with this requirement is extremely weak according to the 2003 Implementation Report. Broadcasters who do not have this obligation may be required to fulfil the obligation in respect of their broadcast services. The only area in which this appears to be problematic is in the use of small displays such as current generations of mobile telephones. It is essential in implementing rules to find practical solutions.

3.3 Policy Options

Having assessed the core proposals and the objectives that the Issues Papers set out for achieving those stated aims, the next step is to consider the various options available, and test them against the available economic evidence. Socio-cultural and political evidence needs to be added to this, in conformity with Commission guidelines. We identify a deregulatory option, as well as those the Commission has pre-defined, namely status quo and three more regulatory options.

This leads to the following list of options:

(1) Deregulating the Directive

This option depends on the analysis of the intervention logic. From the perspective of the Single market in audiovisual services, basic human rights, and consumer protection, this is no option for the entire Directive, but a lower level of

³⁹ Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems CETS No.: 189 at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=189&CM=8&DF=10/02/05&CL=ENG>

⁴⁰ http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf at Article 5.

regulation or co-regulation may be a valid option for individual provisions where Member States can demonstrate their effective oversight.

(2) *No policy change*

Every impact assessment has to consider a scenario in which nothing changes –the status quo. It may disregard the stated reasons for revision, but provides a benchmark for the assessment of differential impacts: will a change in regulation achieve more favourable impacts?

(3) *Revision to encompass linear audiovisual content services*

Revise TVWF to make the advertising rules more flexible and to update the definitions in order to ensure that all services similar to television are covered. The Directive would not encompass non-linear services.

(4) *Comprehensive framework with graduated treatment of linear and non-linear services*

The Directive would create a comprehensive framework for any form of electronic delivery of audiovisual content, but will treat different types of service (specifically linear and non-linear) differently. Non-linear services will be subject only to a basic tier of rules rather than to the entire body of Directive provisions.

(5) *Full harmonisation with equal treatment of linear and non-linear services*

Introduce an audiovisual content services Directive that treats all types of services on an equal basis. Every provision of the Directive –from the country-of-origin principle to the requirements for European and independent production– will apply to every linear and non-linear provider alike.

The impact assessment will look comprehensively at options 2, 3 and 4, and will consider the first option of deregulation only in specific cases where there may be reason to reconsider the intervention logic of the Directive. The 5th option considers full harmonisation in the entire audiovisual industry, which is very ambitious, but also unrealistic taking into account the character of the highly diverse, rapidly evolving industry, and is therefore no longer considered.

Table 4 explains in what ways the options differ from each other, which is the basis for our analysis. Focus of the table is European level regulations. Where the table states “National”, there is national legislation in (some) Member States⁴¹, but no European level sector specific legislation.

Where “TVWF” is indicated, the current scope of TVWF applies. The cells marked with “Audiovisual Directive” indicate where the TVWF is extended to non-linear content.

⁴¹ See Table of Member State responses to non-linear questionnaire in Chapter 2.

Table 4. Regulatory Options and Regulation of Classes of Audiovisual Media Providers

| | Option 1 – Repeal TVWF ⁴² | Option 2 – current situation | Option 3 – TVWF update ⁴³ | Option 4 – 'Audiovisual' ⁴⁴ |
|---|--|----------------------------------|---|--|
| Broadcast | National, enforced through license | TVWF | TVWF | Audiovisual Directive |
| Linear – e.g. web streaming – other than Broadcast | National – where enforced | TVWF/National – ⁴⁵ | TVWF | Audiovisual Directive |
| Non-linear e.g. video on demand | National – ⁴⁶ | National | National | Audiovisual Directive: basic tier requirements |

Beyond the national legislation in different Member States (which is not directly affected in any of the options) there is a combination of international treaty obligations⁴⁷, national laws⁴⁸, state-firm negotiation on trading conditions (for example public broadcaster license fees or inward broadcaster trading conditions absent country-of-origin)⁴⁹, bilateral co-operation between countries⁵⁰ and both national and international co- and self-regulation⁵¹. This is summarised in the table in Annex 2.

The starting point for the analysis is the current TVWF, which we now analyse for its impacts on stakeholders, specifically by each of the options, which the Commission prescribes. We explain the options and the stakeholders in the next chapter.

⁴² ECD remains in force

⁴³ New definitions with all linear services covered; more flexibility for commercial communications.

⁴⁴ Covering all linear and non linear audiovisual media services and supra n.40.

⁴⁵ Note unclear legal status following *Mediakabel v. Commissariaat voor de Media* (Dutch Media Regulatory Authority Case n° C-89/04).

⁴⁶ Supra n.33. Example: 2% investment quota on France VOD.

⁴⁷ See Table in Annex 2, including Council of Europe and other obligations.

⁴⁸ Including criminal law and constitutional requirements (freedom of expression and privacy laws).

⁴⁹ Examples from pre-Directive era are cited in Hoffman-Riem, Wolfgang (1996) *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* Guildford Press. Also in Noam, Eli M. (ed.) (1985) *Video media competition : regulation, economy, and technology change* Columbia University Press

⁵⁰ Notably in neighbours with a shared language.

⁵¹ Numerous examples expressed in contributions to Directive revision consultations.

4.1 **Stakeholder analysis**

RAND Europe assessed the stakeholder responses to the six Issues Papers published by the European Commission against economic impact. This led to a systematic tabling of impacts as reflected in Annex 5. In order to complement the analysis interviews were held with many of the stakeholders at the Liverpool Audiovisual Conference 20-22 September 2005. The Impact Assessment is based on that qualitative evidence, and complemented with evidence gathered from the quantitative sources outlined in Chapter 2.

The Commission identifies five major groups of stakeholders. Some will be directly involved in implementing the Member State regulation, based on TVWF others are affected indirectly.

- (1) *European Union*: sets minimum standards for audiovisual content regulation.
- (2) *Member States*: formulate and enforce national regulations based on (and in accordance with) the Directive.
- (3) *Viewers and Consumers*:⁵² The Directive is partly responsible for the quality of content that is presented to individual viewers, although it is up to the individual consumer to decide which channels, programmes, and modes of delivery they use. Households pay for audiovisual services. The Directive does not affect national licence fees, but the costs of its implementation may be passed on to consumers.
- (4) *Service providers*: Companies (public and private) that package audiovisual and other content to consumers. This concerns, for example: Public Service and Free-to-Air Commercial Broadcasters; VOD providers (TV cable companies and broadband providers such as FastWeb and HomeChoice); Pay-TV operators; Internet Service Providers which also produce content; Printed press publishers (with online distribution of content); other potential market entrants from Internet and other video delivery media.
- (5) *Content providers*: Producers of the actual audiovisual content, such as: the cinematic industry (large and small); other rights holders (creators, performers,

⁵² A distinction between “Viewers” from “Consumers” can be based on whether the viewer is acting as a citizen primarily or a more non-political consumer.

sports) and independent programme producers; streaming IPTV companies; and other linear programme packagers (editorial function) and Channel aggregators and advertising sales.

4.2 Implementation, compliance and enforcement

The direct costs and benefits of the Directive arise from the way in which its provisions will be implemented by the Member State, the actions that stakeholders will have to take in order to comply with obligations and requirements, and the need for monitoring and enforcement by the Member State to counter (the risk of) non-compliance.

We have made a first assessment of the issues of compliance and enforcement based on three questions:

- (1) What do companies have to do to comply?
- (2) How much does it cost to comply with each individual provision of the Directive? If we cannot attach a specific amount, we should at least indicate if it is trivial or expensive.
- (3) How do Member States enforce the regulations that derive from TVWF? And how much does it cost?

Quantitative estimates of the costs of compliance, monitoring and enforcement are largely unavailable, which is why our analysis is restricted to an assessment of magnitude (marginal versus significant) and direction (plus or minus), where plus (+) indicates positive net revenue effect and minus (-) negative net revenue effect.⁵³

Annex 4 shows a high-level prognosis for financial compliance, cost-benefit analysis and Member State enforcement of proposed issues that might be applied to non-linear audiovisual content services. It does not consider linear services or non-financial costs and benefits.

4.2.1 Co- and self-regulation

Co-regulation and self-regulation are becoming increasingly important in regulating the media sector in the Member States and at the EU level. The term co-regulation encompasses a range of different regulatory solutions that contain a complex interaction between general legislation and a self-regulatory body. In self-regulation this interaction is less formalised, but without at least a threat of government intervention –in case of disagreement between market players– self-regulation would not be effective.

Various studies have been conducted or are still ongoing to assess the effectiveness of new self- and co-regulation schemes. All agree that the traditional form of command-and-control regulation is losing its effectiveness, because of e.g.:

- the need for rapid and flexible response to fast changing markets and technology;
- inability to take account of stakeholder interests;

⁵³ This does not account for socio-political benefits.

- ineffectiveness in stimulating creative processes;
- the increasing complexity of society;
- a growing knowledge gap of the public sector; and
- trends triggered by globalisation which make nationally oriented regulation increasingly ineffective.⁵⁴

Thus the need is clear, but the effectiveness of co- and self-regulation is by no means certain and some basic requirements for such schemes are emerging. First and foremost there must be sufficient incentive for industry players to want to self- or co-regulate. Primary incentives are improving market penetration and/or to prevent the need of statutory regulation (www.selfregulation.info). At the same time co-regulation needs to have effective implementation and enforcement instruments, processes and institutions to achieve the objectives of the regulation and in particular to safeguard the expected level of protection of citizens, against inappropriate and harmful content. Balancing the self-interest of the industry and the greater societal aim of regulation is at the core of effective self- and co-regulation.

Regimes must be adapted to the needs of each sector and other circumstances. The website www.selfregulation.info lists a number of minimum requirements for co-regulation to be effective in the media sector.

- (1) Co-regulatory regimes should follow guidelines for transparency and access to information, similar to those applied by public and government bodies, according to international best practice.
- (2) Self-regulators and co-regulators should provide summaries of complaints by clause of code of conduct, numbers and findings of adjudications on their websites.
- (3) Sufficient funds and resources should be made available: if the regime is fully financed by market players the independence of the regime should be guaranteed explicitly.
- (4) An auditing procedure should be applied for establishing self-regulatory institutions and codes to increase control and legitimacy.
- (5) Boards of self-regulatory schemes should include laymen and contain a minority of industry professionals.

There are cases where co-regulation might not be effective or have adverse effects that need to be taken into account. In regulating free speech, self-regulation is less accountable and may not sufficiently guarantee the protection of the positive right to free speech. It also needs to be noted that the Internet Service Providers' (ISPs) response to recent surveys and calls for self-regulation has been very meagre, due to lack of resources devoted to this topic. Effective audits of self-regulation of ISPs are called for. In addition the relationship

⁵⁴ Shulz and Scheuer (2005) First Report to DG INFSO pp.1-2

between industry self-regulation codes and user-based solutions (filters, media literacy, hotlines, trustmark accreditation) needs to be strengthened.

These considerations and uncertainties on effective application and enforcement of co-regulation schemes must be taken into account when assessing possible impacts of proposed regulation.

Applying a two-tier approach to non-linear and linear services would imply that more space is left for self-regulation in non-linear services. Whereas linear services have a strong element of supply side control, non-linear services leave the choice of what can be viewed to the potential viewer. It is therefore likely that customers/viewers will be more active in protecting their interests and shaping their use of such services to suit their needs. The element of choice that is at the heart of these services makes them more suitable to self- or co-regulation and user-based solutions like filters and trustmark accreditation. So far the industry has not been very active in self- or co-regulation, as pressures from users have not been sufficiently targeted, or intense, nor has the ambivalence of users hampered market penetration and the development of new services.

4.2.2 **Uncertainty and effectiveness**

The economic impacts of the Directive occur through a series of regulatory and market layers and each layer introduces a further degree of uncertainty.

- *European Commission:* The Directive imposes minimum standards of regulation and a certain degree of harmonisation, but Member States decide on the actual level of regulation and on methods of implementation, monitoring, and enforcement.
- *Member State:* Actual implementation is done on a Member State level, but the audiovisual content providers, that are the subject of the Directive, are free to choose their country of establishment. The predominantly national character of linear broadcasting does provide a degree of predictability (e.g. a French channel most likely will not opt for an office in Poland), but this may not be the case for non-linear service providers.
- *Viewers and consumers:* audiovisual media services are intangible and non-rivalrous. With the advent of non-linear delivery, consumers can view what they want, when they want, depending on their access and willingness-to-pay. Watersheds and acoustic signals can be ignored, parental control can fail, the availability of European content does not guarantee that it will be seen, advertising can be skipped or ignored, and so on. The viewer is in many ways both a passive party with respect to the Directive and in control with respect to its impact on the economy and society.
- *Service providers:* Companies that supply the audiovisual content industry with non-content services (e.g. satellite uplinks; advertising agents; marketing consultants; DVD producers; web designers; etc.) depend on the development of audiovisual content service providers, but unless they are small and work for national or local niche markets, they are not bound to national markets or specific companies. Their development is affected by the response of the audiovisual content industry, but the relationship is not direct.

- *Content providers:* The industry has to meet the requirements defined in the Directive and imposed by national regulation, but can postpone such regulation “where practical” and “by proportionate and appropriate means”.

4.3 Assessing the nature and magnitude of likely impacts

Below we assess the economic impacts of the four options by considering the theoretical impact, making use of currently available economic data to underpin the analyses:

- Option 1: Deregulation
- Option 2: No change in regulation
- Option 3: Minor revision
- Option 4: Comprehensive framework with graduated treatment of linear and non-linear services

Table 5 compares the scope of each option with reference to the six Issues Papers.

Table 5: A comparison of the four options and the issues identified in Chapter 3

| | Scope | Access to information | European and independent production | Commercial Communications | Protection of Minors | Right of Reply |
|------------------|------------------------|--|--|---|-----------------------|--------------------|
| Regulator Intent | Definitional certainty | Access to major news events (especially sport) | Ensure investment/time quota devoted to EU works | Flexibility | Minimal harmonisation | Editorial Fairness |
| Option 1 | Decreased | No EU | Monitoring | Liberalised | Self-regulation | No EU |
| Option 2 | Unchanged | No EU | Unchanged | Monitored | TV | No EU |
| Option 3 | Linear | Linear | Two tiers: non-linear phase in | Extended | Linear | Linear |
| Option 4 | Comprehensive | Comprehensive | Comprehensive | Two tiers: Across all commercial audiovisual Internet sites | All Internet | Comprehensive |

Media pluralism is not included as there are no proposals for regulatory action, other than ongoing monitoring. In line with current impact assessment practice within the Commission we consider five issues across the four options for each component of the proposed new Directive:

- (1) **Compliance:** What do various parties have to do to implement the Directive? How does this differ from current practice? What will the impact in terms of compliance costs (a direct effect)?
- (2) **Enforcement:** Who will be responsible for monitoring and enforcement? How many resources and manpower will it require?
- (3) **Stakeholder response:** How will stakeholders who will be (or already are) directly involved in or targeted by the Directive respond to the requirements it imposes? What will be the costs and benefits of their compliance (indirect effects)?

- (4) **Indirect effects:** What will be the impact of compliance and stakeholder response on other parties in the value chain (e.g. manufacturers of household equipment and consumer software; advertising brokers; satellite operators)?
- (5) **Impact on consumers:** What will the various economic impacts do for consumers? Will costs and benefits be transferred to households? Will the quality of service and the variety of choice increase?

4.3.1 **Deregulation of broadcast, other linear and non linear services in Option 1 & 2**

Before considering the effect on broadcasters of the removal of ‘country-of-origin’ and other Internal Market measures in TVWF, we consider the effect of a relatively untrammelled free market in linear and non-linear audiovisual content. We accept that this free market will be distorted by competitive distortions and substitution effects in, for instance film and premium TV markets, where the dominant broadcast market is likely to determine contractual terms for rights holders in dealing with the much smaller Internet-based market. However, it is an extremely useful exercise in identifying market failures and thus rationales for extending the scope of TVWF in Options 3 and 4.

We note that Option 1 does leave the possibility – indeed, inevitability - of national regulation for broadcast. Economic analysis must consider this, but in order to identify the core economic drivers, first we consider markets that might be totally unregulated, as Internet-delivered video has done to date in both hypothetical deregulation (Option 1) and current status quo (Option 2, section 4.3.1.1). After that we focus on specific issues related to Option 1 (section 4.3.1.2), and to Option 2 (section 4.3.1.3).

4.3.1.1 **Common elements Options 1 and 2**

Without even national regulatory constraints on programming, the market will dictate developments: the potential advertising revenues attached to specific types of audiovisual content will reinforce consumer preference. This does not necessarily accompany decreasing cultural diversity:

- a large proportion of programming is language specific,
- regulations on European content do not ensure diversity of programming within Member States (e.g. with sufficient room for political alternatives or ethnic minorities).

Market segmentation may increase, with distinctions between specialized ‘channels’ and more general ‘channels’, and between small new entrants (e.g. building market share by focusing on biggest sellers regardless of cultural content) and major incumbents. Note Articles 4 & 5 for European and independent works exclude “time appointed to news, sport events, games, advertising, and teleshopping”, already leaving content service providers many niche genres to exploit in the presence of pan-European regulation.

Right to reply: Especially larger providers may provide their consumers with the right to reply as part of their customer service and to support their public image⁵⁵. Smaller players may institute broad non-liability notices in order to avoid consumer lawsuits.

⁵⁵ As is currently the case for MSN and AOL to take two prominent examples.

Identification requirements: Audiovisual media service providers may comply voluntarily since ISPs are already required to comply with the same requirement in the ECD⁵⁶.

Protection of minors and human dignity: The vast majority of commercial audiovisual content providers will self-regulate. The small number that operate otherwise legally and still maintain commercial presence in the EU – which will mainly impact issues of human dignity and public order– can have a large disruptive effect on society and on consumer confidence in content providers in general.

Advertising: there will be a degree of self-regulation for individual stakeholders

- Advertisers want to reach a large audience, which is in turn dependent on the attractiveness (or “competitiveness”) of the audiovisual content.
- The market will therefore tend towards an optimum level of commercial communications in terms of the length and number of commercial breaks⁵⁷ and equilibrium is likely to be reached, with rogue channels choosing to exceed minutage where the audience is captive (i.e. hit series or premium content)⁵⁸.
- Without regulation, there would, however, be a proliferation of new and possibly consumer-detrimental methods, including subliminal and surreptitious advertising, explicit sponsorship and product placement with the intent to sell, etcetera. In addition, advertising for medicines, medicinal treatments, alcohol, and tobacco could return (where now prohibited) or become more aggressive (where now tempered). Audiovisual ‘spam’ may result.

Indirect Effects

National law will always demand some regulation of the protection of minors and human dignity, even when it is not harmonized. However, there may be an increase in consumer demand for software and hardware intended for filtering and blocking linear and non-linear harmful content, which benefits the manufacturers of consumer electronics and computer software as well as the computer service industry, but increases complexity, cost and lack of trust amongst consumers.

⁵⁶ See First Implementation Report on the ECD (2003) for evidence that compliance is not uniform or comprehensive, and www.selfregulation.info for evidence of lack of regulatory commitment amongst some actors in many MS.

⁵⁷ When substitution effects of other media (radio, Internet and recorded media) are included, these also act as restraints on television advertising. By contrast, newspapers and print magazines can carry far larger proportions of advertising.

⁵⁸ Advertising revenues are a function of two variables: available space and the price per slot or minute. The price is determined by the scarcity of advertising space and the size and composition of an audience. In the market for normal goods and services, the market can essentially be infinite (determined by the total number of potential customers), but in audiovisual advertising the market is finite (determined by the number of minutes per hour). The result will be backward-bending supply and demand curves: suppliers of advertising space (audiovisual content service providers) will not want to sell all their time to advertisers, because their primary product is audiovisual content and the amount of commercial breaks is one of the determinants of its attraction on consumers.

