

# regulation

The advent of multi-channel pay-TV in the US in the 1970s, and a decade or so later in Europe, gave rise to legislation designed to regulate the new distribution methods and afford a degree of protection to existing 'traditional' broadcasters. Similarly, telecoms liberalisation – led by the UK in the early 1980s – led to a new licensing regime for once state-owned utility providers.

Two decades on, the 'Holy Grail' of convergence has been reached, with content now available across a multiplicity of platforms. Whereas content and network issues were once handled at a national level – often by separate regulators – such matters are now being



Information Society and Media Commissioner Reding

addressed at a pan-European level. Information Society and Media Commissioner Viviane Reding is seeking to extend the reach of the current legal framework for broadcasting to include 'non-linear' services.

Although most observers agree that the TVWF Directive (TV Without Frontiers) - introduced in 1989 and amended in 1997 – is long overdue in being updated to reflect the changes in technology, business strategy and policy responses to audiovisual and multimedia convergence, there is much disquiet at the possibility that rules designed for broadcasting will be applied to other services, such as IPTV.

## **CHANGED TIMES.**

Commissioner Reding set out the challenges in a speech to the EIM Conference in Vilnius in December 2005. She noted that audiovisual markets in the European Union had changed since the 1989 enactment (and 1997 revision) of the TVWF Directive. "In 1989, when the Directive was first enacted, non-national satellite commercial television was in its infancy. In 13 of the new Member States (both 1994 and 2004 enlargements) there were no commercial channels available nationally."

**Broadcasters are regulated locally and at the European level; now the EC wants to regulate the Internet. *IPTV International* looks at the implications for IPTV operators and their broadcast suppliers, and asks: 'What is regulated and by who?'**

She noted that by 1997, trans-frontier satellite commercial television had become 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 become as popular, or even more popular than local terrestrial broadcasting (with cable systems carrying both)."

# LAYING DOWN THE LAW

## “Rules shouldn’t depend on the delivery platform but on the nature of a service.”

- Viviane Reding,  
European  
Commission

She said that her staff had launched the inter-services consultation on a modernisation to the Television without frontiers Directive with the aim of making it future proof and transforming it into a Directive on audiovisual media services. “The aim of the new regulatory framework is to modernise the co-ordinated rules for audiovisual content services in a platform neutral way,” she suggested, “which would mean that the same rules apply to the same kind of services whatever the delivery platform is. The set of applicable rules shouldn’t depend on the delivery platform but on the nature of a service. The future regulation would distinguish between linear audiovisual services or ‘broadcasting’, including Internet-TV, streaming or web-casting on one side, and non-linear services, such as ‘video-on demand’-services, on the other side.”

**RISING TENSION.** Among the viewpoints expressed by industry observers contacted by *IPTV International*, with particular emphasis in Europe and Asia, was that there is rising tension between regulators treating IP Video services as broadcasting versus Internet content. One major industry player expressed the concern that the highly regulatory approach in place for most broadcasting services could chill the development of new innovative video service offerings.

In terms of the implications for IPTV operators and their broadcast suppliers, it was suggested that the issue is how to minimise market distortions caused by regulation, if the same programme is delivered across different transmission networks, but subject to different laws. “Regulators across the globe are converging and re-organising themselves from vertical silos into horizontally integrated, common regulatory organisations in order to deal with the fast changing market landscape,” noted one observer. “A number of regional regulators see convergence as an opportunity to reduce the burden on industry and apply deregulation, adopting a light-touch approach in order for market forces to play their role.”

Another comment was that part of the challenge for the regulators was to agree a common vocabulary for converged AV services. This could range from an end-to-end managed IPTV service (Telco TV) through to best efforts video streaming (Over The Top TV).

As to whether IPTV regulation is a cultural, economic, or industry issue, it was suggested that all three dimensions come into play in considering regulation. “IPTV is perceived by economic and industry regulators as a way to encourage telecommunications infrastructure investment, leading to accelerated growth in the information society and a competitive regional posture. The EU has the 2010 Lisbon agenda, whilst China has its Five Year ICT plan.”

Regulators are therefore looking to encourage the competitive provision of multichannel video services. Their concern is that the indiscriminate application of broadcast regulation would act as a disincentive to investment. Another regulatory concern is that moving too quickly to regulate the converged AV space will flatten the variety and differentiation of competitive alternatives and lessen the chance of their particular region nurturing the next You Tube or My Space.

