

HOUSE OF LORDS

European Union Committee

3rd Report of Session 2006–07

Television Without Frontiers?

Report with Evidence

Ordered to be printed 23rd January 2007 and published 31st January 2007

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 27

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FOREWORD—What this Report is about

When the Commission published its draft Audiovisual Media Services (AMS) Directive in December 2005, it was met with alarm in many quarters, particularly in the United Kingdom.

The Directive sought to amend the existing ‘Television Without Frontiers’ (TVWF) Directive, by extending the scope of the Directive to those new services perceived to be competing for audiences and revenue with traditional television. This threatened to introduce burdensome and potentially inappropriate regulation to what was a thriving new media sector in the United Kingdom, with very different business models. There were fears that emerging new media companies may either collapse or relocate outside the European Union.

Since the original draft, a number of changes have been made to the text to attempt to tighten the definition of the services covered to “television-like” services. Whilst this is an improvement, we are still concerned that there is not sufficient legal certainty over precisely what these services are, particularly in a rapidly changing market.

As in other recent single market legislation, the previously accepted basis of a Country of Origin approach to operating across 25 (now 27) Member States, which was contained in the original TVWF Directive, and the original draft AMS Directive, has come under attack. We maintain our view that the Country of Origin approach is the best way to go forward and must be defended.

Whilst we understand the concerns of traditional, “free to air” broadcasters at additional pressures to revenues from new competitors, we firmly reject the idea that regulators should act to preserve the market dominance of established players from new entrants. We are however unconvinced of the need for any quantitative restrictions on advertising in a market which is now clearly open to competition.

Television Without Frontiers?

CHAPTER 1: BACKGROUND TO THE PROPOSAL

Introduction

1. This report examines the European Commission's proposal to amend the "Television Without Frontiers" Directive (TVWF). In this chapter we set out the history of the Directive, in the context of the changing landscape of services available which the revisions of the Directive seek to reflect. In the following chapters we will present the evidence we have received in the course of our inquiry on what we have identified as the key issues.

The original Directive

2. The original TVWF Directive was adopted in 1989. Its fundamental objective was straightforward: the creation of a single market in television broadcasting.
3. In the late 1980s, this was a very important objective. At the time there was a relatively limited choice for viewers and state-owned and other terrestrial 'free to air' broadcasters held a dominant position in the market.
4. The TVWF Directive established the principle that Member States should ensure freedom of reception and should not restrict retransmission on their territory of television programmes from other Member States. They would only be permitted to suspend retransmission of television programmes that infringe the provisions of the Directive on the protection of minors.
5. In order to meet the objective of a freedom of movement for service providers in a single market, certain means were deemed necessary to create a common framework across the European Economic Community as was. These means were the creation of common rules governing both the quantity and content of the advertising the TV companies transmitted.
6. The provisions in the TVWF Directive on advertising are as follows:
 - There is a 15 per cent maximum proportion of daily transmission time allowed for advertising and a 20 per cent maximum within a given one-hour period;
 - There are set procedures for interrupting programmes;
 - The advertisements must conform to certain ethical considerations, in particular the protection of minors; and
 - The advertisements must comply with certain criteria concerning advertisements for alcoholic beverages.
7. Advertising of tobacco and prescription medicines is prohibited under the Directive.
8. Sponsorship of television programmes is permitted, provided it complies with certain rules. The sponsorship must not affect the broadcaster's editorial independence. In addition, sponsored television programmes must not

encourage the purchase of the sponsor's products or services. Finally, news and current affairs programmes may not be sponsored.

9. The use of the means chosen to create a single market had the consequence of expanding the impact of the TVWF Directive beyond its core objective. Not only was it concerned with facilitating the freedom of movement of broadcasters across the EU, but at the same time through these common standards sought to preserve certain public interest objectives: cultural diversity; the right of reply; consumer protection; and the protection of minors.
10. There were also provisions in the Directive to promote the distribution and production of European audiovisual programmes, for example by ensuring that they are given a majority position in television channels' programme schedules.

Why revise TVWF?

Technological Developments

11. By 1997, the Commission had taken the view that the impact of new technology meant that there was a need to update, and sometimes create, new rules on content based on matters of public interest, such as the protection of children or harmful content such as incitement to race hatred. The Directive was updated in 1997 in order to respond to technological developments since 1989 by, for example, allowing dedicated shopping channels.
12. Since 1997, the landscape for broadcasting has changed significantly and is continuing to change at a rapid pace, driven by dynamic advances in technology.
13. Technology has fundamentally altered the way people watch audiovisual media. On-demand services mean that users can determine the time of the transmission they want to view. There is also now technology available to record programming and miss out commercial breaks.
14. Convergence has greatly increased the number of available platforms on which to view these transmissions: through personal computers as well as through mobile phones. The Commission were keen to regulate such transmissions no matter what platform is used and thus would have to revise and extend the scope of the TVWF Directive.

Competition

15. There has been an enormous proliferation in TV channels broadcasting in the EU. Ofcom's figures are that the number has grown 500 in 1989 to more than 1,500 today.
16. There is clearly now a considerable level of competition in television broadcasting. The far greater level of choice for viewers which has resulted from this increase in competition has fundamentally altered the balance of the relationship between consumer and producer.
17. As a result of these changes there was a perceived need for a less heavily regulated environment for advertising in television broadcasting as consumers could now exercise real choice about what they watched. At the

outset, we accept the need for liberalisation, and believe that it is still crucial for single market considerations to be taken into account.

The Commission's proposal

18. In 2005, the Commission felt that the Directive be readdressed in the light of developments since 1997 and in December 2005 published a proposal to amend the TVWF Directive once more (15983/05 COM(05) 646SEC (05) 1625).
19. The existing TVWF Directive applies to “the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public ...” (89/552/EEC as amended by 97/36/EC, Article 1a).
20. The 2005 proposal seeks to redefine the services covered, rather than purely applying to television: TVWF would become an “Audiovisual Media Services Directive”.
21. The proposed Directive would now apply to any commercial “service as defined by Articles 49 and 50 of the Treaty, the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2a of Directive 2002/21/EC of the European Parliament and the Council” (Article 1a of the 2005 proposal).
22. These services are what are referred to in the text of the proposed Directive as “Audiovisual Media Services”.
23. Following the above definition, the 2005 proposal would cover all audiovisual media services whose principal purpose was the provision of moving images to the general public, and which provide these images over any electronic network, including the internet, mobile and telecommunications networks and terrestrial, cable or satellite broadcasting networks.
24. These audiovisual media services would be divided into two distinct categories; linear and non-linear. In the 2005 proposal, non-linear services were defined as those in which “the user decides on the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider”. (Article 1e of the 2005 proposal) Linear services by contrast are scheduled and the timing of their availability for viewing is not determined by the viewer.
25. The 2005 proposal sought to cover all audiovisual media services, both linear and non-linear, under a basic tier of rules, set out in Articles 3c to 3h.
26. In addition to the basic tier of rules covering all audiovisual media services, linear services would be subject to requirements on the coverage of major events; quotas of European and independently-produced content; rules on advertising; and rules on the right of reply which are similar to those which the TVWF Directive already applied to exclusively television broadcasting services (Articles 3 and 3a, 4 and 5, 10 to 20, and 23 respectively).
27. In the proposed revised Article 11, content such as films, children’s programmes and news programmes may be interrupted by advertising only once every 35 minutes. This compares with a limit of once every 45 minutes for films, and once every 20 minutes for news and children’s programmes, in

Articles 11.3 and 11.5 of the current TVWF Directive, which is part of an attempt in the Proposal to simplify existing rules.

28. The TVWF Directive embodies a ‘Country of Origin’ principle which is designed to assist the creation of a Single Market in television broadcasting services.
29. This is the principle that if an enterprise complies with the rules applicable in its country of origin, then it qualifies to provide services without having to be established in another Member State, or to comply with local rules regarding the services provided, notwithstanding that there may be differences between the two regimes. The alternative is a country of destination principle, under which an enterprise is not allowed to provide a service unless the legal and regulatory requirements of the destination or host country are complied with. In the European Union, this would mean identifying and then complying with the requirements of as many as 26 other Member States.
30. The 2005 proposal would have left the Country of Origin principle intact, while extending its scope to cover audio-visual media services (Article 1(a) in the 2005 proposal).

Why is the proposal particularly significant to the United Kingdom?

Online advertising

31. According to the latest figures, the United Kingdom has the fastest growing online advertising market in the world, growing at around 40 per cent per annum, according to recent estimates by media buying agencies.¹ The United Kingdom currently has the highest forecast share of 13.5 per cent of global online advertising, according to figures published by Zenith Optimedia.
32. Starting from a relatively low base, broadband access in the United Kingdom has rocketed. In 2002, only 5.1 per cent of homes had broadband, but by the middle of 2006, this figure was 47.4 per cent. As broadband technology facilitates the greater use of video advertising on the internet, the advertising opportunities seem vast in the new media. Indeed, media advertising does not yet seem to be close to capitalising on this opportunity. According to Zenith Optimedia and GroupM, consumers in the three biggest markets (the UK, the USA and Japan) spend an average of 21.9 per cent of their “media time” online, but on average only 6.8 per cent of advertisers’ budgets are allocated to online advertising.
33. To illustrate the increasing importance of online revenue, Google UK is expected to generate over £900 million in 2006, passing Channel 4’s advertising revenue this year. By 2008, Google UK is expected to exceed ITV’s revenue.²
34. Any attempt to alter the way in which online advertising is regulated thus has critical economic importance for the United Kingdom, with the largest and fastest growing market in the EU. Much online content is funded solely by advertising and is free to access by users. Therefore any proposals must clearly be sensitive to the business models of online media service providers.

¹ “Britain leads the way in online advertising” *International Herald Tribune*, 3 December 2006

² “Google to beat TV in race for ad revenues” *Financial Times*, 1 November 2006

These business models are fundamentally distinct from those of the established television broadcasters currently covered by the TVWF Directive.

35. As Shaun Woodward, the Tourism and Creative Industries Minister told us, creative industries now account for around eight per cent of the United Kingdom's Gross Domestic Product, thus it is vitally important that we have a decent understanding of which businesses the revised Directive will affect and how it will affect them.

Satellite Broadcasting

36. Most of the Member States in the EU are net receivers of broadcasting. By contrast the United Kingdom is, partly as a result of its "lighter touch" approach to regulation, an "international host country" for national versions of channels. These channels include MTV, the Discovery Channel, National Geographic, Bloomberg, Hallmark, Jetix (Fox) and Turner. According to Ofcom there were 116 British based channels targeting foreign markets in 2004.
37. Ofcom currently licenses 762 satellite and cable channels in the United Kingdom. This amounts to around 57 per cent of the total number of licensed channels across the EU. Of those 762 channels, approximately 200 operate cross-border services.
38. The Country of Origin principle is enshrined in the TVWF Directive. This allows operators to provide services on the basis of the regulations in the Member State in which they are established. Any alteration of this principle would have serious consequences for those channels established in the United Kingdom and broadcasting to other Member States. This principle will be discussed in more detail in Chapter Three.

Where does the Directive stand now?

The Council of Ministers text

39. At the meeting of the Education, Youth and Culture Council on 13 November, a general approach on the Directive was agreed to, along the lines of a revised text which was prepared by the Finnish Presidency.
40. The text of the general approach was supported by all delegations except Sweden, Ireland, Latvia, Belgium, Lithuania, Luxemburg and Austria. The Commission, Austria, Germany and Italy indicated their intention to add statements to the Council minutes.
41. The Council's revised text makes a number of very significant changes to the Commission's original proposal, reflecting the wide ranging and often polarised debates both within and between the Member States. These changes will be discussed in the following chapters.
42. Where reference to a "Council text" is made in our report, we are referring to the Council's 13 November general approach. The following chapters will comment on the merits of the 2005 proposal, the Council text, and, where different, the European Parliament text according to our witnesses, together with our own assessment. Our recommendations will be based on the Council text as it stands.

The European Parliament text

43. On the same day as the Council Meeting, Ruth Hieronymi MEP, Rapporteur of the European Parliament's Culture Committee, presented her report on the Directive, and some important amendments were made. These amendments were adopted in the Parliament's plenary first reading in December 2006.
44. In our view, and the reported views of Mrs Hieronymi, both texts take the Directive in the same direction on almost all of the contested issues.
45. Where the Parliament's text does differ significantly from the Council's text is on its approach to advertising rules, and this will be discussed in Chapter Three.
46. We await with interest the comments on the Parliament's amendments which the Commission will make to the Council in due course. The German Presidency have announced that they will seek agreement on the Directive by the end of their term in June 2007.
47. The following chapters summarise the views of the witnesses received by the Committee in the course of our inquiry both in writing and in person. It became clear to us that the main issues of concern revolved around the following areas:
 - The scope of the proposal;
 - The status of the Country of Origin principle;
 - The proposed quantitative rules on advertising;
 - The proposed advertising content rules;
 - The proposed rules on product placement;
 - The principle of Self-Regulation; and
 - The quality of the Commission's Impact Assessment.
48. Our witnesses' views are laid out below, with the Committee's assessments on each in bold type.
49. We make this Report to the House for debate.

CHAPTER 2: THE SCOPE OF THE PROPOSAL

Introduction

50. One of the main drivers for reform of the Television Without Frontiers Directive has been the rapid growth in the number and types of different platforms over which EU citizens may receive audio-visual material. Free-to-air terrestrial broadcasting now competes with satellite, cable, broadband Internet and mobile services.
51. A second fundamental change in the market concerns the manner in which audio-visual material is supplied to citizens. The classic broadcasting paradigm was one where the broadcaster transmitted (or ‘pushed’) its programmes simultaneously to the general public, who simply chose whether to watch their television. In our current environment, while that paradigm continues to represent the dominant means of receiving such material, we are also witnessing the emergence of a wide range of alternatives, most specifically the provision of material in response to the demand of an individual viewer, often obtained (or ‘pulled’) from a selection of material made available by the broadcaster.
52. Such fundamental changes in the provision of broadcasting services have meant that the existing regime is no longer ‘fit for purpose’, since it was drafted in an era when each Member State had relatively few providers generally operating in a similar manner.
53. **We too recognise the changes that have taken place, and are continuing to take place in the sector. We accept, as do all those that gave evidence, that reform of the regime is needed. Witnesses also generally supported the view that now is a good time to be reassessing the existing regulation.**
54. The central issue in the Proposal is, therefore, how far to extend its scope of application: what sort of activities should be brought within the regulatory regime?

The Electronic Commerce Directive and the Audiovisual Media Services Directive

55. Activities left outside the regime will either be subject to the general law or other regulatory regimes, such as that governing the provision of “Information Society Services” under the Electronic Commerce Directive (00/31/EC).
56. One concern expressed by some of the witnesses was that the proposal will add to the regulatory definitions already in existence, resulting in another layer of uncertainty about what and when such rules are applicable to an entity operating in an Internet environment. An Internet service provider, for example, will already be considered a provider of “electronic communications services”, under European communications law and a provider of “information society services”, under European e-commerce law.
57. As outlined in the box below, the broad conception of “information society services” means that “on-demand services” would simply be a subset. Indeed, a proposed recital in the revised text recognises this overlap,

providing that in the event of conflict, the Audiovisual Media Services Directive would prevail.

BOX 1

How will the Audiovisual Media Services Directive relate to the Electronic Commerce Directive?

The Electronic Commerce Directive (00/31/EC) provides a regulatory scheme for those that provide “information society services”. It has been transposed in UK law by the Electronic Commerce (EC Directive) Regulations 2002. Such services are those delivered “at a distance”, “by electronic means” and at the “individual request of the recipient”.

The Directive contains the following key provisions:

- The application of the Country of Origin principle to service providers
- Transparency obligations, i.e. requirements to provide certain information to consumers
- Rules governing commercial communications, including unsolicited commercial communications
- The validity of contracts formed electronically, as well as conditions on the mechanism for entering into such agreements
- Safeguards from liability for 3rd party content where the provider is engaged in “mere conduit”, “caching” or “hosting” activities.

The draft Audiovisual Media Services Directive overlaps with the Electronic Commerce Directive in respect of the operation of the country of origin principle and the transparency obligations. The Electronic Commerce Directive expressly excludes traditional broadcasting, but this will not be possible under the Council’s revised proposal (see below), particularly in respect of on-demand services.