To the extent that the current provisions on broadcasting quotas make a positive contribution to the European audiovisual content industry, deregulation will eliminate this contribution. The impact will depend on the nature of the contribution:

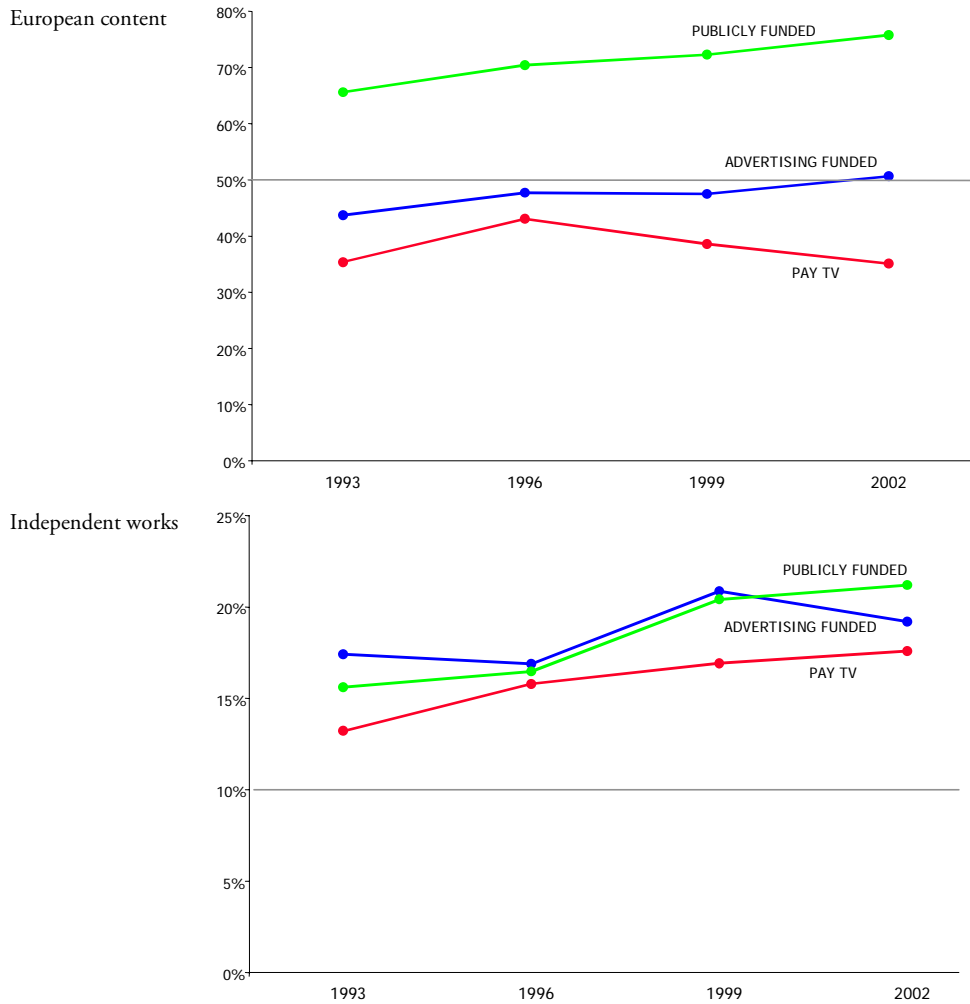
- The Directive provides non-market support to the industry and its removal forces it to produce more competitive content in more efficient ways. A possible outcome is a separation in the market between major companies producing for the mass market, and small companies (possibly including independent producers) focusing on niche markets (either in the production of niche programmes or in the development of programming templates or formats)
- The Directive offers the European audiovisual industry the opportunity to compete on an equal footing with non-European competitors (notably American majors) so that without the guarantee of a majority market share the industry will have to restructure.
- The Directive has no significant impact on the industry. Compliance comes naturally for most broadcasters, although more so for public broadcasters than for commercial cable and satellite companies, who are interested more in the attraction of programmes to advertisers than in its cultural content.

In the first two cases deregulation will result in a loss of employment and a decline in revenues, after which the industry could emerge stronger and more viable than before. The third option suggests that the European audiovisual industry is potentially healthy, although this begs an answer to the question why profit margins have declined, to which the thesis applies that supranormal profits previously accrued to free-to-air channels⁵⁹. The main issue in the promotion of the distribution and production of European content is, however, not the removal of market failures but the protection of European cultural diversity and identity in audiovisual content.

Sample data collected by David Graham and Associates shows that compliance is not an issue where it concerns independent works and that the share of European content is rising in publicly funded and advertising funded channels (Figure 13). Only pay-TV channels present a problem in that European content has been losing market share since 1996.

⁵⁹ Note levels of profits in free-to-air commercial television with little competition in the period following liberalisation, see European Audiovisual Yearbook 2005.

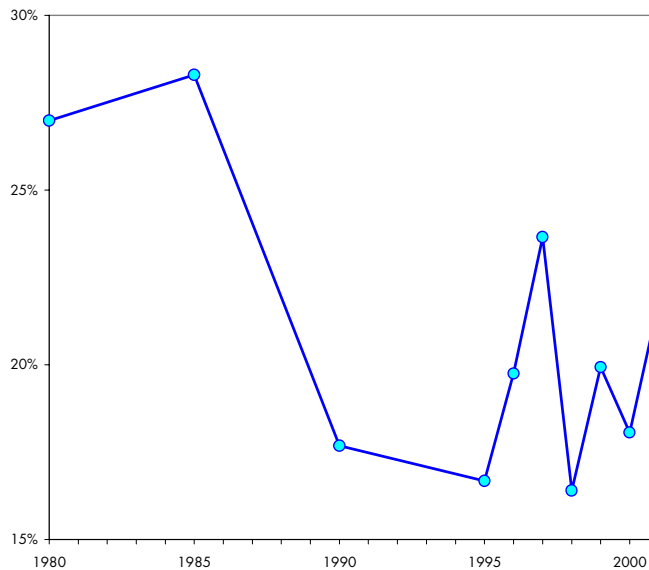
Figure 13. Compliance with broadcasting quota



Source: David Graham and Associates (October 2004).

There was strong decline in the market share of national films during the second half of the 1980s (Figure 14). After 1995 the industry recovered, but it remains to be seen if the apparent upward trend will persist and if this trend is in any way connected to TVWF.

Figure 14. Share of national films in total gross box office receipts in 10 EU Member States, 1980-2001



Note: The ten countries are Belgium, Denmark, Germany, Spain, France, Italy, the Netherlands, Finland, Sweden, and the United Kingdom.

Source: Eurostat, *Cinema, TV and radio in the EU: statistics on audiovisual services. Data 1980-2002* (2003).

The volume of feature film production in the EU-15 has increased significantly since 1994 from a total of 511 films in 1994 to 773 in 2001 and 926 in 2004. In Central and Eastern Europe production has also increased, albeit at a much slower pace.⁶⁰

Withdrawing support for independent producers may result in a decline in the production and distribution of alternative and innovative programmes, especially in niche markets other than on a regional or local level.

Impact on consumers

Revisions in the area of the right of reply, the identification requirement, and the protection of minors and human dignity have an economic impact by affecting consumer confidence.

- Without the right of reply, citizens will lack the means to confront perceived unfairness other than through national law. Without the right of reply and a universal identification requirement it will be far more difficult for citizens to ask for rectification and compensation. Legal costs will be higher, which creates an inequity between those with the access to and means for legal action and those without. For some providers such considerations may be a reason not to voluntarily provide a right of reply.

⁶⁰ In 2004 the share of domestic films in the local market was highest in France (39%), between 20 and 24% in the Czech Republic, Germany, Denmark, Sweden, the UK, and Italy, 17% in Finland, 13% in Spain, 11% in Poland, and below 10% in all other EU MS. Screen Digest (June 2005).

- Even though the right of reply does not directly involve the consumption of audiovisual services, and the associated cases will most likely concern only a fraction of the audience, news surrounding such cases will tend to lower consumer confidence in audiovisual services other than those provided by major, well-known (incumbent) service providers. Thus, deregulation can strengthen the position of large incumbents (mainly linear) opposite smaller new entrants (mainly non-linear).
- The absence of an identification requirement will have little impact on linear service providers whose products are purchased in packages (e.g. satellite multiplex; cable subscriptions), but consumer confidence in online services without identification can be an obstacle to the purchasing of non-linear services.
- Deregulation will move the protection of minors and human dignity into the realm of consumers, and consumer choice may become the main determinant of viewer exposure to harmful content (e.g. incitement to hatred and discrimination, pornography), although the industry will self-regulate and a lot of content will remain protected by decoders and authorisation mechanisms.

Access to information, commercial communications: In the absence of regulation, market mechanisms will be expected to deliver the underlying social and economic goals.

- Some, or many events of national importance may become accessible only on condition of payment. Unless public broadcasters purchase rights (such as happens in the Olympics), a proportion of the European audience will be denied access to audiovisual content (although they will be able to read about events in newspapers and on the Internet). The costs of access will consequently also rise (the highest bidder wins), even though consumer access costs will not be prohibitive but tend towards an optimum that is determined by the need for subscription revenues and advertising revenues (that also depend on audience size).
- Consumers may be faced with higher costs imposed by a suppliers' market for short extracts, unless pan-national regulations allow free resumption or (bilateral) agreements on resumption of short reports are reached.

4.3.1.2 Option 1: Deregulation at EU level

Compliance and enforcement

Compliance and enforcement will no longer be a European issue. This liberates resources (lowering costs) among stakeholders (a private gain) but increases coordination costs for governments if it is replaced by bi- or multilateral agreements (a public loss).

The loss of the country-of-origin principle means that pan-European broadcasters will be forced to negotiate with the country of reception even when located in a 'regulatory entrepot', a Member State with relatively liberal rules. This will be a return to the situation prior to 1989, when different national laws allowed commercial channels to operate in an entrepreneurial but potentially expensive environment. The main impact is likely, as before, to be on transmissions on local languages into neighbouring countries, where reciprocal regulatory ties are strong and enforcement and negotiation therefore possible. In the case of pan-European services, the compliance costs may become insurmountable for all but the largest players.

Stakeholder response

Self-regulation or voluntary action may substitute current regulations.

- *Pan-European Short extracts:* Current practices and problems with respect to access will persist. The market may be able to solve the issues of value and access, but market relations will be unequal (rights owners dominate) and access will not be universal, owing to problems of affordability among consumers and willingness-to-sell among rights owners.
- *European and Independent Content:* The market may become the dominant force in the development of audiovisual media services. Consumer preferences for national content over imports may not change very much over time⁶¹, but if barriers to entry are lowered, consumers are confronted with an increase in choice. If barriers to entry become too low, undesirable effects can occur: new entrants can use ‘hit-and-run’ tactics to aggressively exploit the market before exiting again.
- *Listed major events:* will be the most valuable events in terms of audiovisual content⁶². Without the Article allowing Member States to separate out events of major societal importance, the market will cash in on the opportunity. This will benefit the major players who are financially able to purchase and exploit the events and, where pay-TV platforms dominate, may exclude a significant part of the viewers.

Indirect effects

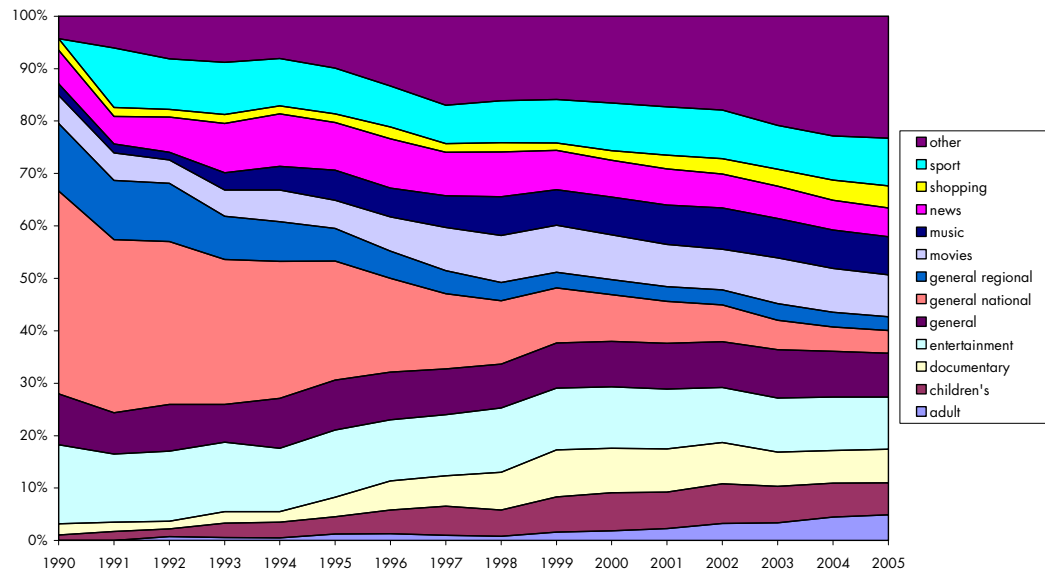
- *Commercial Communications:* An increase in the competitive intensity of the advertising market (between suppliers and across media) will give a boost to intermediary services (e.g. advertising sales houses) and to the producers of advertising (both conventional and innovative). More innovative ways of marketing will be developed to compensate for decreasing marginal returns to advertising expenditure: reaching new audiences, more effectively targeting specific groups of consumers, exposing existing audiences to more effective methods including subliminal and surreptitious advertising. The impact on advertising revenues is uncertain.
- The choice of channels is increasing and as non-linear services become a viable alternative consumer choice is becoming wider. On the other hand, without European standards of regulation on the amount and nature of commercial communications, consumer protection (in cross-border audiovisual services) will depend on national legislation and regulation. This exposes consumers to a potentially wide variation of standards, which may include methods of advertising that are currently outlawed or restricted. The economic impacts will depend on consumer response, although there is a lag between viewers switching off and changes in advertising practices on a given channel due to package sales (e.g. cable and satellite subscriptions) and monitoring gaps.

⁶¹ David Graham Associates for EC (2002)

⁶² The number of listed events is miniscule – unless one assumes that the threat of regulation prevents more listing. The 2001 list contains mainly Olympics and UEFA Cup/World Cup/European Championships football at http://www.obs.coe.int/oea_publ/iris/iris_extra/sports_rights_tv.pdf.en

- Between 1990 and 2005 the number of channels has increased vastly, from 93 in 1990 to 1,703 in 2005. Growth has been exponential but has progressed without trend breaks (including the introduction of the revised TVWF in 1997). The increase in the number of channels has been accompanied by diversification and specialisation (see fig. 15).

Figure 15. Distribution of European channels by genre, 1990-2005



Source: Screen Digest (August 2005).

4.3.1.3 Option 2: No change in regulation

Compliance and enforcement

Only traditional broadcasters are required to comply with regulations derived from the Directive (Member State regulation may be stricter). As Internet (linear and non-linear) services gain market share and compete more directly and vigorously with traditional linear services (see table 6), the direct and indirect costs of compliance may undermine the competitive position of broadcast services. This does depend on the nature of the requirement and the costs of compliance.⁶³

⁶³ e.g. The costs of the identification requirement in Option 3 are on the traditional broadcaster moving into linear services, whereas compliance with the provisions on commercial communications in Option 3 can be considerable and apply to the Internet audiovisual broadcaster

Table 6. Forecasts of the growth of digital television in Europe and the United States, 2004-2009 (TV households; %)

| | digital cable | digital satellite | digital terrestrial | IPTV | digital % |
|---------------|---------------|-------------------|---------------------|------|-----------|
| Europe | | | | | |
| 2004 | 4 | 16 | 5 | 0 | 25 |
| 2005 | 5 | 18 | 9 | 1 | 32 |
| 2006 | 7 | 19 | 12 | 1 | 40 |
| 2007 | 10 | 21 | 15 | 2 | 47 |
| 2008 | 12 | 22 | 18 | 3 | 54 |
| 2009 | 13 | 23 | 21 | 4 | 61 |
| USA | | | | | |
| 2004 | 21 | 22 | 0 | 0 | 43 |
| 2005 | 24 | 24 | 1 | 0 | 49 |
| 2006 | 26 | 26 | 1 | 0 | 53 |
| 2007 | 27 | 27 | 2 | 1 | 57 |
| 2008 | 28 | 28 | 2 | 2 | 60 |
| 2009 | 29 | 28 | 3 | 3 | 64 |

Source: Data monitor, *Digital TV Markets 2005*.

Right of reply: The costs of compliance can be considerable for regulators, content providers and consumers (even over €1,000 per case in British alternative dispute resolution⁶⁴). Consumers may demand compensation from Internet content providers under national (civil) law, but this does require providers to be identifiable as well as established within a given jurisdiction. The right of reply must therefore be examined in combination with the articles on *identification* and *jurisdiction*. Current fairly elaborate identification requirements will not be imposed on broadcast services. The costs of compliance are, however, marginal. Without clear establishment criteria for non-linear content service providers, it will be difficult in many cases to assign jurisdiction.

Monitoring and enforcement: These will become progressively harder as the number of channels increases. The right of reply and the identification requirement require comparatively few resources, but the provisions on short reporting, events of major importance, European content, and commercial communications pose a bigger challenge. Sampling of programmes and schedules by channel is needed to monitor compliance. Compliance with the provisions on cultural content may be facilitated by a shift in consumer preference from movies towards game shows and reality shows, both of which are specific to language (although formulas can be bought abroad).⁶⁵ Non-linear services are exempt from the requirements on European content, which gives them greater flexibility in adjusting supply to their customers' preferences.

Short extracts: Without a change in regulation the rights to short extracts remain firmly with the rights holder of the original broadcast, who is likely to demand an economic

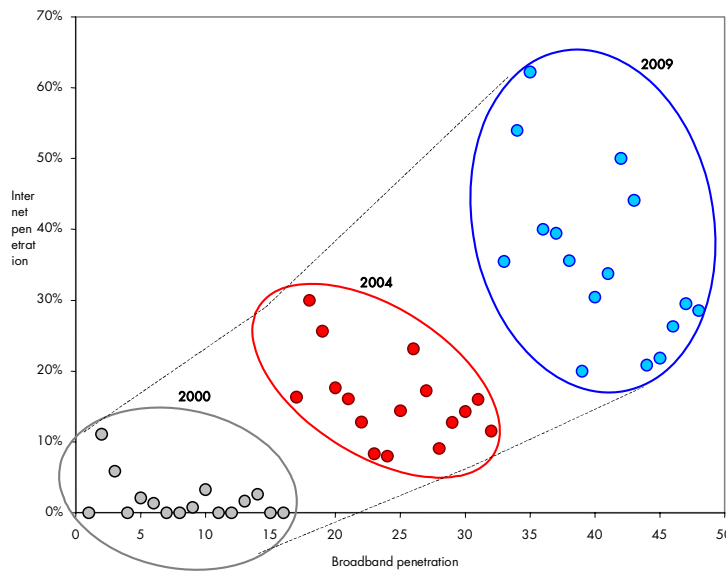
⁶⁴ Figures available from Financial Services Authority and others: <http://www.financial-ombudsman.org.uk/news/index.html>

⁶⁵ *Television 2004*.

return on the provision of content. The price will depend on the level of demand. The rights holder may decide to provide content directly to the viewer or to negotiate a contract with a third party such as a mobile service provider. For example, a football club may hold on the rights to short extracts of its own goals for the mobile domain, whereas TV rights for league matches are transferred to a TV broadcaster. This is a functioning market that may not require regulation.

The impact of European content regulation on consumers depends on the price of European audiovisual products (of independent and other producers) relative to competing non-European products, and on the way in which price differences are translated into subscription rates, licence fees and other costs. If programming of linear audiovisual services does not conform sufficiently to consumer needs and linear broadcasting services do not offer sufficient alternatives, consumers may turn to non-linear alternatives, depending on availability, costs (price and income elasticities), quality, and access. The continuous increase in Internet and broadband penetration may be able to support this shift (Figure 16). However, by 2009 neither the Internet in general nor broadband in particular will be universally available. In addition, it appears that differences in rates of penetration among the Member States will increase, so that the opportunities of the online market will not be equally accessible and affordable to everyone in the European Union.

Figure 16. Internet and broadband penetration in the EU and Switzerland, 2000-2009 (%)



Sources: PwC 2005. Television 2004.

With little or no change to the 1997 version of the Directive, there may occur a gap between the quality of service of linear and non-linear services with respect to methods and intensity of advertising, although advertising in both segments will use different methods.

4.3.2 Option 3: Minor revision to encompass linear services

Compliance and enforcement

The Directive would cover linear services, resulting in similar competitive tensions as in the “no change” option for non-linear on-demand providers. However, greater flexibility with respect to commercial communications and a slightly wider scope can alleviate the burden of linear compliance. Enforcement would be somewhat affected by the balance between the increase in the number of service providers and channels and a slightly lower regulatory burden. In general, the third option will generate the same impacts as the second option (“no change in regulation”), although the Directive will have a slightly wider scope. Greater flexibility in advertising rules makes compliance easier and product placement is captured in regulation. Simplification of the requirements makes enforcement more straightforward, although it will not significantly reduce the amount of resources and manpower needed to effectively monitor and enforce the Directive.

Non-linear services are exempt from the requirements on European content, which gives them greater flexibility in adjusting supply to their customers’ preferences. Linear audiovisual content service providers will remain subject to the existing, detailed restrictions on commercial communications, while non-linear service providers remain exempt. This does not (yet) translate into a competitive disadvantage for linear services: the linear and non-linear markets do not really compete in the demand for advertising space and call for different advertising techniques.

The rise of Internet advertising

Internet advertising is still a fairly modest market segment. In the USA the Internet accounted for 4.8% of total US advertising expenditure in 2003 (\$6,132 million) and 5.3% in 2004 (\$7,442 million). It did post the most impressive gain over 2003/2004 of all advertising media (21.4%).

Internet advertising revenues (U.S.) for the first six months of 2005 were approximately \$5,800 million; a new record and a 26% increase over the first half of 2004. Most advertising formats are, however, not audiovisual: rich media account for merely 8% of online advertising expenditure.

