

Speech to the Foreign Policy Centre

## **Lessons for EU Regulation: How does the revised TVWF Directive affect competitiveness?**

**James Purnell MP, 26 January 2006**

1. Can I start by saying what a pleasure it is to be here. I remember the birth throes of the Foreign Policy Centre. It came out of the perception that there was a lack of informed debate and policy innovation in foreign policy making in the UK. Mark Leonard and Robin Cook were right to spot the need for a place where policy could be analysed more seriously and even-handedly than sometimes happens. That need is as real today as it was then and I can't think of anyone better than Stephen Twigg to lead the FPC at this important time.
2. I make this speech from the position of a passionate pro-European. In a global world, global governance becomes ever more necessary. Britain's national interest will be more effectively secured through the weight of the EU than if we were standing out alone. The achievements of the EU in its short history are so obvious that they are sometimes forgotten – 50 years of peace, democracy and growing prosperity. No wonder so many neighbours want to join.
3. One of the EU's greatest achievements is the Single Market. That is as true of television as it is of physical goods. The Television Without Frontiers Directive was a far-sighted piece of deregulation that has helped the European television industry to grow and has created a genuinely pan-European television market that works. I believe that the next version of TVWF – my subject today – can repeat the same trick, but only if we learn the lessons of the Directive's success to date and unite the Union around a more deregulatory version of the Commission's current proposals. If we don't do this, then in 10 years our successors will bemoan the handicaps we gave to European industry and the restraints we put on free speech.

### **Digital EU**

4. This isn't an arcane debate, for techies only. These questions are central for the EU, because digital technology is the backbone of the knowledge economy.
5. Worldwide, there are more than 2bn people with mobile phones. There are a billion searches on Google every day.
6. And the UK is on its way to becoming Europe's digital laboratory. As at the end of 2005, OFCOM estimate that
  - two thirds of UK households received digital TV services;
  - one third of UK households had a broadband connection;
  - over 60% of UK adults buy goods, tickets or services on line.

7. Some other EU countries have higher penetration rates of some of these technologies. But no other country has the combination of such high uptake of mobiles, broadband and digital TV and radio.
8. As a direct consequence, the UK is at the cutting edge of new technological developments – here are some examples:
  - The BBC are piloting an interactive media player that could make on-demand TV a reality;
  - O2 and Arqiva are carrying out world-leading pilots of mobile television;
  - Google is piloting its mobile Internet services here.
9. Sky's linking with Easynet and BT's pilot of an interactive Freeview box could create genuinely converged media companies, not to mention the possible Virgin Mobile-NTL link-up
10. Innovations like this are partly made possible by the UK's converged regulatory framework – combining effective competition policy where necessary and deregulation where possible. We want to achieve the same advantages in the European framework.

### *The TVWF Directive*

11. The Television Without Frontiers Directive is of course the main EU legislative instrument about broadcasting. It dates from 1989, and has been revised once, in 1997. It is a Directive that extends beyond the EU, since the four EFTA States – Iceland, Norway, Switzerland, and Liechtenstein – also subscribe to it.
12. At the heart of the TVWF Directive there is, in effect, a kind of deal. TVWF places every TV broadcaster under the jurisdiction of one Member State, and one only. That Member State is then required to impose certain minimum standards on the broadcaster's programming, and all the other Member States are required to ensure free reception of its TV broadcasts.
13. This is what is known as the 'Country of Origin Principle'.

### *Revising the Directive*

14. The European Commission published its proposals for a further amendment of the Directive in December
15. I want to start by making clear that there is much in the Commission's proposals which the UK welcomes. The plans should improve competitiveness in a number of ways – for example, with lighter touch controls on TV advertising.
16. We welcome that, as we do the firm retention in the Commission's proposals of the Country of Origin principle. A Single Market regime in which each TV operator needs authorisation from only one Member State provides in our view the only sensible model for regulation in what has always been a trans-national industry.
17. But we do have serious concerns about a very fundamental aspect of what the

Commission are proposing. That is the suggestion that the scope of this Directive be widened to cover new media services – that it should change from being a 'TV' Directive to being an 'Audio-visual Media Services' Directive.