58. **The Committee shares the concern of witnesses about the proliferation of multiple and overlapping regulatory schemes. We call upon the Commission to work to make the regulatory boundaries as clear as possible for business and to enhance legal certainty.**

The 2005 Proposal

59. The December 2005 proposal created a two-tier regime, with a set of minimum rules governing all forms of “audiovisual media service” and additional provisions imposed only on those that provide “television broadcasts” or so-called “linear services”. The inclusion of “non-linear services” within the scope of the proposal was intended to reflect the new forms of service provision that have arisen with developments such as the Internet and 3G mobile services.
60. The proposal sought to be “technology neutral”, i.e. to not favour one delivery platform over another but to create a “level playing field”. Simon Persoff from Orange UK expressed the concern that in the proposal “the principle of technology neutrality has been turned on its head”, and “used as a justification for imposing inappropriate and administratively

unworkable regulation” and effectively “turning into a regulatory-initiated barrier to market entry”. (Q 66)

61. According to the evidence we received from Phonographic Performance Limited (PPL) and Video Performance Limited (VPL) the similarities between online and offline services mean that, in principle, laws which apply offline should apply online as well. However, PPL and VPL told us that the broadcasting environment is very specific, as is the regulatory environment which has grown around it. They argued that in the offline world, spectrum (the range of frequencies available for over-the-air transmission) is a scarce commodity, whereas in the online world there is no such scarcity. Therefore, the regulatory mechanism which allows detailed scrutiny of broadcasters no longer applies.
62. Out of physical necessity, offline broadcast services, e.g. traditional television, are broadcast from an establishment in one Member State, although those services may be broadcast into some or all other Member States. Online, however, a service can be located anywhere in the world. The PPL and VPL argued that if the supply-side conditions imposed on European-based operators become too onerous, they will simply move their operations overseas. The impact assessment carried out by RAND Europe for Ofcom took the view that the requirements in the Commission’s original proposal would have precisely this effect. This assessment differs strongly from the findings of the study carried out by the same consultants for the Commission. We return to this issue in Chapter Seven.
63. The witnesses representing consumer groups strongly supported the extension of scope. The Voice of the Listener and Viewer (VLV) welcomed the Commission’s proposal to extend the scope of the TVWF Directive to all Audiovisual Media Services. VLV felt that the proposed distinction between a linear and a non-linear service makes sense from a consumer’s perspective.
64. Jim Murray from the European Consumers’ Organisation (BEUC), also accepted the premise that the scope should be extended to non-linear services which compete commercially with television, arguing that “since we have always accepted ... the need for regulation of commercial communication and advertising, it makes sense, although it is by no means easy, to try to follow commercial communication wherever it goes in terms of regulation.” (Q 353)
65. The Newspaper Society told us that online versions of newspapers should be excluded from the scope of the Directive. The Society argued that regional and local newspapers are firmly based in their local communities and that their print and online content is aimed at that local audience and readers. They further argued that few print newspapers are intended to circulate across national frontiers (although online services are obviously globally accessible).
66. The Society noted that newspaper companies which have diversified into local radio, local television and new media have not encountered any of the regulatory problems by which the Commission seeks to justify its proposals. The Society concluded that the Directive would not simplify the regulation of audiovisual content but complicate it. It might well impose stricter content controls over material generated and published by regional media companies and increase newspaper companies’ liability.

67. When the Commission issued the proposal, the issue of scope was viewed as the most controversial aspect by the Government. Appearing before the Committee, the Minister described the initial scope as “too ambitious, too burdensome, too costly and too onerous”. (Q 157)
68. Ofcom shared the Government’s misgivings on this issue. Alex Blowers, the Head of Policy Development, told us that they were concerned “that many internet-type services, weblogs containing video content, online gaming, for instance, would be caught by this proposal and it was almost as if nobody had thought that that might be the implication.” He was clear that these services were “nothing like broadcasting” and thus it would be totally inappropriate to seek to include them in this proposal. (Q 120)
69. **We agree that the original scope of the proposal was too broad and too ill-defined to operate without risk of great harm to new media businesses. We welcome the reduction in scope in the revised proposal.**

The Council of Ministers text

70. The November Council text amends the fundamental definition of audiovisual media services in a number of ways.
71. First, the text introduces the requirement for the service to be “under the editorial responsibility of a media service provider”. (Article 1a)
72. The revised text also narrows the scope of the Directive, limiting the extension to non-linear services to “on-demand services”, and describes the characteristics of these services in Recital 13a:

BOX 2

Recital 13a of the revised draft Directive

It is characteristic of on-demand services that they are “television-like”, i.e. that they compete for the same audience as television broadcasts and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.

73. We were concerned that, as Gregory Paulger from the Commission conceded, “TV and TV-like are words that one can understand but to define them in law is difficult.” (Q 321)
74. Despite apparent pressure from some Member States in Council, we are relieved that the latest text continues to exclude electronic versions of newspapers and magazines. It is perhaps ambiguous as regards online content which is not a direct copy of printed content, but the text states that “The definition excludes all services not intended for the distribution of audiovisual content, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose.” (amended Recital 13)
75. **We welcome the apparent intention to exclude entirely electronic versions of newspapers and magazines but believe that in a rapidly changing communications world, the above distinction may well prove difficult to make in practice.**
76. **The implementation and enforcement of this Directive, particularly when many of the services covered are ‘a moving target’, may be**

fraught with difficulties in the absence of sufficient legal certainty over its exact scope as the range of new media services continues to develop and expand.

77. We recognise that the evidence before us has demonstrated clearly that the distinction between television and internet and other new media services is becoming blurred. This ‘blurring’ takes two forms: firstly consumers are freely exercising their choice across these media; and secondly the advertising market also views these varying markets as to a degree inter-competitive or substitutable.
78. It is an assumption of the proposal that traditional advertising revenue is migrating from television broadcasting to new media services. As the current regulation of advertising is far stricter for traditional broadcasters, there could be said to be something of an “un-level playing field.”
79. As we noted in Chapter One, there has been an undeniably rapid growth of advertising revenue on the internet. However this is not necessarily a “zero sum game” between television and the internet, and the Directive risks presenting the market in just such a manner.
80. **It could equally well be argued that, with the much greater degree of choice available to the consumer, the Commission should seek to liberalise the provisions on advertising for established broadcasters, as discussed below, than to seek to extend similar provisions to the new media services.**
81. **In our view, it is neither the role of regulation nor the role of any regulator to protect those with established market positions from threats by new market entrants operating under different business models.**
82. **We are concerned that the identification of some of media services as “television-like”, may lead some to conclude that eventually “like-services” should be regulated in a “like-manner”, i.e. a perfectly “level playing field.”**
83. The Council text seeks to identify and propose the regulation of “television-like” services but proposes to regulate them differently. **As we note above, if they are to be included at all we agree that they must be regulated differently, but the wording and definitions in the latest versions of the text may encourage the idea that they can and should be regulated in the same way as television. We would consider such a move now or in the future to be a grave error.**
84. There may also be a second problem with extending the draft Directive into non-television services, such as the internet and other new media services. It might be taken as an encouragement that it is desirable to extend regulation into these services more widely and eventually to go beyond “television-like” services into other parts of the internet and new media.
85. **Given the practical difficulties in defining, regulating and enforcing a Directive based on “television-like” services, we believe that any further incursion into the internet and other new media services will be fraught with even greater difficulties and, as we have indicated above, is unnecessary in order to secure a single internal market.**

CHAPTER 3: THE COUNTRY OF ORIGIN PRINCIPLE

Introduction: a wider debate

86. The Country of Origin principle has been the accepted basis for legislation to assist the free movement of services as a part of development of the single market in the European Union for some time. We are nevertheless well aware of the mood in some parts of the European Union shifting against the Country of Origin principle.
87. This Committee has recently produced two reports on the Services Directive, which came to the conclusion that the principle was “an essential part of enabling SME service providers to break into the markets of other Member States”³.
88. The Services Directive was an attempt by the Commission to ensure a genuine, single market in services across the EU. One of the key issues which arose from this attempt was the ability of service providers to provide services into other Member States without being encumbered by up to 26 other sets of regulations.
89. The original Commission proposal for the Services Directive was for services to be provided under the rules and regulations of the Member State in which the service provider was established, i.e. a Country of Origin approach to regulation. In both our reports on the Directive, we expressed strong support for the inclusion of the Country of Origin principle.
90. The principle proved controversial for a number of reasons, especially in the European Parliament. Notwithstanding the Parliament’s initial support for the principle, the Directive was heavily amended to shift the basis of regulation from the Country of Origin to the Country of Destination.
91. Mary Honeyball MEP told us that the European Parliament was “still becoming familiar with the fall-out from the Services Directive, where the whole thing has changed quite considerably”. (Q 397)
92. The Minister described to us the debate over the principle in the context of this Directive as an “example of people having a rather overzealous view about the capacity of the European Union.” (Q 178)

The 2005 proposal

93. The Commission’s 2005 proposal had the Country of Origin principle at its centre as the basis for broadcasters supplying services in Article 2a. It was also central to the original TVWF Directive.
94. The Satellite and Cable Broadcasters Group (SCBG) argued that its members’ success in providing television and other audio-visual services in more than 100 million homes across Europe, and broadcast in more than 20 European languages has been enabled entirely by the provisions of the TVWF Directive, and in particular by its application of the fundamental Country of Origin principle.
95. According to the SCBG, inward investment, employment and revenues in this sector have grown steadily in the last decade, and will continue to do so

³ *Completing the Internal Market in Services*, EU Committee 6th Report, Session 2005–06, HL 23 (para 189)

provided the basic principles of the present Directive are maintained—ensuring that regulation remains based on the country of origin, not on the country of reception. (pp 164–168)

96. They were concerned that, even though the 2005 proposal sought to maintain the Country of Origin principle, a number of Member States were seeking to change the rules of jurisdiction in a way, which would effectively bring regulation into the country of reception. They were also concerned that the Commission’s own proposed amendments to Article 2 (new paragraphs 7,8,9 and 10), under which a Member State may take action against a media service provider established in another Member State, may unintentionally provide a new route for complainant countries to evade the Country of Origin principle.
97. The SCBG warned us that if the Country of Origin principle were to be undermined in practice by any of these means, the satellite and cable sector of the UK creative economy would be damaged substantially.

The Council’s text

98. Perhaps the most significant of the alterations in the revised text concerns the Country of Origin principle. The revised text introduces new limits to the principle, set out in article 3:

BOX 3

Article 3 of the revised draft Directive

1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive.

1a. In cases where a Member State:

- has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and
- assesses that a broadcaster under the jurisdiction of another Member State directs all or most of its activity towards its territory

it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules of general public interest in question. The Member State with jurisdiction shall inform the first Member State of the results obtained following this request within two months.

99. The Council’s revised text adopts a concept originating from Sweden of “mandatory co-operation” for National Regulatory Authorities to mitigate any clashes between the rules of the Country of Origin and Country of Destination over these services.
100. Mrs Honeyball described the proposal for mandatory co-operation as “probably not very sensible” because of the burden it would put on National Regulatory Authorities such as Ofcom to co-operate with 24, soon 26, other NRAs, all with differing rules. (Q 397)

101. Mr Murray from the European Consumers' Organisation (BEUC) defended the Swedish position, telling us that "nobody would seriously argue that the restrictions which they wish to maintain arose from a purely protectionist instinct, to stop people buying non-Swedish goods" but from genuine public interest grounds. But he accepted that other Member States often present measures motivated by pure economic protectionism as motivated by similar public interest concerns. (Q 376)
102. Article 3 of the Council text allows Member States to block broadcasts on grounds of "general public interest", and when "a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory". Recital 11 clarifies the public interest grounds by referring to European Court of Justice case law and states that they must be "objectively necessary, applied in a non-discriminatory manner, suitable for attaining the objectives which they pursue and do not go beyond what is necessary to attain them."
103. Further restrictions to Member State action against broadcasters from other Member States are set out in Article 2. The Member State in question must show that the broadcaster it wishes to take action against "manifestly, seriously and gravely infringes Article 22 (1) or (2) and/or Articles 3b;" and has infringed at least twice in the previous 12 months. The Member State must then inform both the broadcaster and the Commission in writing of the actions it will take should the broadcaster infringe again, and allow 15 days for a consultation with the Commission and the other Member State to try to reach an amicable settlement. Ultimately the Commission has the role of deciding whether the measure legitimately falls under the Directive.
104. Chris Dawes from the DCMS told us that the revised article threatened to "introduce uncertainty to industry", although it was not necessarily "absolutely fatal to the Country of Origin principle." (Q 178)
105. Matteo Maggiore from the BBC regarded any step backwards from the Country of Origin principle as "tantamount to going back to a world of erecting frontiers to the circulation of services at a time when the potential for trans-border and global communications is becoming greatest". He was concerned that it would undo any benefits from the 1989 Directive. (Q 12)
106. Mr Paulger from the Commission was forthright in telling us that he viewed the Country of Origin principle as being absolutely central to the Directive; that the revised article 3 was "a measure that would weaken the Country of Origin Principle" and that the Commission "do not like it." (QQ 336-343)
107. The Minister highlighted the inherent problem for broadcasters in requiring them to fit the requirements of a Country of Destination when "it is impossible for a programme maker now anyway to imagine where a programme might be destined for in 20 years' time and who might be watching it". (Q 178)
108. **We share the considerable concern of the majority of our witnesses over the apparent dilution of the Country of Origin principle. We understand that the opposition to the principle has gained momentum in many quarters of the European Union, but view this as an obstacle to the consolidation of the internal market.**
109. **We hope that the proposed monitoring system will work effectively to prevent Member States from obstructing audiovisual media service providers for any grounds other than those strict public interest grounds set out.**

CHAPTER 4: QUANTITATIVE RULES ON ADVERTISING

The 2005 proposal

110. While one stated objective of the Proposal was to ease or remove some of the existing rules, significant concerns have been expressed that such liberalisation has not gone far enough, while new restrictions have been proposed that would adversely impact on the sector, where advertising revenues are critical and yet the sources of such revenues are under threat and are rapidly evolving.
111. The general view of respondents from industry was that the current quantitative advertising rules are no longer appropriate in an environment where the consumer has such a wide choice of provider and can express any dissatisfaction with the quantity of advertising being fostered on him by moving to an alternative provider.
112. The Government were against the quantitative rules imposed by the Commission's proposal, particularly the 20 per cent rule and the 35 minute rule for films, children's programmes and news programmes. They argue that such rules can only have negative effect on the transmission of this type of programming by commercial stations. In their view, the need for these restrictions is based on a broadcasting environment of spectrum and service scarcity which is largely a thing of the past.
113. Today, there is an enormous range of television services and the universal availability of a greatly increased number of channels will be secured by the switchover to digital broadcasting. The Government support the fact that the Commission's proposals do contain some important simplifications of the TVWF rules on television advertising. (pp 64–66)
114. Several of our witnesses viewed the quantitative rules as entirely unnecessary as viewers would simply switch to alternative services if they found that there was too much advertising on one channel, as was the case with some recent examples in the United Kingdom with commercial radio.
115. Martin Stott from Channel 5 called for "a levelling down of the detailed rules" with "a form of rules of principle" rather than what he regarded as unnecessary "micro-management." (Q 272)
116. Jonathan Simon from Channel 4 told us that their preference would be for "no rule at all at the European level" on advertising for children, which would allow Member States to set their own rules according to their very different priorities. (Q 297) This approach would, however, seem to negate the Country of Origin principle, discussed below, still further.
117. There were strong concerns from the free to air broadcasters over the impact of the 35 minute rule for children's programming. Mr Stott told us that "the economics of children's programming are fairly fragile already and it is quite difficult to make a profit on a commercial channel by broadcasting children's programmes." Impinging on the existing ability of channels to fund these already marginally profitable services was, according to Mr Stott, "less kids' programming" or "less original kids' programming", and a greater reliance on cheap imports and repeated programmes. Thus, far from protecting children's programming, it was likely to have a negative impact on quality and a negative impact on original European content. (Q 292)

118. Magnus Brooke from ITV suggested that the Commission risked “taking the most commercially vulnerable genres and subjecting them to additional rules” with children’s and news programming and that there was no obvious detriment to the viewer of, say the advertising break in the *News at Ten*. (Q 293)
119. Mr Dawes from the DCMS agreed that the imposition of these new rules “seems to be going in the opposite direction of liberalisation”, which was the stated purpose of the proposal. (Q 164)
120. Mr Blowers from Ofcom agreed that it would be “entirely appropriate to remove those kinds of artificial restrictions and certainly to look very hard at an artificial impediment to the creation of children’s programming.” (Q 143)

The Council’s text

121. In the Council’s text, Article 11(2) has been altered so that all programmes excluding children’s programming and news programmes are now subject to a 30 minute rather than 35 minute rule.
122. Meanwhile children’s programming and news programmes should be interrupted for advertising only once for each period of 30 minutes, provided that such programmes exceed 30 minutes to begin with.