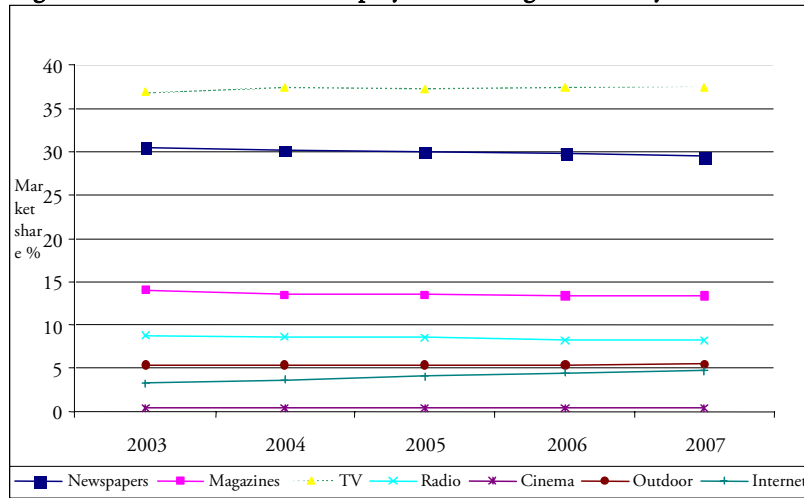
A study carried out by the Internet Advertising Bureau in partnership with PricewaterhouseCoopers (PwC) and the World Advertising Research Centre (WARC) shows that Internet advertising expenditure is continue to grow very rapidly. UK Internet advertising expenditure totalled £407.8 million in 2003, £653 million (3.9% of the market) in 2004, and reached £490.8 million in the first half of 2005 (5.8% of the market). The analysts expect online advertising to break the £1 billion barrier by the end of 2005. The main drivers of this rapid growth are:

- Increased connection speeds to the Internet through broadband technology, a rapid increase in broadband take-up, and longer online presence and higher spending by broadband users.
- Innovations in Internet advertising technology, such as video streaming, personalisation, interactive formats and localised search to extend brand conversations.
- Greater understanding and more effective use of the opportunities for the customization of advertising and the interaction with customers in the online environment.

Source: TNS Media Intelligence, “U.S. advertising market shows strong growth in 2004” (March 8, 2005); FinFacts Business News, “Online UK advertising up 62% to £490 million for first half of 2005 (October 4, 2005) [http://www.finfacts.com/irelandbusinessnews/publish/article_10003503.shtml]

Linear audiovisual content service providers will become subject to the existing, detailed restrictions on commercial communications, while non-linear service providers remain exempt. This does not (yet) translate into a competitive disadvantage for linear services: the linear and non-linear markets do not really compete in the demand for advertising space and, as is clear from Figure 17, and call for different advertising techniques.

Figure 17: Global shares of display advertising revenue by medium



Source: Zenith Optimedia July 2005

Stakeholder response

There will be little or no change with respect to the ‘softer’ requirements (right of reply, identification, protection of minors and human dignity). Identification requirements do not impose a high regulatory burden on linear audiovisual service providers.

Some non-linear service providers may be tempted to deliver content considered inappropriate for linear broadcasting (e.g. because it may be considered, or actually is, a threat to minors or to public order) without providing information regarding identification. On the other hand, non-linear service providers are already to some extent covered by the Electronic Commerce Directive, and they may self-regulate, partly if not entirely with the intention of inspiring consumer confidence.

Without a broader adjustment to the Directive, market developments may undermine its effectiveness. Current practices and problems with respect to the trade in short extracts will persist, but in the areas of major events, European content, and commercial communications developments in non-linear services can upset the current system.

Non-linear service providers can already purchase exclusive rights to major events. Non-linear audiovisual content providers are currently not considered broadcasters. Their location of establishment is not defined in TVWF. When non-broadcast rights holders own and exploit an exclusive right, it is the broadcasters, not the right holders, who are regulated under the Directive. The rise of non-linear providers may make this solution an increasingly likely scenario. A crucial precondition is that the audience of non-linear

services has to reach a certain threshold above which providers can afford to purchase exclusive rights and that threshold is as yet a long way off.⁶⁶

To the extent that companies dutifully comply, they will try to find the most attractive programmes and formulas that fit regulatory constraints. Where the Directive is insufficiently clear with respect to the inclusion or exclusion of actors (on the boundaries between linear and non-linear services), legal uncertainty can hold back companies. The precise outcome is as yet uncertain. Will convergence between media draw non-linear services into the Directive or will linear services be drawn outside its scope? Extending the Directive to non-linear services may create a level playing field, but to what extent do linear and non-linear services really compete on the same playing field? At present, traditional television broadcasting, IPTV, VoD, nVOD, and other media still serve different market segments. The convergence of media is, however, only expected to provide strong returns for a handful of media companies. Most providers will be confronted with greater competition.⁶⁷ These companies will need to have a very strong customer-focus and enable multi-channel use of media.

T-commerce: an example of converging markets

T-commerce –the provisioning of TV shopping, direct response TV (DRTV), travel shopping, and transactional interactive TV (iTV)– is increasingly steadily in Europe. Revenues reached €5,200 million in 2004 and are expected to reach €8,000 million in 2008. Its future is dependent on:

- The regulatory environment, especially with respect to the amount of advertising and TV shopping that can be broadcast.
- Total digital TV penetration and the iTV strategies of pay-TV operators: the level of digital penetration is expected to increase from 18.5% in 2003 to c. 40% in 2008.
- The economic situation, the state of advertising, the popularity of distance selling/mail order.

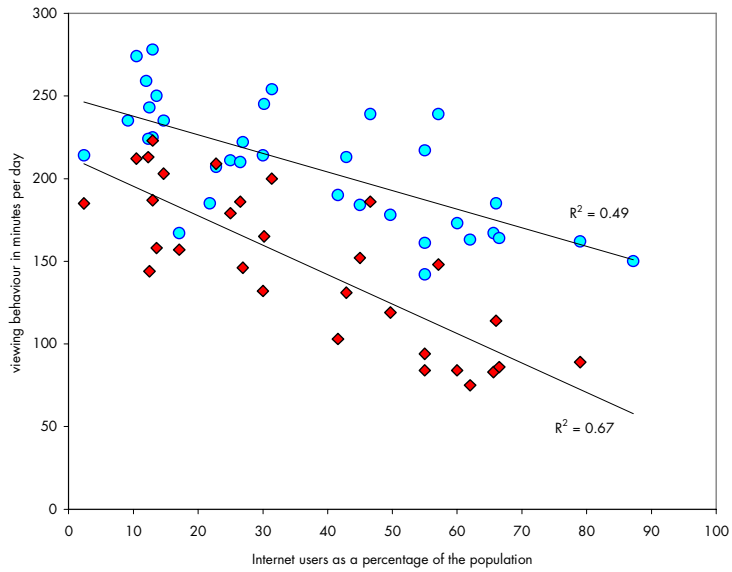
Source: Screen Digest (September 2004)

Is competition at stake or not: are they substitutes or complements? The various media (audiovisual and otherwise) all compete for a share in the leisure time of consumers. The most contentious issue concerns the competition between linear services (conventional broadcasting) and non-linear services (especially over the Internet). Consumers still use both services for different purposes and in different ways, but there does appear to be a negative correlation between Internet use and viewing behaviour (Figure 18). One word of warning is, however, that we have used data on Internet users as a percentage of the population rather than the actual amount of use.

⁶⁶ Between 1990 and 2005, the balance of premium rights between free TV and pay-TV has shifted. In 1990 each had a share of about 50%, by 1995 the share of pay-TV had risen to c. 60% and by 2000 to 75%. After 2000 free TV regained some of its earlier share until by 2005 it accounts for close to 30% of all premium rights. Screen Digest (August 2005).

⁶⁷ Arthur Andersen, 2002. DGTP (Directoraat-generaal Telecommunicatie en Post), De toekomst van de elektronische communicatie [The future of electronic communication], Ministerie van Economische Zaken, Den Haag, 2005

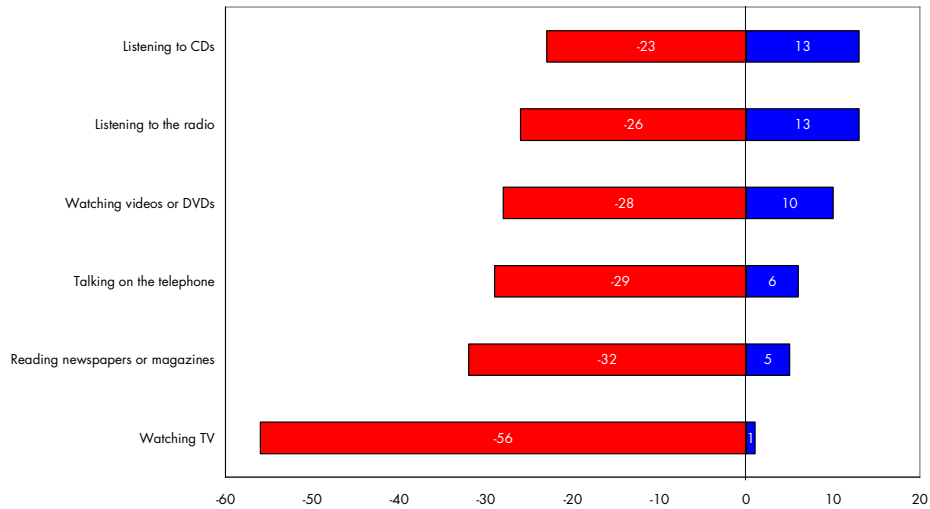
Figure 18. The relationship between the number of Internet users and television viewing behaviour, 2003



Source: Television 2004.

More specific data from the European Information Technology Observatory 2005 (Figure 19) does show that there has been a significant shift in the behaviour of users who have online access to multimedia content, with the majority of people moving away from traditional viewing and listening methods and towards online access. Indirectly, the linear and non-linear market segments do compete.

Figure 19. Since you subscribed to broadband Internet services, do you spend more or less time on the following activities? (Blue: more; Red less)



Source: EITO 2005.

There may be opportunity costs involved with compliance by linear content service providers: where non-linear content service providers are entirely free to determine the composition of their audiovisual production, linear providers have to favour European content possibly at the expense of more profitable alternatives. On the other hand, the Articles for linear services on European works and independent producers exclude “time appointed to news, sport events, games, advertising, and teleshopping”, leaving content service providers plenty of room to manoeuvre.⁶⁸

Companies may eventually migrate from linear to non-linear as technology and market opportunities allow and thus avoid regulation. This will, however, require the two market segments to converge. For example, methods of advertising are not easily interchangeable due to differences in the business model and in the interaction with consumers.

Triple-play and convergence

With increasing competition in the broadband Internet market, a growing number of telcos are making a move into the IPTV and VoD markets. They aim to boost their broadband subscriber base by offering bundles of IPTV/VoD, broadband Internet access, and telephony (triple-play). Serious competition has emerged from ISPs using the incumbent telecom operators' network infrastructure and local loop unbundling, e.g. to offer telephone services. Cable operators have also entered the telco's traditional business area by offering cable telephony [and Internet access].

IPTV is still a very modest affair, but the number of subscribers is expected to increase significant in response to attractive triple-play bundles, to an estimated 4.4 million in 2008. It is consequently not expected to pose a serious threat to established pay-TV operators.

Source: Screen Digest (October 2004).

As non-linear services gain market share and become more interesting to advertisers problems may arise. These relate primarily to advertising methods rather than content, considering current national regulations on advertising in general (tobacco, alcohol, protection of minors). The majority of non-linear services are currently offered in pay-per-view models, in which viewers pay to see a specific piece of content free of advertising. As linear and non-linear services converge (e.g. IPTV) the latter may become a more interesting channel for commercial communications, but without regulation non-linear services will have a competitive advantage in the market for advertising space.

Indirect effects

When non-linear audiovisual content is considered inflammatory, harmful, damaging or otherwise in conflict with the fundamental rights of citizens and consumers, and the provider cannot be identified, Member State authorities and regulatory agencies will have to resort to more rigorous actions. This can affect ISPs that channel related websites, much as it already affects satellite operators and uplink operators in the case of linear services.

⁶⁸ In addition, the production costs of European feature films are considerably lower than those of American films.

The articles on the promotion and distribution of television programmes continue to ensure European audiovisual content producers (independent and otherwise) of a substantial market share.

A minor revision of the Directive creates more room for innovative methods of advertising, including product placement, which could give a boost to audiovisual content producers and marketing agencies, as advertisement budgets are reallocated away from broadcasters to the content providers.⁶⁹

Continued restrictions on commercial communications in the linear market segment combined with a low level of regulation in the non-linear segment may lead to the emergence of a creative content industry aimed specifically at the non-linear market segment. This industry does not have to develop in Europe, but given the size of the global advertising market and the growth rate of non-linear content services, having such an industry would constitute a considerable competitive advantage.

Impact on consumers

Consumer protection supports the growth of consumer trust and confidence. Consumer confidence in online services without identification can be an obstacle to the purchasing of non-linear services: consumers have nowhere to turn when the quality of service is lower than agreed and without identification there can be no right of reply. Consumers may respond to a lack of protection against unethical behaviour in the non-linear market segment by 'opting out' and mainly consuming linear audiovisual products.

In a market for short extracts that is dominated by suppliers or rights holders, the trade in short extracts may involve considerable costs that can be transferred onto consumers. On the other hand, most linear services work on the basis of fixed subscription rates so that unexpected expenses impact on the profit margins of broadcasting companies. As Table 7 shows these margins are generally low.

Table 7. Average profit margins of audiovisual branches in the EU-25, 1999-2002 (%)

| | |
|--|-------|
| TV satellite operating companies | 35.1 |
| private radio broadcasters | 8.4 |
| home video publishing/distribution companies | 6.3 |
| film distribution companies | 2.3 |
| film production companies | -0.8 |
| TV production companies | 1.1 |
| television broadcasters | -2.9 |
| terrestrial transmission companies | 5.8 |
| film exhibition companies | -2.6 |
| videogame publishing companies | -5.2 |
| videogame developers | -24.1 |

Source: European Audiovisual Observatory 2005.

⁶⁹ ACT (2005); Carat/Koan (2005).

With little or no change to TVWF, there may occur a gap between the quality of service of linear and non-linear services with respect to methods and intensity of advertising, as it is clear that advertising in both segments will use different methods.

4.3.3 **Option 4: Comprehensive framework with graduated treatment of linear and non-linear services**

Compliance and enforcement

All audiovisual services would be required to comply with the Directive's requirements, although linear and non-linear services would not be subject to the same set of requirements and individual provisions would work out differently for linear than for non-linear services. This revision would eliminate many competitive advantages created by regulatory differences (a level *legal and regulatory* playing field).

Right of reply: Compliance will require Member States to put in place systems that extend the right of reply to non-linear services, which may involve an increase in government manpower and expenses. Non-linear audiovisual content service providers will have to put in place the administrative mechanisms and implement the technical means of compliance. This may involve *ex post* measures, for example, masking number plates, addresses and other personal contact details, as well as the faces of people in compromising situations, without obtaining consent prior to broadcasting. The costs of such technical measures may be high, if not prohibitive, for small players, especially in the non-linear (and consumer-generated) market segment, making equity an important issue: a simple hyperlink to the offended party would be of negligible cost but might not offer a satisfactory recompense. Non-compliance brings the risk of high legal and compensatory costs, especially when the right of reply is not supported by strong criteria (defining when it can be invoked) and an efficient and cost-effective system for assessing, channelling and handling cases.

Identification: The costs of complying with the identification requirement are marginal. The main burden of compliance will fall on linear service providers who do not yet have a website: the Electronic Communications Directive covers the identification of non-linear service providers.

Protection of minors and human dignity: Non-linear (online) audiovisual content service providers will have to consider which methods are most appropriate. For minors, this will most likely be a balance between parental control and household software purchases (end-user controlled, e.g. blocking adult content) and company investments in age verification, labelling, and other watershed methods. Many linear and non-linear service providers already have such systems in place and because these involve some fixed costs but very low variable costs, compliance will not be a major issue.

Events of High Importance and Short Extracts: The provisions on major events will not be extended to non-linear services. The impacts are similar to those of the “no change” option or –if the definitions are rephrased– the “minor revision” option.

Implementation of the articles on short extracts will involve Member States imposing market rules on audiovisual content service providers established within their jurisdiction. These rules describe how audiovisual content service providers within their jurisdiction will deal with outside providers who copy their signal for the purpose of news reports. They will also involve a definition of (i) fair and reasonable terms for access to audiovisual signals

and (ii) events of high interest to the public. The Directive will harmonize the approach of Member States but not the outcome, thus defining framework conditions for the (cross-border) exchange of short extracts.

A framework for the resumption of short reports –containing a good definition of the terms of exchange, the events involved, and the duration of short reports– will benefit receiving parties, most notably smaller and financially weaker content service providers. The economic impact of an article on short reporting would, however, be more difficult to assess with respect to the owner of the original broadcast or service. Information has, after all, value and some types of information are more valuable than others. The market will be able to accommodate the exchange of most types of information based on solid definitions and ordinary market mechanisms in which willingness-to-sell are balanced against willingness-to-pay.

Willingness-to-pay does appear to be a major obstacle in the development of many online services. In the case of new subscribers, there is not only an issue of what people want, but also of what people would be prepared to pay for. Perhaps unsurprisingly, people would be far more willing to pay for items that they can download, rather than items that are streamed (Table 8).

Table 8. How interested would you be in subscribing to a broadband service that let you do the following? (% of all broadband users; Western Europe, 2004)

| | very/somew hat interested | total who would pay | would pay less than €5 | would pay €5 to €15 |
|---|---------------------------------|------------------------|---------------------------|------------------------|
| Download music files to your computer legally | 63 | 55 | 35 | 20 |
| Listen to streamed audio of various music channels | 44 | 20 | 17 | 3 |
| Watch streamed video clips of movie trailers or entertainment | 41 | 19 | 16 | 3 |
| Watch streamed video clips of current news events | 38 | 17 | 14 | 3 |
| Play a PC game with other players on the Internet | 32 | 17 | 12 | 5 |
| Watch streamed video clips of sports highlights | 25 | 12 | 10 | 2 |
| Use a video game console to play with others on the Internet | 16 | 13 | 10 | 3 |

Source: EITO 2005.

Property rights are decisive for price setting. The price is defined by ownership rather than scarcity: free-to-air TV services are non-rivalrous (additional consumers do not diminish the availability of supply for other consumers) and broadcasting rights define a content providers ability to extract value (through reselling of rights or advertising).

The most significant impact will concern those events for which private parties have purchased exclusive rights: allowing short reports may diminish the value of exclusivity. This value is, however, often market-specific: a major event in Poland has high value for a Polish broadcaster but much lower value in Spain. The implications may spill over into the domain of events of major importance: to avoid conflicts with private audiovisual content

service providers, Member States may decide to widen the scope of the list of events of major importance, thus reducing the potential size of the market for exclusive rights.

To regulate short extracts would mean to oblige rights holders to make short extracts available, which would infringe on their transmission and copyrights. This provision will likely have most impact on football rights holders. Other content like news clips are already available. Sport (football) clubs, right holders of football TV rights will see the value of their rights decrease at the margin. This value will effectively be transferred to providers of mobile audiovisual services, broadcasters who are not right holders, and other intermediaries.

European and Independent Production: For non-linear services the Directive will not propose a specific amount of European works but merely require Member States to encourage non-linear service providers to promote the distribution and production of European works. This is an obvious choice, because unlike linear programming there is no basis for specific quotas: where linear services have a given broadcasting period, non-linear services depend on the amount of viewing time purchased by their consumers. Non-linear services work on the basis of demand rather than by schedules, so that quotas would relate to goods on offer rather than broadcasts. Consumer choice determines the outcome. Compliance rests on the shoulders of the Member States who are called upon to devise methods to provide incentives to or impose obligations upon non-linear service providers. The costs of Member State implementation are encompassed in the overall costs of national audiovisual regulation within EU frameworks. Compliance on behalf of stakeholders will involve identification of products on offer by national origin.

For linear services current provisions will remain in place. One significant revision is that the restriction on the articles in this Chapter that they should “not apply to television broadcasts that are intended for local audiences and do not form part of a national network” has been omitted. This extends the requirement to all linear audiovisual services. Since local and regional networks already mainly provide European content, compliance will mainly involve administrative duties (e.g. reporting; earmarking independent productions) rather than actual costs. For an overview of public vs. private see Table 9.

Commercial communications: Linear audiovisual content service providers will remain subject to the existing restrictions on commercial communications, while non-linear service providers are subject to a basic tier consisting of regulations concerning human dignity, the protection of minors, and health-related issues. Greater flexibility in advertising rules makes compliance easier and cheaper. In addition, product placement is captured in the regulation. Simplification of the requirements makes enforcement more straightforward, although it will not significantly reduce the amount of resources and manpower needed to effectively monitor and enforce the Directive.

Monitoring and enforcement: This challenge is greater than in Option 3. Although compliance is fairly easy and the costs are negligible, monitoring and enforcement require considerable effort and resources. The number of service providers will increase exponentially when non-linear services are included, and this segment of the market will require more work simply because it is a more volatile sector. Monitoring and enforcement of the articles on European content of linear services can be a major challenge, both in terms of financial resources and manpower, and especially if local and regional broadcasters

are included. This is where non-linear services will be at an advantage: compliance is a task for the EU rather than for Member States and consists merely of monitoring and perhaps benchmarking Member State initiatives to encourage non-linear service providers. The costs of monitoring and enforcement can be considered minimal.

