

# Proposals for Revision of Television Without Frontiers Directive Consultation on Issues Papers



## Introduction

The UK's Broadband Stakeholder Group has acted as a key advisory group on promoting the roll out and take up of broadband services since 2001 and its membership has increasingly become representative of the complete broadband value chain, such that it now covers network and service providers, equipment suppliers, broadcasters, members of the content industry, central and local government, regional development agencies, consumer representatives, trade unions and trade associations.

Given the breadth of membership, the BSG is acutely aware of the advance of convergence, the issues that this raises and the interdependencies that exist between the different parts of the value chain. As such, it has welcomed many of the European Commission's proposals for creating conditions that will assist this important market to flourish across Europe. Most recently, the reality of convergence, and the significance of the ICT and content sectors, has been recognised in the Commission's Communication of 31 May 2005 *i2010 – A European Information Society for growth and employment* – which notes that a quarter of EU GDP growth and 40% of productivity growth are due to ICT.

In this Communication, the European Commission acknowledged that *“digital convergence requires policy convergence and a willingness to adapt regulatory frameworks where needed so they are consistent with the emerging digital economy”* and undertook *“to examine the rules affecting the digital economy to make their interplay more coherent and oriented to economic and technological realities.”*

This should not imply an extension of analogue legislation. It requires vision and suggests that TVWF and the Electronic Communications Framework should be reviewed concurrently.

In the light of this, the BSG is surprised that DG Information Society proposes *“to create a consistent internal market framework for information society and media services by modernising the legal framework for audio-visual services, starting with a Commission proposal in 2005 for revising the Television Without Frontiers Directive”* **in advance of** a review the electronic communications regulatory framework in 2006.

In relation to the latter, the Commission indicated that the review of the framework *“will thoroughly examine its principles and mode of implementation, especially where bottlenecks are delaying the provision of faster, more innovative and competitive broadband services.”*

The BSG does not understand how revisions can be proposed for TVWF without a thorough analysis of the potential impact of any proposals on the development of next generation networks and services.

However, the BSG believes that convergence does raise legitimate questions and that a review of the existing regulatory framework is required. However, we do not believe that the approach set out in the Issues Papers is sufficiently well founded. Indeed, we believe that it could be counterproductive in terms of the objectives set out in i2010.

In the light of its concerns outlined above, the BSG welcomes the fact that responses to the consultation on the Issues Papers, and options for progressing this review in the wider context of the i2010 programme, will be discussed at the joint EC/UK audiovisual conference in Liverpool on 20-22 September. We trust that this will be an open debate that will take on board the concerns of the BSG and those that we understand are being expressed by other players.

### **General Comments**

Convergence is being driven by a combination of consumer demand, advances in the capabilities in consumer equipment and content development. Network capabilities are responding. However, investment in next generation broadband is dependent upon the development of a vibrant content market and it is equally essential that network investments, particularly at the access level, continue to meet new consumer demands for bandwidth, both upstream and downstream.

Many of these demands will be for video based content and services and, hence, any review of TVWF has to consider the potential impact of the different options for audiovisual content regulation on investment in network and service provision.

Convergence is, inevitably, leading to moves away from historic business models and to different market structures. All players in the ICT and content sectors are faced with degrees of uncertainty and are assessing how they respond to such changes. Companies need to have flexibility to develop new commercial models for the provision of next generation networks and services and, again, any review of TVWF should not unduly limit the options. In this respect, although the BSG is aware that a review has been mooted for some time, it is concerned that the propositions developed by the Focus Groups, and contained in the Issues Papers, do not take full account of all value chain interests.

The BSG is not responding to each of the Issues Papers but has some specific comments below that address the overall package of proposals.

### **Specific Comments**

The Commission appears to primarily intend that the revised Directive should remove ambiguity and/or differences in the regulation of broadcast and non-broadcast (i.e. on-line/on-demand) content.

In this respect, it is understandable that traditional broadcasters do not wish to be disadvantaged in relation to newer platforms – although most, if not all, will be moving into non-linear delivery.

Similarly, it is understandable that on-line providers do not wish to be inhibited by the extension of traditional broadcasting rules to their services. Furthermore, regulators do not wish to unduly inhibit the development of nascent services and markets.

Additionally, it is important also to ensure that EU content providers are not disadvantaged vis-à-vis non-EU providers and there must be concern that the current proposals could result in such a situation.

The key question is whether, to remove ambiguity, there is any rationale for revision of traditional content regulation in relation to the on-line space (and the BSG is unconvinced of this) or whether the desire for greater neutrality could be achieved by reducing the regulation of broadcast content. It could be argued that obligations on broadcasters imposed during periods of near monopoly supply are inappropriate in the convergent, on-demand, multi-platform world and the BSG favours the option of pulling back on traditional broadcast regulation.

The current proposal for a two tier system, covering linear and non-linear content, might appear a practical option at first sight but, when considering the time that it could take for any new Directive to take effect and the current rapid advance towards convergence, the practicality and enforceability of such an approach is highly questionable. We could see a number of scenarios (as follows) that could make such a split non-viable.