The European Parliament’s text

123. The Parliament’s text imposes stricter quantitative limits on advertising, with the daily limit of the percentage of advertising content reduced from 20 per cent to 15 per cent.
124. The Parliament’s text also limits advertising breaks in “films made for television, cinematographic works, concerts, theatre plays and operas” to “once for each period of 45 minutes”—and not, as the Commission had proposed, every 35 minutes. This goes in the opposite direction to the Council’s proposal, where the 35 minute rule would be relaxed to a 30 minute rule.
125. **We are unconvinced by the case made for any of the proposed quantitative rules on advertising. We believe that in an increasingly competitive environment, consumers will be able to influence for themselves the volume of advertising which they find acceptable.**
126. **We are concerned about the likely implications of these rules for free to air programming, particularly children’s programming, of the proposed 30 minute rule.**

CHAPTER 5: ADVERTISING CONTENT RULES

The 2005 proposal

127. The Proposal, building on the Television Without Frontiers Directive, contains a range of measures that are designed to regulate the content made available through audiovisual media services. These rules can be sub-divided into four categories: (a) rules governing advertising; (b) rules governing harmful and illegal material; (c) rules concerned to ensure that content are diverse and originate from Europe, i.e., the production quotas; and (d) rules concerning access to certain content, e.g. so-called ‘listed events’ and news reports.
128. The main concern of those raising questions about scope arise from the fact that some of these content rules would become applicable to a much wider range of undertakings and services than under the existing regime.
129. Of these four categories of content rule, the one that generated the vast majority of responses from those that submitted evidence were the advertising rules.
130. **There was general acceptance that current qualitative advertising rules were satisfactory and did not require reform. We agree with this view.**
131. The rules concerning “European” and “independent” works, through the imposition of quotas, was felt by all respondents to have had little if no impact on the UK broadcasting market. Existing broadcasters stated that they far surpassed the minimum requirements.
132. **As there was little appetite for such quotas to be imposed, we are pleased that the revised text leaves it to Member States to define where action is needed to promote European and independent works, and where such action is practical.**
133. **We also support the ‘lighter touch’ on quotas for on demand services, where the imposition of quotas would have placed unreasonable burdens on operators.**
134. Only a few respondents expressed an opinion about the rules concerning access. Current UK arrangements concerning the use of short news reports was considered to be perfectly adequate and did not require the creation of a new legal right. The Council’s text permits such arrangements to continue in existence.

Harmful and Illegal Content

135. There was consensus that there is a continued and urgent need to maintain controls over harmful and illegal content, particularly as relates to the protection of minors. **We believe that these concerns remain valid and paramount.**
136. We would nonetheless draw attention to the work of the Internet Watch Foundation, an essentially self-regulatory industry body, which has seen a reduction in UK hosted child pornography from a global level 18 per cent in

1997, when the IWF became operational to only a 0.4 per cent proportion of global content in 2005 (pp 154–5).⁴

137. We noted the Government's concern that the stated categories of material in the Proposal go beyond that which is currently illegal under UK law.
138. The Minister told us that the United Kingdom was already "very well served" as regards regulation in this area through Ofcom and the Communications Act. (Q 159)

The Council's text

139. The Council's revised text, and that of the Parliament, both return to the list of grounds for offence in the original 1989 Directive, rather than the Commission's 2005 proposal. These grounds are actually fewer than those set out in the Treaty.
140. Some of the concerns over the impact of the new rules on freedom of expression were related to fears over the scope of the Directive, particularly the electronic press. As Mr Paulger from the Commission noted, "Now the demarcation lines are much clearer as regards scope the risk of restrictions on freedom of expression are much less than they would have been as the scope had been understood to be in the beginning." (Q 334)
141. **We are persuaded that the rules on harmful or illegal content will not pose a significant threat to freedom of speech in the United Kingdom, particularly in light of the reduced scope of the Directive.**

⁴ Professor Ian Walden, who acted as Specialist Adviser to the Committee for this inquiry, is a non-industry board member of the IWF.

CHAPTER 6: PRODUCT PLACEMENT

The 2005 proposal

142. As a part of the general drive of the text to allow broadcasters to seek advertising revenue from beyond the perceived dwindling traditional source of spot advertising the proposal initially sought to liberalise the rules on product placement.
143. Jim Murray from the European Consumers' Organisation (BEUC) warned us that "commercial communication is more and more a part of our daily culture" and that the proposed rules "would add greatly to the exposure to commercial communication." (Q 361)
144. By contrast, Jeremy Beale from the Confederation of British Industry (CBI) welcomed the move to relax the rules on advertising as a recognition of something which "is happening globally anyway." (Q 51)
145. There was a degree of uncertainty about the significance of product placement to advertising revenue. Mr Blowers from Ofcom told us that "product placement market opportunity is somewhere in the £25 million to £100 million range, whereas in 2005 the value of the spot advertising market was something like £3.5 billion" and that Ofcom do not see product placement as "an inevitable and necessary substitute for spot advertising revenues." (Q 145)
146. Mr Beale also highlighted the rather contradictory element that the provision on editorial control would introduce to the proposal, in that the draft Directive assumed that an editorial versus commercial divide would always be apparent. Given the text's explicit focus on commercial rather than non-commercial audiovisual media services, this raised fundamental questions. (Q 51)
147. The Government were concerned that the Commission's proposals for identifying programmes with product placement would interfere with acquired programming in an unjustified and impracticable way, not least by focusing on a payment not only to a broadcaster or "media service provider" but to anyone in the value chain. (p 69)
148. Matteo Maggiore, from the BBC, highlighted the potential difficulties for a broadcaster to "ascertain whether an acquired programme, which had not been commissioned, contained any product placement" as it would require an impossibly in-depth understanding of the editorial process behind the programme production. (Q 16)
149. There has been some divergence within the European Union over the current status of product placement. Magnus Brooke from ITV told us that currently "product placement is not technically allowed" in the United Kingdom and that "the UK takes the view that the current Directive does not allow product placement, per se, for example the paid inclusion of particular products or particular brands in programmes." However he continued to tell us that this "is not a view which is universally shared, I have to say, and the Austrians, for example, take the view that product placement within programmes is allowed under the current Directive." (Q 289)

The Council's text

150. The post November Council text reverses the initial attempt of the proposal to liberalise the rules on product placement by imposing a blanket ban and allowing for Member States to derogate from the ban in certain respects.
151. Article 3(f) of the revised text states that "Product placement shall be prohibited". It does allow for Member States to derogate from the ban "in cinematographic works, films and series made for television, sports broadcasts and light entertainment programmes" and "in cases where there is no payment but only provision of certain goods or services for free with a view to their inclusion in a programme". This derogation cannot apply to children's' programming.
152. Even if Member States were to derogate from the ban, programmes including product placement would not be allowed to impact on "the responsibility and editorial independence" of the broadcaster; nor would they be allowed to "directly encourage the purchase or rental of goods or services" or give "undue prominence to the product in question". A further provision is that viewers must be clearly notified of any product placement when they watch such programmes.
153. There is a blanket ban on any product placement for tobacco products, or for companies whose principal activity is making or selling tobacco products.
154. Under the revised text, sites such as YouTube may not be covered because the content they make available is likely to be categorised as "user-generated" rather than "on demand" services. Nevertheless there is empirical evidence of large commercial enterprises using such sites to advertise to users, as was the case with the "unpimp your ride" campaign on YouTube for Volkswagen, which erodes this regulatory distinction.

The European Parliament's revised text

155. Under the Parliament's amended text, product placement would be explicitly banned in "news and current affairs programmes, programmes for children, documentaries [and] advisory programmes". As with the Council text, Member States would be able to derogate from the ban, and thus still allow product placement only "in cinematographic works, films and series made for television and sports broadcasts", or in instances when there is "production aid where there is no payment but only provision of certain goods or services for free with a view to their inclusion in a programme."
156. **We fully understand that were product placement to be permitted, there would be concerns about the danger of it interfering with editorial content.**
157. **At the moment, product placement is only a very small part of advertising revenue. The figures appear to show that television advertising is currently stable, thus product placement cannot be considered necessary to the viability of television companies. If this were to change in future, we believe that the issue of product placement must be revisited.**

CHAPTER 7: SELF-REGULATION

The 2005 proposal

158. In the Government's submission they stated that so far as TV broadcasting was concerned, the Government takes the view that the existing regulatory arrangements, involving Ofcom, were working well—and allowed regulation to take place with as light a touch as possible. They would also support as light a touch as possible for non-linear services—in as far as these were included in the finalised proposal at all. The Government stated that there was a lack of clarity in the Commission's original proposal about the regulatory regimes that will be acceptable in Member States.
159. The Minister told us that he was “totally in favour of regulation so long as it is self-regulation and it should only be state regulation when self-regulation cannot work, by and large because I think the experts are better at regulating themselves than those of us who are not experts and we are more likely to keep up to speed with their industry.” (Q 157)
160. As mentioned above (paragraph 136), the Internet Watch Foundation has been a very successful example of how industry is willing and able to regulate itself in the United Kingdom.
161. A further example is provided by the Advertising Standards Agency (ASA), which has regulated non-broadcast advertising in the UK since the 1960s and was given responsibility for broadcast advertising by Ofcom in 2004 in recognition of its success. Under the current framework, the ASA provides a “one stop shop” to advertising content with a self-regulatory approach for non-broadcast and a co-regulatory approach (with Ofcom) for broadcast advertising.
162. The ASA argued in their submission to us that “the proposed text of the AMS Directive could severely inhibit the continued operation and development of effective advertising self- and co-regulation in the UK and across the EU-25.” (pp 140–142)
163. According to the BBC, self-regulatory schemes should be the preferred option in addressing public policy concerns in the context of on demand services. In their view, the context in which users access services on-demand should enable a lower requirement for regulatory protection than in the case of linear broadcasting. They argued that binding regulation of on-demand services would be at best premature, almost certainly ineffective and possibly undesirable.
164. Mr Murray from BEUC challenged the notion that self regulation was always the best option telling us that “There is a conflict there which has never really been satisfactorily resolved. It is usually resolved by slightly ignoring it or being slightly inconsistent. We can see self-regulation as being possible within a very clear legal and institutional context but not in the kind of context in which it has appeared in recent directives in that Member States are to encourage self-regulation. This is a nonsense.” (Q 381)

The Council's text

165. The Council's text introduces the principles of self-regulation and co-regulation, which were absent from the 2005 proposal, in Member States where such regulation is compatible with national laws.

166. Mr Paulger from the Commission told us that they were “very much in favour of co- and self-regulation as a regulatory technique ... This was our position at the outset”. He explained that there was no mention of self-regulation in the body of the initial draft Directive only because of legal concerns that it might not be compatible with the section on current self-regulation in the existing inter-institutional agreement on better law-making. (Q 350)
167. He cautioned us however that “self-regulation is more developed in some Member States than in others as a regulatory technique,” and thus cannot be simply prescribed to all. (Q 350)
168. **We strongly welcome the inclusion of co- and self-regulation in the body of the revised text, and hope that it will allow such regimes to continue to flourish in the United Kingdom and other Member States where they already operate.**
169. **We are persuaded that self-regulation is the best means of operation in principle, especially for rapidly developing technological markets such as broadcasting.**

CHAPTER 8: IMPACT ASSESSMENT

170. Several of our witnesses reported concerns over the quality of the Commission's Impact Assessment which was carried out on the 2005 proposal. Of these witnesses, perhaps the sternest criticism came from the Government. The Minister confessed to be "terrified" by the lack of any attempt to quantify the effects of the proposal with numbers. (Q 157) Wes Himes from the European Digital Media Association (EDiMA) supported this view complaining that the data in the Impact Assessment had "not been generated statistically", "quantifiably" or "even been generated qualitatively." (Q 20)
171. Jean-Luc de Cockborne, Head of the Commission's Audiovisual Policy Department, felt that such criticism of the lack of quantification of impact contained in the Commission's Impact Assessment was unfair as it was "impossible" "to quantify the actual evolution of the market", and that in any case, the market was so fast moving that in a year's time it would be out of date. (Q 347)
172. Mr de Cockborne criticised what he called "the Ofcom approach" to this proposal by saying that it only sought to distinguish between the cost of regulation and the cost of no regulation. He told us that in reality, the two alternatives to consider were the "cost of complying with one harmonised set of rules at European level" and the cost of complying "with 25 or 27 different rules" varying with each Member State. (Q 347)
173. Alex Blowers from Ofcom suggested that a further significant impact which had not been considered in the Commission's study was "the indirect effect on the business behaviour of introducing these rules at a time when this industry is taking off." (Q 129)
174. Chris Bone from the DCMS told us that he detected in the Impact Assessment a "bias towards bringing existing broadcasting interests into these discussion but not including enough of the telecoms industry, the software providers, the software houses, the games developers and all the other people who potentially could be affected by this" and noted that those consulted by the Commission were "nearly all broadcasters." (Q 157)
175. Perhaps as a result of this, Simon Persoff from Orange UK felt that the Impact Assessment lacked "an assessment of both new and existing business models" and was specifically lacking in any discussions of the new and emerging media business models and how they might be affected. (Q 111)
176. Mr de Cockborne from the Commission responded to this by stating that the Commission had conducted an open consultation and had published "about 1,500 pages of comments" from stakeholders, available on the Commission's website. (Q 347)
177. **We accept the Commission's argument that there are practical difficulties in quantifying how many companies will be affected by this Directive, partly because the proposal is designed to regulate according to the type of service, rather than the type of provider.**
178. **Notwithstanding the above, more rigorous impact assessments were possible in our view. We believe that it was possible to obtain cost estimates in respect of specific provisions within the proposal. As an example, the quantitative rules governing the timing of advertising**

slots, the so-called ‘35- (now 30-) minute rule’, has direct measurable consequences in terms of a reduction in the amount of revenue that can be expected to be obtained by broadcasters.