Table 9. Number of public and private nationwide channels and all other channels, 2001

| | Total No. TV channels | Public channels nationwide distribution | Private channels nationwide distribution | All other |
|-------|-----------------------|---|--|-----------|
| EU-15 | 1454 | 109 | 767 | 578 |
| BE | 43 | 6 | 25 | 12 |
| DK | 31 | 4 | 24 | 3 |
| DE | 120 | 13 | 77 | 30 |
| EL | 82 | 3 | 27 | 52 |
| ES | 134 | 7 | 115 | 12 |
| FR | 139 | 9 | 113 | 17 |
| IE | 4 | 3 | 1 | 0 |
| IT | 364 | 20 | 93 | 251 |
| LU | 6 | 1 | 5 | 0 |
| NL | 50 | 4 | 34 | 12 |
| AT | 187 | 3 | 15 | 169 |
| PT | 36 | 3 | 31 | 2 |
| FI | 25 | 5 | 18 | 2 |
| SE | 33 | 8 | 25 | 0 |
| UK | 200 | 20 | 164 | 16 |
| CZ | 31 | 2 | 17 | 12 |
| EE | 4 | 1 | 3 | 0 |
| CY | 6 | 2 | 4 | 0 |
| LV | 28 ^{a)} | 2 | 3 | 23 |
| LT | 13 ^{a)} | 1 | 3 | 9 |
| HU | 42 | 3 | 39 | 0 |
| MT | | 1 | 9 | |
| PL | | 3 | 44 | |
| SI | 42 ^{a)} | 3 | 3 | 36 |
| SK | 78 ^{a)} | 2 | 4 | 72 |

^{a)} 2001

Source: Eurostat (2002)

Stakeholder response

Smaller non-linear content producers may focus on programmes that are less likely to offend or infringe upon citizens' rights. Reality TV shows –one of the main drivers for growth in the current television market⁷⁰, current affairs programmes, celebrity shows, and other programmes that deal with the intimate details of individual citizens may

⁷⁰ Television 2004.

become too dangerous financially. This could lead to segmentation in the market and force SMEs out of profitable market segments.

The risk of non-compliance is low, since the effort involved is negligible. Only disruptive market players who do not intend to comply with specific requirements –such as those on public health related advertisements or the protection of human dignity– are likely to evade regulations.

The articles on the protection of minors and human dignity are based on widely shared norms and values. The risk of non-compliance will most likely be due to negligence and limited to small providers in the online environment. Most adult content, gambling, and other potentially harmful content are already hidden behind encryption or age verification of some kind (as part of their business model), placing responsibility in the hands of parents.

European and Independent production: Linear audiovisual content service providers will probably continue to provide European content as they do now, although the nature of programmes will shift according to changes in consumer preference. Non-linear services can respond to the obligations or incentives provided by Member States, for example, in one of the following business models:

- The service provider buys a programme, movie, or other piece of audiovisual content (a primary right). His return on investment depends on the attractiveness of the product and the willingness-to-pay of his customers, but the producer of the item is ensured of an income.
- The service provider acts as an intermediary and offers producers of audiovisual content a channel of delivery, so that producers can reach their consumers directly. The revenues of producers then depend on consumer preference, while the intermediaries (non-linear ‘broadcasters’) either earn a stable income (when producers rent the channel) or extract revenue from consumption (a provision per item viewed) – this is known as the ‘long tail’ thesis, in which additional consumption of niche product at low cost recoups more economic value for niche non-blockbuster content.

Commercial communications: The revised regulations on commercial communications only subject non-linear services to a basic tier of regulations, aimed at implementing the charter of fundamental rights and protecting consumer health. To the extent that national regulations have yet to impose restrictions on online advertising for tobacco, alcohol, and medicinal products, non-linear content service providers stand to lose part of their advertising revenues. This proportion cannot be determined precisely, but given the relatively modest size of Internet advertising, its macroeconomic impact will not be significant.

Greater flexibility in advertising regulation allows linear audiovisual content service providers to extract higher value from their advertising activities. The lower regulatory burden on service providers allows them more freedom with respect to insertion, product placement, teleshopping, and the separation of commercial communications from editorial content. This flexibility may be translated into higher advertising revenues. The financial outcome depends on demand for and supply of advertising space, in particular for new methods and products of television advertising (shorter teleshopping spots; split screen

techniques and interactive advertising; better use of sponsorship or virtual advertising)⁷¹ and on the impact of competition from alternative media, most notably the Internet. Stakeholder input does suggest that advertising revenues would increase: ACT indicates that removing or reducing current limitations would yield considerable benefits and allow broadcasters to experiment with new advertising products and methods.⁷²

Total audiovisual advertising revenues are likely to increase as non-linear services become increasingly attractive, and linear services are provided with a lower regulatory burden. The various media markets do not necessarily compete. In a report for OFCOM, PricewaterhouseCoopers show that multi-channel advertising is a rapidly rising phenomenon, but also state that the traditional market is only marginally affected. Cross-price elasticities between the two markets are low (they are not substitutes) and the price elasticity of multi-channel advertising is much higher meaning that changes in supply has a much greater impact on multi-channel revenues than on traditional revenues.⁷³ PwC presents two scenarios to show the long-term impact of the rise of multi-channel advertising (Table 10), which underscores the stability of traditional television advertising.

Table 10. Econometric forecasts (pooled) for two illustrative scenarios

| Illustrative TV NAR forecasts (in constant 2003 prices) | | Traditional | Multi-channel | Total |
|--|--------------------|-------------|---------------|---------|
| Scenario A (weak digital penetration) | 2003 | £2,570m | £590m | £3,160m |
| | 2014 | £2,530m | £1,470m | £4,000m |
| | Annual growth rate | -0.2% | +8.6% | +2.1% |
| Scenario B (strong digital penetration) | 2003 | £2,570m | £590m | £3,160m |
| | 2014 | £2,430m | £1,620m | £4,050m |
| | Annual growth rate | -0.5% | +9.6% | +2.3% |

Source: PwC, *Economic Analysis of the TV Advertising Market*, (Report commissioned by OFCOM; December 2004)

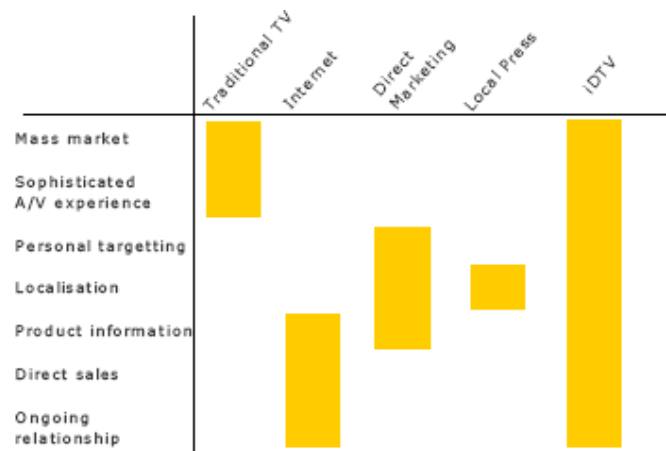
On the other hand, online advertising is more attractive due to its salient features. A report by Arthur Andersen (2002) concludes that: “online advertising offers advertisers the opportunity to integrate three steps of the sales cycle (information, transaction and follow-up), whereas traditional media are mainly focused on mass marketing and information. Interactive and personal advertising on iDTV platforms will go even further as they combine some characteristics of online advertising with characteristics of traditional TV and press advertising” (see figure 20).

⁷¹ Carat Crystal and Bird & Bird (2002) *Study on the development of new advertising techniques*

⁷² ACT, *Impact of some possible changes to Television Without Frontiers on European broadcasters* (Input for DG Information Society & Media; September 2005). They estimate the additional revenues generated by introducing a “sliding hour” at €30 million. Removing the daily limit could generate an additional 1% of revenue and the insertion of a second break in films and audiovisual programmes an additional 10% of revenue.

⁷³ PwC, *Economic Analysis of the TV Advertising Market* (Report commissioned by OFCOM; December 2004)

Figure 20. Online advertising and iDTV advertising compared to other media types



Source: Andersen 2002.

Indirect effects

Producers of specialised software, decoders, and other equipment for households and content providers will earn additional revenues when non-linear services are included in the Directive. On the other hand, the marginal increase in their revenues will probably be modest, given that most non-linear and linear services as well as households already own and use such software and equipment.

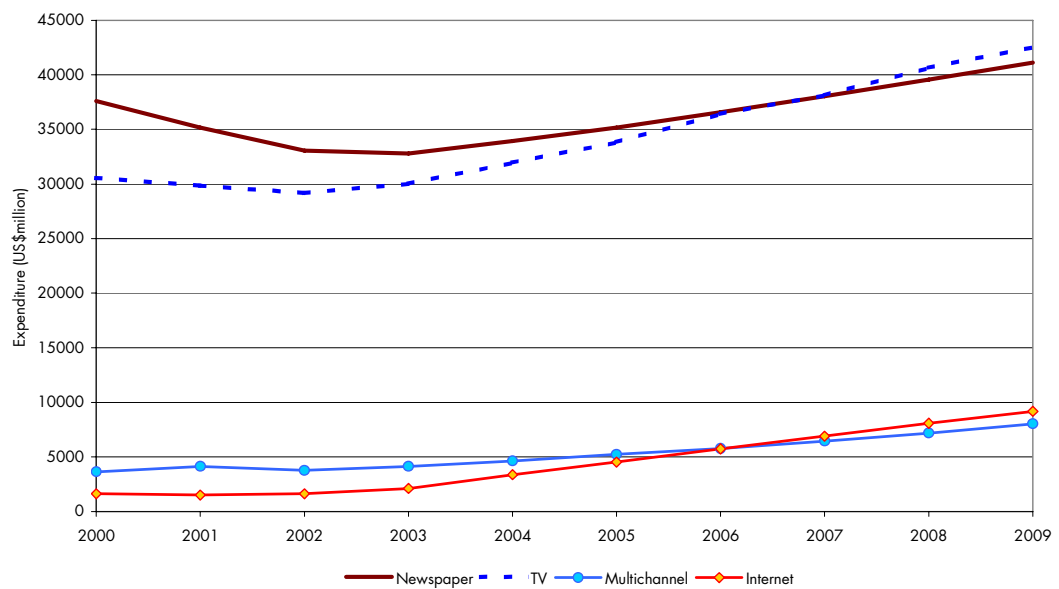
The indirect effects of the market-oriented provisions may be more significant.

- Lowering the value of exclusivity by allowing short extracts will have financial implications for recorded events: revenues from the sale of broadcasting rights might decline. Broader exposure on a European scale can, however, attract new sponsors.
- If broadcasting quotas are successful in promoting the production and distribution of European audiovisual products, producers and distributors will be faced with higher revenues and possibly also with higher profits. By reserving a substantial proportion of the market for the producers (and distributors) of European content, competitive pressure in the market is lowered: European producers compete among each other and only the weaker European competitors (who produce a product of lower quality or higher relative price) have to confront non-European producers.
- Promoting the production of co-productions requires producers to overcome language barriers and socio-cultural differences. If the Directive is successful in this domain, there may occur a loss of cultural diversity as (i) producers focus on the lowest common cultural denominator and (ii) producers move from unique concepts (that may become formats) to the development of formats for the global market place.
- The potential increase in advertising space and revenues in linear audiovisual services could potentially draw revenues away from competing media. However, the various markets do not compete directly. Newspapers, outdoor advertising, and online advertising do compete to some extent for scarce company resources, but since each channel provides complementary rather competing channels towards consumers, such

crowding out is unlikely to occur. The best approach to follow in the current and near-future environment may be to wage multimedia or ‘integrated’ campaigns.⁷⁴

Newspaper advertising may be losing market share (a relative development), but after a decline between 2000 and 2002 its revenues have steadily increased and are expected to continue doing so until 2009 (Figure 21). Terrestrial television advertising follows the same pattern, albeit at a slightly higher rate of growth. At a much lower level, multichannel TV advertising and Internet advertising are making headway, but they will only begin to make a significant impact on the advertising market well after 2009, assuming that current conditions persist.

Figure 21. European advertising expenditure in newspapers, television and the Internet, 2000-2009 (US\$million)



Picard and Grönlund (2002) examined the impact of the Internet on advertising expenditure in Europe in the 1990s in order to determine if it withdraws financial resources for advertising from other media. They conclude that the Internet not only does not crowd out other advertising investments, but also that the development of online advertising was accompanied by significant new spending in established media.⁷⁵

Impact on consumers

Awareness among consumers is key to the effectiveness and impact of the right of reply.

⁷⁴ ZenithOptimedia (2004) “Demand for traditional advertising firm; Internet up again”. The Zenith report also states “We have tended to underestimate Internet advertising, but even with this upgrade it is still only partly substituting traditional media. The Internet is not the only alternative destination for traditional media money, of course: in media planning, we identify up to 35 types of customer contact.”

⁷⁵ Picard, Robert G. and Mikko Grönlund (2002) “The impact of the Internet on European media advertising expenditures”, Paper for the COST A20 Impact of the Internet on the Mass Media Conference, University of Tromsø, Norway, June 21-22, 2002

When all audiovisual content service providers are identifiable, the market for their products and services becomes more transparent. Consumer confidence in the market for audiovisual content will be raised, especially when identification is backed up by (visibly) efficient monitoring and enforcement and by a robust system to support the right of reply and consumer protection.

Extending protection to non-linear services may provide a boost to consumer confidence, if this extension is well-publicized (thus raising awareness) and its marginal contribution is significant (when a large proportion of non-linear providers currently does not offer good protection but will comply with the requirements of the revised Directive).

Consumers will be provided with short reports on major events that they would otherwise be unable to view, either because the channels from which they have been copied are unavailable or because the price of access to live transmissions is too high.

New forms of viewing behaviour are developing. Although they need not be affected by the provision on European works, they can have an impact on the objectives targeted by the provision. Consumers can shift from linear broadcasting (in which they select from a potentially large sample of channels and their viewing behaviour is largely unknown other than for statistically representative but small samples) to very specific and identifiable consumption; they can purchase individual products, to be viewed when they want rather than when the broadcaster wants, or they can buy entire packages of programmes (possibly at a bargain). Filtering, mastheads, watersheds and other methods to protect minors etc. will be tied to the product rather than the provider.

Viewing time per individual is increasing. Adults watch more television than children. An interesting statistic is that adult viewers in the new Member States (including Romania and Bulgaria) spend 13% more time watching television than in the EU-15, while children in the same countries watch 43% more television (table 11). In the new Member States the potential exposure of children to harmful content of any kind is consequently much higher.

Table 11. Daily viewing times of adults and children in the EU-25 and candidate countries, 2003 (time in minutes; unweighted by population size)

| | adults | children |
|--|------------|------------|
| Austria | 161 | 84 |
| Belgium | 190 | 103 |
| Denmark | 167 | 83 |
| Finland | 173 | 84 |
| France | 213 | 131 |
| Germany | 217 | 94 |
| Greece | 243 | 144 |
| Ireland | 184 | 152 |
| Italy | 245 | 165 |
| Luxembourg | 142 | |
| Netherlands | 185 | 114 |
| Portugal | 211 | 179 |
| Spain | 222 | 146 |
| Sweden | 162 | 89 |
| UK | 239 | 148 |
| average EU-15 | 197 | 123 |
| Bulgaria | 185 | |
| Czech Republic | 214 | 132 |
| Estonia | 239 | 186 |
| Hungary | 274 | 212 |
| Latvia | 207 | 209 |
| Lithuania | 210 | 186 |
| Poland | 250 | 158 |
| Romania | 235 | 203 |
| Slovakia | 235 | |
| Slovenia | 178 | 119 |
| average new Member States and candidate countries | 223 | 176 |
| average EU-25 (and candidate countries) | 207 | 142 |

Source: Television 2004.

New methods of advertising will be used to influence consumer preference and behaviour. The quality of service will change either due to the insertion of more advertising spots or by allowing consumers to interact and select their own ads. Advertising will need to become more subtle and embedded in the medium as ad-skipping techniques become more prominent.⁷⁶ In order to maintain advertising incomes, the segmentation of the market needs to become more precise, so that targeted advertising becomes a reality. This will remove the traditional 3-5% minimum audience threshold for commercial attractiveness of channels.⁷⁷

⁷⁶ Deloitte, 2005. Andersen, 2002

⁷⁷ Andersen, 2002.

5.1 **Introduction to Stakeholder Analysis by Issue**

An essential element of Impact Assessment is to analyse the impacts on stakeholders in as much granularity of detail as possible. This presents an exponentially greater challenge in a policy arena of convergence between markets, which in this case involves broadcast, Internet and printed press value chains, amongst others. This is further compounded by the 25 national markets, which make up the Single Market. Added to this is the nature of the Commission's proposed revisions, which make up six separate Issues Papers, and in the revisions proposed, at least five major issue areas. Within these Issues Papers, a variety of trade-offs have been made, for instance in the area of Commercial Communications.

There are therefore a complex variety of potential impacts:

X (markets, at least 4) x Y (stakeholders, value chain of at least 8 links) x 25 (Member States) x 5 (Issues) x Z (trade-offs for each issue, depending on issue, at minimum binary).

The total number of discrete impacts is therefore at least:

$$4 \times 8 \times 25 \times 5 \times 2 = 800.$$

Each of these impacts can itself have an effect on associated impacts, arguably producing 800^{800} (to the power of 800) impacts. This itself then must be applied to the four options.

This clearly is an impossible task in a static environment, let alone one as dynamic and progressive as that under review. We have therefore simplified the X x Y equation to 10 stakeholders, those most directly affected. We have considered the overall impact of each of five issues based on the five relevant Issues Papers (media pluralism not being a legislative subject currently under the revision).

In order to assess the conformity of the objectives and Issues Papers presented for stakeholder consultation, and in conformity with the requirements for a broad sustainability and socio-economic Impact Assessment laid out in the good governance and better regulation agenda and Multi-year Action Plan⁷⁸, RAND has prepared a set of Tables which outline impacts on stakeholders for five issues: protection of minors; European and

⁷⁸ http://europa.eu.int/comm/governance/suivi_lb_en.htm

independent production measures; short extract news reporting; measures proposed to introduce flexibility in commercial communications; the extension of the country-of-origin principle. These are laid out below, with indication of effect on stakeholders, together with footnotes explaining origin of empirical evidence and other reasoning. They are not intended to be exhaustive, and the footnotes also indicate areas in which empirical evidence is lacking or would be impossible to obtain.

In determining what policy option to choose certain trade offs need to be made. The final decision on how a trade off is made is a political one, based a valuation of likely effects, opportunity and an assessment of the overall expected societal benefit. Here we highlight what trade offs appear and how these weigh up in the light of the objectives of the review and the assessment criteria. A detailed assessment of the main policy options can be found in Chapter 6.

5.2 Stakeholder assessment tables

The tables in this annex outline impacts on stakeholders for five issues:

- protection of minors;
- European and independent production measures;
- short extract news reporting;
- measures proposed to introduce flexibility in commercial communications;
- the extension of the country-of-origin principle to linear and non-linear content services.

It contains an indication of effect on stakeholders, together with footnotes explaining origin of empirical evidence and other reasoning. They are not intended to be exhaustive, and the footnotes also indicate areas in which empirical evidence is lacking or would be impossible to obtain.

In common in all Tables, a more deregulatory Option depends on a sliding scale of licensing obligations at national level depending on the actor:

- Public service broadcasters have politically controlled negotiated agreements with Member State governments, which leaves relatively little flexibility in general regulation to deregulate;
- Free-to-air broadcasters have a legacy of detailed licence conditions designed to broadly compare with public service broadcasters. There is some leeway to depart from these conditions in a deregulatory direction but the mass viewership imposes a high level of public scrutiny;
- Pay-TV broadcasters typically have relatively light licence conditions, which enable them to adopt largely market driven solutions within general audiovisual regulation, subject to enforcement in egregious or persistent cases of regulatory transgression. Exceptions with tighter and longer standing licence conditions include terrestrial (Canal+), large viewership channels and news providers.

- All other value chain participants have much greater freedom to operate if a deregulated environment exists, with the exception of incumbent ISPs in which case large subscriber base and longstanding regulatory legacy makes the political sensitivity greater and the compliance culture stronger⁷⁹.
- For viewers and consumers, the trade-off of self-regulatory benefits and dynamic responsiveness against dangerous free-riders and potential self-regulatory meltdown (replaced by state regulation) depend on circumstances. In extreme cases, where market participants have no self-interest in balancing long-term loss of regulatory certainty against short-term free-riding gains, the customer's experience of the sector can suffer.

Issue 1⁸⁰: Protection of minors and human dignity for non-linear content providers

Note regulation at Member State level exists for all four options in most Member States⁸¹. The options therefore explore the implications for pan-EU content where pan-European harmonization exists only for certain sectors (national broadcasters in Option 1; pan-European in 2; all linear in 3; all linear and non-linear in 4). Apart from the general introductory comments above, we identify regulatory impacts in the following circumstances:

Option 1: As predicted, pay-TV has no need to alter its co-regulatory approach in Option 1, nor can public service broadcasters depart significantly from their scrutinized role. Free-to-air can save from decreased reporting obligations to regulators. ISPs have few observable direct or indirect effects – absent a calamitous failure of self-regulation. The decision of mobile ISPs to adopt a Code of Conduct illustrates the self-interest in long-run effective regulation that applies. Linear and non-linear video providers maintain existing self-regulatory (or co-regulatory depending on Member State) systems in place. Regulators have increased coordination costs internationally, and internal monitoring costs are based on political obligations in response to media shocks rather than a systematic examination⁸².

Option 2: No change.