- On-line publishing, which includes both editorial and related video clips, some on demand, plus advertising, could be both linear and non-linear.
- A web based news service with video clips available on demand would be non-linear but, if a live feed is available of high interest events, it could become multicast and, hence, linear.
- Small websites that contain visual images, and advertising, plus sponsored links to third party sites.
- Music videos that are distributed on both linear channels (e.g. MTV) and also available on demand, possibly with different ad inserts
- A webcast of a music video to individuals would be non-linear but, in a situation where viewers could vote for their favourite music video, which triggers off multicasting of the same content over the Internet, it would become linear.
- Coverage of a live event (sports or concert) for storing on a PVR might be linear but, if the broadcaster imposes controls on the consumer's time to view, this could be non-linear.
- If broadcasters offer a service where programming is transmitted overnight but only available for viewing at a set time the next day – as a result of PVR improvements that allow many hours of programming to be cached – the broadcaster may control the earliest actual viewing time but the consumer would still decide. Is this linear or non-linear?
- AOL Music, which combines Internet radio, video clips, bespoke downloads, and interviews.

International experience suggests that the development of artificial definitions is fraught with problems. The Digital Millennium Copyright Act (DMCA) in the US was not able to achieve a sustainable, satisfactory definition of 'digital' music and conditions attached to its distribution, such that its provisions were seen as too

restrictive and commercial arrangements superseded regulations. The same could apply to digital content.

### **An alternative market-led approach**

In relation to an area of particular concern to all, i.e. the protection of minors and human dignity, the BSG believes that a combination of existing law, EC Directives and Recommendations and sound self-regulatory solutions, combined with a comprehensive media literacy programme, offers the best approach, particularly for addressing the concerns that intermediaries have in terms of their liabilities.

In this respect, the BSG welcomes the Commission's support for self-regulatory models. There are a number of existing self-regulatory bodies within Europe, which have effectively addressed the concerns raised in the Issues Papers and these should be built upon. The BSG is proposing to work with self-regulatory bodies within the UK to explore options for further development of current practices. It would suggest also that the Commission could consider how harmonisation of effective self-regulatory structures and codes of practice could provide the solutions to many of the concerns in the on-line, on demand world.

In relation to commercial communications, it is important to recognise the dangers that restrictive regulation might have in relation to new revenue streams that are essential if new services are to develop. The full effect of the increasing convergence of TV and on-line advertising, and of consumers' abilities to use technology to either avoid or interact with advertising, are still uncertain but these have to be core considerations despite, at this stage, making it difficult to implement regulation. The BSG believes that a less prescriptive/more flexible approach, applying guiding principles combined with self-regulatory codes of practice, must be seriously considered.

### **Summary**

The BSG believes that other respondents will share its concerns and that there are sufficient reasons for the Commission to review its programme for revision of TVWF.

The BSG urges the Commission to take a macro view – aligned with i2010 objectives - and question whether there is a real need for major change; i.e. are changes really required and/or practical in light of a probable 2-4 year programme to get a revised Directive in place, set against developments in technologies and services, particularly in the non-linear area. Although the BSG recognises that there might be (political) pressure to advance a review that has been in hand for some years, this should not drive inappropriate provisions.

The guiding principle, which seems to be recognised in the i2010 Communication, must be that developments in the information, communications and media sectors, driven by technological developments, need time to evolve and shouldn't be unduly inhibited by premature and unnecessary regulatory intervention.

The BSG questions the need for any revision of scope to encompass non-linear services in the light of:

- Existing national legislation

- Existing Directives, such as Framework, Privacy and E-Commerce Directives together with Council Recommendation on Protection of Minors and Human Dignity.
- Existing supranational conventions and declarations, such as ECHR and various UN and Council of Europe conventions and declarations.
- Existing self-regulatory models (and greater harmonisation of such models).

In essence, the BSG considers that the extension of the Television Without Frontiers Directive provisions throughout the non-linear space, e.g. into the area of newspaper content, whether print or on-line, is neither appropriate nor achievable.

However, bearing in mind the objective of removing ambiguity and/or differences in the regulation of broadcast and non-broadcast (i.e. on-line/on-demand) content, the BSG suggests that the Commission should address the concerns of traditional broadcasters by pulling back on regulation of linear broadcast services.

The BSG believes that the only valid approach is for the Commission to review the TVWF and Electronic Communications Directives concurrently. When dealing with on-line/on demand services, the Commission must focus attention on identifying which issues are truly amenable to 'better regulation' (i.e. appropriate, effective and enforceable) at EU level.

In any event, the BSG does not believe that any changes should be proposed without comprehensive Regulatory Impact Assessment of possible impacts across the wide, next generation and services value chain. The Commission must take an 'evidence based' approach to ensure the proposals are justified, proportionate, and will allow emerging markets adequate room to develop.

**Further information about the BSG and its membership can be found at [www.broadbanduk.org](http://www.broadbanduk.org). The BSG has also worked with the UK's Digital Content Forum (DCF) on this response and this submission broadly reflects the views of their members.**

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**5 September 2005**