But the cultural regulators are concerned that with the increased connectivity associated with IP services, television may begin to lose its sense of regional identity. Industry, on the other hand, points to the

potential of the technology, unencumbered by spectrum costs and restrictions, to promote cost effective community television and community services.

**LICENSING ISSUES.** The problems facing narrowcasters have been highlighted by UK Broadcasting Minister Shaun Woodward, who has described the draft proposal as catastrophic. “Supposing you set up a website for your amateur rugby club, uploaded some images and added a link advertising your local sports shop,” he told *The Times*. “You would then be a supplier of moving images and need to be licensed and comply with the regulations.”

Woodward is proposing a compromise that requires EU states to agree a new definition of what constitutes “television”. He suggested that it was common sense. “If it looks like a TV programme and sounds like one then it probably is. A programme transmitted by a broadcaster over the net could be covered by extending existing legislation. But video clips uploaded by someone is not television. YouTube and MySpace should not be regulated.” The Government’s definition of online broadcasting covers feature films, sports events, situation comedy, documentary, children’s programmes and original drama. It excludes personal websites and sites where people upload and exchange video images. “The real risk is we drive out the next MySpace because of the cost of complying with unnecessary regulations,” added Woodward said.

The House of Lords European Union Committee has begun an inquiry yesterday into the directive. Lord Woolmer, the committee chairman, noted that the proposals bring within the regulatory framework areas of the media previously untouched by broadcasting legislation. “Britain is at the cutting edge of new media and alternative broadcasters in Europe, and we are keen to ensure that the proposals will not damage this growing industry in seeking to incorporate them into EU regulation, he said”

**LIGHT TOUCH.** According to one observer, regulators are also discussing separate video regulation for linear programming and non-linear programming. Broadcast laws are being revised and applied to linear programming, whilst light-touch and self-regulation is being recommended for non-linear programming i.e., VoD, video blog, and mobile TV. The argument behind this is to ensure a balance between broadcast and Internet regulation. A key example of this in practice is the EU’s Audio Video Multimedia Service (AVMS) Directive, it is pointed out.

“A vibrant array of service offerings is evolving where there is a light regulatory touch. As companies around the globe develop business models, preserving innovation for these services will enable a robust market for converged services to evolve,” concluded one observer.

Clearly, before the regulatory environment for IPTV is settled, the arguments over balancing TV-style content regulation against the ‘free for all’ the Internet has grown up with will continue. And, ultimately, the supra-national authorities are also likely to have arbitrate – or impose solutions – to resolve the inevitable ‘turf wars’ between old-style regulators whose conflicts define the difficult transition to true convergence of media and communication.

The challenge is to agree and implement ‘next generation rules’ much more quickly than is traditional in lawmaking and regulation before the uncertainty damages investment and the development of innovative content for next generation networks.

## IPTV REGULATION IN THE EU: PREMATURE EXTENSION OF THE TVWF DIRECTIVE

(Extracted from an Ovum report - [www.ovum.com](http://www.ovum.com))

Aleksandra Bosnjak, content and media analyst for Ovum's Broadband Content and Mobile advisory services unit, is currently working on a number of broadband content topics, including IPTV regulatory issues and IPTV marketing strategies.

Earlier in 2006, Aleksandra produced a research paper on what Ovum consider a premature extension of the TVWF Directive. Her main observations and conclusions, looking in particular at the UK and French regulatory regimes are set out below.

**The convergence of telecommunications and broadcasting industries has brought new legal challenges to both the EU and national telecommunications and broadcasting regulators. In the past, there was a clear split in terms of 'the responsible authority' and how these traditionally divided services were regulated. With the broadband revolution, the boundaries between 'telecommunications and audiovisual', 'private and public', and 'non-commercial and commercial' are becoming increasingly fluid, and the emergence of a new industry is anticipated. The key IPTV regulatory question is whether it will be regulated as a data or a broadcasting service.**

Ovum believes that any externally imposed EU regulation and unclear content and rules over the frequency of advertisements may cripple the overall IPTV commercial rollout and on-demand economics, especially in the 'embryonic' IPTV industry environment.

