



MEF Position Paper on the EU Commission's Proposal to amend the Television Without Frontiers Directive

The Mobile Entertainment Forum (MEF) exists to represent the interests of its global membership across the mobile entertainment value chain. MEF's goals are to build awareness, create business development opportunities and facilitate the development of commercial guidelines and best practices to promote a healthy and profitable industry. Latest estimates value the European mobile entertainment industry in the region of \$7 billion*.

MEF welcomes the Commission's initiative to enhance the harmonisation of national legislation in order to facilitate the free movement of audiovisual media services within the EU. This is based on applying the "country of origin" principle in a context of digital convergence, regardless of any specific technical delivery mode.

*(*Informa telecoms & media 2006)*

Consultation to date

Several MEF members have participated unilaterally in the consultation process initiated by the EU Commission during the preparation of the current proposal to revise the 'Television Without Frontiers' (TWF) Directive.

Following the publication of the Commission's proposal on 13 December 2005, MEF has produced this position paper after consultation with its membership. The current MEF position does not preclude individual members of MEF from providing additional comments or defending their specific interests by individual actions at a national or international level.

Proposed rules applicable to television broadcasting services (linear services)

While MEF supports the principal of harmonisation, there are a number of compelling arguments for treating new and emerging entrants differently from incumbent services and networks, as elaborated below. One solution is to grant Member States the freedom to exclude these new innovative services from regulatory obligations for a period

of time in order to allow them to develop. The reasons for this are as follows:

(i) **Investment levels**

Innovative audiovisual services, such as mobile TV, evolve in a highly competitive and unpredictable market environment. In order to provide these new services for the benefit of consumers, significant investment in services and networks is needed. The costs of providing capacity, either for streaming over 3G networks or building dedicated data networks as spectrum becomes available, are substantial. It is far from clear how the market and business models will develop and it is too early to say whether there will be a mass consumer demand to pay for these services. Additional regulatory burden will add to the costs of development, and, if not carefully assessed, risks stifling the development of innovative new services across Europe at a time when they are still in their infancy.

(ii) **Maintaining Europe's competitive edge in the global market**

Europe wants to be a world leader in the development of new media services. Untried and untested technologies need room to "breathe" so that they can find a place in the market and work out how they can best meet the needs of consumers. If undue regulatory burden is imposed as a result of the revisions to the Directive, Europe risks other territories being chosen as the venue to pioneer new platforms and consequently those territories, rather than the European consumer, shaping future trends and business models.

(iii) **Differences between traditional broadcasting and new audiovisual services**

Service providers on new platforms are not competing on a level playing field with traditional broadcasters. For example unlike public service broadcasters they do not enjoy public funding, and unlike commercial broadcasters they do not have established advertising income streams or models. They also do not have the same level of access to spectrum as many free to air broadcasters. Incumbent players, including many pay TV providers, also enjoy a number of advantages by virtue of the fact that they have an established position in the market: users are familiar with their services; they already have positions on Electronic Programme Guides; and they have pre-existing contractual relationships with content providers (which may be

exclusive or may include rights to distribute content over new media platforms, thereby foreclosing the market to new entrants).

For the reasons given above, MEF proposes that Member States should be granted discretion to exclude new innovative linear services from regulatory obligations for a period of time in order to allow these services to develop.

Proposed rules applicable to on-demand services (non-linear services)

The MEF is opposed to the extension of the Directive to cover on-demand ("non-linear") services. The issues identified above apply equally, if not more so, to on-demand services.

From the perspective of the user, new media platforms also operate in a different context to traditional TV-like services, for example there is a higher degree of end-user control. It is therefore questionable whether extending the regulatory model for "linear" services to new "non-linear" methods of content delivery is appropriate.

MEF members are also concerned that the distinction drawn in the proposed revised Directive between "linear" and "non-linear" services (the former being subject to more stringent rules and the latter being subject to a minimum standard of content regulation) is problematic. Within mobile reception services there might be a mixture (or, at least, confusion) of such linear and non-linear content within the delivery of a single audiovisual service. Mobile reception services are expected to include the simultaneous entire retransmission or part retransmission of pre-existing national or foreign television programmes; extracts of previously broadcasted programmes, either simultaneously or in a delayed mode; specific audiovisual programmes edited by the relevant mobile service operator, including "live" (or delayed) retransmissions; as well as bespoke "made for mobile" content. Some of these programmes may be available as "linear" and others may become available via a "non-linear" mode of delivery, depending on the method or time of distribution.