Option 3: With the first three categories equalised with linear IPTV in co-regulatory or regulatory schemes, consumer benefits flow from recognised safe parameters. Self-interest ensures that regulation is light touch but effective, and the costs to regulators and producers are in line with Option 2 – as commercial products in the IPTV media market are identical in many ways to broadcast (including by definition). For consumers there is a possibility of confusion between the regulations of linear and non-linear audiovisual media services – so long as these are similar in practice, consumers will expect similar standards. Should they widely diverge that contextual difference will justify differing consumer and therefore regulatory expectations⁸³.

⁷⁹ See review of conditions for successful co- and self-regulation in Chapter 4.

⁸⁰ See <http://www.europa.eu.int/comm/avpolicy/revision-tvwf2005/2005-contribution.htm> at IP5

⁸¹ See Chapter 2.

⁸² For an inside view, see Wright, A. (2005) *Coregulation of Fixed and Mobile Internet Content*, paper at 'Safety and Security in a Networked World: Balancing Cyber-Rights and Responsibilities' conference, Oxford, September, at <http://www.oii.ox.ac.uk/research/cybersafety/?view=papers>

⁸³ Comments from representatives of OfCom and BBC in Workshop at Liverpool conference.

Option 4: Written press continues to see no effect unless entering the broadcast market, similar to other print-based market entrants. Gains in legal certainty to linear IPTV are enhanced by similarity across all media and thus consumer certainty. Where non-linear is self-regulated effectively, there is no increased burden that cannot be recouped by brand value inflation ('flight to quality' by consumers). For independent producers, the editorial content is now identical across all three audiovisual platforms, increasing scope economies and eliminating re-versioning. Regulators gain similar scope economies with convergence of standards. Consumers see no decrease in diversity providing compliance is sensitive to cultural sensitivities (a subsidiarity matter) but an increase in certainty.

| Stakeholder | Option 1 | Option 2 | Option 3 | Option 4 |
|--|-----------------|----------|-----------------|-----------------|
| <i>Public service broadcasters</i> | = ⁸⁴ | = | = | = |
| <i>Free-to-air commercial</i> | + ⁸⁵ | = | = | = |
| <i>Pay-TV</i> | = | = | = | = |
| <i>Written Press</i> | = | = | = | = ⁸⁶ |
| <i>ISPs – cable, telco</i> | = ⁸⁷ | = | = | = |
| <i>IPTV linear</i> | = | = | + ⁸⁸ | + |
| <i>VOD non-linear</i> | = | = | = | = ⁸⁹ |
| <i>Independent Producers</i> | = | = | = ⁹⁰ | + |
| <i>Regulators and Member State administrations</i> | - ⁹¹ | = | = ⁹² | + |
| <i>Consumers inc. Fundamental rights</i> | - ⁹³ | = | - | + ⁹⁴ |

⁸⁴ Obligations in licence to maintain state/licence fee mandatory funding.

⁸⁵ Significantly cheaper even if right to reply maintained – no obligation to report to regulator or permit appeal beyond normal legal remedies. Depends on MS and option to co-regulate or regulate directly.

⁸⁶ Costs only if entering audiovisual market.

⁸⁷ Most ISPs already have Codes of Conduct through national ISP associations. They are unaffected by the Directive as it affects editor/broadcasters only. Penetration of broadband – and therefore ISP revenues – may be affected by Directive, but other factors (poverty, computer literacy, mobile Internet) more likely to drive broadband subscription (quality of connection a further factor to consider).

⁸⁸ Increases consumer confidence and may therefore drive subscription to services. Given broadcast content, unlikely to be significant costs to comply. Mobile Codes of Practice indicate compliance in sectoral impact.

⁸⁹ Increases consumer confidence and may therefore drive subscription to services. ATVOD good example of self-regulation in this area

⁹⁰ Costs if entering audiovisual market or is passed on by broadcasters. Normally compliance is internalized within normal operating procedures and discussed with broadcaster.

⁹¹ Costs of imposing national regime and coordinating with other MS regulators.

⁹² Likely to be subject to monitoring a co-regulation scheme.

⁹³ Less consumer protection may be mitigated by increased choice and end-user control. Harmful content still most likely in extra-legal content – non-EU Internet content and harmful offline media (video/DVD/print).

⁹⁴ Subject to effective and efficient enforcement, compared to legal action.

Issue 2: Promotion of European works for non-linear content providers⁹⁵

Note the only substantial changes will be in the third and final columns.

Apart from the general introductory comments above, we identify regulatory impacts in the following circumstances:

Options 1-4: For the three current types of broadcast stakeholders, existing obligations impose no costs that would not otherwise be borne by market requirements or national political settlements. Member States would have decreased costs with no reporting requirement. There is no effect given the massive preponderance of this audiovisual content to either press or ISPs.

Option 2: The confused state of European law means that much linear broadcasting may be now encompassed within the Directive. There is an obvious need to clarify the law in the Directive. For one market, France, VOD operators are already required to invest 2% of revenue in European production.

Option 3: IPTV has less revenue and therefore flexibility to produce original higher cost content. If obligation is implemented flexibly, where practical and according to market development, any potential extra costs may be prevented. For consumers and independent producers, the greater investment required by non-EU foreign investors may be beneficial – so long as this does not raise significant entry barriers to new entrants. Regulators have additional monitoring costs.

Option 4: Positive impacts exist for linear IPTV as it removes any potential extra costs and uneven regulatory treatment compared to non-linear. For non-linear content, the argument is more complex. Two potential effects exist which cancel each other out. First, consumers may choose majority non-European works and any investment/catalogue quota may be underused by European consumers. Second (per Telecom Italia speech to Liverpool conference) the ‘long tail’ theory of consumer selection of niche products may take effect⁹⁶. This ‘Amazon effect’, after the book retailer, suggests that in a world of infinite consumer choice, consumers will be incentivised to consume products at the margin that in a world of restricted choice was not available to them. Thus markets will develop for all types of content, including much archived European content that is not currently on offer. In such an environment, European content may flourish over more homogenized ‘blockbuster’ US content.

| Stakeholder | Option 1 | Option 2 | Option 3 | Option 4 |
|------------------------------------|-----------------------|------------------|----------------------|------------------|
| Key indicator | no obligations | no change | change linear | promotion |
| <i>Public service broadcasters</i> | = ⁹⁷ | = | = | = |
| <i>Free-to-air commercial</i> | = ⁹⁸ | = | = | = |
| <i>Pay-TV</i> | = ⁹⁹ | = | = | = |

⁹⁵ See <http://www.europa.eu.int/comm/avpolicy/revision-tvwf2005/2005-contribution.htm> at IP3

⁹⁶ See Shapiro and Varian 1998, *Information Rules: A Strategic Guide To The Network Economy*.

⁹⁷ Obligations imposed by licence agreement and state funding – but advertising supported investment could suffer as a result of deregulation. See Mark Thompson Liverpool speech at http://www.bbc.co.uk/pressoffice/speeches/stories/thompson_presidential.shtml

⁹⁸ Free to air broadcasters carry a vast majority of European works. David Graham Associates 2002 and Implementation Reports on Articles 4,5 TVWF.

| | | | | |
|--|-----------------|-----------------|-----------------|-----------------|
| <i>Written Press</i> | = | = | = | = |
| <i>ISPs – cable, telco</i> | = | = | = | = |
| <i>IPTV linear</i> | = | ₋₁₀₀ | ₋₁₀₁ | ₌₁₀₂ |
| <i>VOD non-linear</i> | = | = | = | = |
| <i>Independent Producers</i> | = | = | ₊₁₀₃ | ₌₁₀₄ |
| <i>Regulators and Member State administrations</i> | ₊₁₀₅ | = | ₋₁₀₆ | ₋₁₀₇ |
| <i>Consumers inc. Fundamental rights</i> | = | = | ₊₁₀₈ | ₊₁₀₉ |

Issue 3: Short reporting, for linear content providers¹¹⁰

Apart from the general introductory comments above, we identify regulatory impacts only between Option 2 and Option 3. The Commission has only two choices, to do something or to hope the market will deliver pan-European extracts for news programming. If this does not occur, the holders of premium content who choose not to release to non-national broadcasters (directly or indirectly) will marginally gain, and the viewers of non-national extracts will be obliged to incur the costs of looking elsewhere for that content. Smaller public service broadcasters may lose out because the transaction costs and marginal potential loss of premium revenue to rights-holders, of providing

⁹⁹ Some pay-TV operators provide less than 50% European works, but monitoring does not require them to make significant improvements except as markets permit in most MS. Graham (2002) op cit.

¹⁰⁰ Covered by articles 4 and 5 already now in case law: *Mediakabel v. Commissariaat voor de Media* (Dutch Media Regulatory Authority) Case n° C-89/04, reliant on the definition of information society services provided in Annex V, Point, 3, sub A of Directive 98/34/EC. See analysis by Valcke, P. (2005) *Television broadcasting or information society service: can the ECJ learn something from a small but complex country as Belgium* at http://www.ofcomwatch.co.uk/2005_04_03_blogarchive on the Opinion of the Advocate general in March 2005.

¹⁰¹ Obligation to carry European works, except in specific genres. Given the small niche of linear streaming, it is possible that there will be minor impacts on programming and monitoring.

¹⁰² Equalises regulatory conditions between linear and non-linear (whether competing sectors or not).

¹⁰³ Depending on degree of independent production required, distinct possibility of greater investment.

¹⁰⁴ Given the as-yet unclear status of the non-linear market, and the degree of uncertainty of its development, it is not possible to make judgments about how content investment will be distributed in this market.

¹⁰⁵ No regulatory obligations.

¹⁰⁶ Some additional monitoring obligations.

¹⁰⁷ Additional monitoring obligations.

¹⁰⁸ Subject to effective and efficient enforcement, compared to legal action.

¹⁰⁹ Cataloguing non-linear services means must-offer for European works. Cultural diversity and the possibility of the ‘long tail’ is enhanced.

¹¹⁰ See <http://www.europa.eu.int/comm/avpolicy/revision-tvwf2005/2005-contribution.htm> at IP2.

such content, outweigh the known advantages in marketing and extract fees. In Option 3, the roles are reversed. For large commercial free-to-air broadcasters, the effects are marginal depending on premium rights market power. Note, in Option 3, the availability of a viable pan-European market creates an indirect benefit to commercial broadcasters, both linear and free-to-air.

| Stakeholder | Option 2 | Option 3 |
|--|------------------|------------------------------|
| | Status quo | Revision made ¹¹¹ |
| <i>Public service broadcasters</i> | = ¹¹² | + ¹¹³ |
| <i>Free-to-air commercial</i> | = ¹¹⁴ | + ¹¹⁵ |
| <i>Pay-TV</i> | = ¹¹⁶ | - ¹¹⁷ |
| <i>Written Press</i> | = | = |
| <i>ISPs – cable, telco</i> | = | = |
| <i>IPTV linear</i> | = | = ¹¹⁸ |
| <i>VOD non-linear</i> | = | = |
| <i>Independent Producers</i> | = | = |
| <i>Regulators and Member State administrations</i> | = | - ¹¹⁹ |
| <i>Consumers inc. Fundamental rights</i> | - | + ¹²⁰ |

¹¹¹ Marginal effect possible on premium and pay-TV rights for all broadcasters except free to air (and especially public service broadcasters).

¹¹² Potential negative effect on smaller free to air broadcasters, particularly in smaller member states, who are unable to secure access to larger neighbours' extract rights.

¹¹³ Some non-national extracts available. Price access conditions to be determined.

¹¹⁴ As above – empirical evidence unavailable.

¹¹⁵ As above.

¹¹⁶ Marginal effect. To the extent that increasing number of events are being sold by rightsholders to pay-TV, the continuing economic trend may be expected to continue without intervention.

¹¹⁷ Possible effect on premium rights costs offset by possible effect in decreasing non-national subscriptions. Possibility to create secondary markets in non-national extracts from existing contractual rights. On balance, negative as market has not provided non-intervention solution to date.

¹¹⁸ Possible market for streamed news?

¹¹⁹ Enforcement and monitoring costs.

¹²⁰ For free to air viewers partially interested in non-national extracts but without subscription to pay-TV service or non-national channels, service will be available.

Issue 4: Commercial communication (global approach covering liberalization of product placement, some quantitative rules to allow more flexibility) ¹²¹

Note that according to the Options logic, the global flexibility of rules suggested can only be introduced for linear broadcasting in Option 3, and non-linear broadcasting in Option 4. In Option 2, no change occurs and in Option 1 all EU rules are abolished, which produces the general effects described at the beginning of this Chapter.

Here, there is a substantial amount of conflicting empirical data from stakeholders regarding substitution effects, and some independent data, which suggests substitution that is much broader and much shallower in scope. Suggestions of a collapse in broadcast advertising, or newspaper advertising, or both, which is suggested in stakeholder responses, claim that either one is cannibalising from the other. Further, both claim that Internet advertising is cannibalising. However, these claims must be treated with caution.

- First, Internet advertising contains many sub-categories, the largest of which (40%) is search-engine related¹²².
- Second, broadcasting commercial communications are largely display, which can only be in competition with other display advertising (though we acknowledge attempts are ongoing to create markets for interactive advertising on TV).
- Third, outdoor advertising and radio (itself a beneficiary of cross-media advertising campaigns recognising its complementarity with Internet usage) are remarkably resistant to competition from other media, and Zenith claims at least 35 possible competitors for display advertising¹²³.
- Fourth, all European sectoral advertising markets are currently growing, reflecting consumption recovery from a deep 2001-3 advertising recession, especially in Germany.
- Fifth, the markets for Internet based audiovisual advertising are effectively zero currently¹²⁴.
- Sixth, print advertising revenue has declined from its historically high share of display advertising in the 1980s by about one-third in two decades. There is some evidence that television advertising may have reached its high point in the last five years, and that a similar slow decline in overall share may be occurring¹²⁵. However, both sectors will continue to grow, if relatively more slowly than in the past.
- Seventh, different national markets have very different characteristics. The most mature European market, UK, is seeing slow relative declines in TV advertising, France and

¹²¹ See <http://www.europa.eu.int/comm/avpolicy/revision-tvwf2005/2005-contribution.htm> at IP4

¹²² See PWC/IAB (2005). The remarkable innovation achieved by Google should be noted in this regard.

¹²³ Zenith (2005)

¹²⁴ We have seen no data suggesting that advertising directly linked to Internet video is a market which can be measured with any certainty in Europe.

¹²⁵ Zenith Optimedia (2005)

Germany have seen declines based on structural economic problems, while much of Eastern and Central European media markets are extremely fast-growing¹²⁶.

- We therefore treat claims of cross-sectoral substitution effects and therefore deregulatory-re-regulatory European ‘levelling’ of playing fields, with great caution.

That said, we see a case for flexibility based on the advantages that it brings to the television advertising market. If there is little or no measurable (even if hypothetical) effect on other markets, and consumer harm can be avoided, there is a strong case for some type of regulatory relaxation. This can be doubly beneficial for consumers in that greater advertising effectiveness produces more revenue, which may be invested in programming (or distributed to shareholders, or used for Internet expansion, amongst other uses).

| Stakeholder | Option 1 | Option 2 | Option 3 | Option 4 |
|------------------------------------|--------------------|-----------------------|-----------------------------|--|
| Key element | EU rules abolished | EU rules broadcasting | linear covered; flexibility | non-linear covered; flexibility for both |
| <i>Public service broadcasters</i> | = ¹²⁷ | = | + ¹²⁸ | + |
| <i>Free-to-air commercial</i> | + ¹²⁹ | = | + | + |
| <i>Pay-TV</i> | = ¹³⁰ | = | + | + |
| <i>Written Press</i> | = ¹³¹ | = | = ¹³² | - |
| <i>ISPs – cable, telco</i> | = ¹³³ | = | = | = |

¹²⁶ PwC (2005)

¹²⁷ Obligations imposed by licence agreement and state funding – but advertising supported investment could suffer as a result of non-harmonised regulation.

¹²⁸ As for all broadcasters, greater flexibility in both commercial communications itself, and ability to extend into linear services with legal certainty. See EGTA and ACT studies.

¹²⁹ Equilibrium in market may in effect produce few obvious changes beyond self-regulation (which currently is effective in most markets under a co-regulatory approach). Advertising for alcohol and to minors, as well as surreptitious and misleading advertising, may well increase in less regulated national markets – which could have an eventual detrimental effect on the television market. Ireland ban on alcohol will have serious impact on national competitiveness with UK-based broadcasters.

¹³⁰ Increases in advertising minutage of limited effect in niche markets, and possible loss of sponsorship and product placement revenues as free to air television proves a strong competitor.

¹³¹ Press advertising may decrease according to increased use of different techniques on TV, in this case permitted by self-regulation. See EGTA and ENPA responses to June 2005 consultation.

¹³² As with Option 1, some substitution effect.

¹³³ Most Internet advertising results from click-through and search website advertising, and substitutes for press in the case of classified. The growth of this sector is unlikely to be seriously affected. Zenith Optimedia (2005)

| | | | | |
|--|------------------|---|------------------|-------------------|
| <i>IPTV linear</i> | = ¹³⁴ | = | + ¹³⁵ | + ¹³⁶ |
| <i>VOD non-linear</i> | = ¹³⁷ | = | = | = ¹³⁸ |
| <i>Non-EU Actors</i> | = | = | = | = ¹³⁹ |
| <i>Independent Producers</i> | = | = | + ¹⁴⁰ | + |
| <i>Regulators and Member State administrations</i> | - ¹⁴¹ | = | = ¹⁴² | = ¹⁴³ |
| <i>Consumers inc. Fundamental rights</i> | - ¹⁴⁴ | = | + ¹⁴⁵ | ++ ¹⁴⁶ |

identifies at least 35 possible substitutes for broadcast advertising, including especially outdoor advertising. Therefore the trade-off is not simple and causation difficult to establish.

¹³⁴ In new markets, advertising unlikely to be substantial – cf. satellite TV sales in 1980s very low. Competition in such niche markets with classified sales in local print, not mass media.

¹³⁵ Greater legal certainty for broadcast-type scheduled services. Given ability to use new advertising techniques, pan-European providers (e.g. linguistic rather than national) are likely to benefit.

¹³⁶ Positive benefits from Option 3 but possible substitution effects from non-linear in Option 4.

¹³⁷ Unclear what advertising beyond insertions at beginning and end of requested file exist. Similar effect to cinema advertising.

¹³⁸ Supra note 9, unclear what advertising techniques will prevail beyond linear techniques. Legal certainty created.

¹³⁹ Possible offshoring of non-compliant ‘spam’ advertisers: to children, of alcohol, pharmaceuticals, tobacco etc.

¹⁴⁰ Larger advertising market, all other things being equal, means greater production revenues and alternative revenue streams from e.g. product placement and sponsorship.

¹⁴¹ Requirement to monitor and draft rules at national level to regulate non-national signals. Possible use of co-regulation. Need to coordinate with other MS in enforcement.

¹⁴² Legal certainty and greater flexibility means lower enforcement and compliance costs, but possibly greater monitoring costs. Use of co-regulation likely to continue.

¹⁴³ Supra, further development of same trends.

¹⁴⁴ Less certainty in regulation of non-national broadcasters.

¹⁴⁵ Greater certainty in standards – possible negative effect unless well-enforced division between editorial and commercial decisions. Larger revenues means more programming quality and choice.

¹⁴⁶ Subject to effective and efficient enforcement, compared to legal action.

Issue 5: Jurisdiction for non-linear content providers¹⁴⁷

In this very focused issue, there are only two Options, whether to include within the ‘Audiovisual’ (no longer television) Directive pan-European non-linear providers – i.e. on-demand. If there is no non-national market there is no effect, as with other services. If there is substitution between linear and non-linear, in Option 3 linear gains from the country-of-origin principle. Consumers in that case would find that similar content has different rules, regulators would enforce against providers from other Member States with the extra costs that were familiar to television regulators prior to the 1989 TVWF.

In Option 4:

- non-linear providers gain from country-of-origin,
- producers gain an extra pan-European outlet for their work from the increased market,
- public service broadcasters see little effect,
- terrestrial commercial broadcasters may see some substitution effects in which their main competitors (non-national broadcasters) are weakened,
- written press can benefit if advertising is diverted from pay-TV markets but this is insignificant compared to the pressure from the structural decline of print compared to broadcast TV and Internet advertising.
- Linear will see a new potential competitor, which indicates a loss in a zero-sum market, but if both were growing rapidly even if substitutable, that would be outweighed by overall market growth.
- Consumers and regulators gain from regulatory certainty in new markets.

| Stakeholder | Option 3 | Option 4 |
|------------------------------------|-------------------|------------------|
| Country-of-origin | no ¹⁴⁸ | yes |
| <i>Public service broadcasters</i> | = | = ¹⁴⁹ |
| <i>Free-to-air commercial</i> | = | + ¹⁵⁰ |
| <i>Pay-TV</i> | = | 151 |
| <i>Written Press</i> | = | = ¹⁵² |

¹⁴⁷ See generally <http://www.europa.eu.int/comm/avpolicy/revision-tvwf2005/2005-contribution.htm> at IP1

¹⁴⁸ Little or no impacts on major broadcast and press markets, as non-national non-linear is currently a miniscule market, see PWC (2005).

¹⁴⁹ Obligations in licence to maintain state/licence fee mandatory funding based on CoO – effects only where signal is carried for advertising in second MS.