18. My argument today is that this increased scope could mean significant regulation of the Internet and stifle the growth of new media services. That would raise prices for consumers, and deprive them of potential new services.
19. I will argue that the case for extending regulation has not been made and that it is unclear how the proposal will fit with the e-Commerce Directive. I will conclude by saying that the solution is to adopt the self-regulatory approach that the commission refers to as Option 3.

### **Our problem with what the Commission say**

20. So let's start with some detail on what the Commission proposes.
21. On 13 December, the Commission published proposals for an amended Directive, to be called the "Audiovisual Media Services Directive", covering  
  
*"All commercial media services offered over the Internet, mobile networks, telecoms networks, terrestrial, cable and satellite broadcasting networks, or over any other electronic network whose principal purpose is the provision of moving images to the general public".*
22. The new proposal takes the form of amendments to the existing Directive, which will apply not only to television but also to other electronic services if their 'principal purpose' is to provide moving pictures 'to inform, entertain or educate' the general public.
23. The TVWF Directive doesn't, and still won't, cover radio. But "television" would include some Internet services streamed over the Internet.
24. The Commission's proposals also bring in a wide range of other Internet, mobile and other new media services. These 'non-linear' services would be subject to a lower degree of regulation than traditional TV 'linear' services, but they would still have more controls than the general law. That effectively means the creation of a basic tier of pan-European content regulation of the Internet.
25. Under the current arrangements, these non-linear services are covered by the e-Commerce Directive, whereas the TVWF Directive covers broadcast television.

### **What is proposed**

26. Under the Commission's proposals, both linear and non-linear services would be subject to controls on:
  - Identification – each site would have to have identification and contact details (this would cover the *name of the service provider, geographical address and e-address, details of national regulator if any*);
  - a requirement not to 'seriously impair the moral, mental or physical

- development of minors’;
  - a requirement not to incite hatred on a number of grounds;
  - a requirement to promote ‘where practicable and by appropriate means”, production of and access to European works;
  - a prohibition on transmitting films outside the licence period;
  - restrictions on the content and nature of adverts (for example, no ads for tobacco, or alcohol ads aimed at children, no ads which are surreptitious or subliminal).
27. So, effectively, a television channel sent over the Internet would be regulated in the same way as a channel broadcast over the airwaves. But we need to ask ourselves whether that is justified: do the reasons that justify regulating broadcast services apply to an Internet-only channel?
  28. These sorts of requirements can readily but sensitively be addressed in licensed broadcasting, and of course have been. But would extension to other services achieve anything? UK national law already, for example, prohibits advertising tobacco through any medium, and it prohibits child porn.
  29. But in some cases the Commission’s proposals are genuinely new. For example, they suggest that Member States should ensure that media service providers, linear and non-linear, do not offer material which contains incitement to hatred on grounds of, for example, disability or age.
  30. I’m the last person to say that issues like this are not important. Of course we have been discussing race and religious hatred in our own Parliament only recently.
  31. But what that debate I think showed was that these are in fact very wide-ranging issues on which there are different, strongly and legitimately held opinions and where intervention must have the strongest justification.
  32. Some Member States – and I don’t just mean the UK – will have serious difficulties with such an approach on grounds of freedom of speech.
  33. There has to be doubt as to whether it is right for Europe to take the lead on matters such as these. They seem clearly to be issues which should be decided at national level. In any event, pan-European rules in these areas should certainly not be imposed as a throw-away part of a rather technical Directive dealing with one particular sort of economic activity.

### *Effect of the proposals*

34. Either these proposals do not impose new regulatory obligations, in which case - given the existence of the e-commerce directive - why bother with them?
35. Or they are significant, in which case we need to assess them rigorously against the effect they would have on consumers and business. There are three grounds on which these proposals fall down.
36. First, they would hamper competition. No other trade bloc is planning these regulations. If they impose significant regulatory costs, then they will put EU companies at a disadvantage, and reduce investment and company creation.