179. The Commission clearly feel, with some justification, that their Impact Assessment took full account of the whole spectrum of media interest, and that the basis for consultation was widespread. Nevertheless the feelings expressed to us, particularly by new media service providers, was that the Impact Assessment failed to give appropriate weight to the impact of regulation on a rapidly evolving and expanding media services sector with fundamentally different business models from traditional television broadcasters. **We recommend to the Commission that they discuss this difference of opinion with the new media service providers as soon as is practicable.**
180. It is also undeniably true that any figures in the Impact Assessment would only be of temporary value in such a fast changing market. However both of these reasons should caution regulators against ambitious action in these markets as there is clearly a limit to their ability to comprehend fully the markets they are faced with today, let alone anticipate what the markets will be like when the proposal comes into force.
181. Wherever empirical measurement or estimation were not feasible in the current market environment, we believe that the Commission should have adopted a highly precautionary approach, only proposing incremental changes to the current regime where clearly justifiable in terms of protecting matters of general public interest.
182. In our earlier report *Ensuring Effective Regulation in the EU*, this Committee concluded “that the European Parliament and Council should produce an impact assessment on any occasion when in the course of debate they depart substantially from a Commission proposal.”⁵
183. **It is a matter of some concern to us that no impact assessment will be carried out on the revised proposals. Currently neither the Council nor the European Parliament have either the obligation or the resources to carry out an impact assessment, nor does the Commission after its initial proposal. With the scope and regulatory burden for non-linear services very significantly altered from the original proposal, we call for a further impact assessment to be made.**

⁵ EU Committee 9th Report, Session 2005–06, HL 33 (para 169)

CHAPTER 9: THE CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE

The scope of the proposal

184. **We recognise that changes have taken place in the sector, and are continuing to take place, and we accept, as do all those that gave evidence, that reform of the regime is needed. The witnesses also generally supported the view that now is a good time to be reassessing the existing regulation. (Para 53)**
185. **We share the concern of witnesses about the proliferation of multiple and overlapping regulatory schemes. We call upon the Commission to work to make the regulatory boundaries as clear as possible for business and to enhance legal certainty. (Para 58)**
186. **We agree that the original scope of the proposal was too broad and too ill-defined to operate without risk of great harm to new media businesses. We welcome the reduction in scope in the revised proposal. (Para 69)**
187. **We welcome the apparent intention to exclude entirely electronic versions of newspapers and magazines but believe that in a rapidly changing communications world, the above distinction may well prove difficult to make in practice. (Para 75)**
188. **The implementation and enforcement of this Directive, particularly when many of the services covered are ‘a moving target’, may be fraught with difficulties in the absence of sufficient legal certainty over its exact scope as the range of new media services continues to develop and expand. (Para 76)**
189. **It would seem more sensible to seek to liberalise the provisions on advertising for established broadcasters, as discussed below, than to seek to extend similar provisions to the new media services. (Para 80)**
190. **In our view, it is neither the role of regulation nor the role of any regulator to protect those with established market positions from threats by new market entrants operating under different business models. (Para 81)**
191. **We are concerned that the identification of some of media services as “television-like”, may lead some to conclude that eventually “like-services” should be regulated in a “like-manner”, i.e. a perfectly “level playing field”. (Para 82)**
192. **If these services are to be included at all we agree that they must be regulated differently, but the wording and definitions in the latest versions of the text may encourage the idea that they can and should be regulated in the same way as television. We would consider such a move now or in the future to be a grave error. (Para 83)**
193. **Given the practical difficulties in defining, regulating and enforcing a Directive based on “television-like” services, we believe that any further incursion into the internet and other new media services will be fraught with even greater difficulties and is unnecessary in order to secure a single internal market. (Para 85)**

The Country of Origin principle

194. **We share the considerable concern of the majority of our witnesses over the apparent dilution of the Country of Origin principle. We understand that the opposition to the principle has gained momentum in many quarters of the European Union, but view this as an obstacle to the consolidation of the internal market. (Para 108)**
195. **We hope that the proposed monitoring system will work effectively to prevent Member States from obstructing audiovisual media service providers for any grounds other than those strict public interest grounds set out. (Para 109)**

Quantitative rules on advertising

196. **We are unconvinced by the case made for any of the proposed quantitative rules on advertising. We believe that in an increasingly competitive environment, consumers will be able to influence for themselves the volume of advertising which they find acceptable. (Para 125)**
197. **We are concerned about the likely implications of these rules for free to air programming, particularly children's programming, of the proposed 30 minute rule. (Para 126)**

Advertising content rules

198. **There was general acceptance that current qualitative advertising rules were satisfactory and did not require reform. We agree with this view. (Para 130)**
199. **As there was little appetite for quotas to be imposed, we are pleased that the revised text leaves it to Member States to define where action is needed to promote European and independent works, and where such action is practical. (Para 132)**
200. **We also support the 'lighter touch' on quotas for on demand services, where the imposition of quotas would have placed unreasonable burdens on operators. (Para 133)**
201. **We believe that concerns over harmful and illegal content, particularly as relate to children, remain valid and paramount. (Para 135)**
202. **We are persuaded that the rules on harmful and illegal content will not pose a significant threat to freedom of speech in the United Kingdom, particularly in light of the reduced scope of the Directive. (Para 141)**

Product placement

203. **We fully understand that were product placement to be permitted, there would be concerns about the danger of it interfering with editorial content. (Para 156)**
204. **At the moment, product placement is only a very small part of advertising revenue. The figures appear to show that television advertising is currently stable, thus product placement cannot be considered necessary to the viability of television companies. If this**

were to change in future, we believe that the issue of product placement must be revisited. (Para 157)

Self-regulation

205. We strongly welcome the inclusion of co- and self-regulation in the body of the revised text, and hope that it will allow such regimes to continue to flourish in the United Kingdom and other Member States where they already operate. (Para 168)
206. We are persuaded that self-regulation is the best means of operation in principle, especially for rapidly developing technological markets such as broadcasting. (Para 169)

Impact Assessment

207. We accept the Commission's argument that there are practical difficulties in quantifying how many companies will be affected by this Directive, partly because the proposal is designed to regulate according to the type of service, rather than the type of provider. (Para 177)
208. We do however believe that it is possible to obtain cost estimates in respect of specific provisions within the proposal. As an example, the quantitative rules governing the timing of advertising slots, the so-called '35- (now 30-) minute rule', has direct measurable consequences in terms of a reduction in the amount of revenue that can be expected to be obtained by broadcasters. (Para 178)
209. Many of our witnesses, particularly those representing new media service providers, felt that the Commission's impact assessment failed to give appropriate weight to the impact of regulation on a rapidly evolving and expanding media services sector with fundamentally different business models from traditional television broadcasters. We recommend to the Commission that they discuss this difference of opinion with the new media service providers as soon as is practicable. (Para 179)
210. It is a matter of some concern to us that no impact assessment will be carried out on the revised proposals. Currently neither the Council nor the European Parliament have either the obligation or the resources to carry out an impact assessment, nor does the Commission after its initial proposal. With the scope and regulatory burden for non-linear services very significantly altered from the original proposal, we call for a further impact assessment to be made.

APPENDIX 1: SUB-COMMITTEE B (INTERNAL MARKET)

The Members of the Sub-Committee which conducted this inquiry were:

Lord Dykes
Baroness Eccles of Moulton
Lord Fearn
Lord Freeman (Chairman)
Lord Fyfe of Fairfield
Lord Geddes
Lord Haskel
Lord Lee of Trafford
Lord Mitchell
Lord Powell of Bayswater
Lord Roper
Lord St John of Bletso
Lord Swinfen
Lord Walpole
Lord Woolmer of Leeds

Declarations of Interests:

A full list of Members' interests can be found in the Register of Lords Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

Members declared no interests relevant to this inquiry.

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

- Advertising Association
- Advertising Standards Authority
- * BBC
- * CBI
- * Channel 4 Television Corporation
- * Channel 5 Broadcasting Ltd
- Professor Richard Collins
- * Department for Culture, Media and Sport
- * European Digital Media Association (EDiMA)
- * European Commission
- * European Consumers' Association (BEUC)
- Professor Michael Holoubek
- * Mrs Mary Honeyball MEP
- * ITV Network Ltd
- Institute of Professional Sport
- Internet Watch Foundation
- Miniclip.com
- * Mobile Broadband Group
- The Newspaper Society
- * Ofcom
- * Orange UK
- PPL and VPL
- RNIB and RNID
- Satellite and Cable Broadcasters' Group
- * T-Mobile
- Voice of the Listener & Viewer

APPENDIX 3: CALL FOR EVIDENCE

1. The Internal Market Sub-Committee (Sub-Committee B) of the House of Lords Select Committee on the European Union is undertaking an inquiry into issues raised by the European Commission's Proposal (COM(2005) 646 final for a Directive amending Directive 89/552/EEC ('Television Without Frontiers').

2. When first adopted, the Television Without Frontiers Directive was designed to harmonise Member State laws in respect of the provision of television broadcasting services. The objectives of harmonisation were to facilitate the free movement of such services within the Single Market and ensure the protection of certain public interest objectives. The proposed amending Directive (the 'Proposal') is intended to advance the process of harmonisation taking into account the huge changes that have taken place in the broadcasting services market, brought out primarily through technological innovations, such as the Internet and mobile communication services. The Proposal would substantially amend the terminology and terms of the existing measure.

3. Sub-Committee B's inquiry will focus on three groups of questions. The first address the need for a regulatory initiative in the area:

- (a) In our current rapidly converging and evolving technological and market environment, is it appropriate to try to recast the regulatory framework?
- (b) What are the advantages and disadvantages of regulating this area? Are the regulatory costs proportionate to the benefits?

4. The second group of questions address whether the Proposal, in its current form, can meet its own broad objectives:

- (a) Does the Proposal sufficiently liberalise the provision of broadcasting services within the European Union?
- (b) Does the Proposal contain measures that will effectively protect public interest objectives?
- (c) Does the Proposal achieve an appropriate balance between the objective of harmonisation and right of Member States to control audiovisual media services in a manner which reflects national concerns and interests?

5. The third group of questions focus on specific topics addressed in the Proposal. These are:

- Defining the nature of the regulated services—Is there agreement on the Commission's proposal to distinguish between linear and non-linear audiovisual media services?
- Jurisdiction and country of origin—Does the Proposal go far enough in facilitating the free movement of broadcasting services?
- Regulatory approach—What role should industry self-regulation play in the new regulatory framework?
- Advertising and commercial communications—Should broadcasters be given greater flexibility in respect of the commercial arrangements they enter into for the financing of programmes?
- Protection of minors and human dignity—What controls should be imposed on non-linear services in respect of illegal and harmful material, such as the granting of a 'right to reply'?
- Media plurality and cultural diversity—Do quotas continue to be an appropriate mechanism for promoting the production of 'European works'?

APPENDIX 4: CORRESPONDENCE WITH THE MINISTER

Letter from the Lord Grenfell, Chairman of the Select Committee on the European Union to James Purnell MP, Minister for Creative Industries and Tourism, DCMS

15983/05 COM(05) 646SEC (05) 1625: Explanatory Memorandum on European Community Legislation—Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

Impact Assessment, Draft Audiovisual Media Services Directive

Sub-Committee B considered this document and your Explanatory Memorandum at its meeting on 6 February 2006 and agreed to maintain the scrutiny reserve, pending receipt and examination of the Regulatory Impact Assessment which you mentioned will be forwarded to us under a Supplementary Explanatory Memorandum.

We noted, and shared, the serious misgivings of UK industry in relation to this document. We are minded to revisit this matter more fully in the forthcoming weeks.

In paragraph 39 of your Explanatory Memorandum you mentioned the UK-based stakeholder group. It would be helpful to have a brief summary of areas of concern that this group has considered.

In paragraph 48 and 49 of your Explanatory Memorandum you explained that the UK Government had serious reservations about aspects of these Proposals. Are you able to expand further on these reservations?

9 February 2006

Letter from James Purnell MP to the Lord Grenfell

Thank you for your letter of 9 February about the European Commission's proposal to amend Council Directive 89/552/EEC, otherwise known as the 'Television Without Frontiers' (TVWF) Directive.

You asked about the UK-based stakeholders group. The group met three times last year and has met once so far this year, with another meeting imminent. Represented on it is a wide range of interests including broadcasters, satellite and cable operators, Internet Service Providers, new media providers, content producers, co and self-regulatory organisations, trade unions and civil society groups.

The major concern for stakeholders has been the scope of the Directive. An overwhelming majority are not in favour of the scope being extended to on-line services. Many have expressed concerns that the Commission's proposals could

lead to increased regulatory burdens and legal uncertainty. They also believe that the Commission's definitions do not make it clear which services the revised Directive will cover, or where exactly the proposed dividing line between 'linear' and 'non-linear' services would be drawn.

The Government shares these views. Aside from the important issue of lack of clarity in the proposed definitions, our key concern is that the concepts of 'audio-visual media' and 'non-linear' services in the Commission's text appear to bring in a very wide range of new media services which have little in common with broadcasting. This is a fast growing and converging area, and we should take great care before imposing controls which might discourage particular business models or encourage providers to move outside the EU.

Harmonisation of minimum standards of the kind proposed across all the services which fall into the scope of the current draft Directive would pose a threat both to their growth and to national traditions of free speech. We consider that the case for such harmonisation in this way at this time has not been made.

In particular, the impact assessment prepared by the Commission offers no convincing case for harmonisation across all the services falling within the scope of the Directive. It is based upon a theoretical projection of what might happen if Member States were to take advantage of derogations available under the e-commerce Directive to impose burdensome national controls that would distort the working of the internal market, or if there were to be serious distortions (in terms of legal certainty or market advantage) as between the types of regulation that applies to different platforms.

It concludes that there would be an overall—albeit essentially unquantified—loss of business. But there are very few figures in the assessment to back this assertion up.

We see no sign that Member States are in fact imposing burdensome, damaging controls in these areas, although the assessment claims that no less than 23 already have controls of some sort. Our own extensive discussion with UK and pan-European businesses and trade associations has not revealed any evidence of concern that lack of harmonisation is stifling business opportunities.

Rather, discussion has revealed severe concerns that these proposals could increase business uncertainty and regulatory risk. Without more evidence of potential harm to business, it seems to us that proceeding with these measures in their current form would run counter to the Commission's own stated aim—endorsed by Member States—of better regulation.

If evidence of undue interference in the single market for such information society services did come forward, we believe that the question would be best resolved in the forthcoming review of the Electronic Commerce Services Directive.

Our overall concern, therefore, is that the imposition of controls of the sort suggested on non-linear services could itself cause just the kind of damage to growth and development in these sectors which the Commission quite rightly seeks to avoid. They would themselves lead to market distortions and to a net outflow of jobs and development in the new media industries from the EU area.

28 February 2006

Letter from the Lord Grenfell to James Purnell MP**TELEVISION WITHOUT FRONTIERS DIRECTIVE****EM 15983/05 COM(05) 646SEC (05) 1625**

Thank you for your letter of 28 February 2006, replying to my letter of 9 February 2006, which Sub-Committee B considered at its meeting on 20 March 2006.

We were most grateful for the fullness and candour of your response. We share your concerns over the potential damage that inappropriate harmonisation might cause to new media industry sectors both in the UK, and across the wider EU. We agree strongly that in such a fast moving area, further bureaucracy has the potential to impede growth.

We have decided to maintain the scrutiny reserve. We would be grateful if you could keep us informed of any progress on this Directive.

21 March 2006

Letter from the Lord Grenfell to Shaun Woodward MP, Minister for Creative Industries and Tourism, DCMS**12348/06 12348/06 +ADD 1 COM(2006) 459 final SEC(2006) 1073: Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC “Television Without Frontiers”, as amended by Directive 97/36/EC, for the period 2003–2004**

Sub-Committee B considered this document, and your Explanatory Memorandum at its meeting on 23 October. As you will be aware, this area is of great interest to the Committee, which is currently conducting an inquiry in the Commission’s proposal for a Directive amending Council Directive 89/552/EEC (Television Without Frontiers).

We note and accept your arguments with regards to the Commission’s criticism of the UK’s performance in the context of the targets set by Articles 4 and 5, and also note that this assessment covers the review period 2003–2004, and may now be outdated. We agree that some of the criteria are clearly impractical when applied to small, specialised channels. What pressure can the Government apply to improve the existing criteria? Can you confirm that UK public service broadcasters meet the targets set by Articles 4 and 5?

We are content to clear the document from scrutiny.

26 October 2006

Letter from the Lord Grenfell to Shaun Woodward MP**12348/06 12348/06 +ADD 1 COM(2006) 459 final SEC(2006) 1073: Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC “Television Without Frontiers”, as amended by Directive 97/36/EC, for the period 2003–2004**

As you will be aware, Sub-Committee B is conducting an inquiry into the Commission’s proposed revision of the Television Without Frontiers (TVWF) Directive. We have completed taking evidence and will produce our final report in December. For the moment, we thought it might be helpful to let you know of certain concerns we have over the proposal, in the light of the evidence we have

received, ahead of the Council Meeting on 14 November, where we understand agreement to a General Approach is sought by the Presidency.

The purpose of the original 1989 Directive was to create and maintain a single market in television broadcasting. We recognise that the context at that time was of large television companies which enjoyed near-monopoly status in many Member States, limited consumer choice and no internet. The central elements of the original directive were, and should continue to be, two-fold: to ensure that television services could be delivered in the EU as a single internal market and on the basis of the Country of Origin principle. To this end there were certain regulations relating to consumer protection. We feel now that there is a further need to employ the minimum necessary regulation while providing allowance for the protection of minors from harmful content, and for the control of material seeking to incite hatred on the relevant grounds.

In updating the Directive, we assume that current thinking on EU legislation would be to adopt a framework which employs the lightest possible regulatory touch necessary to achieve the objectives of the legislation. The revised Presidency text of 20 October endorses the principles of self and co-regulation in these sectors, and we warmly welcome this move. We believe that, where consistent with Member State law, self-regulation is the best possible option especially in an area where technology and markets are changing continuously.

We are concerned that by adopting a terminology relating the directive to Audiovisual Media Services, there may be a danger that legislators are drawn into a desire to regulate the internet and other new media services. On the evidence we have received during our inquiry, this would in our view be a grave mistake. These services already provide a strong single internal market across the EU and indeed often globally. There appears to be little or no purpose in seeking to regulate these services in order to achieve a single market which already exists across media. No evidence has been provided that suggests otherwise.