¹⁵⁰ For most terrestrial licensees, competition would be lessened from non-national broadcasters, who would be required to conform to laws in MS of reception. Particularly so in markets with high investment quotas (e.g. France) and stricter advertising laws (e.g. Sweden).

¹⁵¹ Where pay-TV operator is broadcasting by satellite and currently able to use CoO to its advantage. In case of terrestrial licensees (e.g. Canal+ in France and Spain) effect is positive in that non-national competitors are required to conform to reception MS rules.

¹⁵² Measures which prevent development of TV advertising markets prevent substitution of press markets. However, growth of Internet advertising is displacing press recruitment advertising faster than television (Zenith Optimedia 2005, PWC 2005) so effect is not most significant.

| | | |
|--|------------------|-------------------|
| <i>ISPs – cable, telco</i> | = | = |
| <i>IPTV linear</i> | + ¹⁵³ | – ¹⁵⁴ |
| <i>VOD non-linear</i> | – ¹⁵⁵ | ++ ¹⁵⁶ |
| <i>Independent Producers</i> | = | + ¹⁵⁷ |
| <i>Regulators and Member State administrations</i> | – ¹⁵⁸ | + ¹⁵⁹ |
| <i>Consumers inc. Fundamental rights</i> | – ¹⁶⁰ | + ¹⁶¹ |

Issues Tables have demonstrated some of the more direct effects of the various options as they impact on stakeholders. In the final chapter, we bring together the analysis of stakeholders and issues, with that of the Options provided, in order to provide a more holistic examination. We also analyse by the broader indirect impacts on the wider European economy, and the likely effects on i2010 and the Lisbon Agenda.

¹⁵³ Competitive advantage over non-linear market if substitutable.

¹⁵⁴ Legal certainty in other than national markets for on-demand competitors. No substantial evidence that on-demand and linear markets will be substitutable so real effects unclear.

¹⁵⁵ No legal certainty in non-national markets. If national market is main target, limited effect.

¹⁵⁶ Legal certainty in non-national markets.

¹⁵⁷ Advantage when serving other than national markets; no need to repurpose.

¹⁵⁸ Fragmented rules in 25 MS increase costs of enforcement against non-national players, and cooperation with other MS regulators.

¹⁵⁹ Allows for legal certainty and reduces compliance and cooperation costs.

¹⁶⁰ Possibility of more content in deregulated environment, though non-EU content would be available in any case. Outweighed significantly by uncertainty regarding rules.

¹⁶¹ Subject to effective and efficient enforcement, compared to legal action.

CHAPTER 6 **Conclusion: Policy Options in a Dynamic Environment**

In this final chapter we draw on all data and analyses in previous chapters to make a high level assessment of the four policy options. First we look at the accrued economic impacts that have been summarised for every option (this is summarised in more detail in the table in Annex 5). Then we analyse for every issue what the likely risks, trade offs and benefits are when applying the four options (a more detailed summary for reference is reflected in the table in Annex 6). Finally we suggest the most likely option for every issue.

6.1 **Overall Economic Effect of the Options**

In our comparison of the economic impacts of the four options, in each option we consider:

- What will happen to technology development and growth of audiovisual sector?
- Will the regulatory burden increase or decrease?
- Will advertising revenues increase or decrease?
- Will broadband rollout be encouraged or not?
- Will GDP and competitiveness benefit or suffer?
- Will benefits and costs be distributed evenly among large and small companies and Member States?

Technology development and growth of audiovisual sector

Legal certainty on the status of non-linear services should support convergence of linear and non-linear on the supply side, and could contribute to a beneficial environment of trust, consumer confidence, and product awareness and acceptance. Regulation currently does not seem to affect development of new AV technologies and growth in the AV sector. However, without a revision of the TVWF Directive new technologies develop first under lower regulatory burden and later possibly under a fragmented regulatory regime dominated by diverging national regulations. Though traditional and new services are not yet competing at a large scale, by 2009 this may be different and divergence in regulatory treatment could become an obstacle to the integration of linear and non-linear markets.

Regulatory burden

Regulatory burden increases foremost for governments that face new enforcement and monitoring challenges. Legal certainty for non-linear services will also lead to a greater regulatory burden where new requirements go beyond existing rules set in the eCommerce Directive. However, coordination at EU level does avoid an increase of new regulatory pressure at the national level and reduce the risk of a fragmented European market. Any regulation of non-linear services at national or European level will put additional strain on governments due to the expected explosive growth of AV service providers. Linear services are likely to benefit from a revision as it will reduce the regulatory burden notably in the area of advertisement.

Advertising revenues

Relaxing advertisement rules should increase industry's ability to retain more revenues per time unit advertisement, as new advertising techniques can be applied. Overall advertising revenue may increase as different media complement rather than substitute each other. Deregulation at EU level could provide even more flexibility, but likely resurgence of national regulation would reduce this potential benefit.

Broadband rollout

A revision of the TVWF Directive will not have a major impact on broadband roll out and uptake. By 2009 broadband will be widely used (see Figure 10). Without any regulation, market developments and consumer choice would determine the outcomes, with an increased likelihood of perverse or undesirable and unevenly distributed effects. This could undermine consumer trust, which is a key driver of broadband roll out and uptake. More legal certainty and protection rules will support consumer trust and confidence and thus is expected to provide a climate in which uptake is likely to be higher. Vibrant digital AV services supply is seen as a potentially important driver for broadband demand and could ensure that broadband becomes an alternative vehicle for free DTH as a precursor to pay-TV.

GDP and competitiveness

Technological neutrality creates a single audiovisual market across media, which produces substantial economies of scale and scope, a net consumer surplus and higher advertisement revenues. On the contrary, fragmentation of markets because of a lack of common standards is likely to cause diseconomies of scale and scope, resulting in consumer loss and eventually in a negative overall effect on GDP. Competitiveness of the AV industry in a protected environment is likely to be upheld, but in the long term only thorough restructuring of the industry could make it truly competitive on a global scale.

Distribution of costs and benefits

Under all options treatment between linear and non-linear will be unequal - least so in a more regulated environment. Differences in market power between small and large players and between new and old Member States will be largely untouched, except where a heavy implementation burden is placed on the industry. Here smaller players are likely to suffer more. Where new rules on short extracts are adopted these are likely to shift economic

value from content producers, and large right holders to consumers, and a variety of service providers – mainly SMEs.

6.2 Comparing the options: Trade-offs, risks and benefits

Intervention logic

Member States' governments have legitimate interests in regulating audiovisual markets. Jurisdictional rules have to be set to avoid this control excluding non-national players from entering national markets. The application of Country-of-origin is proven to be the most effective approach, but it requires certain common minimum rules across the EU. Therefore the TVWF justifiably sets minimum standards for issues that concern all Member States and should extend these to cover new AV services, in order to avoid a re-fragmentation of the existing Internal Market. If *de facto* there were no Internal Market in linear online and non-linear services, due to the specifics of this industry (not solely due to existing national regulatory barriers) it would be disproportionate to regulate, as this causes unjustified regulatory burdens on the parties involved. This would also cause subsidiarity concerns.

The minimum rules should ensure legal certainty for market players, consumers and governments at EU and Member States' level. They should enable the growth and competitiveness of the AV market and at the same time serve greater societal values that need to be protected. These do not oppose one another, as for instance, trust and consumer confidence is good for the consumer and the market, legal certainty allows effective control and clarity for market players to develop their services, etc. In this assessment of the options we will be looking at identifying the right balance between these interests based on objective tests described in Chapter 4.

Scope

Given the general context sketched above, the scope of the review should be to ensure that the growing market for new linear and non-linear services and content production can flourish without putting traditional linear service providers at an unfair disadvantage through the discriminate application of regulation. Also the review should enable similar levels of protection of fundamental rights in all AV services. Whereas leaving new AV services unregulated could decrease the compliance and enforcement cost, the benefits of legal certainty across the Single Market weighs heavier. This argument is even more relevant, as an absence of EU regulation would not prevent Member State regulation; leading to a fragmented as well as a regulated market, thus preventing new service providers benefiting from the Internal Market and burdening them with multiple compliance costs.

The values that TVWF sets out to protect are: the protection of minors, right of reply, human dignity and the avoidance of incitement to hatred, as well as certain commercial communications and advertising for some products that are potentially harmful to consumers health. These minimum rules are essential to create the level of mutual recognition required for the application of the country-of-origin. How to apply them is either carefully described or left to the discretion of Member States. In setting the rules

enforceability needs to be taken into account alongside the objective that the rule tries to achieve. Therefore additional regulatory tools like self- and co-regulation codes can supplement (and sometimes even replace) legal instruments.

Protection of Human Dignity

In areas like prevention of incitement to hatred and protection of minors it is justifiable that the government seeks specific tools to act rapidly and decisively once such content is identified. These instruments go over and beyond - costly and slow - general legal provisions that allow for redress of damages and/or the forced removal of damaging or otherwise harmful content. However, enforcement and monitoring of the online AV environment is near impossible. Without complementary self-regulation and other instruments like awareness raising among parents and educators and the support for the development and application of filtering tools, the objectives will be difficult to reach. It should be in the interest of all parties involved to create an environment of consumer confidence and trust and to support generally accepted values, therefore the incentives for effective self regulation are largely present and should be actively exploited.

Masthead identification and right of reply

In providing the viewer or consumer the possibility to execute his rights, in case of unfair or other damaging content, the service provider is obliged to identify himself and to offer the viewer/consumer the right of reply. Such a right of reply requires that the industry develop a conflict resolution mechanism and other instruments – e.g. an ombudsman - to guarantee the objective assessment of each individual case and to provide the redress that people expect. Such a mechanism can provide the viewer/customer easier and faster remedy than by filing a (civil) law suit. However it is costly for the industry and may place an unequally heavy burden on small players, who could be driven out of the market or may choose not to comply, which in turn could undermine the credibility of the system. Moreover, such a scheme faces a challenge to establish its credibility, independence and trustworthiness. Also, the legal guarantees fall short of actual legal proceedings. Given these expected impacts it would be preferred to leave the right of reply to be addressed in general civil law provisions. Masthead identification can be made mandatory. Costs will be minimal as this identification is required under the eCommerce directive and broadcasters already carry their contact details on their websites.

Advertisement content

National rules on advertisement content and advertisement insertion also prevent pan European services developing. Therefore these have been included in the minimum requirements. Deregulating this area is undesirable, as this would mean going back to the pre-1989 situation of diverging national laws and a fragmented Internal Market. From this perspective it seems beneficial to extend the rules to new linear and non-linear services. However, currently national advertisement rules are largely absent for these services and are not yet creating barriers. In the absence of evidence of Internal Market barriers, there might be other justifications such as: the risk of future barriers; the persistence of an unfair competitive advantage of new services; or the desire to make sure that fundamental rights will be protected across all AV services within Europe. The extension of existing rules to non-linear services may have a negative financial impact in compliance, which reduces the

competitive edge of this growing sector. It will also have a significant impact on monitoring costs. Therefore an intervention needs to be justified, effective, and enforceable. It should provide better protection of fundamental rights and key societal interests in new AV services and prevent future Internal Market fragmentation. Only a co-regulatory system, with voluntary industry codes backed up by legal provisions, can ensure the required level of compliance to make these rules effective in new online AV services.

Advertisement insertion rules

With declining advertisement revenues and low compliance rates, current advertisement insertion rules need to be reviewed. Broadcasters and content producers need to be given more possibilities to increase the value of advertisement time. This would allow them to provide a more targeted offering and also to apply new advertisement methods like product placement. Full deregulation may be a viable option if Member States would not regulate at the national level. In a free market the total advertisement time, the total number of commercial breaks and the concentration of advertisement around programmes with high viewer density would all increase. But this effect would be mitigated, as viewer numbers are an important determinant of the value of advertisement and too much advertisement scares viewers off, thus in turn reducing the value per time unit of advertisement. The market equilibrium may still be unacceptable to some governments. They will intervene in order to limit commercial interruptions of programmes or to set rules for identifying or forbidding product placement. Thus it is likely that some harmonization at the level of the EU is required to avoid fragmentation of the Internal Market. At what level such harmonization should take place is a political decision, though it should be below the market equilibrium to justify intervention. Monitoring costs, to be effective, must be high, as the number of online AV services are numerous and increased flexibility makes it more difficult to control compliance.

European and independent content

The current TVWF actively supports the production of European and independent content, by setting minimum levels of broadcast time for such content in traditional linear services. New linear and non-linear services are not covered. If this inequality provides an unfair disadvantage for broadcasters and if such rules would be implementable in the online environment and prove effective in supporting the production of European and independent content it could make sense to extend the current rules to these new services. Currently, on average, broadcasters programme more European content than required, as most markets are linguistically or nationally determined. Thus this rule does not provide a competitive disadvantage and it does not seem to be necessary to ensure programming of European content. Moreover, stimulating the supply of content, independent of demand may not be an effective way to stimulate quality content or a viable and competitive European content production industry. Existing rules for traditional linear services may have limited effect but they avoid disruption of the Internal Market by Member States who would like higher quota and should therefore remain. Extension to new services is not currently justified, especially as this would entail an increase in monitoring cost for the EU. Also non-linear services have a demand- instead of a supply-driven business model that does not depend on broadcast time, but on the catalogue of content and the viewer demand. It is more likely to carry many niche products including independent and

European content to serve the many demand of few viewers, whereas traditional broadcasting and linear service seek to capture large audiences with a limited range of content.

Access to short extracts and major events

Finally the review sets out to define the right of access to information and to balance this with the legitimate interests of economic rights holders of specific content. By introducing the right to access short news extracts, and to allow Member States to draw up lists of events that should be open for all, the value of transmission rights is reduced. This benefits the public at large, small linear service providers (e.g. mobile phone operators), which may not generate the content themselves or pay for the exclusive transmission rights. The content producers and right holders (e.g. sports- or music events, football clubs and independent producers) see the value of their rights affected, creating uncertainty in exploiting the high demand for such content to develop other services over a variety of platforms or to invest in content generating activities. The market will not self-regulate, therefore to guarantee access intervention is needed. This may be justified to allow access to information, which would otherwise not be accessible and which is of great societal value. As most news footage is readily available, the main content that will be affected is major sports events. How to balance the right to access with the right holder's interests is a political decision, especially in the absence of evidence of competitive effects. Ways to mitigate the negative effects on right holders could be to allow a 24-hour delay in the provision of access and/or the reduction of duration of short extracts. There will be extra monitoring and enforcement cost.

6.3 Conclusion

Different issues require different approaches across the 4 policy options. The option of deregulation holds promise in some areas, but can rarely be applied, as the EU cannot force deregulation at national level, therefore risking fragmentation of the Internal Market. Application of the country-of-origin principle should be extended to new services, requiring common European minimum standards on fundamental issues.

Rules to protect fundamental rights in the online environment are difficult to enforce. It will require a mixed response of EU minimum rules, national provisions, self-regulation, and support instruments like awareness raising and application and development of technology. The right of reply is better left to general provisions of civil law, complemented with self-regulatory codes of the industry. The difficulty to provide effective and credible remedy, the cost of setting up dispute settlement procedures and institutions, and the unequal burden on small service providers are the decisive factors. Masthead identification, however, is useful and can be applied without cost. Advertisement content rules also are hard to enforce, but minimum rules are necessary to avoid Internal Market fragmentation. Compliance can be improved through self- and co-regulation. Insertion rules for advertisement should be made more flexible for traditional linear services to compensate for the decline in advertisement revenue and changes in technological possibilities.

Complete deregulation may be considered, but risks re-fragmentation of the Internal Market as some Member States are expected to regulate. European and independent content rules do not need to be extended to non-linear services, but should be kept for linear services as a defensive instrument to avoid re-nationalisation of these rules, and the risk of fragmentation in the Internal Market. The economic impacts of the four options have been compared in Annex 5.

Finally: defending a right to information, by ensuring access to short news extracts and events of major importance is a significant infringement of right holders' economic rights. Setting rules leads to re-allocation of this economic value to viewers, free-to-air broadcasters, and small service providers. Where to strike the balance is a political decision. If such access is desirable than regulation is necessary as the market will not self-regulate. Effects on right holders can be mitigated through the design of the rules.

Annexes

Annex 1 – Definitions of terms in the proposed Directive

| Issue area | Definitional Issue in Issues Paper | Stakeholders Affected | Clarifying Comment |
|---------------------------------|--|--|---|
| Audiovisual Content | <p>“The elements for the definition of “audiovisual media services” could include:</p> <ul style="list-style-type: none"> • Services as defined by the treaty (Art 49 and 50), • for the delivery of moving pictures with or without sound, • to the general public, • by electronic networks. <p>This definition would exclude by its reference to “services as defined by the Treaty” all forms of non-commercial or private mass communication. By its reference “to the general public” all forms of individual communication”</p> | <p>Video blogs on WWW – supported by Google Video search, Google Blogsearch, or future ‘Video blog search’</p> <p>Only the content provider will be affected – not pure search engines</p> | <p>Potential to capture larger group of WWW publishers, rather than traditional broadcasters and VOD suppliers. Intention to cover only “television –like” services.</p> <p>Difficult to quantify whether any of the affected groups would choose to avoid classification by off-shoring; changing business model; using flag of convenience Member State</p> <p>These obligations are already theoretically established in most Member State in a non-harmonized manner. Cost-benefit for provider of new content services will include the Country-of-origin principle.</p> |
| Editorial | <p>“Content service provider” means the natural or legal person who has editorial responsibility for the content of the audiovisual content service. [alternative: determines the manner in which audiovisual content is organized.]</p> <p>Editorial responsibility would be part of the definition for 2nd tier.</p> <p>Services that are scheduled, i.e. where there is a succession of programmes arranged throughout the day by the responsible editor and the viewer does not control timing of transmission.</p> <p>On-demand services where users/ viewers are able to choose the content they wish at any time, e.g. VOD, web based news services, etc.</p> | <p>Would include traditional television, web casting, streaming and near VOD</p> | <p>Difficult to quantify whether any of the affected groups would choose to avoid classification by off-shoring; changing business model; using flag of convenience Member State</p> |
| Non-linear audiovisual services | <p>On-demand services where users/ viewers are able to choose the content they wish at any time, e.g. VOD, web based news services, etc.</p> <p><u>Multiple forms of moving images</u> possible on websites:</p> <ul style="list-style-type: none"> • Video-on-demand – ‘click to watch’ services can be both streamed or downloaded <p><u>Video-enhanced text based WWW</u>: audiovisual content a part of a larger page of information and advertising. Is video on a website always the primary aim? For instance, a videocam or video stream on a text page may be used for illustration of e.g. a product, not as primary aim of page.</p> | <p>All advertising/product information supported websites within the purview of media regulation.</p> <p><i>User-generated content e.g. blogs</i> already ‘mini-syndicated’ to include advertising</p> | <p>Linear services are defined as services where the content service provider decides upon the moment in time when a specific programme is offered and on the composition of schedules; This is not altered when the viewer uses a PVR or subscription service.</p> <p>Refined definition in a way as to exclude the examples of website design (e.g. Flash or streaming) and the effects. Difficult to quantify impact on these players – technological choice may create new categories of linear or non-linear actors with technical choice creating legal arbitrariness. Example: costs of providing streaming versus on-demand delivery</p> |

| | | | |
|---|--|---|---|
| <p>Non-EU audiovisual content providers “Masthead” “identification” rules</p> | <p>Threshold: audiovisual content service accessible by EU surfers</p> <p>ECD obligation</p> | <p>Including all commercial video-enhanced WWW pages globally</p> <p>Is additional group affected only broadcasters formerly outside ECD?</p> | <p>Single Market-oriented compliance?</p> <p>Incentive for regulatory arbitrage (e.g. EU Member State flag of convenience as with shipping)</p> <p>Non-linear services already have identification obligations. This would be a new obligation for traditional Broadcasters, which seems necessary with regard to the experience in the application o TVWF.</p> |
|---|--|---|---|

Scope Issues Paper at http://europa.eu.int/comm/avpolicy/revision-tvwf2005/ispa_scope_en.pdf

Annex 2 – Relating to other European and International legal instruments

This table identifies other European and international legal instruments that bear on the scope of the Directive

| Issue | Legal Instrument | Relationship To Proposed Revisions |
|---|---|--|
| Substantive scope | European Court of Human Rights decisions on definition of 'mass media' ¹⁶² ECD (2000/31/EC) Second Implementation Report ¹⁶³ | The European Parliament requested that the definition of audiovisual content must be expanded to take account of media convergence at the technical level. ¹⁶⁴ Until now, there was a clear distinction between "television broadcasting services" subject to TVWF, and "information society services", subject to the ECD. Provided the new comprehensive Directive is purported, there will be an overlap as far as audiovisual (media) services on-demand are concerned. |
| Jurisdictional Scope: country-of-origin Principle | ECD | ECD Article 3.4 empowers Member State to derogate from the Country-of-origin principle in view of public policy objectives like "protection of minors", "fight against any incitement to hatred" or "protection of consumers". Member States have <i>never used</i> this derogation, with the effect that non-linear audiovisual services are <i>potentially</i> subject to non-harmonised rules in different Member State. A Directive providing minimum rules for the delivery of audiovisual content would provide basic harmonization for the ECD <i>theoretical gap</i> . |
| Fundamental Rights | Art. 6 TEU stipulates that the Union respects fundamental Rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No: 005. Charter of Fundamental Rights | Coherence and consistency with the Charter of Fundamental Rights should be ensured. TVWF establishes a delicate balance between the basic freedom of expression on the one hand and protection of human dignity, right to reply and protection of minors on the other. |

¹⁶² See, for example, *Thorgeirson v Iceland*, Judgment of the European Court of Human Rights of 25 June 1992, Series A, No.239; *Oberschlick v Austria*, Judgment of the European Court of Human Rights of 23 May 1991, Series A, No. 204; *Bladet Tromsø & Stensaas v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999 and *Unabhängige Initiative Informationsvielfalt v. Austria*, Judgment of the European Court of Human Rights of 26 February 2002.