### Overview of the TVWF Directive

The EU broadcasting landscape is regulated by the current TVWF Directive that was introduced in 1989 and amended in 1997. It provides the legal framework for television broadcasting in Europe. It was designed to promote free transmission in broadcasting by setting down minimum rules for the

regulation of European content, and to support and promote European independent production while, at the same time, remove trade barriers to the exchange of content between member states. Overall, EU law distinguishes between 'television broadcasting services' subject to the TVWF Directive and 'information society services' subject to the E-Commerce Directive that includes selling goods and services over the Internet, as well as search engine providers of video on-demand (VoD).

The fundamental TVWF rules are split into two categories:

- Tier 1 – protection of minors, ban on tobacco and certain drugs, respect of human dignity (any discrimination or hate behaviour), right of reply, and identification of content provider.
- Tier 2 – percentage quotas on European content, advertisement frequency and maximum percentage of transmission time, restrictions on alcohol advertisements, sponsorship and access to events of national importance.

Both the EU and national regulators recognise the need for a more integrated and modernised approach to telecommunications and audio-visual media services applicable to a mix of different stakeholders: such as telcos, regulators, broadcasters, content providers and national cultural agencies. In discussing possible regulatory scenarios, we find that the current legal EU frameworks and 'working proposals' are interpreted in different ways in different countries (for example, France and the UK). At the moment, there is a hot debate in the EU about the extent to which the existing EU legal frameworks cover new audio-visual and telecommunications services.

### How might the TVWF be extended?

The proposed TVWF Directive extension



is a well-designed conceptual framework which distinguishes between linear and non-linear audio-visual services. Linear services include all traditional TV and radio broadcasting streamed over the Internet and is fully, tightly and easily regulated by both Tier 1 and Tier 2 rules under the current Directive.

Non-linear services include any audio-visual content where the viewers decide when a specific programme is transmitted from a choice of content provided by the media service provider. The difference between TV broadcast or linear services, also known as 'push content', and non-linear services or, 'pull content', depends on who decides the 'content choice', when specific content is transmitted and whether any schedule exists.

Non-linear services, such as VoD and downloads of previously broadcast programmes, will only be subject to Tier 1 or basic rules. Furthermore, the purpose of the distinction between linear and non-linear services is to allow less regulation where viewers have greater control and where their consumption expectations are likely to be satisfied.

### Regulatory environment in the UK and the impact of extension

Ofcom is the regulator for the UK communications industries, with an 'integrated' scope of responsibilities including broadcasting, radio, telecommunications and wireless communications services. Fundamentally, there are two parts to the UK Regulatory Act: terrestrial television and other platforms. Terrestrial television is quite a tightly regulated and a well-managed process; everything else falls under 'other' platforms, which has a clear separation between content and infrastructure. It covers 'anything able to convey signals' and it excludes VoD and other non-linear services. The UK self-regulatory Video-On-Demand Code Association (VODA) governs the conduct of its

members in relation to their provision of VoD services within the UK.

In comparison to other EU countries, the UK market is fairly sophisticated and 'lucky' with its strong ecology of players and the existence of an 'umbrella' regulator and self-regulatory non-linear services bodies.

The inclusive nature of its scope and the coverage of both 'telecommunication and broadcasting' explains why, relative to other EU markets, the UK regulatory environment is market-friendly and in favour of regulatory 'exit strategies,' especially in cases of what the TVWF Directive defines as 'non-linear' services.

Ofcom believes that the advantages of extending TVWF provisions to non-linear services are not clear. While in principle there should be some sort of regulatory 'harmonisation' at the EU level, any premature and impulsive EU regulation on non-linear services will disrupt the overall commercial rollout of the new industry.

The principle of a simple extension of the old rules to include all audio-visual services should be avoided. Ofcom cites a number of reasons why this should be the case, including:

- new legislation in its current 'proposal format' would be too difficult to enforce against all regulatory risks associated with 'convergence.' This can be avoided by dealing with non-linear services at national level
- non-linear content is already covered by the E-Commerce Directive
- the UK enforces 'the country of origin principle', a core element of the TVWF Directive which makes it possible to freely receive TV channels licensed in any of the EU member states.
- the current uncertainty associated with a legislative proposal and its final implementation could harm innovation and investors'

confidence in the broadband IPTV technical and operational control solutions.