As far as public interest protection is concerned, we note that the eCommerce Directive already covers the point-to-point, on-demand services which it regards as 'information societies'. The Directive requires internet services providers to remove illegal content when it is reported to them, and through derogations to the Country of Origin Principle, it permits Member State governments to block content originating from other Member States on grounds of public policy including health, security and consumer protection.

We recognise, as the evidence before us demonstrated, that the distinction between television and the internet or other new media services is becoming blurred in two ways. Consumers are freely exercising choice across these media and the advertising market also views these varying markets as to a degree inter-competitive. We do not believe that it is the role of regulators to seek to protect businesses or providers that are challenged by the emergence of new developing technologies.

Nevertheless, the evidence appears to be that there is still a recognisable television market, in what one might term a traditional sense, being broadcast and available to the population as a whole for simultaneous viewing, often free at the point of use. The evidence to us in general strongly supported liberalising the quantitative rules on advertising on television services in recognition of the vastly increased consumer choice and the availability of new technology to enable consumers to decide how much advertising they want to see as well as time-shift technology. We held concerns over the 35 minute rule in the Commission's original draft

Directive, and recognise that the move to a 30 minute rule is a tentative step in the right direction. The evidence to us on product placement was mixed, and we recognise the difficult issues involved here, especially as regards the potential impact on editorial control in programme production.

The evidence to us, taken as a whole, very strongly suggested that it remains useful to have a Directive that deals solely with what is conventionally termed television, but that it should not seek to go beyond that. In one sense, we recognise that the Presidency draft of 20 October represents a significant improvement on the scope of the original Commission draft, which in our view was excessively and dangerously wide. The Presidency draft nevertheless does seek to extend regulation into the internet and other new media services and seeks to limit this incursion by defining certain “non-linear services” as on demand services which are described as having the characteristics of “television-like” services (Recital 13a). The implications of this are set out in Article 1(aa). We have received little evidence that convinced us that this incursion into the internet and other new media services is necessary to achieve a single internal market in the EU, nor desirable on any other grounds bearing in mind the existence of the e-commerce directive.

We note that the Presidency draft seeks to moderate the implications of this incursion beyond television services by limiting the scope and intensity of the regulations proposed for those “non-linear services”. Insofar as this is a considerable improvement on the Commission’s draft, we welcome this. Nevertheless, we received no evidence to suggest that the current Directive needs to be extended in scope into the internet and other new media services in order to achieve the limited objectives of the revised Presidency draft. Existing laws appear to protect important public interest matters such as the protection of minors, which we strongly endorse.

In our view, having reflected carefully on the evidence before us, extending the Directive into the internet and other new media services has two substantial dangers. By identifying some of these services as “television-like”, it may lead some to conclude that eventually “like-services” should be regulated in a “like-manner”, i.e. a perfectly “level playing field”. The Presidency draft seeks to identify and propose the regulation of “television-like” services but proceeds to regulate them differently. As we note above, if they are to be included at all we agree that they must be regulated differently, but the wording and definitions in the Presidency text may encourage the idea that they can and should be regulated in the same way as television. We would consider such a move now or in the future to be a grave error.

There is a second problem with extending the draft Directive into non-television services, such as the internet and other new media services. It might be taken as an encouragement that it is desirable to extend regulation into these services more widely and eventually to go beyond “television-like” services into other parts of the internet and new media. Given the practical difficulties in defining, regulating and enforcing a Directive based on “television-like” services any further incursion into the internet and other new media services will be fraught with even greater difficulties and, as we have indicated above, is unnecessary in order to secure a single internal market.

In summary, the Presidency draft to be considered next week is an undoubted improvement on the Commission draft. But based on the evidence before us in our inquiry, we believe that it has been a mistake to seek to extend the scope of the existing Directive into the internet and other new media services. We agree that,

with the present state of technology, and in the communications market place, there is still an identifiable and important television market and that certain aspects of television do need to be liberalised in the face of greatly increased consumer choice and new technology. Going beyond television into the internet and other new media services is in our view unnecessary to achieve the fundamental objectives of the legislation in this area. Moreover commencing the process of incursion into these areas opens the door to significant problems in the future and in any case may prove difficult to enforce, other than in a way which interferes unnecessarily with the business model of a new media service provider and creates for them an un-level playing field.

8 November 2006

Letter from Shaun Woodward MP to the Lord Grenfell

12348/06 12348/06 +ADD 1 COM(2006) 459 final SEC(2006) 1073: Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC “Television Without Frontiers”, as amended by Directive 97/36/EC, for the period 2003–2004

Thank you for your letter of 26 October confirming that you are content to clear this document from scrutiny.

I can confirm that the UK public service broadcasters have exceeded the requirements of Articles 4 and 5. You may be interested in the attached summary report (not attached) which was prepared by OFCOM on the position of the public service broadcasting analogue and digital terrestrial channels. This summary showed that for these channels in 2004, the overall proportion of European works was 85 per cent and of independent European works it was 45 per cent.

You asked what pressure the Government can apply to improve the existing criteria for the types of channels which are expected to meet the TVWF European production quotas. The Government’s approach has been to keep a watching brief on this issue and to make sure the position does not worsen.

So far as the current negotiations on the revision of the Directive are concerned, there have to date been no moves to increase the current quotas for ‘linear’ (i.e. television broadcasting) services or to remove the existing flexibilities. We are pleased about that, but our primary objectives in this negotiation have been concerned with its scope, the country of origin principle and the limits which are set on television advertising.

Member States’ approach to the quotas varies. While Germany, for example, would like to see the quotas for non-linear services removed, France would like to see them increased and would even like to include industry levies.

22 November 2006

Letter from the Lord Grenfell to Shaun Woodward MP

12348/06 12348/06 +ADD 1 COM(2006) 459 final SEC(2006) 1073: Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC “Television Without Frontiers”, as amended by Directive 97/36/EC, for the period 2003–2004

Thank you for your letter of 22 November 2006 which Sub-Committee B considered at its meeting on 4 December.

We were grateful to you for confirming that the public sector broadcasters in the UK exceed the requirements of Articles 4 and 5, and for the summary report from Ofcom which you sent us.

We are however seriously concerned that the Government has limited its actions on what are unsuitable criteria contained in these Articles to “a watching brief”, as there is a clear danger that future reports will mislead readers as to the state of broadcasting in the UK. We trust that you will consider raising this issue with the Commission.

As you are aware, we are finalising our report into the revision of the Television Without Frontiers Directive and expect to publish shortly.

6 December 2006

APPENDIX 5: GLOSSARY OF TERMS

3G mobile services—Third generation mobile services are those using a part of the spectrum that enables large volumes of data to be transmitted by a mobile handset over a short period of time, enabling video calling and the receipt of television programmes.

Broadband—A standard of end-user access to the Internet that enables large volumes of data, such as a film, to be downloaded over a short period of time.

Free-to-air terrestrial broadcasting—Traditional television is broadcast ‘free-to-air’ enabling anyone with the relevant equipment, e.g. aerial, to receive it. Such broadcasting is generally distinguished from subscription-based services and services delivered over physical networks into the home.

Information society services—These are services provided in the form of economic or professional activities at the direct request of the user of the services, without the parties being simultaneously present at the same location. Such services involve the processing, storage or transmission of information by electronic means intended for the digital processing and storage of data. Information society services must be entirely transmitted, conveyed and received by electronic means of communication.

Internet Protocol Television (IPTV)—This is a system where a digital television service is delivered using the Internet Protocol over a network infrastructure, which may include delivery by a broadband connection.

Linear services—These are scheduled services, comparable to traditional television broadcasts. The user cannot determine the timing of their availability for viewing.

Listed events—A sporting event considered by Ofcom to be of national interest, e.g. the FA Cup Final, and therefore subject to restrictions concerning the manner in which it is broadcast.

Non-linear services—These are non-scheduled services selected by a media service provider where the user decides the timing of their transmission.

Product placement—This is a form of advertising where a commercial product is used in fictional or non-fictional media, and the presence of the product is a result of a commercial transaction.

User-generated content—Content made available over the Internet that has been generated by an end-user, generally on an amateur basis, rather than professionally produced.

Video on demand (VOD)—These are services which allow users to select and view video content over a network as part of an interactive television system. VOD systems either “stream” content, allowing viewing while the video is being downloaded simultaneously, or “download” content, when the program is delivered in its entirety to a set-top box prior to viewing. These are by definition “non-linear”.

Weblogs—A collection of messages posted on a website in respect of a particular topic, generally displayed in a chronological order. The term is derived from ‘Web log’.

APPENDIX 6: RECENT REPORTS FROM THE SELECT COMMITTEE

Session 2005–06

The Further Enlargement of the EU: threat or opportunity? (53rd Report, HL Paper 273)

Annual Report 2006 (46th Report, HL Paper 261)

The Brussels European Union Council and the Priorities of the Finnish Presidency (44th Report, HL Paper 229)

EU Legislation—Public Awareness of the Scrutiny Role of the House of Lords (32nd Report, HL Paper 179)

Ensuring Effective Regulation in the EU: Follow-up Report (31st Report, HL Paper 157)

Annual Report 2005 (25th Report, HL Paper 123)

The Work of the European Ombudsman (22nd Report, HL Paper 117)

Scrutiny of Subsidiarity: Follow up Report (15th Report, HL Paper 66)

Evidence from the Minister for Europe—the European Council and the UK Presidency (10th Report, HL Paper 34)

Ensuring Effective Regulation in the EU (9th Report, HL Paper 33)

Evidence by Commissioner Franco Frattini, Commissioner for Justice, Freedom and Security on Justice and Home Affairs Matters (1st Report, HL Paper 5)

Reports prepared by Sub-Committee B (Internal Market)

Session 2005–2006

Inquiry into the European Commission's Green Paper, "A European Strategy for Sustainable, Competitive and Secure Energy" (41st Report, HL Paper 224)

The Services Directive Revisited (38th Report, HL Paper 215)

Seventh Framework Programme for Research (33rd Report, HL Paper 182)

Including the Aviation Sector in the European Union Emissions Trading Scheme (21st Report, HL Paper 107)

Completing the Internal Market in Services (6th Report, HL Paper 23)

Session 2004–2005

Liberalising Rail Freight Movement in the EU (4th Report, HL Paper 52)

Session 2003–2004

Packaging and Packaging Waste: An Update Report (33rd Report, HL Paper 198)

Services of General Interest (29th Report, HL Paper 178)

Gas: Liberalised Markets and Security of Supply (17th Report, HL Paper 105)

Directors' and Auditors' Liability (15th Report, HL Paper 89)

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE B)

MONDAY 16 OCTOBER 2006

Present	Eccles of Moulton, B	Haskel, L
	Fearn, L	St John of Bletso, L
	Fyfe of Fairfield, L	Swinfen, L
	Geddes, L (Chairman)	Walpole, L

Memorandum by the BBC

1. The BBC welcomes the opportunity to give evidence to the House of Lords on the review of EU Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (“Television Without Frontiers”).

REVIEW OF THE DIRECTIVE

2. The BBC supports the Commission’s initiative in revising the “Television Without Frontiers” Directive and considers that the Commission’s proposal is a good basis for this revision. The BBC sympathises with the aim of improving regulatory conditions for advertising funded broadcasters in the face of challenges posed by interactivity, shift-viewing and on demand access to broadcast services. Simplifying EU rules on advertising seems a priority to all commercial public service broadcasters in the UK and across the EU.

SCOPE AND DEFINITIONS

3. The BBC supports the principle of extending the definition of services covered by the Directive from “broadcasting” to “audiovisual media services”. Technological convergence blurs the lines between different media and makes it increasingly difficult to draw a clear distinction between different types of services. This includes the current distinction in EU law between “broadcast” services as defined in the “TV Without Frontiers” Directive and “Information Society Services” as defined in the “e-commerce” Directive. Reviewing these definitions is a precondition for modernising the Television Without Frontiers Directive in any of its parts. In particular, it would be helpful to clarify, in the articles on scope, that the definition of an AV media service is independent from the type of network—satellite, terrestrial, cable, mobile, IP—used to distribute it.

4. However, the nascent new media sector should not be subject to unnecessary content rules. Regulation should support the development of new media. The BBC is strongly committed to contributing to the rapid development of new digital services, provided both by public service broadcasters and by commercial media. The BBC and other European public service broadcasters already play a decisive role in ensuring that new media develop rapidly and successfully and that users have access to an attractive mix of innovative quality content on all platforms and through all access modes.

5. For this purpose it is important that definitions of covered services are as clear as possible as to the services the directive intends to cover; that they are accompanied by explicit exclusions in relation to categories of services that should not fall under the directive’s scope; and that the Directive includes guidance for regulators to interpret scope limitatively in borderline cases—err on the side of restrictive rather than extensive application.

6. In our submissions to the European Union institutions we have proposed that in addition to “purely private websites” the list of services excluded from the Directive’s scope should include:

- Activities which are primarily non-economic (a moderate transactional activity aimed, for example, at recouping costs, should not automatically be equated with economic purpose).
- Any exchange of audiovisual material for the expression of personal opinions, in particular services organising the exchange of user-generated audiovisual content.

16 October 2006

- In general, services which do not have a clear impact on a significant number of members of the public.

LINEAR AND NON LINEAR SERVICES

7. The BBC welcomes the Commission's approach to regulation in two tiers of graduated intensity, one applicable to all audiovisual media, and another, more detailed, for linear broadcast services. User behaviour is changing alongside technology. Thanks to the proliferation of ubiquitous and portable platforms and devices, and the growing possibility for time-shifted viewing, content tends to be used increasingly in a non-linear way. However, the transition from linear and narrative to non-linear and participatory services will take time. Linear television channels will remain at the centre of most people's media consumption for the foreseeable future. In the coming years regulation will have to cater for this hybrid, complex media world.

8. The criteria for distinguishing between linear and non linear services could be clarified. Exclusive editorial responsibility is hard to identify as the growing number of links in the media value chain all exercise some degree of editorial control over the nature of content which is offered (or not) to the viewer. In the EU debate we suggested a distinction based on the user's experience rather than editorial control and existence of a schedule: between synchronous access by many, or on demand access determined by an individual.

9. Technology and user behaviour are evolving very rapidly. There are several services already which are hard to capture in a future-proof regulatory formulation. Others yet will emerge even before the Directive's review is complete. For example, computer software can generate personalised schedules for individual users based on their past preferences. The user would have the feeling of accessing a scheduled series of programmes, but no human editorial decision would have been involved in producing that particular order of content items, other than the user's own past record of content selection. As the user determines the criteria for this selection, the BBC has suggested that this kind of software-generated service should be considered at the same level as on demand services. Conversely, the streaming or broadcasting of live events shares the key feature of linear content, ie the simultaneous watching by an indeterminate number of viewers of the same content, and this renders live content "linear" even when a single event is accessed on demand.

SELF- OR CO-REGULATION

10. We consider that only a limited number of high priority public policy objectives can be pursued credibly in the context of on demand services, and then only through full cooperation between industry and regulators. Self-regulatory schemes should be the preferred option in addressing public policy concerns in the context of on demand services.

11. In our submissions prior to the publication of the proposal we maintained that the context in which users access services on demand determines a lower requirement for regulatory protection than in the case of linear broadcasting. Users associate on demand access with a higher degree of individual responsibility than traditional television viewing. In relation to on demand services, binding regulation would be at best premature, almost certainly ineffective and possibly undesirable.

12. EU institutions and Governments are discussing the problems involved in implementing a directive through self-regulatory measures. Self-regulatory schemes for the internet and the advertising sector in the UK are widely considered to be effective. BBC suggestions for amendments to the draft directive include language ensuring that the self-regulation can be used to implement the provisions applicable to all audiovisual media services ("Tier 1") as opposed to those reserved for broadcast services only ("Tier 2").¹

COUNTRY OF ORIGIN

13. The country of origin principle is central to the Directive's effectiveness in regulating the free circulation of audiovisual services, broadcast or on demand. The BBC supports the Commission's proposals to incorporate the effects of jurisprudence from the European Court of Justice within the Directive's articles on this matter. We would be concerned at any change complicating, and weakening the principle of, free provision and free reception of audiovisual services within the European Union.

¹ There are precedents for the coexistence of soft law with hard law in the same EU directive. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, for example, contains articles that commit Member States and the EU institutions to binding action and others, like Article 18, that urge Member States to "encourage" certain actions and outcomes subject to review by the Commission.