¹⁶³ COM (2003) 776 final of 12 December at http://europa.eu.int/comm/avpolicy/legis/reports/com2003_776final_en.pdf at p6

¹⁶⁴ See Perry Report, PE 312.581/DEF, Point 10. The European Parliament "Believes that the definition of audiovisual content must be expanded to take account of media convergence at the technical level; believes, further, that the principles underlying the Directive, and, indeed, those underlying the Community's audiovisual policy should be set down in a Content Framework Package of graduated levels of regulation, which would provide an overarching framework for the audiovisual sector".

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|---|--|--|
| Definition of 'Audiovisual Media Service' | Framework Directive (2002/21/EC) 1998 Transparency Directive ¹⁶⁵ ECD | The definition of “audiovisual media service” is different to services provided by electronic communications networks within the meaning of Article 2(a) of Framework Directive The ECD contains the principle of identification of the content service provider; the revised TVWF would introduce the principle of the audiovisual content provider. |
| Consumer protection | Misleading Advertising Directive (84/450/EEC and 97/55/EC) Directive 2005/29/EC on Unfair Commercial Practices | These instruments do not replace sector-specific regulation - in case of conflict of these general documents with sector-specific EU rules, the sector-specific rules apply. The UCP Directive provides an examples of unfair commercial practice: “Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)” adding that this is without prejudice to TVWF. The UCP Directive also introduces in its Recital 6 the notion of “legitimate product placement”. |
| Cultural Diversity | Article 151.4 TEU | Article 151.4 obliges the EU institutions to anticipate and assess the cultural impact of all regulations |
| Free movement of services | EC Treaty - Article 49 and 50 | The definition of “audiovisual media service” refers to services as defined by Article 49 and 50 of the Treaty. The rationale of the Directive is the Internal Market for services. |
| Access to major events | The Cable and Satellite Broadcasting Directive (93/83/EEC) | The Cable and Satellite Directive allows that satellite broadcasters may acquire broadcasting rights for the entire EU, The acquisition of such rights takes place, under Article 3 (1), by way of agreement, i.e. by contracts between rights holders and broadcasters. |
| Protection of minors | 1998 Recommendation on Protection of Minors and Human Dignity; The self-regulatory and educational schemes under the Safer Internet Action Plan since 1998 | Evidence of market failure? See self-regulation info (2004). See COM(2004) 0341 European Parliament legislative resolution on the proposal for a recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry |
| Advertising, protection of minors | Measures taken at Member State level including co- and self-regulation | See Hans Bredow Institute (2005) White Paper on European Governance (2001) ¹⁶⁶ |

¹⁶⁵ http://europa.eu.int/comm/enterprise/tris/98_48_EC/index_en.pdf

¹⁶⁶ Com (2001) 428 Final, European Governance – A White Paper, at p21, see http://europa.eu.int/eurllex/en/com/cnc/2001/com2001_0428en01.pdf

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| Protection of human dignity | Recommendations of the Council of Europe; Convention on Cybercrime ¹⁶⁷ | Not yet in force generally: <i>Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems</i> CETS No.: 189 ¹⁶⁸ |
| Tobacco advertising | Tobacco Advertising Directive (2003/33/EC) | As it applies across the board, no need to include non-linear, but broadcasting was excluded, ¹⁶⁹ so a linear services reference needed. |
| Short extracts | Copyright Directive (2001/29/CE) Articles 81/82 TEU Council of Europe Recommendation 91(5) ¹⁷⁰ Article 9bis, European Convention on Transfrontier Television 1989 as amended 2002 ¹⁷¹ | Quotation right is an exception to copyright but recourse to exceptions of this Directive problematic Refusal to deal/bundling/tying all potential abuses of competition. ¹⁷² Definition of Fair Reasonable and Non-Discriminatory Access in ECJ case law ¹⁷³ |

167 See CETS No.185 entered into force on 1 July 2004 at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=185&CM=1&DF=&CL=ENG>

168 See <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=189&CM=8&DF=10/02/05&CL=ENG>

169 “This Directive should be without prejudice to Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities(6), which prohibits all forms of television advertising for cigarettes and other tobacco products. Directive 89/552/EEC provides that television programmes may not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products, or the provision of services, the advertising of which is prohibited by that Directive. Teleshopping for tobacco products is also prohibited by Directive 89/552/EEC.”

170 http://www.ebu.ch/CMSimages/en/leg_ref_coe_r91_5_short_reporting_110491_tcm6-4376.pdf

171 <http://conventions.coe.int/treaty/en/Treaties/Html/132.htm#FN2>

172 See DG COMP (2005) Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks, 21 September, Paras 14, 24, 43, at http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/final_report.pdf

173 See for instance Woods, L. (2005) Broadcasting, universal service and the communications package, info 7: 5 Pp 29 - 41

Annex 3 – European Commission Specific Objectives for Directive revision

The European Commission has stated that the specific objectives are as follows:

Material Competence

Audiovisual content regulation should provide modern flexible rules that clearly spell out general public interest objectives such as protection of minors and the promotion of cultural diversity. At the same time, they should permit opportunities for increased competition and consumer choice.

Modern rules should be neutral between and within platforms, and thus create a level playing field between the different operators.

The public policy objectives to be ensured by regulatory intervention are limited to clearly defined subjects: Protection of minors; Human dignity (ban of incitement to hatred); Protection of consumers; Right of reply; Cultural diversity.

These objectives have to be achieved in a graduated and adequate manner with respect to the nature of the regulated service. Establishing harmonized minimum standards at a European level is necessary for an effective application of the principle of regulation by the Country-of-origin.

Territorial Competence

The main objective is to simplify the administrative procedure for Member States to implement and enforce the Directive, to give jurisdiction to the Member State that has the technical possibilities to enforce the rules. This is part of the better regulation strategy to which the Commission committed itself.

The second objective is to give legal certainty to the audiovisual service providers (linear and non-linear) Member State to enable them to fully benefit from the Internal Market. For the moment only linear service providers can profit from the Country-of-origin principle.

Specifically:

- the existing criteria for linear services should be modified to ensure correct application of the Directive;
- new jurisdiction criteria for non-linear services can be introduced;
- a solution should be found which defines in an adequate way the responsible Member State taking into account circumvention measures while respecting the strict application of the Country-of-origin principle.

Masthead and Identification

To ensure easily, directly and permanently accessible information on the identity of audiovisual content service providers, to allow parties concerned to exercise their rights.

Human Dignity

- (1) to ensure compliance with equally valid policy objectives: the protection of minors against harmful audiovisual content, the protection of human dignity and the right of reply (or equivalent remedies).
- (2) to ensure legal certainty, which in turn should stimulate investment.
- (3) to balance the fundamental right to freedom of expression with measures taken in the field of protection of minors against harmful audiovisual content, the protection of human dignity and the right of reply.

Access to Events of High Importance

There is no specific mechanism at the Community level with the aim of promotion of the right to information as a component of the freedom of expression. Recognition of the right of access to short extracts of audio-visual programmes transmitted outside the borders of the signal transmitting country, has the aim of promotion of the right to information and to the transfrontier circulation of programmes of information on other Member States media events.

European content

The circulation of European works and works by independent producers is held to be essential in order to promote cultural diversity, freedom of expression and pluralism.

- Concerning European works, the objective would be to create a more integrated European audiovisual industry by facilitating the development of “European majors”, enhancing intra-Community co-operation between film producers and promoting the increased circulation of European co-productions.
- Concerning independent producers, the objective would be to vertically de-concentrate and balance audiovisual content supply and distribution sectors. The thesis is that this would contribute in the long run to a wider consumer choice and more attractive programming for viewers with positive side effects on plurality of content and cultural diversity.
- the definition of “European works”, would be streamlined while adapting it to future challenges, particularly in view of the UNESCO Convention on cultural diversity.
- With regards to the application and monitoring of the rules on promotion of cultural diversity, the objective would be to achieve a stricter and more uniform application of Articles 4 and 5 throughout the Community for better results. Also, more consistent results in monitoring are necessary for evaluation purposes and to give full effect to the rules on promotion of cultural diversity.

Commercial Communications

- Linear services: to soften the existing rules in the light of technological and of market developments and user behaviour to remain proportional with the goals of general interest. In this respect, the "evolution of technologies requires a continuous evaluation of the means and methods used so that they are always proportioned with the objectives to reach". The objective is that the rules are "the least necessary to achieve these goals".

- Non-linear services: to subject to basic rules to safeguard certain essential general interest objectives.
- to consider the legal options in the linear and nonlinear environment and to measure the impact of these measurements.

Listed Events

Unlike Article 2a(2) of the TWF Directive, Article 3a(2) currently makes no mention of a "decision" to be taken by the Commission. There have been problems with interpretation. A proposal is to amend Art 3a in a way as to oblige Member States to inform the Commission if the Member State has created a list of major events. This would turn the legal possibility into a legal obligation.

Annex 4 – Methods and costs of linear content compliance

Table on Methods and costs of linear content compliance (by stakeholders) and enforcement (by government)

| Reform Issue | ECD ¹⁷⁴ sufficient? | Compliance costs ¹⁷⁵ | Enforcement? C (Co-) S (self) regulation | Cost to regulator | Cost to regulatees |
|----------------------------|---|---------------------------------|---|--|---|
| Scope - sectoral | ECD applies: COM(2003) 702 final Directive 98/48/EC | - | Member State existing regulations typically exceed TVWF ¹⁷⁶ | State enforcement -- | Single market benefits |
| Scope - jurisdiction | ECD applies: COM(2003) 702 final Directive 98/48/EC | - | As above – ECJ and national case law on deviation from Country-of- origin | Coordination problems between Member State – Contact Committee can lessen costs | -- in cases of deviation from Country-of- origin |
| Masthead identification | ECD applies: COM(2003) 702 final Directive 98/48/EC | = | Implementation of ECD ¹⁷⁷ | = broadcasters introduce such measures but likely to already apply via their websites | = broadcasters introduce such measures but likely to already apply via their websites |

¹⁷⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

¹⁷⁵ Marginal (under 1000e) or Significant represented by double ++ or --

¹⁷⁶ See OfCom Tariff Tables 2005/6 at http://www.ofcom.org.uk/consult/condocs/socp/tariff/tariff_2005_06.pdf. OfCom charged £33,022,518 for the year to end-March 2005, and expenditure was £27,026,071. Expenditure for 2005/6 is expected to be £30,554,595. The minimum licence fee for a shopping channel is £2000/3000euro per annum, for a licensable programme channel application £2500/3750euro but mass market channels pay a revenue %age.

¹⁷⁷ Com (2003) 702 Final refers to the results of a sampling of websites carried out by VZBV (Verbraucherzentrale Bundesverband - German association of consumer organisations) in 2002-3 at http://www.vzbv.de/home/start/index.php?page=themen&bereichs_id=5&themen_id=20&mit_id=164&task=mit

| Reform Issue | ECD¹⁷⁴ sufficient? | Compliance costs¹⁷⁵ | Enforcement? C (Co-) S (self) regulation | Cost to regulator | Cost to regulatees |
|-------------------------------------|---|---------------------------------------|---|---|---|
| Protection of minors ¹⁷⁸ | ECD applies: COM(2003) 702 Directive 98/48/EC Recommendation | = | Co- and self-regulation | ++ Note enforcement lacking and self-regulation weak | FSM study of German licensing showed almost total disregard for law. Good co-regulation example of NICAM in Netherlands and ATVOD in UK |
| Right to reply | New Directive 98/48/EC | - | Co- and self-regulation Netherlands alternative is civil law enforcement by individuals. | Indicative costs per case 1000euro? Examples focus on costs of billing disputes in telecom. Examples from press and broadcast do exist – costs very high (but generally disputed). | Examples such as UK Broadcasting Standards Commission and French disputes involving Al Manar and Yahoo! suggest very substantial costs |
| Incitement to Hatred ¹⁷⁹ | New – Directive 98/48/EC | -- | Criminal law | | |

¹⁷⁸ See Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity (98/560/EC), OJ L 270, 7.10.1998, p. 48

¹⁷⁹ Note 2003 Protocol to Cybercrime Convention <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>

| Reform Issue | ECD¹⁷⁴ sufficient? | Compliance costs¹⁷⁵ | Enforcement? C (Co-) S (self) regulation | Cost to regulator | Cost to regulatees |
|---------------------------------------|---|---|---|--|--|
| Independent Production | New | -- | Broadcast regulator monitoring – licence requirements | Unknown – awaiting information on enforcement | Unknown – awaiting information on enforcement – potential for co-regulation as in European advertising |
| European production | New | -- | Broadcast regulator monitoring– licence requirements | Unknown –information on enforcement varies widely in Member State (e.g. UK versus France) | Unknown – refusal to deal cases under European law |
| Prescribed adverts | Existing Directive requirements Directive 98/48/EC | -- | Broadcast regulator monitoring – other regulations from health ministries | Unknown – awaiting information on enforcement – potential for co-regulation as in EASA | |
| Product Placement | Deregulatory | -- for non-linear as broadcast competitors enter market; ++ for broadcasters | Broadcast regulator monitoring– licence requirements | Unknown – awaiting information on enforcement – potential for co-regulation as in European advertising | |
| Commercial Communication – time limit | Deregulatory | -- for non-linear as broadcast competitors enter market; ++ for broadcasters | Broadcast regulator monitoring – licence requirements | | |

| Reform Issue | ECD¹⁷⁴ sufficient? | Compliance costs¹⁷⁵ | Enforcement? C (Co-) S (self) regulation | Cost to regulator | Cost to regulatees |
|---------------------|--------------------------------------|---|---|--------------------------|---------------------------|
| Short Extracts | New | -- for all but pan-European news services | National basis found in co- and state regulation. Market solutions also exist | | |
| Events of Interest | Status quo | = | Broadcast regulator monitoring–licence requirements | | |

Annex 5 Economic Impacts

A comparison of the economic impacts of the four options (+ positive net impact; – negative net impact, ≈ no significant net impact)

| | 1 | 2 | 3 | 4 |
|---|---|---|---|---|
| Technology development and growth in the audiovisual sector | There is no evidence to suggest that regulation currently forms an obstacle to the growth of new audiovisual technologies, such as IPTV. Deregulation can give linear services more room for innovation. (≈) | New technologies develop in an environment with a different set of regulations and possibly with a lower regulatory burden. These technologies (e.g. IPTV, High Definition TV, VOD) are not yet serious competitors for conventional linear services (e.g. broadcasting) nor will they be by 2009. The current Directive could in time become an obstacle to the integration of linear and non-linear markets and give a disincentive to potential investors. (–) | The same impact as option 2 although the slightly wider scope and more flexible advertising regulations of option 3 assuage option 2's negative impacts on technological development. (–) | Legal certainty on the status of non-linear audiovisual content service providers can encourage the convergence of linear and non-linear on the supply side. Harmonization across all media may also boost consumer confidence and promote product awareness and acceptance. The AVD will not be able to accomplish this on its own, but it will provide good framework conditions for technological development and sectoral growth. (+) |
| Regulatory burden | The regulatory burden of the EU on the Member State will fall, but this concerns a decline in coordination as much as regulation. Stakeholders will have to deal with up to 25 different systems of legislation and regulation. (–) | The steady rise of non-linear services that fall under different, less stringent regulations lowers the overall regulatory burden on European audiovisual content services, but does create unequal competitive conditions. (≈) in the short run (–) in the longer run as non-linear services become more important and have to deal with 25 different sets of regulation. | Somewhat more favourable than in option 2 due to more flexible and simple advertising regulations. (≈/+) | The regulatory burden on non-linear services may become somewhat higher where the AVD imposes requirements that are not already imposed by other Directives (e.g. ECD). The costs of compliance with basic tier regulations will be minimal. The burden on linear services will become somewhat lower, especially with the simplification of advertising regulations. The burden on government will, however, increase significantly: the rapid increase in the number of service providers and |

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| | | | | channels make monitoring and enforcement a daunting challenge. (+) for linear services (-/ \approx) for non-linear services (-) for Member State governments |
| Advertising revenues | Deregulation will not result in an endless stream of advertising, but revenues are likely to increase relative to the current trend as new (and potentially harmful) methods of advertising are made possible and the duration and timing of spots can be adjusted freely. Full reliance on national regulation can, however, fragment the internal European advertising market. (+) under current conditions but without a Directive (-) if national regulations diverge too much | The current trend in advertising revenues will persist, although a growing proportion will be earned in non-linear services. This proportion will increase as those services gain in market share. (\approx) | More or less the same as in option 2 although the slightly wider scope and more flexible advertising regulations of option 3 may provide a mild stimulus to advertising revenues. (\approx /+) | Harmonization of regulatory requirements across all media provides transparency. More flexible rules enable new advertising techniques (with respect to insertion, duration, technologies, etcetera). Advertising revenues are likely to increase as different media complement rather than substitute each other. (+) |
| European content | European audiovisual content producers will lose their most-favoured status and a guaranteed market share. In the short term, this will result in a loss of revenues and employment, which will require a restructuring of the industry. This will also favour the stronger market parties (larger companies, especially in Western Europe), although producers for local and regional markets will probably be spared. (-) in the short term | The situation will remain as is, which entails a mild increase in the production and transmission of European content and an increase in the urgency of dealing with non-compliance as pay-TV becomes more important. (\approx) | Similar to option 2. (\approx) | Similar to option 2. However, if Member States sincerely comply with the requirement to encourage European content provision among non-linear services, the audiovisual content industry will receive an additional boost. (\approx /+) |

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| | (+) in the long term, conditional upon successful restructuring | | | |
| Broadband rollout | When market developments and consumer choice determine the outcomes without regulation, the likelihood of perverse or undesirable effects is greater. Costs and benefits will not be distributed evenly and the market will in many ways be less transparent. This will undermine consumer trust and confidence, which is a key driver of broadband uptake and rollout. National regulation can cope with some of these problems, but not without some form of EU-level coordination. (-) | Broadband rollout will continue regardless of the Directive. Non-linear services (e.g. streaming video) now form a separate market segment and are not in direct competition with regular broadcasting. By 2009 broadband will be widely available and rollout will not be affected by the Directive. (≈) | Similar to option 2. (≈) | Legal certainty will support consumer trust and confidence and encourage investments. Option 4 will also provide support for convergence on the supply side (such as triple-play) and the demand side (consumers using different services simultaneously). This will boost broadband rollout. Obviously, the AVD cannot achieve this alone as consumers clearly have to get used to paying for audiovisual services. In the new regulatory environment broadband can, however, become an alternative vehicle for free DTH as a precursor to pay-TV. (+) |
| GDP and competitiveness | Without EU regulation there may be fragmentation of markets, which imposes diseconomies of scale and scope: (1) geographical markets, many different systems of Member State regulation supplemented with co-regulation and self-regulation. (2) fragmentation of the audiovisual markets hinders convergence. (3) this will result in net consumer loss. Without protection European audiovisual content-producers are forced to deal with strong non-EU (specially US) competition, which | The costs imposed by the Directive do not extend to the entire sector, and the same is true for the benefits it generates. If and when linear and non-linear converge, and non-linear gains (significant) power in markets, today dominated by linear, the Internal Market may suffer resulting in a net loss due to diseconomies of scope. On the other hand: without EU regulation non linear services could be tempted to look for better market opportunities outside the EU, thus | Similar. GDP (≈) Competitiveness (≈/+) | In many respects technological neutrality creates a single audiovisual market across media. This produces substantial economies of scale and scope, a net consumer surplus and higher advertising revenues. Market protection for European content producers remains in place: the audiovisual industry may become inward looking. GDP (+) Competitiveness (≈) short run, (-) long run |

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| | <p>will lead to a loss of revenues and employment in the short run, but could lead to a more competitive sector in the long run. The advertising industry may gain, but the audiovisual industry will suffer as a result from bad framework conditions.</p> <p>GDP (-) Competitiveness (-) short run</p> | <p>gain competitive strength.</p> <p>GDP (≈) Competitiveness (≈/+)</p> | | |
| Distribution of costs and benefits | <p>The current Directive only provides special protection for independent producers. The market determines the outcome with respect to large and small companies and between different Member States. Without some form of regulatory coordination at EU level large companies are more likely to benefit than SMEs and consumer protection may weaken.</p> <p>(-)</p> | <p>Linear services face more stringent regulations than non-linear services, especially with respect to content quotas and advertising. This regulatory gap is bound to widen as non-linear services increase. In addition, there is a wide gap between the EU-15 and the 10 new Member States where it concerns the share in audiovisual content production (>90% in the EU-15), Internet and broadband penetration, and the emergence of new audiovisual technologies. The current Directive will not remedy these inequities and without change they are likely to increase.</p> <p>(-)</p> | <p>Similar to option 2. Consumers and SMEs will benefit from the adjustments concerning advertising and short extracts.</p> <p>(≈/-)</p> | <p>Linear and non-linear services receive more equal treatment (but not the same). Quotas remain in place. Consumers and SMEs will benefit from the adjustments concerning advertising and short extracts. Otherwise, the AVD will not affect differences in market power between large and small companies and between EU-15 and new Member States.</p> <p>(≈/+)</p> |