37. Regulatory costs of these kinds also raise barriers to entry and will therefore undermine competition, and prevent new services being developed, damaging the interests of consumers.
38. Second, the proposals risk being ineffectual at best, and counterproductive at worst. It is not clear how they would be enforced, since there is nothing that prevents companies setting themselves up outside the EU.
39. Companies that did move would bypass these regulatory requirements. All we would have achieved was pushing companies overseas, while promising the consumer a level of protection that they would not then receive.
40. Third, they would create anomalies that would make implementing the Directive difficult at best, and impossible at worst. Here are three examples -
  - The BT "on demand" system will feature a simple EPG that will list both scheduled and recorded events as well as other content. People will search on "content" and not necessarily be concerned whether the event is live or recorded;
  - A service set up to "stream" pop concerts over DSL and mobile broadcast will be "linear" when the concert is live but "non-linear" when the content was recorded;
  - Film services will be linear if saved from a pay per view film channel to a PVR but non linear if downloaded from the service provider.
41. And what problems would that cause?
42. From the point of view of the supplier, quite a few. She would have great difficulty in deciding which parts of her seamless, integrated product were covered by the 'linear' rules and which ones weren't.
43. The linear parts would probably need to be covered by a licensing system of some sort, and would be subject to detailed requirements about – for example – advertising and European and independent production quotas.
44. The non-linear parts would be subject to less onerous and less specific requirements.
45. That could well mean in practice that she over-interpreted what the new rules required. This could mean that much of what the Commission envisage as the 'linear' tier of control could come to be applied across the piste to all audio-visual media services.
46. Alternatively, some operators might take the view that they should skew the development of their products so as to stay out of the linear area.
47. I would value some economic research from the industry on the effect this would have on growth. But it seems likely that the effects would be significant. Some new services may not develop, and others would be more expensive because of the extra regulatory costs. And the question that has not been answered is what does the consumer benefit from the extended scope of the Directive that would justify these costs?

### *Split between linear and non-linear*

48. There would be a lot of hard, if not unanswerable, questions for national regulators too.
49. If the Commission's proposals come in as they are currently framed, Member States will have to check their legislation to see whether it complies. If not, they will have to pass specific legislation to cover 'audiovisual media services'.
50. If this were to mean a registration or licensing system, how would this work when there is a multitude of service providers? It's unclear exactly how far the definition of a service provider would stretch in practice - but it seems on the current definition that it would, for instance, embrace all those people (huge numbers) who run sites that have ads with moving pictures on them. It would include webcasts and streamed video.
51. And Google are bringing in a system where anyone can put up their own video – and everyone who accesses it will pay them (the putter-up, not Google) money. Potentially, all these services could be linear and could need to be licensed
52. This would place additional burdens on industry. And a massive burden for regulators too. And potentially stymie the new trend for consumer-created content.
53. The linear/non-linear frontier is already porous. It will soon disappear, a line in the sand being washed away by the tide of convergence. It would not make any sense to consumers.
54. OFCOM research shows that consumers have an extremely sophisticated understanding of the different regimes that apply on-line and off-line. There is no obvious consumer demand for this new distinction - nor would it be clear how we would explain the different obligations that applied to linear and non-linear content on the same website. For example, how would we explain that on a band's website, the streamed chat was regulated more stringently than the downloadable video? Could we realistically convince that band or record company to apply for a broadcasting license?

### *Compatibility with the e-Commerce Directive*

55. Furthermore, the UK is concerned that it is not clear how this draft Directive will fit with the e-Commerce Directive.
56. The e-Commerce Directive gives consumers clarity about where a company is regulated, and where to pursue any complaints – namely, where the company is established.
57. Therefore, the relevant national law applies, backed up by European law on consumer protection and on single market. And if any country decides that its national policy objectives are being undermined in certain areas by this regime, they can derogate from the e-Commerce Directive.