Ovum believes that any 'heavy-handed' external regulation may also inspire erosion of responsibility, encourage illegal competition and will not protect consumers. For example, it is not very clear how non-linear classification can be applied in terms of 'content service provider' definition and who has editorial and/or content packaging responsibility.

Currently, the 'extended' Directive simply gives too many alternatives and triggers legal confusion. In the absence of a 'clear enforcement' direction, a number of 'speculative' content providers and delivery channels may emerge and make consumers vulnerable to consumption of 'illegal' content.

Ovum notes that BT, scheduled to launch its BT Vision IPTV service during the autumn of 2006, has suggested that it will be impossible to control the non-linear services environment and self-regulated on-demand services will play an important role in making sure that pin-protected technologies are enforced and minors protected.

## **IPTV regulation in France: support for extension of the TVWF Directive**

In France two different regulators regulate the communications landscape:

- **L'Autorité de Régulation des Communications Electroniques et des Postes (ARCEP)** is responsible for telecommunications. Its key areas of responsibility are: provision and funding of the key infrastructure and frequency components making up the public telecommunications sector, reinforcing transparency of regulation in a competitive environment, and overseeing convergence and other emerging issues

- **the Conseil supérieur de l'audiovisuel (CSA)** is responsible for linear services (whatever the platform including IPTV) but not for

non-linear services.

Should the Directive be adopted, France will have to decide, when transposing the directive, which authority will be responsible at the national level for content regulation on non-linear services. At the moment, neither ARCEP nor the CSA has the responsibility for non-linear services such as VoD.

The CSA and ARCEP are currently in discussions over who will be the responsible.

## **How is the TVWF extension viewed in France?**

The CSA's view is that 'the extension' is not an impediment but rather a 'facilitator' to the rollout of non-linear services.

The key reasons are cited as:

- there will be competition and substitution of traditional movie channels in the future. The entry of new players will further be challenged by VoD services.

- if regulators do not capture regulation of these non-linear services, there may be a totally unregulated environment, which they would not like to see happen

- extending the scope is appropriate, especially with regard to the distinction between linear and non-linear services

- key benefits of extension would include what they call a 'smooth legal substitution' covering existing



**"The key IPTV regulatory question is whether it will be regulated as a data or a broadcasting service."**

**- Aleksandra Bosnjak, Ovum**

linear services and application of basic principles across the EU. At present, French authorities believe that the existing E-commerce Directive does not adequately address this particular issue of 'transition'

- under the assumption that old linear services will be substituted by new non-linear serv-

ices, French regulatory authorities believe that we cannot have one side that is completely regulated and the other non-regulated. It will be more difficult to act if a basic set of principles does not exist or are not agreed upon.

In terms of licensing issues, Ovum notes that some big French TV channels have expressed concern about telcos' potential market power.

However, according to the CSA, it is too early to estimate the power and true role of telcos' entry into the content delivery world.

The CSA stressed the importance of Canal Plus in discussing all content and licensing issues because of its role as a key French premium content provider.

According to Ovum, as expected, the French are keen to mandate a certain percentage of home-produced content in their programming. They also insist that some kind of measures be applied to EU-produced content and

would like to see France and Europe commit to domestic content production, for example, a percentage of telco's IPTV revenue to be invested into European and domestic production. Also, French regulators view the extension as 'too flexible' in terms of advertising quotas.

Overall, French regulatory authorities perceive the IPTV extension as weak regulation. It will, however, challenge the French law and how the French TV market is regulated. While it will be easy to deal with big content delivery players, they recognise the issues associated with the regulation of many emerging small players will be difficult to resolve.

Ovum notes that France Telecom understands the importance and desire of the EU regulatory community to adopt a common EU legal framework for new non-linear services. However, it has expressed a profound concern that the extension of the existing TVWF regulation will add more uncertainty and confusion. The main reasons are:

- creation of additional liability and what is done/regulated at the national level

- interference with and replication of some areas already covered in the existing E-Commerce Directive.

France Telecom believes that there is a need for further clarification of definitions, particularly for some open-ended TVWF 'extension definitions' and the notion of a content service provider. Currently, it is defined as follows: 'the person that has editorial responsibility' for content and 'the person that determines the manner in which content is organised'.

Fundamentally, this creates a legal confusion over the responsibility of content aggregators and other intermediaries, as well as enforcement issues in what promises to be a rapidly changing 'on-demand' and content-driven world.