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PROJECT RESOURCE

Can Internet TV have frontiers?

RAND Europe informs the European Commission's TVWF Impact Assessment

Abstract

The European Commission has undertaken an assessment of options for revising and extending the existing 'TV without Frontiers' (TVWF) Directive to include all video services in Europe, including those distributed through the Internet. The review of the 1997 Directive was prompted by changes in market trends and new technologies that rendered the TVWF Directive obsolete.

RAND Europe was asked to provide empirical evidence to inform the drafting of the TVWF review. Its report analyses the future of video services based on consideration of several regulatory options. Researchers addressed the need to balance the benefits of Internal Market liberalisation with the potential costs and impacts of more stringent regulation on innovation and competition.

The report advises against precipitate action without further full evidential support and recommends, as far as possible, a flexible approach based on self and co-regulation by the industry.

The proposed Directive has been published in draft form and will be debated by the European Parliament in 2006.

Changes in technology and shifts in market dynamics have moved the debate on the required regulatory framework for audio-visual services in the European Union to new levels. After four years of consultation, the European Commission (EC) has proposed a revision of the 1997 'TV without Frontiers' (TVWF) Directive, which the European Parliament is considering in mid-2006. A Regulatory Impact Assessment (RIA), which the EC asked RAND Europe to inform, was conducted to evaluate the options for the proposed Directive. Provisions of this new Directive are likely to result in legislation in Member States in 2009–2010.

Existing law

The existing TVWF Directive imposes minimum common standards on broadcasters. It only covers commercial moving images (including public service television) and excludes non-commercial, private, printed and audio-only communication. The 1997 Directive provides legal certainty for pan-European broadcasters based on basic identification and harmonisation of national regulations. The country-of-origin principle, which establishes under EU law application of rules of countries transmitting, not receiving, audio-visual material, is also included. The TVWF Directive mandates certain safeguards to ensure content of European origin, protects individual viewers against inappropriate advertising and content abuses, and provides right of reply, enabling viewers to have recourse against unfair and inaccurate broadcasts without private legal action.

Technological advances are driving regulatory changes

Advances in technology are largely responsible for revisions to existing video regulatory policies. The development and use of the Internet for video viewing represents a major change. Digital technology has transformed the telephone, allowing personal computers and interactive computer games consoles to be used as Internet video devices. The increase in third generation (3G) networks, enabling audio-visual viewing on mobile phones, gives rise to new regulatory considerations.

Impact of new technology on the market

Technological developments will continue to impact 'traditional' television markets at a rapid pace. Most significant is the impact from the switch from analogue to digital technology. The total number of digital pay-TV subscribers is expected to increase by more than 80% by 2008. The rise in digital use has already increased the number of channels available, which permits greater viewer choice but adds to regulatory pressures.

The growth of non-linear video services in the marketplace is another factor leading to the review of EU law. Compared to streamed or linear broadcasting, non-linear technology provides on-demand services from the Internet, where viewers are able to 'click-twice' to actively choose or 'pull' desired video content at any time. Examples of non-linear services are Video-on-Demand movies,

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RAND Europe
Westbrook Centre
Milton Road
Cambridge CB4 1YG
United Kingdom
TEL +44.1223.353.329
FAX +44.1223.358.845

Chris Marsden
marsden@rand.org

RB-9201-EC

www.rand.org/randeurope

some web-based news services and Google Video. It is clear that non-linear services cannot be regulated before transmission to the end-viewer as with traditional rules set for broadcasters.

Considering EU 'Better Regulation' objectives

The Commission undertook a RIA to assess several policy options. The RIA focused in particular on the effects of different policy options vis-à-vis the 'Lisbon' objectives and i2010, completing the Internal Market in communications, and the agenda for Better Regulation.

Increased competition will require careful monitoring and enforcement or compliance among companies, depending on the type of regulatory policies required. It is essential that any revisions support regulatory certainty and do not have negative impacts on innovation in new services, in conformity with Better Regulation and i2010 imperatives. Existing national co- and self-regulatory schemes may provide models that ensure flexibility as well as regulatory certainty for investors.

While the goals of these EU initiatives are found in the full report cited below, they relate to TVWF revision in the following ways. New regulation should consider changes in interactive advertising techniques to offer greater flexibility and opportunities for commercial communications in broadcast services. Any change in regulation should enable greater balance in monitoring, and, when necessary, enforcing an estimated 1,000 European TV channels. Facilitating compliance through consultation should lower administrative and regulatory burdens on all stakeholders, including small to medium-sized enterprises, and new market entrants. Finally, changes to the TVWF Directive must be considered with other EU legal acts and initiatives, including the review of the E-Commerce Directive due in 2007.

Informing the RIA

One aspect of RAND Europe's research was to project market trends to 2009/2010 and to empirically assess whether the Commission's proposed revisions to the TVWF Directive were justified. In conducting its analysis, RAND Europe assessed all policy documents and material assembled throughout extensive rounds of stakeholder consultation. Researchers also conducted an extensive literature review and analysed empirical data and projected data specifically addressing key facets. Research showed that accurate predictions of market trends for the broadcasting sector in 5-10 years are impossible, given the pace of change in technology and fluctuations in the marketplace.

Informing the RIA: Examining regulatory options

RAND developed five options for revising the existing 1997 Directive, ranging from full deregulation to a mix of regulatory policies to harmonisation of all commercial video offerings. Increased regulation or harmonization, to the extent of equal treatment of linear and non-linear service, was considered to be unrealistic in today's rapidly evolving industry, as was complete deregulation. The remaining three options were examined in detail:

- No policy changes from the 1997 TVWF Directive;
- Revision to include 'linear' audio-visual content services;
- Applying a graduated, two-tiered regulatory approach to linear/non-linear services, the latter of which would require more co- and self-regulation by the industry.

Findings are described in detail in the full report cited below.

Informing the RIA: Stakeholder impact

RAND Europe assessed stakeholder impacts in three broad areas:

- Preventing harmful content;
- Extending the country-of-origin;
- Integrating non-linear content by quotas.

Preventing harmful content is costly and difficult to implement and enforce. Whereas specific regulation—contrasted to existing general legislation—allows public authorities to react more effectively ex post, consistent monitoring of such rules in the fast growing supply of non-linear audiovisual services would be very challenging and nearly impossible to enforce without active cooperation by the sector. Effective self-regulation could be possible, motivated by growth benefits from greater consumer confidence. Consumer confidence can engender both stronger markets and better regulation, as industry acknowledges the business case for greater enforcement and stronger consumer representation in co-regulation.

Codifying the country-of-origin case law of the European Court of Justice may provide more certainty, but it would also risk tension with the 2007 revision of the E-Commerce Directive. Extending the scope to Internet-based services risks legal uncertainty, especially where service providers have low barriers to entry, and therefore are able to move outside national or even EU boundaries. There is a danger of 'off-shoring' by footloose investors, as has previously occurred in Internet gambling services.

The 1997 TVWF specifies minimum requirements for European and independent content on broadcast services, but it does not provide for non-linear services. An extension to non-linear services by imposing minimum quotas would be problematic given their 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 the content consumed (if not offered), not the service provider, as in the case of linear broadcasting. Supply may be endless and cater to niche demand. In this context, an investment in catalogue quotas, which ensure the majority of non-linear services offered, even if not consumed, are of European content, does not currently seem a proportionate response to new delivery platforms and user-defined content choice.

RAND Europe's independent research was published in a report and is available at: http://www.europa.eu.int/comm/dgs/information_society/evaluation/data/pdf/studies/s2004_01/tvwf_rand.pdf.