58. We recognise the Commission's concern on this last point – in theory, a Member State might be able to use its powers to derogate under the e-Commerce Directive to block an audio-visual media service. But it hasn't been a problem yet. So why regulate for a hypothetical issue which industry isn't concerned about?
59. In any case, if it does happen, it would better to revise the e-Commerce directive to reduce the grounds for derogation.
60. We should not regulate for a hypothetical threat in the name of helping the industry when the industry themselves are saying that they don't want the extra regulation.
61. We want a Directive which regulates only when necessary, which is 'light touch', reducing administrative burdens and provides simplification.
62. In particular:
  - There needs to be evidence that changes to the Directive are necessary and that current levels of protection are inadequate;
  - Whatever emerges must be proportionate. Establishing principles is likely to be more practical than establishing rules;
  - The Directive needs to recognise the respective roles of regulation, co-regulation and self-regulation;
  - The Directive must encourage innovation, not stifle it.

### Reasons to regulate

63. The heart of the problem of the Directive is that it defines the need for regulation around whether the services are providing audio-visual material for the purpose of informing, entertaining or educating.
64. But that isn't a rationale for regulation. If it were – why not apply the provisions to newspapers? They are informing, educating and entertaining – what is it about audio-visual material that justifies extra content regulation at European level?
65. Instead, the real considerations should be
  - Whether the service uses scarce resource, eg spectrum;
  - Whether it has an effect and/or share of the market that causes concerns about plurality and diversity;
  - What the public's expectations are;
  - How the service is consumed (eg is it on demand/in private etc).
66. Using these criteria, it is clear that television services transmitted over Freeview, say, raise different issues from audio-visual services streamed over the Internet. These are differences of kind, not of degree, which justify and require different regulatory approaches for each.
67. Some people may then say that this argument already implies that as spectrum scarcity reduces, so the amount of regulation should also fall.

68. To which our reply would be: yes, and it's already happening. OFCOM has reduced the programme obligations on ITV and Channel 5 precisely because of the decreasing value of their analogue spectrum. We apply different rules to religious ownership of television and radio licences depending on the limits upon the number of channels on the platform – so religious organisations can own a satellite channel, but not a channel on a DTT multiplex.
69. That doesn't mean that we would never want to regulate content services transmitted over the Internet. After all, there are constraints on newspaper ownership already – so the issue isn't only about spectrum scarcity.
70. If such concerns materialise for Internet television channels, then we can consider this issue at the time. But, crucially it has always been accepted that the decisions on such issues are a responsibility of national governments. And certainly we shouldn't regulate for a hypothetical, given the costs of such an approach as I described them earlier.
71. This points to maintaining the Commission's current and successful approach of having a TVWF regime for broadcast services and the e-commerce Directive, or something like it, for everything else.
72. If the Commission have new areas they want to regulate and they are able to justify the cost-benefit of such intervention, they should go for Option 3, self regulation of Internet services above the general law of the land. We can review that in perhaps 5 years to see whether any services have reached a market share that raises the issue of further European regulation.

### **Summing up**

73. So, in summary, it is vital to make sure that EU doesn't force Member States to regulate in a way that will in practice be unenforceable or would discourage the growth of e-services in the EU.
74. We need to be wary of applying broadcasting legislation to the non-linear sector, rather than, as currently in the e-Commerce Directive, relying on the general law. We always need to ask: what is the need for it? Why won't ordinary law do the trick?
75. If non-linear services are to be included at all, the obligations need to be very narrow and there needs to be much more emphasis on self-regulation.
76. If Europe gets this wrong, that could lead to operators moving out of the EU, and work directly contrary to the Lisbon Agenda of transforming the EU into the most competitive and dynamic knowledge-based economy in the world.

### **Next Steps**

77. The UK industry is well up on all these issues, and has played an important part in shifting the Directive in the right direction. But this seems to be much less so in Europe. I think it will be very important to get European industry engaging with their own governments and with MEP's.
78. For the UK Government's part, we will be working with other Member States



to address these concerns. We want to be at the heart of the discussions involved on improving the text.

79. We now have to try and influence the Council and the Parliament to produce a Directive which will work in practice.
80. Thank you.