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PROTECTION OF MINORS

14. A harmonised approach to protection of minors across all audiovisual media services can enhance the conditions for freedom of circulation and reception of services. Like all the provisions in the directive applicable to all AV Media Services (“Tier 1”), article 3d should rely on self-regulatory measures and cooperation between regulators and industry in each Member State. The wording should be clarified to ensure that it would be possible for Member States to implement the article through self- (or co-) regulation and that there would be latitude to adapt the concept of “seriously impair” according to different cultures and values, as in the case of linear services.

RIGHT OF ACCESS TO SHORT EXTRACTS OF EVENTS OF MAJOR IMPORTANCE FOR THE PURPOSE OF NEWS REPORTING

15. In the course of the consultation preceding the publication of the Commission’s draft in December 2005, the BBC submitted that there is no need for the creation of a new right of this kind, since in most cases code of practice under the fair dealing exceptions to copyright are sufficient in dealing with any access problem at national level. It is necessary to take account of existing legislation and self-regulation on News Access in Member States—and the possibility of using existing regulation as a base to address any real problems on news access, rather than creating a new right. Since this right is now formulated in the Commission’s draft, the language in the Directive’s article should strike a balance between right of information and exclusive broadcast rights. In the BBC’s view, if it is unavoidable to create a new right, this should be limited to off-air access only, in respect of footage relating only to events covered by exclusive rights; such a right should only be exercisable by those who directly exercise the function of informing the public. The only extension to that category of beneficiaries of the right should be in wholly exceptional cases (and we know of none in practice) where for specific proven technical or practical reasons (eg geographical distance) a particular broadcaster has no other means of obtaining access to such footage without making recourse to the services of an intermediary. In any case, in line with established practice, access to information does not include physical access to premises where the event is held.

PROMOTION OF EUROPEAN CONTENT

16. The BBC supports the objective of promoting European audiovisual production. The vast majority of content shown and made available through BBC services is of British, and therefore of European, origin. The BBC believes that like other “Tier 1” provisions, the article on promotion of European content by providers of non-linear, on demand services should be clarified to ensure its implementation is left to self- (or co-) regulatory mechanism. This should allow industry to take account of the objective of cultural promotion at a pace and across a selection of services which is consensually identified as relevant and reasonable.

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Memorandum by EDiMA

1. INTRODUCTION AND EXECUTIVE SUMMARY

EDiMA,² the European Digital Media Association, is an alliance of digital media and technology companies who distribute audio and audio visual content on line. We welcome the opportunity to contribute to the debate on the proposal for a Directive on audiovisual media services.³

As a starting point, EDiMA wishes to recall the specific objectives the European Commission has identified as the basis for its proposal, which are welcomed and supported by EDiMA:⁴

- Taking full advantage of the internal market for new services;
- Ensuring minimum harmonisation for the protection of minors and human dignity and commercial communications;
- Contributing to cultural diversity;

² See <http://www.europeandigitalmediaassociation.org/> for further information on EDiMA.

³ European Commission proposal for a Directive amending Directive 89/552/EEC, COM (2005) 646 final.

⁴ See pp 22–23, European Commission staff working document—Impact Assessment—Draft Audiovisual Media Service Directive—SEC(2005) 1625/2.

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- Fostering the right to information; and
- Limiting regulation on commercial communications to what is indispensable.

Notwithstanding our support for these objectives, EDiMA questions whether the proposed extension of the scope of the Directive to cover all audiovisual media services, is appropriate and proportionate to meeting these objectives. Instead, EDiMA favours a limited revision of the existing Television without Frontiers Directive, so that only television and television-like services are include in the scope of the Directive.

2. THE EVOLVING AUDIOVISUAL MEDIA LANDSCAPE

The audiovisual media sector is undergoing rapid change and, after several false starts, the promise of “convergence” is becoming a reality. The evolving audiovisual media landscape will bear little resemblance to the environment for which the Television without Frontiers Directive was originally introduced.⁵

For consumers, the new landscape will offer increased choice of audiovisual media services and content, access through multiple platforms (TV, PC, mobile etc), greater control over how, where and when audiovisual media services are consumed, the ability to be a publisher as well as a consumer of audiovisual media services and involvement with new communities focused on culturally diverse audiovisual content.

For audiovisual media service providers, the new landscape will be defined by lower barriers to entry, new business models, an evolving economic value chain and new set of commercial partnerships, innovative and more targeted forms of monetisation, a changing competitive environment and markets characterised by constant innovation and disruptive technologies.

EDiMA believes that, as far as possible, the regulatory framework for audiovisual media services needs to accommodate the evolving audiovisual media landscape.

3. CREATING A PRO-INVESTMENT CLIMATE FOR THE AUDIOVISUAL MEDIA SECTOR

The first objective of the European Commission’s i2010 strategy is to deliver a “single European information space, offering affordable and secure high bandwidth communications, rich and diverse content and digital services”.⁶ The member companies of EDiMA are committed to providing audiovisual media services in Europe in order to further this objective.

As major investors in the audiovisual media sector, EDiMA’s member companies believe that the regulatory framework should:

- Be developed on the basis of specific public policy objectives and realised in a manner that is proportionate and minimises regulatory burdens on service providers. New regulation should be judged against whether such objectives are already being satisfied in the market either through self-regulation or existing regulation.
- Provide legal certainty, while offering flexibility to deal with evolving markets and services.⁷
- Promote a pro-competitive environment that favours market entry and empowers consumers through the provision of innovative and affordable services, while promoting consumer confidence through targeted consumer protection measures.

4. THE CURRENT REGULATORY FRAMEWORK FOR AUDIOVISUAL MEDIA SERVICES

The current regulatory framework for audiovisual media services is based around two pillars: the existing Television without Frontiers Directive⁸ and the Electronic Commerce Directive.⁹

The framework draws a distinction between “television broadcasting”¹⁰ and “information society services”.¹¹

⁵ The defining characteristic under which the original Directive was introduced was spectrum scarcity. Limited availability of this scarce resource, justified detailed regulation to meet public interest objectives. Today’s audiovisual media environment, in particular the online environment, is not subject to the same limitations.

⁶ European Commission Communication: “i2010—A European Information Society for growth and employment”.

⁷ The proposed Directive is unlikely to be transposed into law before 2008 at the earliest. Consideration therefore needs to be had to ensure that the regulatory framework is as far as possible “future proof”, in particular as it relates to markets undergoing rapid development and technological change.

⁸ Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities.

⁹ Directive 2000/31/EC on certain legal aspect of information society services, in particular electronic commerce, in the Internal Market.

¹⁰ Article 1(a) of Directive 89/552/EEC.

¹¹ Article 2(a) of Directive 2000/31/EC.

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This distinction is a reflection that, even though there are consistent policy objectives in relation to television broadcasting and information society services, a differentiated regulatory approach, which takes into consideration the specific nature of these services and the manner in which they are consumed, is appropriate to meet these objectives in a proportionate and effective manner.

In addition to these two Directives, audiovisual media services are subject to a range of EU level sector specific and horizontal measures, covering *inter alia*, the protection of minors and human dignity, commercial communications and consumer protection.

5. UPDATING THE REGULATORY FRAMEWORK FOR THE EVOLVING AUDIOVISUAL MEDIA LANDSCAPE

EDiMA recognises that the evolving audiovisual media landscape challenges existing rules and therefore justifies a review of the current regulatory framework.

The proposal for a Directive on audiovisual media services would extend the scope of the existing Television without Frontiers Directive from “television broadcasting” to “audiovisual media services”. The European Commission has indicated that their intention is to extend the scope of the Directive to include “TV-like services”.¹² EDiMA is concerned that the definition of audiovisual media services proposed and the distinction proposed between linear and non-linear services, will not achieve the European Commission’s stated goals. Rather, the proposed extension of scope, which EDiMA considers goes considerably beyond “TV-like services”, is likely to have the unintended effect of undermining legal certainty. This will impact investment in new audiovisual media services.

Instead, in respect of new audiovisual media services,¹³ EDiMA believes that the objectives that the European Commission has identified can (or are already met) by alternative, more proportionate and effective means:

- *Taking full advantage of the internal market for new services*—the Electronic Commerce Directive already provides an appropriate framework that ensures that new audiovisual media service providers can benefit from the country of origin principle.¹⁴ Additional regulation is therefore unnecessary. The e-Commerce directive already provides the means to address upcoming regulatory issues through the ability of Member States to enhance the regulatory regime through additional requirements related to sensitive issues such as consumer protection.
- *Ensuring minimum harmonisation for the protection of minors and human dignity and commercial communications*—as new consumption patterns for new audiovisual media services evolve, the protection minors is better addressed by a mixture of legislative and non-legislative solutions. In addition to existing rules¹⁵ EDiMA believes that emphasis should be placed on media literacy, self- and co-regulatory solutions and market based solutions, such as the provision of filtering software.
- *Contributing to cultural diversity*—the most effective means to ensure cultural diversity in new audiovisual media services will be to lower barrier to distribution and production of European content.¹⁶ This will create new and niche markets for content that would otherwise and previously not have been exploited because of higher commercial thresholds. The new media landscape is already contributing to cultural diversity by breaking down barriers and drawing together communities around shared culture and content. Regulatory intervention will only serve to raise barriers to entry and as a result, restrict access to and availability of content. Cultural quotas in what are essentially consumer-driven markets not achieve the intended result of cultural diversity but would simply raise barriers to access to content and stifle the innovation required by content providers to ensure the spread of European content in the first place.
- *Fostering the right to information*—EDiMA supports the proposals to foster the right to information.
- *Limiting regulation on commercial communications to what is indispensable*—in respect of “non-linear” services, the provisions of the proposed Directive are by and large already provided for in the

¹² See European Commission Press release IP/05/1573 of 13 December 2005.

¹³ EDiMA favours a revision of the existing definition of “television broadcasting” that would extend the scope of the existing Directive to include only TV like services. New audiovisual media service, be they “linear” or “non-linear”, would therefore fall outside the scope of the proposed Directive, but still remain subject to the Electronic Commerce Directive and other sector specific and horizontal measures.

¹⁴ Service providers have highlighted that the scope for derogations under the Electronic Commerce Directive have not given rise to barriers to the provision of services across markets.

¹⁵ Council Recommendation on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity.

¹⁶ In this respect, EDiMA has consistently supported legislative and industry initiatives which aim to break down barriers to content distribution caused by the territorial nature of current licensing regimes in EU member states.

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Electronic Commerce Directive. These rules are supplemented by self-regulatory codes that have been developed to deal specifically with new audiovisual media services. This approach is consistent with dynamic changes in advertising and sponsorship markets that better respond to consumer needs and provide advertisers with more effective return on investment.

In summary whilst supporting the objectives of the proposal for a Directive on audiovisual media services, EDiMA believes that these can be achieved, and in some cases are already being achieved, through alternative approaches which will deliver a regulatory framework better able support and nurture a thriving market for audiovisual media services in Europe.

6. CONCLUSION—EDiMA POSITION ON THE PROPOSAL FOR A DIRECTIVE ON AUDIOVISUAL MEDIA SERVICES

In its impact assessment, the European Commission highlighted that five options for reviewing the Television without Frontiers Directive had been considered.¹⁷

EDiMA strongly favours option three, namely a focused revision of the existing Television without Frontiers Directive, to clarify that all “linear” services similar to television are covered by the scope of the Directive. We also support updating existing rules on advertising and sponsorship.

In the event that the Directive is extended to include new audiovisual media services, beyond television and television like services, EDiMA believes that particular attention needs to be had to clarifying the definitions of audiovisual media services and the distinction that is drawn between linear and non-linear services.

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Examination of Witnesses

Witnesses: MR DAVID LEVY, Controller, Public Policy, and MR MATTEO MAGGIORE, Head of EU and International Policy, BBC; and MR WES HIMES, Director, European Digital Media Association (EDiMA); examined.

Q1 Chairman: Gentlemen, good afternoon. You are most welcome. I have two apologies, before we get underway. The first one is that we are already nine minutes behind schedule, but, as you may have realised, a vote was called at almost exactly four o'clock and we had about 15 minutes of business to do before we asked you to come in. The second is apologies from our normal regular Chairman, Lord Woolmer, who unfortunately has urgent business outside the House so he has asked me to stand—or sit—in his place, which I will do to the best of my ability, which will not be as good as his, but never mind. Mr Levy, from the BBC. I hope I pronounce your name correctly?

Mr Levy: Absolutely; yes.

Q2 Chairman: Mr Maggiore: is it a soft “G”? It is. Mr Himes, have I got that one right—thank you very much—from EDiMA; for the benefit of the transcript, the European Digital Media Association. Would any of you like to make a short opening statement, or are you happy to go straight into questions?

Mr Levy: Straight into questions.

Q3 Chairman: As of course you are aware, we are most grateful to both your organisations for the written evidence that you have given us, which

certainly we have read. The revised proposals on the Television Without Frontiers tries to bring in almost the emerging media, I know the buzz-word is “platforms”, we are not very familiar with that word “platforms” but methods of receipt—would that be roughly equivalent—and of course specifically the Internet. Do you think—I think I know what answer EDiMA is going to give, having read the evidence, however let me put it without any prejudice—that such a wide scope is appropriate, and what advantages and disadvantages might such a regulatory approach have? Mr Levy, would you like to start on that?

Mr Levy: Thank you. Let me just introduce the two of us from the BBC. I am David Levy. I am Controller of Public Policy. That means I have an overview of our regulatory and political activities here and in Europe. My colleague, Matteo Maggiore, is Head of European and International Policy. In terms of the scope of the Directive, I think our feeling is that this is territory where, whilst being very cautious, in terms of ensuring that we have appropriate levels of regulation for different kinds of services, nevertheless there is an argument for saying that the broadening of the scope as proposed by the Commission is justified, in broad terms. This Directive originates from 1989, when there was a Television Without Frontiers Directive before the

¹⁷ See p 24, European Commission staff working document—Impact Assessment—Draft Audiovisual Media Service Directive—SEC(205) 1625/2.

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Internet was known and when broadcasting was a pretty simple and straightforward business that we could all understand. Since then, as we know, there has been a variety of different methods of distributing audiovisual content, including over the Internet, and, in a sense, there is a parallel structure at the moment. There is an E-Commerce Directive, which has things to say over distribution over the Internet, of services defined as “e-commerce”, and there is the Television Without Frontiers Directive which regulates traditional broadcasting. The consequence of that is that BBC programmes, for example, when they are transmitted in linear form over broadcast environments, are regulated under the Television Without Frontiers Directive, but the same programme, made available in on-demand form over the Internet, would come under the scope of the E-Commerce Directive. We can see arguments for extending the scope of the Directive, in terms of ensuring a more coherent approach to regulation of different distribution systems; however, having said that, we are very much in favour of the lightest possible touch approach towards Internet-distributed content. In some way—and my colleague, Matteo Maggiore, may want to add to this—our position is that we see an argument for the extension of scope, we feel it recognises what is happening in terms of convergence, but at the same time we think it is very important that the principle that is within the draft Directive, of a two-tier approach and a much lighter touch approach for certain kinds of services, is reflected in practice.

Q4 Chairman: Do you want to add anything, Mr Maggiore?

Mr Maggiore: I think David has covered practically all the ground on this one, in terms of the BBC’s position. The only thing I would stress is that the BBC made submissions to the Commission in advance of the publication of the draft in December 2005, stressing that we saw, as David said, an issue about definitions of services and an issue about what kind of regulation you apply to different types of access modes. We were very pleased that the Commission took on board our and other people’s views in this respect and tried to go down the path of a graduated approach to regulation, depending on modes of access. Of course, this is a fairly innovative way of tackling regulation and it presents pretty complex problems of clarity in terms of scope and division between linear and non-linear services, but we think that, by and large, this is our preferred route, in terms of covering the necessary scope and also ensuring that on-demand services are regulated as lightly as possible.

Q5 Chairman: Mr Himes, it is possible you take a slightly different view?