It is predicted that in future this trend towards services combining linear and non-linear elements will increase. There is therefore the risk that by the time the revisions to the Directive would be implemented (it is anticipated that the changes will not come into

force until at least 2010), the distinction drawn between the two types of service may have been overtaken by technological developments.

The MEF therefore recommends that if the Commission goes ahead with its plan to extend regulation to on-demand services, it clarifies the definitions of "linear" and "non-linear" services, and looks further into the issue of how services which combine both linear and non-linear elements should be treated.

The following considerations should also be taken into account for the mobile entertainment sector:

(i) Regulatory regimes and additional licensing requirements

Mobile telephone network operators operate their services subject to licences and authorisations granted by their respective national independent telecommunication authorities. Operators providing audiovisual services may now be required to obtain an additional licence from the relevant national authorities for the audiovisual sector as a result of the widening of the type of services subject to regulation under the Directive.

Where there is not a single regulator for both telecommunications and broadcast services, the practicalities of having to comply with the requirements of two different regulators may create an undue administrative burden, which is disproportionate where mobile reception of audiovisual content is merely incidental to the provision of mobile telephone services.

Moreover, such a requirement appears to run counter to the document's own introduction which states in paragraph 12 that "*no provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisations on any type of media*", a principle already embodied in article 4 of the E- Commerce Directive.

The current draft of the Directive will also, by requiring Member States to regulate the content of on-demand services, pose great practical difficulties for regulators, who would have to try to monitor the output of a myriad of new services rather than a limited number of traditional channels.

(ii) Country of origin principle

If the new Directive is to apply to non-linear audiovisual services, it should fit neatly alongside the existing regulatory regime under the E-Commerce Directive, rather than awkwardly overlapping with it. The E-Commerce Directive regulates "information society services", namely "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services" (and there is clearly some overlap between this definition and the proposed definition of a "non-linear service").

The E-Commerce Directive already contains a principle similar to the country of origin principle (whereby each Member State is charged with ensuring that information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question). It also creates a harmonised and co-ordinated legal framework providing exemptions similar to the provisions currently suggested by the EU's proposed revision to the TWF Directive. The E-Commerce Directive also imposes requirements for service providers to clearly identify themselves, as does the proposed revision of the TWF Directive. Such legislation, combined with other EU-related decisions such as the recommendation on Minors Protection of 1998, appears to represent a harmonised legal environment for the provision of on-demand audiovisual services.

Whilst the only remaining non-harmonised area may be the content of commercial communication, it appears that the divergences between member states have been reduced to a minimum and that at the current stage (and for the foreseeable future) they represent no significant obstacle to providing non-linear services at a pan-European level.

(iii) Duplication with E-Commerce Directive

MEF is concerned that a possible duplication of the proposed revision of the TWF Directive with the adopted and implemented E-Commerce Directive might provoke legal uncertainty regarding the status of mobile audiovisual services. Moreover, different interpretations may arise at the national and/or the EU level, thereby further reducing legal certainty for the launch of non-linear audiovisual services, especially in relation to the proposed distinction between linear and non-linear services.

Conclusions

MEF considers that Member States should be granted the freedom to exclude new innovative linear services (especially where the provision of audiovisual content is merely incidental, such as content on mobile phones) from regulatory obligations for a period of time in order to allow these services to develop.

MEF also considers that the proposed revision of the TWF Directive should not apply to non-linear audiovisual services. In the event that both linear and non-linear content is covered, the Directive should:

- contain clear indications allowing the mobile entertainment industry to understand and determine which services are covered by the rules applicable to linear and non-linear services; and
- not impose undue additional licensing and authorisation procedures on the mobile entertainment industry, in particular with regard to the provision of non-linear services; and
- have a coherent complementary approach to the E-Commerce Directive and should avoid any potential clash with the current legal and regulatory regime by properly securing the "country of origin" principle for non-linear services.