Annex 6 – An assessment of options: Risks, Trade Offs and Benefits

Analyses of the risks, trade offs and benefits of the four options against issues.

| <p style="text-align: center;">Option</p> <p style="text-align: center;">Issue</p> | <p style="text-align: center;">Option 1</p> <p>No EU regulation</p> <p>National regulation of Broadcasting</p> <p>National regulation of linear services where enforced and non-linear services where applied</p> | <p style="text-align: center;">Option 2</p> <p>Status Quo:</p> <p>EU rules only for broadcasting</p> <p>National regulation of linear services where enforced and non-linear services where applied</p> | <p style="text-align: center;">Option 3</p> <p>Status Quo extended to all linear services and liberalisation of advertisement rules:</p> <p>No EU regulation for non-linear</p> <p>National regulation of non-linear where applied</p> | <p style="text-align: center;">Option 4</p> <p>Extension to non-linear:</p> <p>Full application of EU rules for all linear services</p> <p>Two-tier approach, for non-linear services forcing compliance to a basic set of rules on human dignity and protection of minors</p> |
|--|--|---|---|--|
| <p>Scope: sectoral, jurisdiction,</p> <p>Country-of-origin</p> | <p><u>Risks:</u> Internal Market disruptions are more likely, even though most programming is nationally or regionally oriented and not EU wide; Service providers avoiding national regulation by transmitting from 3rd Member State. Legal uncertainty; cost of coordination between Member state regulators; disputes over minimum rules.</p> <p><u>Trade offs:</u> legal uncertainty, lack of regulatory control and a fragmented Internal Market against free entrepreneurialism in AV services;</p> | <p><u>Risks:</u> direct and indirect cost of compliance could undermine competitive position of traditional linear services, as non-regulated new (linear and non-linear) services gain market share; Possible future fragmentation of market of pan-European non-linear services as country-of-origin do not apply; thus possible increase in legal uncertainty for non-linear</p> | <p><u>Risks:</u> Similar to option 2, but all linear included</p> <p><u>Trade offs:</u> Similar to option 2, but all linear included</p> <p><u>Benefits:</u> Similar to option 2, but all linear included</p> | <p><u>Risks:</u> reduced growth potential of new on-line services; increasing rigidity in a fast moving unpredictable market; high enforcement and compliance costs, which particularly affects the small players.</p> <p><u>Trade offs:</u> Reduce competitive advantage created by regulatory differences vs allowing new services (linear and non-linear) to develop freely and rely on self-regulation</p> <p><u>Benefits:</u> Protection of broadcasting industry against unfair advantages</p> |

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| | <p>Lowering barriers to entry increases consumer choice; if they are too low could lead to short term market exploitation (hit-and-run)</p> <p><u>Benefits:</u> potentially reduced compliance cost to industry and enforcement cost to EU;</p> | <p>service providers</p> <p><u>Trade offs:</u> Decrease in competitive position of traditional linear service providers</p> <p><u>Benefits:</u> Simplicity as new players are not concerned and traditional AV service providers know the rules; flexibility in as fast moving on-line market is hard to predict and to regulate</p> | | <p>for new service providers (linear and non-linear); Ability to enforce national rules; effective control over AV service providers, and the content that is provided; legal certainty for non-linear service providers in non-national markets; Convenience and reduction of cost of coordination between regulators; and of cost of enforcement against non-national players;</p> |
| <p>Masthead identification</p> | <p><u>Risks:</u> low as ISPs already need to comply with identification rules under eCommerce directive; and broadcasters have this on their websites. They are likely to comply voluntarily</p> <p><u>Trade offs:</u> no sector specific regulation relying on other instruments and self regulation</p> <p><u>Benefits:</u> <u>low enforcement costs; benefiting effectively from high incentives for self-regulation</u></p> | <p><u>Risks:</u> Similar to option 1,</p> <p><u>Trade offs:</u> Similar to option 1 for linear and non-linear</p> <p><u>Benefits:</u> Similar to option 1</p> | <p><u>Risks:</u> Higher enforcement cost as new linear services are covered.</p> <p><u>Trade offs:</u> Sector specific regulation covering linear to provide level playing field with traditional linear AV services</p> <p><u>Benefits:</u> extra instrument to ensure compliance across linear AV service industry</p> | <p><u>Risks:</u> risk is low, as compliance is already mandatory under eCommerce Directive. Only linear AV service providers without a website will face compliance costs</p> <p><u>Trade offs:</u> is there a need for regulating something that is already regulated under another Directive and to which there is an active self-interest of the business to comply?</p> <p><u>Benefits:</u> Viewers are ensured that they can always approach the service provider wherever they are in Europe; Possible increase in trust</p> |

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| <p>Right of reply</p> | <p><u>Risks:</u> limited as traditional linear services can be regulated at national level. Enforcement in case of internet-based services will be near impossible and in most cases individuals should have redress under civil law where protection is more comprehensive, even though this may be too costly and cumbersome for an important segment of the viewer population.</p> <p><u>Trade offs:</u> difficulty of enforcement avoided, possibly to detriment of protection of the individual</p> <p><u>Benefits:</u> (large) Players can self-regulate as part of their service offering; lower compliance cost, setting up a (self-regulatory) conflict resolution scheme is costly</p> | <p><u>Risks:</u> Similar to 1, but possible an unfair competitive disadvantage to traditional linear AV service providers that face compliance costs</p> <p><u>Trade offs:</u> Similar to 1 for online linear and non-linear services</p> <p><u>Benefits:</u> Similar to 1</p> | <p><u>Risks:</u> Similar to 1 for non-linear AV services; Increase in compliance cost of new linear AV services;</p> <p><u>Trade offs:</u> Similar to 1 for non-linear AV services</p> <p><u>Benefits:</u> Similar to 1 for non-linear AV services; possibly increase in environment of trust and consumer confidence in new linear AV services</p> | <p><u>Risks:</u> high enforcement and compliance costs. Non-linear AV service providers will have to put in place administrative mechanisms, and ex post measures. These costs could be prohibitive especially for small providers that are driven out of the market or choose for non-compliance, which in turn may lead to decrease in consumer trust.</p> <p><u>Trade offs:</u> the cost of defending individual rights are put with the sector or are left to society; increasing compliance costs to the sector could reduce its competitiveness and growth potential;</p> <p><u>Benefits:</u> Easy legal redress, compared to a defamation lawsuit in court; increase in trust and consumer confidence</p> |
| <p>Protection of minors, human dignity; Incitements to hatred</p> | <p><u>Risks:</u> Internal Market disruptions; It only takes a few players to seriously damage trust, and consumer confidence; the government lacks specific tools to actively and rapidly intervene when incitements occurs; cost of imposing national regime and</p> | <p><u>Risks:</u> without minimum rules there will be no application of country-of-origin principle and thus no Internal Market for new linear and non-linear services; possible lack of</p> | <p><u>Risks:</u> for non-linear services similar to option 2 and for new linear services similar to option 4</p> <p><u>Trade offs:</u> for non-linear services similar to option 2 and for new linear services similar to</p> | <p><u>Risks:</u> low risk of non-compliance by legitimate service providers as effort is negligible and social acceptance/pressure based on shared values and norms is high... Non-compliance is likely to be caused by negligence.</p> |

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| | <p>coordinating with other Member States</p> <p><u>Trade offs:</u> Loss of social benefit of regulation; against effective self-regulation. Desire for government to have the specific tools to intervene as soon as incitement is identified vs applying existing general law that prohibit incitement to hatred.</p> <p><u>Benefits:</u> Effectively benefiting from incentives to self-regulate; incentives for users to develop tailored solutions including the application of filtering technology, etc.; low enforcement cost</p> | <p>protection of fundamental rights in on-line AV services, but emergence of national rules and self-regulation is more likely;</p> <p><u>Trade offs:</u> Similar to option 1</p> <p><u>Benefits:</u> similar to option 1;</p> | <p>option 4</p> <p><u>Benefits:</u> for non-linear services similar to option 2 <u>and for new linear services similar to option 4</u></p> | <p><u>Trade offs:</u> Setting rules in an environment where enforcement will prove difficult</p> <p><u>Benefits:</u> effective and efficient enforcement; Potential increase in trust in new AV services, reducing risk of new fragmentation of Internal Market</p> |
| <p>European and independent production</p> | <p><u>Risks:</u> Given that most programming is language and market/culture specific, the risks of serious decrease in European content is limited. There are many other support instruments in Europe at Member State and EU level to support content development. Also EU regulation on European content does not ensure diversity of programming within Member State. Finally enforcement of current rules is difficult, thus impact of rules is limited and in fact most countries show more European content than the</p> | <p><u>Risks:</u> Possible unfair advantage of new over traditional linear AV services but expected to be low as obligation to carry European content exists already in certain linear online services (Mediakabel case), limited for non-linear business models, as they are likely to support a much wider offering to cover niche market demand;</p> | <p><u>Risks:</u> low. There is no negative competitive effect of excluding non-linear services from this provision, as the business models and offering of linear and non-linear services are very different. In non-linear total offer is the determining factor and not time. If viewer demand for European production is low there is a risk that viewers want to avoid linear channels that fill a substantial part of their programme with this content.</p> | <p><u>Risks:</u></p> <p><u>Trade offs:</u> actively support European content in non-linear services by forcing service providers to invest in such content or leaving it up to government incentive programmes and other support tools or not supporting the content industry at all</p> <p>Similar to option 3</p> <p><u>Benefits:</u> Similar to option 3</p> |

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| | <p>minimal thresholds set by TVWF;</p> <p>Independent production: Risk of less investment in independent production, however regulation would also benefit large market players that do not need to be supported.</p> <p>Diversity of supply and distribution (alternative and innovative programmes) may decline.</p> <p>Consolidation of industry through increase competition. Market segmentation, between large and small players, general and specialized channels.</p> <p><u>Trade offs:</u> providing indirect support to independent/ European content industry, against direct support and letting the market decide what content to programme. Trade off between accepting viewer demand and giving supply side support presumably to increase quality of offering and to avoid foreign cultural dominance in European AV services. More competition could strengthen the sector in the mid- to long term, but weaken it in short term...</p> <p><u>Benefits:</u> Market supply will adjust better to viewer demand; potentially strengthening competitive position of</p> | <p><u>Trade offs:</u> Similar to option 1 for new linear and non-linear AV services</p> <p><u>Benefits:</u> Similar to option 1 for new linear and non-linear AV services</p> | <p>This could lead to a switch towards non-linear services. However there is no supporting evidence for this yet. Another scenario may be that linear services may no longer depend on blockbuster content but could also offer consumers a wide selection of niche products ('long tail' theory of consumer choice or the 'Amazon effect'); Inclusion of local and regional services – that already provide mostly European and even national or regional content - will lead to administrative compliance costs</p> <p><u>Trade offs:</u> Similar to option 4, but no specific recommendation to member states to support European and independent content in non-linear AV services</p> <p><u>Benefits:</u> low compliance cost for non-linear AV service providers; leaving new services space to develop</p> | |
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| | <p>EU content providers by exposing the industry to more domestic competition; reduction in enforcement and compliance costs; more flexibility in programming; Especially large broadcasters will benefit</p> | | | |
| <p>Prescribed adverts, human dignity, restrictions on certain products</p> | <p><u>Risks:</u> Risk is mitigated by other legal EU instruments governing advertisement content and self-regulatory schemes for instance in alcoholic beverages industry. Moreover most Member States have and will keep legislation in place to avoid misleading and detrimental advertising; This could lead to (re-) fragmentation of Internal Market; Higher compliance cost for pan-European services, if national regulation diverges</p> <p><u>Trade offs:</u> Falling back into old situation of diverging national laws vs accepting Member State position to monitor and enforce.</p> <p><u>Benefits:</u> Less enforcement cost at EU level; extra cost of coordination with other Member States</p> | <p><u>Risks:</u> Low, as other legal instruments apply; Growing divergence in national regulation in new linear and non-linear AV services, risking a fragmentation of the Internal Market</p> <p><u>Trade offs:</u> Leaving a relatively new market to develop, without adding regulatory rigidities, taking account of difficulty of enforcement; against preparing the ground for an Internal Market and attempting to protect societal values in new AV services as in traditional AV services</p> <p><u>Benefits:</u> Simplicity as</p> | <p><u>Risks:</u> Similar to option 4 for new linear services. Non-linear are not regulated and follow option 2</p> <p><u>Trade offs:</u> Similar to option 4 for new linear services. Non-linear are not regulated and follow option 2</p> <p><u>Benefits:</u> Similar to option 4 for new linear services. Non-linear are not regulated and follow option 2</p> | <p><u>Risks:</u> Extension to include non-linear services will impact current revenue stream, as most member states have not yet effectively regulated / restricted online advertisement.</p> <p>Difficulty to monitor and enforce especially when non-linear services are included. Increased burden on EU/EC</p> <p><u>Trade offs:</u> ability to enforcement vs protection of fundamental rights; leaving space for self-regulation or setting legally binding rules.</p> <p><u>Benefits:</u> minimum rules make it possible to adopt country-of-origin rules and mutual recognition principles; both are essential to ensure a functioning Internal Market; Rules can help create an environment of trust, and consumer</p> |

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| | | traditional linear AV service providers know the regulation and providers of new linear and non-linear AV services are excluded; no additional enforcement cost at EU level | | confidence in on line AV services |
| Insertion rules for advertisement, Product placement Teleshopping | <p><u>Risks:</u> Fragmentation of Internal Market if national governments decide to regulate; If left to market forces to determine advertisement time and programming, leading to increase in number of commercial breaks and possibly total advertisement time. As audience numbers are an important factor in determine the value of advertisement, the market has self-correcting mechanisms to reduce negative impact of unregulated environment. The market is likely to be biased towards supporting content that has high attraction value and may not support programming of quality content per se; Confusion or misleading of viewer through un identified product placement; Legal insecurity without clear regulation.</p> <p><u>Trade offs:</u> Self –regulation and market forces vs organisation by</p> | <p><u>Risks:</u> Traditional linear AV service providers are left with the current regulatory rigidities that prevent them from responding as they see advertisement revenues drop; Substitution effects are have not been identified so far; legal uncertainty for pan-European non-linear and new linear AV services</p> <p><u>Trade offs:</u></p> <p><u>Benefits:</u> Simplicity as traditional linear AV service providers know the regulation and providers of new linear and non-linear AV services are excluded; no additional enforcement</p> | <p><u>Risks:</u> Similar to 4 for new and traditional linear AV services; legal uncertainty for pan-European non-linear services</p> <p><u>Trade offs:</u> Similar to 4 for new and traditional linear AV services; Either non-linear services are left free to self-regulate or national regulation will emerge leading to fragmentation in Internal Market</p> <p><u>Benefits:</u> Similar to 4 for new and traditional linear AV services; benefit of non-linear AV services depends on national regulatory action</p> | <p><u>Risks:</u> Greater flexibility may lead to more total advertisement time and a higher number of disruptive advertisement breaks, though likely to be less than under option 1; Commercialisation of content through product placement; higher monitoring cost.</p> <p><u>Trade offs:</u> More possibilities to increase value of advertisement time through more targeted offering vs more disruptions of programme and AV content and increase in enforcement cost.</p> <p><u>Benefits:</u> Compliance costs should be slightly less for linear services as the rules are simplified and made more flexible. Greater flexibility should allow service providers to extract higher value from advertisement activities. This</p> |

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| | <p>public concerns; (Cultural) integrity of content and viewers interest vs more innovative ways of financing content production and providing some replacement of decline in regular advertisement revenues.</p> <p><u>Benefits:</u> More flexibility to increase value of commercial time, by better targeting of key audiences; Innovative ways to finance content production, shifting some of the advertisement funds from service providers to content producers; reduction of compliance and enforcement cost; risk of extra compliance cost for non-national AB service providers</p> | <p>cost at EU level</p> | | <p>however may be largely off set by the increase in available advertisement space and time provided by new on line services; more legal certainty and flexibility.</p> |
| <p>Short extracts and Events of Major interests</p> | <p><u>Risks:</u> current problems with access to short extracts will persist; unequal market power will affect price and access; A significant share of viewers will not be able see real time or very recent clips of sport events and particular AV news footage; On major events Member States would be free to ensure access to major events - even though there is no EU rule - this should lower the value of rights and thus the income of the events and their participants. Effect of deregulating at</p> | <p><u>Risks:</u> Similar to option 1 <u>Trade offs:</u> Similar to option 1 <u>Benefits:</u> Similar to option 1</p> | <p><u>Risks:</u> As in option 4 <u>Trade offs:</u> As in option 4 <u>Benefits:</u> As in Option 4</p> | <p><u>Risks:</u> Limit the possibility of rights owners and content producers to exploit these rights and develop services over a variety of platforms based on the high demand for this specific content. <u>Trade offs:</u> reduce value of rights to allow broad access to (specific) information <u>Benefits:</u> legal certainty, Internal Market benefits through harmonized approach (even though</p> |

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| | <p>EU level is low, as the current number of (European) listed events is limited, however risk of non-national broadcasters excluding majority viewers will increase;</p> <p><u>Trade offs</u>: allowing rights holders and content producers to exploit their rights against providing access for all Access for all is weighed against potential revenue from licensing rights. The market will not self-regulate, therefore to guarantee access intervention is needed.</p> <p><u>Benefits</u>: Right holders (including event organisers) can exploit their rights to develop new services or invest in the organisation of such events based on the revenues generated by the strong demand for this specific content.</p> | | | <p>outcome may vary); Access for all to major events</p> |
| <p>Compliance and enforcement</p> | <p><u>Risks</u>: Loss of social benefit of regulation, loss of overview at European level, Compliance and enforcement of existing rules is weak.</p> <p><u>Trade offs</u>: compliance and enforcement no longer EU issue, reduces enforcement costs, but increases coordination cost for</p> | | | <p><u>Risk</u>: the inclusion of non-linear services will significantly increase the number of channels and services, which will make enforcement and monitoring near impossible</p> <p><u>Trade off</u>: reliance on self-regulatory regimes may be insufficient to protect fundamental rights but</p> |

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| | governments <u>Benefits</u> : Lower EU compliance cost; | | | enforcement and monitoring of regulation is complex and costly |
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Annex 8 – Glossary and Abbreviations

| Abbreviation | Meaning |
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| 3G | Third generation mobile networks, providing voice and data capacity at midband speed above 128kilobits per second. |
| AVD | Audiovisual Directive Option 4 |
| Country-of-origin | Country-of-origin principle; basis for freedom of reception of services in the European Union. This principle establishes that service providers need only conform to the law of the country in which they are first established, not that of the recipient of services, in this case, audiovisual services. |
| DG INFSO | Directorate General Information Society and Media. One of 25 Directorate Generals of the European Commission, established by the merger of DG INFOSOC (Information Society) and the Media Directorate of DG Culture in 2004. The Commissioner is Madame Vivienne Reding. |
| EU-15 | Fifteen pre-existing Member States at 31 December 2003, prior to the Accession States' joining of the European Union. |
| European Council | Council of Ministers of European Union Member States , responsible for adopting legislation together with the European Parliament. |
| EC | European Commission ; executive body of the European Union, responsible for developing and implementing the <i>acquis communautaire</i> , the body of European Union law. |
| ECD | Electronic Commerce Directive ; more formally Directive 2000/31/EC |
| EEA | European Economic Area ; the Internal Market of the 25 EU Member States and other members of the EEA, notably European Free Trade Area countries Switzerland, Norway and Iceland. |
| EU | European Union , as established in the Treaty of Maastricht 1992. Formerly the European Economic Community (EEC). |
| (Free) DHT | Distributed Hashtable search mechanism algorithm, often used in the peer-to-peer environment |
| IPTV | Internet Protocol Television ; video programming delivered over IP networks. |
| ISP | Internet Service Provider ; company providing access to the Internet for consumers and businesses. The largest ISP in most Member States is provided by the incumbent telco. ISPs often provide content, have 'portal' pages which offer news, weather and video reports, dating, chat, search and other functions. Mobile networks are also ISPs. |
| Member State | Member State of the European Union; 25 in total with 10 Accession States ratifying membership to join on 1 January 2004. |
| OECD | Organisation for Economic Cooperation and Development. 'Thinktank' for developed nations: 30 national members; membership is limited by commitment to a market economy and a pluralistic democracy. Formed in 1961 and grew out of the Organisation for European Economic Co-operation |

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| | (OEEC), set up in 1947. |
| PVR | Personal Video Recorder ; hard disk recordable drive connected to the video stream in the household and permitted by digital rights management to record and store live programming for time shifted viewing at a later period. |
| SME | Small and Medium-sized Enterprise |
| Telco | Telecommunications provider ; term normally used for incumbent former national monopoly provider. There are also ‘competitive telcos’ – all other providers of switched telecommunications services except the national incumbent. |
| TVWF | Television Without Frontiers Directive; formally Directive 89/552/EC as amended in Directive 97/36/EC. |
| VOD | VOD ; provision of video programming at individual demand rather than by an editorial controller in a scheduled sequence. |