Mr Himes: Yes; absolutely. I was hoping that, already having thought of my response, you would have absolved me from answering, but I will go ahead and add to that comment. It is of no surprise that the European Digital Media Association is against the extension of scope to non-linear activity, and let me give you a few reasons why. Number one: most of the audiovisual services that we provide currently to customers and consumers online are already covered by the E-Commerce Directive, which was alluded to by Mr Levy and Mr Maggiore. The E-Commerce Directive, or as it is called there the Information Society Services, which allows such services to promulgate online, already contains a number of provisions in relation to things such as protection of minors. Where there are no provisions they are taken up by self-regulatory and, in some cases, co-regulatory codes, taken on by the industry in a voluntary capacity to address some of the public interest issues that are being raised around the debate of this particular Directive. Number two: we see absolutely no evidence of the need for an extension to scope. The evidence is mainly put forward by the Commission that it will strengthen the Country of Origin regime, which currently, as it is passing through the European Council and the European Parliament, raises questions as to whether such a Country of Origin regime will remain intact, in terms of the final piece of legislation which will come out of that legislative process. Number three: we asked if there was any large amount of evidence from online providers that there were problems under the E-Commerce Directive. For instance, did the derogations allowed by Member States to “gold plate” the E-Commerce Directive create a fragmentation that was impossible to sustain for online providers, and therefore the Television Without Frontiers Directive might provide some relief in that regard. We have not seen any evidence, from our members or from third parties, which would say that the E-Commerce Directive is no longer functioning effectively as a regulatory agent for online service providers.

Q6 Chairman: I am sorry; could you stop there for just a minute? You are saying you do not think the E-Commerce Directive is any longer effective in this respect; is that what you are saying?

Mr Himes: We believe that audiovisual services, as they are regulated currently for online providers, are covered by the E-Commerce Directive under the definition of Information Society. We feel that framework has served effectively for the provision and regulation of those services.

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Q7 Chairman: And will continue so to serve?

Mr Himes: We hope so. As I said, we have seen no large amount of evidence which indicates that the E-Commerce Directive is not functioning effectively or regulating this sector, and therefore see no public interest reason for it to move toward an additional piece of regulation which would cover audiovisual media services. The next thing, of course, is we have a great fear that legislation, in a very innovative, fast-paced, high-tech environment, will create an anchor to the construction and development of audiovisual services, in other words, slow down their involvement, and you have seen perhaps in the paper recently the YouTube discussions and the recent takeover by Google. We often wonder, in a Television Without Frontiers environment, as envisioned by this proposed Directive, would a YouTube have been able to get off the ground and create such a successful story as it has to date. We often fear that regulation in this creates a more imperfect market for these services and thus, in fact, encourages legislators to take a precautionary rule when moving in the direction of regulating audiovisual online services.

Q8 Lord St John of Bletso: If I may ask a supplementary, and I agree totally with your analysis, surely, if the Directives become too draconian, content providers may be tempted to host their servers outside of the jurisdiction, thus circumventing any attempts to control content?

Mr Himes: Absolutely. My Lord Chairman, it certainly is the effect that overregulating the Internet, in whatever aspect, whether, for instance, it is in the music industry, has caused sites to be established in other jurisdictions outside the European Union in order to satisfy demand which the regulatory environment in the EU no longer allows for catering to. We must always take into account the effect that online regulation is significantly different from off-line regulation. There is a level of control and that level of control has to be a fine balance between allowing consumers to seek what they wish to consume while, at the same time, protecting the public interest. Otherwise, as correctly pointed out, there will be sites which are constructed in other jurisdictions which satisfy that demand, which do not have any levels of control that satisfy the public interest.

Q9 Chairman: All the evidence we have received emphasises just how fast, technologically, this industry is moving. You barely have to blink and something else has come up and it has got smaller, or more refined, or whatever it happens to be. A question aimed at both your organisations: do you think that the proposals as they stand presently are sufficiently technologically neutral and, to me

certainly, even more important, are they future-proofed? If not, the implication, of course, is this is the wrong time to do it; so that prompts a question when is there ever a right time to do it?

Mr Levy: If I could start for the BBC and then pass on to my colleague, your Lordships will be very conscious of the timescales involved in European legislation and our guess is that this Directive, if there is a Directive, would come into force round about 2009, so the question is absolutely right, in terms of how does one regulate appropriately in such a fast-moving market. I think I would start from the other end, if you like, which is, clearly there are problems about how you have a future proof piece of regulation, but equally well I think the status quo would be a very difficult position to defend. The definition of broadcasting that we have in the 1997 Television Without Frontiers Directive will not make a lot of sense by 2009, so we share the concern of Mr Himes's organisation's about not having excessive regulation of new platforms, but at the same time we do not think that it is realistic to try to defend the traditional definition of broadcasting up to 2009 and way beyond that. Do you want to pick up the future-proofing point?

Mr Maggiore: If I may just add to what David was saying, I do not plan always to come in after David, if he covers the point, but just to say that the review of the Directive at this point in time was prompted by a desire to lighten the burden of regulation on commercially-funded broadcasters, so there was an intent to deregulate and adapt regulation to a fast-moving technology in the broadcasting sector. Having this desire, as David said, it is very difficult to review this Directive without reviewing the definition of scope, precisely because things have moved on. I think that part of what Wes was saying about threats to the Country of Origin principle is a very important point, but equally the threats to the Country of Origin principle are political, they are not in the context simply of this debate. In other words, there is a sense in a number of Member States that they are losing control of the regulation of the audiovisual environment, and in that context the Electronic Commerce Directive may offer Member States, under the exceptions provided to Country of Origin, more of an opportunity to fragment the regulatory landscape around Europe than a harmonised, or a minimally harmonised, framework across the EU. I just offer a complementary comment on these two points.

Q10 Chairman: Mr Himes?

Mr Himes: My Lord Chairman, let me address the two questions which you posed. Future-proofed: as pointed out by this Committee, I concur wholeheartedly that the ability to future-proof in such a highly dynamic and ever-changing

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environment is very difficult. Let me give you a tangible example. What happens, if I were to create weshimes.com and I were to do my home videos and put them up for compilation on my site to allow my relatives, family friends or, for that matter, anyone to come and learn more about me, and this occurs already in companies like MySpace and Facebook, among others, am I now an audiovisual media service provider? Do I have to comply with the Directive, and if so how do I do so? These are the types of innovative methods that are occurring on the Internet now and you can see where the confusion and sometimes disproportionate response of regulation to that example will take effect. Let me talk about technological neutrality. A case could easily be made for, for instance, the simulcasting, which is the simultaneous transmission of traditional broadcast material on television online, being anything more than simply broadcasting on a PC or broadcasting on a mobile. I think there can be an effective argument that those two, regardless of platform, are the same thing, broadcasting, and I think the Directive is aimed at covering that. However, when you start moving into non-linear, on-demand, we believe, in many cases, that this is a different customer proposition and therefore technological neutrality can be defined only where the two services are substitutional. We think, in many cases, non-linear, on-demand material is complementary to traditional broadcasting, therefore the ability to create that as a technically-neutral issue is somewhat difficult. Those are the responses, I think, to your two questions.

Chairman: Thank you. If we have time, I would like to come back to those two points because I think they are quite crucial, but I am conscious of the time. You should know, incidentally, that this Committee is remarkably familiar with the Country of Origin principle, having just finished an inquiry on the Services Directive and with all the furore that introduced. Lord Fearn, you wanted to pick up, I think, on the Country of Origin principle?

Q11 Lord Fearn: You have already touched on it, but in your opinion has the Country of Origin principle benefited your Association and the UK/European broadcasting industry? If I may come in with two others, on top of it, do you consider this principle to be now under threat, one of which I think has been mentioned, and have Member State derogations from the Country of Origin principle, or a threat of such derogations, caused problems in the past?

Mr Levy: Can I start with the benefit, the first of those questions, and can I deal with the other two points, from the BBC's perspective. The Country of Origin principle has benefited, I think, both UK broadcasters and the BBC, because, in the case of

the BBC, it has meant that our services can be relayed, for example, in the Benelux, without additional licensing requirements, and that is also the case in some other parts of Europe. It has also benefited UK broadcasters as a whole. Over the past few years there has been a large number of pan-European broadcasters that have chosen to base themselves and register themselves in London, and that has been partly because of the Country of Origin principle under the existing Directive meaning that registration and licensing in one location has meant that they have been able to provide services across the whole of the EU. We think the Country of Origin principle has been beneficial to us as an organisation and also to the UK in terms of its broadcasting activities.

Mr Maggiore: To pick up on the question about whether this principle is under threat, certainly we think that there is a lively debate in a number of Member States, and in particular smaller Member States who have large neighbours that speak the same language. They are concerned at a sense of loss of control in regulating their own environment, and this debate, of course, takes new life in the context of the discussion of the Audiovisual Media Services Directive. We think that this debate is the problem and that discussion in the audiovisual media service context is a symptom, if you like. If there were not this review, we fear that increasingly Member States might make recourse to exceptions under the Electronic Commerce Directive and that might lead to further fragmentation, going forward. I agree with Wes that it has not happened so far, but this debate is a symptom that it might well happen, going forward, so there is a problem, yes, and we are very concerned that Country of Origin should remain a principle underlying audiovisual media service regulation. I have no sense that derogations on a Country of Origin principle have harmed the BBC in the past, as far as I am aware.

Mr Himes: Is the Country of Origin principle under threat? Quite succinctly, yes. Number one: for us, as digital media, particularly on-line digital media providers, the Country of Origin is a great liberating force; we are on the Internet, we are globally available. If we could get a Country of Origin for the globe, most assuredly we would enjoy that. However, and as you point out quite rightly, through your deliberations on the Services Directive vote, the Country of Origin is under considerable and constant threat. When I spoke to the Commission on the Television Without Frontiers Directive I asked the exact question you were asking me today, what is the advantage of this Directive, and the first answer I always received was that it would strengthen the Country of Origin principle to allow the pan-European provision of linear and non-linear programmes. It was supposed to

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strengthen the Country of Origin definition under the E-Commerce Directive in which the Commission's view has offered too many opportunities for Member States to add additional regulation. We are seeing now, through the process of this Directive, in the European Parliament, in the European Council, the slow erosion of that fundamental principle. Already we have had numerous governments provide input to Council deliberations, and the most recent Finnish Government proposal shows a watering down of the Country of Origin principle. This greatly affects our ability to do business because it fragments what is essentially a streamline market, the Internet market, and we have grave concerns that the supposed one advantage, one large advantage, of this Directive will not come to fruition.

Q12 Lord Swinfen: I just wonder what you suppose will happen if the Country of Origin principle goes; does it cause complete and unutterable chaos throughout the whole of the Union?

Mr Maggiore: It would certainly create problems and it would certainly, effectively, take away any benefits that Television Without Frontiers provided the EU since 1989, so, yes, we would be extremely concerned if the Country of Origin principle should go. It would be tantamount to going back to a world of erecting frontiers to the circulation of services at a time when the potential for trans-border and global communications is becoming greatest, so it would have a very bad effect indeed.

Mr Himes: I can only reiterate what Matteo said. I agree completely. The erosion of the Country of Origin principle will create incredible legal uncertainty for operators, if not technical uncertainty, on how to provide such services. Let me give another tangible example, a question that I do believe the Committee will raise later, concerning European works. What happens if you have different European works regimes in every single Member State? The effect is I can no longer run a dot-com service, I now have to run 25 separate services to adhere to that regulation in each Member State; such would be a travesty to the ability to provide these services on a pan-European basis. That gives you, I hope, a tangible example of what might happen if this Country of Origin principle is eroded to the point that Member States can quite easily add additional regulation and thus create a very difficult market for Internet service providers and digital media providers.

Chairman: A fairly unanimous reply, on that one.

Q13 Lord Haskel: Surely the alternative to the Country of Origin principle is harmonisation, and you seem to reject harmonisation, you assume that every country will operate on a different basis. Do

you not think that because the technology is international, because the technology does not know frontiers so harmonisation would be a logical consequence?

Mr Himes: In many cases, that is held out as the Holy Grail of the ability to utilise the internal market. I question the political will of creating a fully harmonised, and that is what we are talking about, a fully harmonised, not minimally harmonised but a fully harmonised regulation to provide for the regulation of audiovisual content. Therefore, I believe that is why the Commission pursued the Country of Origin approach with a regime which supposedly made it difficult to add to that, so effectively offering full harmonisation although providing a caveat for Member States to derogate. I do believe that there is not an appetite politically to reach full harmonisation and I think that is being shown in the deliberations occurring right now on this particular Directive.

Q14 Baroness Eccles of Moulton: The next question deals really with advertising. Mr Maggiore has referred already to how important the advertising question is to the Directive. The question is, on advertising, do the proposed rules adequately address the emerging business models, the content provision over the new platforms?

Mr Maggiore: I think the only thing we can say, on the side of the BBC, which is a publicly-funded broadcaster, for the most part, is that we recognise the problem. We have recognised that advertising-funded broadcasters face a very momentous challenge posed by the evolution of technology and new ways of accessing audiovisual content, both on-demand and in a time-shifted way. We want to see a thriving, free-to-air, advertising-funded broadcasting sector, so we sympathise with any effort to make sure that regulation supports the ability by the commercial sector to tackle these challenges, but I would say that beyond this point we are not the best placed to comment on the specifics of the regulation.

Mr Himes: For our members, the issue of advertising, and of course within the Directive, there is a supposedly lighter regime, certain advertising aspects, for non-linear audiovisual service providers, and of course a different regime for traditional broadcasting. I think one of the biggest problems we find in the advertising is somehow the urge simply to take off-line regulation and attach it to online regulation, because in the off-line world we are used to considering advertising as sort of an in-stream, whether it separates shows or in-between shows, whatever it might be, and to some extent sponsorship. When you get into the online side it does not fit that nice little description. For instance, you often have audiovisual content that pops up

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when you request it to play, but all around it there will be different advertising, or there will be links to people who might provide such services or products that you have seen on the digital media screen. We find it very difficult to try to transpose those off-line regulations into online regulations, and even if it is a “lighter regime” today I have to think in the future that ultimately it will become a tougher regime or eventually it will be reconciled with the traditional broadcasting side. In that case, I think we are quite worried about making this transfer of rules and what it will mean by the ability of our online companies to be able to monetise and afford the audiovisual media services that they are providing to the customer. Therefore, once again, and I am sure it comes as no surprise, we would like to make sure that the advertising rules are not beholden to online audiovisual media services providers, in terms of the future.

Q15 Baroness Eccles of Moulton: I think that the next two supplementaries, which are linked, probably do highlight the difference between two methods. Do you support the continued need for the imposition of formatting rules, such as the 35-minute rule, on programme-makers; and are the proposed rules on product placement workable?

Mr Himes: This is probably somewhat outside the remit of EDiMA members, because these are quite detailed rules. Obviously, a rule like the 35-minute rule is quite difficult to replicate online; would that mean you could not have advertising around the digital media screen for the duration? In terms of product placement, once again this is an issue probably more correctly addressed by the traditional broadcasting industry, because really it involves the ability to highlight products within a stream service. Once again, we are uncertain as to whether that advertising which surrounds online audiovisual media services comes under this Directive, we would prefer it not to be, but I think time will tell on that over the next few months.

Q16 Baroness Eccles of Moulton: It will be interesting to hear what you have to say about it?

Mr Maggiore: As I said at the beginning, clearly we support lightening the regulatory burden on the commercially-funded sector. The 35 minutes rule has been debated extensively in the context of the discussion of the Directive; 35 minutes is a very odd number, it is a bit of a political compromise. The original draft by the Commission said 40 minutes, some were pleading for 30 minutes; the final draft said 35. I think currently we have gone back to 30, but 30 minutes certainly would seem to make more sense from a broadcasting perspective. This said, again, there are some among the commercial broadcasters who say that the whole rule should be

taken out in its entirety. As outsiders to this particular funding model, nevertheless we have sympathy with the requests of the commercially-funded sector. On product placement, equally, it is not for us to say much about that, except in the context perhaps of the fact that it would be important to decide how product placement is taken to be defined in the context of acquired programming. Also, it would be very important that broadcasters had not had to do something which, in certain cases, might be impossible to do, which is to ascertain whether an acquired programme, which they had not commissioned themselves contained any product placement, because that might not be possible to determine.

*The Committee suspended from 5.00 pm to 5.07 pm
for a division in the House*

Chairman: Welcome back. The two topics on which I think really the Committee would like to hear evidence are, one, the implementation, and the other is the impact assessment. Lord St John, would you like to go in to bat on implementation.

Q17 Lord St John of Bletso: On implementation, what do you consider the European Commission’s or the Government’s and/or Ofcom’s proper role to be in this sector? Mr Himes has already touched on my next question, which is on what issues, Mr Levy, do you consider industry self-regulation to be a sufficient or the most appropriate regulatory response? Finally, what limitations are there to reliance on a co- or self-regulatory approach in this sector?

Mr Levy: In terms of the sharing out of responsibility between the Commission, the UK Government and Ofcom, in our case, what has happened in the past, I think, is a reasonable model here, where you have a framework set at European level and you have national implementation. For example, on the Television Without Frontiers Directive, in the past it has been the Department for Culture, Media and Sport which has reported, for instance, on the performance against the quota provisions of that. I think there are areas where some of the things, in terms of consumer protection, that are within the draft Directive would mean that one would need to interpret those. One would need to have some degree of interpretation at national level whilst at the same time maintaining what has happened to date, which is some degree of co-ordination between national regulators; there has been a contact committee, for example, around Television Without Frontiers. I think that is quite a useful model, in terms of taking that forward, so that you both combine some degree of recognition that, some areas, and I mentioned consumer protection, the interpretation of those may require

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some degree of national context; at the same time, one does not want that to be a back-door way of creating obstacles to a single market into the Country of Origin principle. In terms of the broad sharing out of responsibility, that is the way I would see it. In terms of the issue of self-regulation, Matteo, do you want to pick that up?

Mr Maggiore: There is a lively debate about that, as well, to what extent should Member States be allowed to rely on self-regulation for the purpose of implementing the Directive. I hope it has become clear that actually Mr Himes's position and ours are not very different, from the point of view of the fact that we really do not think that this sector, in particular, Tier 1, the rules applicable to all services, should result in an overregulation of a nascent sector. We believe that it will be very important for the Directive to contain clear language, and we do not think that language is clear enough in the Commission's original proposal, stating that Member States should be allowed to make use of self-regulatory schemes in order to implement the pursuit of general interest goals, as stated in Tier 1, so we would like to see clarification in that respect. Recently, Commissioner Reding said, in Rome, I think, in a speech, that she very clearly intended to make sure that the Directive should become applicable through self-regulation, and we thought that was a very helpful statement.

Mr Himes: Absolutely. I would concur absolutely with Matteo on that comment. We believe that our industry has taken appropriate steps, where needed, to provide self-regulatory schemes, or in some cases co-regulatory schemes, to cover sufficiently, and hopefully mitigate, the public interest risk that may occur in those services. I will give you two or three examples; one is labelling. Audiovisual content that is not fit for consumption by minors is labelled and in many cases, in fact most cases, provides an age identification service to make sure that content is not consumed by minors. Number two: technical measures. I do not know if the Committee is familiar with, for instance, the Internet Content Rating Association, in which any website can register and label their website and then parents can voluntarily download the software which provides the filter on those sites when children try to access them. There is a myriad of technical measures, there is a myriad of labelling programmes, which industry is taking in order to mitigate risk on the consumption of audiovisual online services. I think that role can continue to be fulfilled robustly on a self-regulatory and co-regulatory basis. It has worked very well in the UK and we hope that some of those models will be exported to other jurisdictions should the Directive ultimately support self-regulation and co-regulation. As to the question of the role of the UK Government and Ofcom, I

think the main thing is they need to provide a voice at the table during the deliberations of this debate, for the very reason that they have a wealth of experience in regulation. I know already that the UK Government and Ofcom are very active on this, so I am simply supporting the position that they should continue sustaining their involvement in this deliberation. Of course, ultimately, once the Directive is adopted at the European level it will be up to the Government and Ofcom to implement and enforce, and I am sure there will be a whole other debate on that subject matter.

Q18 Lord St John of Bletso: Do you believe that the Government's and Ofcom's initiatives are appropriate and adequate in the circumstances?

Mr Himes: In relation to the regulatory climate here or in relation to the Directive?

Q19 Lord St John of Bletso: In relation to the Directive.

Mr Himes: I do believe that, through the regular, continual regulator meetings, done by Ofcom and its counterparts in other jurisdictions, they have taken both a general and a detailed look at this Directive and how it cuts across their current regulation, and I believe that they are raising those issues with the Commission and Council, and which we would applaud. We know that Ofcom has been very strident in terms of trying to create a commonsense regulation, moving forward, and we support that effort. I think the same goes for the UK Government and the hard work that the various departments are doing, in terms of trying to create a proper and appropriate framework for the audiovisual online sector, going forward.

Chairman: Lord Haskel, on the impact assessment.

Q20 Lord Haskel: Thank you, My Lord Chairman. Those of us who are uninformed put a lot of faith in the impact assessment, out of necessity. Has the Commission considered adequately the impact that this proposal is likely to have on the sector; is it even possible to predict the likely costs and benefits of this proposal with sufficient reliability to support the proposed changes in the Directive? Would a precautionary approach to regulation suggest different proposals for change, and we wonder whether you could put us right on that?

Mr Himes: Impact assessment; yes. We have found that the impact assessment is probably not sufficient, in terms of justifying to us why this Directive has been promulgated and, most importantly, extended to non-linear audiovisual online services. As I mentioned in one of my opening comments, we have asked the Commission this and we have yet to get what we find a satisfying answer which justifies the extension of scope for this

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Directive. We can also ask the same question under Better Regulation principles, which I know is very dear to the heart of UK institutions and legislators. The same sort of effort supposedly is being made at the European Union level, but once again it does not seem to have been applied to this particular Directive. Therefore, we would want to have a more detailed impact assessment before an extension is put through and we want it detailed in answering specific questions about the impact, not generalities. We would want to know what a European works regulation would mean for the audiovisual online sector; we would want to know what legal liability would be carried by audiovisual online services and what legal uncertainty would continue to be carried by audiovisual online services. These have not been generated statistically, have not been generated quantifiably and, to some extent, have not even been generated qualitatively, and therefore we would ask for a deeper impact assessment on our industry to understand that essentially we are not killing a nascent industry at its birth.

Mr Levy: I think, from our perspective, what is clear is that the Commission has been engaged in consultation on this Directive for the best part of the last five years. There has been a whole range of studies that have been conducted. There has been one on television advertising, there has been one on television quotas, there has been one on co-regulation, there has been one on advertising rules and then there has been an impact assessment done for the European level by the RAND Corporation and there has been another impact assessment done by RAND, which has been done for Ofcom, looking at aspects of video-on-demand. I do not think there is any shortage of studies or shortage of consultation. I think what is a fair point is that during this period the proposals have been evolving, that is the nature of consultation and one of the good things about consultation is that people's ideas should change in the light of that. I can see a case for suggesting that the Commission, as the ideas firm up and harden up, should pull together this vast amount of material which has been generated over the last five years and actually say what will be the impact of the specific proposals that are on the table now. In that sense, I have some sympathy with Wes. I think the idea that a precautionary approach would suggest no action essentially would assume that we are in a kind of regulatory void, that we are in an area without any regulation, and that is just not the case, in the sense, at the moment, as I explained at the beginning, we have the interaction of the E-Commerce Directive and the existing Television Without Frontiers Directive. I have some sympathy with the demand that there should be a consolidation, if you like, of the information that is around in terms of the impact of the proposals but

I do not think a precautionary approach would suggest no action because I do not think we are existing in a world with no regulation. I think we have rather confused regulation at the moment.

Q21 Lord Haskel: What the Directive really seeks, I think, is to have more pluralism, more diversity, more innovation, more competition, new entrants in the business, and what the impact assessment seeks to do is to see whether regulation will achieve this. Do you think that it does; or is it just the incumbents who are going to be satisfied with what is going on so that they can carry on their business, which is the attitude of many firms which are already in existence?

Mr Himes: My Lord Chairman, all of those objectives are admirable and they all exist, they exist on the Internet, there is a pluralism of content, the long tail of the Internet which allows companies to put content up at a low cost and makes them available to the general public. You can find more content online than you will find in the biggest off-line store out there; so, in terms of pluralism and cultural diversity, online audiovisual services offer it. We believe that all of those objectives are already achieved, and therefore the question is, for this Directive, why?

Q22 Lord Haskel: They do not need any regulation to achieve those objectives, they are already achieved?

Mr Himes: As I mentioned earlier, we already provide co-regulation and self-regulatory schemes. There are already national laws, for instance the cease and desist or notice and takedown laws for e-commerce providers for certain content. There are already schemes to help filter out content that we would find unacceptable to be provided. As I mentioned earlier, the e-commerce regulation already provides a level of regulation. It is not as though our services exist in a regulation-less world, we do have regulation that we have to comply with, whether it is consumer protection, whether it is access for the legal or policing authorities. There is already a host of regulation at both European and national level, as well as co-regulation and self-regulation, which we feel satisfies the public interest in this market. Therefore, we come back to the question, for this Directive, why?

Q23 Lord Haskel: What you say describes the incumbents' behaviour very well, but what the impact assessment tries to do is see that there are new entrants and that there is innovation and competition, if you like, against the interests of the incumbents?

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Mr Himes: Let me use a tangible example on that, if I may. To go back to my YouTube example, if this Directive were in place and there was a legal liability for the founders and creators of YouTube to have a certain amount of European works on their site, therefore creating a compliance cost, would that site have started, would it have gone from where it started to where it is now? The fact of the matter is the Internet environment has allowed three young men in California to come together and develop a site which in 18 months' time has attracted more consumers than many of the incumbents to which I assume you are referring. The Internet provides this opportunity for innovation and that is a prime example of how that occurs now, and we have to think about how the Directive might cut across that ability.

Q24 Lord Haskel: Does the impact assessment take care of this?

Mr Himes: I can say, just to add to what David said, there was no doubt, and I think we both agree on this, there was a lengthy deliberation process and a number of studies and impact assessments done, but I do not think any of them cut to the specific details which, for instance, I just gave in this example. I think most of them said that there would be little

harm done in the extension, or some said that the compliance cost would not be raised to the point of barring new entrants. The example I give I think raises questions about that analysis and I think we would want to see further answers before we were convinced that this regulation would do no harm to the audiovisual online services industry.

Mr Levy: I would just add that I think there is a very strong case for excluding user-generated content, of the kind of YouTube, from the scope here. Also, the Directive does have this two-tier approach between linear and non-linear content and the degree to which the content is accessed on the individual demand of the user, and I would have assumed that a service like YouTube would be excluded on both counts, user-generated content and accessed on demand at the individual request of the user.

Chairman: Gentlemen, you have been very patient and very full with your answers and we are extremely grateful. We have missed three questions, of which I think you have had prior notice. I wonder if you could each be kind enough, very briefly, just to give us the written reply to those three. I am sorry we have not had time to discuss them with you face to face; t'was always thus on these occasions, particularly when divisions are inconveniently called. Mr Levy, Mr Maggiore and Mr Himes, thank you all three very much indeed.

Memorandum by the CBI

INTRODUCTION

The CBI welcomes the opportunity to respond to the Internal Market Sub-Committee of the House of Lords inquiry on the review of the Television without Frontiers Directive (TVWF).

As the UK's leading business organisation, the CBI represents over 240,000 businesses employing around a third of the private sector workforce. The effects of TVWF, whilst crucially important for the converging technology, media and telecoms sectors, will be felt throughout the whole of Europe by businesses who are increasingly relying on digital content and services to add value to their business processes and to market and advertise their products. The creative industries that supply these services are major drivers for economic growth and a key asset for the competitiveness of knowledge-based economies.

The review of the TVWF Directive (Audiovisual Media Services Directive) was introduced as part of the Commission's i2010 programme for jobs and growth in Europe. However, we do not believe that the proposals (as currently formulated) help drive forward the objectives of i2010 as they adopt an overly complex approach to the regulation of online and mobile services. Whilst the deregulatory aspects proposed for the traditional broadcast sector are applauded, we have yet to see a compelling case for extending regulation to online and mobile services. This is particularly relevant as digital content and services become increasingly important for UK business competitiveness in a global economy characterised by growing competitive pressures from low-cost overseas rivals.

Q3a. *In our current rapidly converging and evolving technological and market environment, is it appropriate to try to recast the regulatory framework?*

The CBI recently hosted an OECD workshop on the future of online audiovisual services, film and video. If we were to pick one key theme that came up consistently from the international mix of speakers, it would be the extremely high pace of change characterising current market developments. Businesses from across the sector noted how they are still creating new business models and strategic partnerships in response to

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a changing digital value chain. Policy-makers highlighted the challenges they face in regulating a sector undergoing such rapid transformation. In such a context, we would second the voices of many representatives from UK industry who consistently queried the value of introducing a new layer of broadcasting regulation over the current regulatory framework of the eCommerce Directive and relevant national advertising laws for internet-based commercial services.

In Commissioner Reding's confirmation with the European Parliament in 2004, she promised to update and review the Television without Frontiers Directive (TVWF).¹⁸ In her 2010 action plan for jobs and growth in the EU, there was a further promise to publish a revised proposal by the end of 2005, a goal she achieved on 13 December. The key issue for UK industry is that, rather than just reducing regulation, the revision of the proposed Directive greatly extended the scope of the original to cover numerous emerging services which bear little resemblance to the broadcast services the original TVWF Directive covered.

The CBI is still optimistic that a net positive result for the EU can be achieved through the review of TVWF. Both in the European Parliament and the Council, the key to achieving a positive outcome will be clarification of definitions and a clarification and limitation of scope to regulate those services that clearly resemble or are identical to traditional broadcast services. We have recently seen signs from some of the Parliamentary Rapporteurs and Council discussions that they intend to clarify many of the issues with the Directive.

In a global economy, UK business competitiveness could be severely hurt if the scope of the current proposal is not clarified. The original Directive successfully regulated the broadcasting sector with rules apt for that sector. We are concerned the current proposal extends its scope to a plethora of new services without adequate regard to their development and operation. CBI research has shown how many of our members are investing in and developing more compelling audiovisual content that takes advantage of broadband connections, driving up the value of online customer engagement, increasing "stickiness" and the likelihood of a return visit or sale on their websites.

Key business processes like marketing and product development are being transformed by such commercial uses of audiovisual content online internet. Customers are becoming more closely involved in the development and use of products or services through social networking sites and user-generated content—companies engage with consumers at an early stage to modify and enhance product development based on feedback and comment from consumers. Product development thus changes from a largely in-house activity—with marketing of products and services very much an arms-length process—to one in which consumers are involved much further back in the definition and development stages.

Such innovative developments are needed to maintain the competitiveness of UK and European business through building customer value in the face of low-cost overseas competition. We are concerned that the Directive will damage this capability by taking an overly simplistic view of such services as either linear or non-linear. Companies are more likely to provide an integrated mix of linear and non-linear content in services offered on their websites or via digital TV in order to enhance the customer experience.

For instance, after customers ordering a new car have been shown an entertainment/informational video of the car being driven at night in a mountainous environment (perhaps using a clip from a thriller film) on a company website, they might then be directed to a list of headlight specifications through an interactive applet that shows them how each specification works in reality. To ensure that the front-end customer website experience and back-office stock and delivery options work together accurately and in real-time, the different content formats and modules will need to be integrated seamlessly. So it is questionable whether any service will be purely linear or purely non-linear in its operation, making it unclear how they would be regulated and difficult for companies to anticipate this in the design of their graphical interfaces with customers.

As well as a tightened definition of scope, there is a need not to regulate emerging services under new regulation until such time as they are well established with a defined market structure and profitable business models. The current non-linear definition in the Directive would regulate numerous developing services when it comes to be implemented. This should be avoided as fettering emerging media services in a complex regulatory framework could slow or even skew their growth and might cause investment capital to move outside the European Union. We see the need for a set of key milestones in terms of market development to be established before regulation under TVWF kicks-in.

¹⁸ http://www.europarl.europa.eu/hearings/commission/2004_comm/pdf/speca_reding_en.pdf

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Q3b. What are the advantages and disadvantages of regulating in this area? Are the regulatory costs proportionate to the benefits?

The proposed Directive could have supported the goals of i2010 by implementing a straightforward regulatory framework that promoted job creation, economic growth and service development within the EU. In creating an additional, overly complicated layer of regulation, the Directive might instead prompt companies to direct global marketing budgets or investments for new services towards those produced and hosted outside the EU. This would badly hurt Europe's ability to respond to international competition through innovative business models.

In a worst-case scenario, an extension of broadcast regulations to online and mobile service providers would introduce an additional licensing system that would be unnecessary and inappropriate for a digital economy and that could hinder its development. Whilst such an outcome is explicitly denied in the Recital 12 of the proposed Directive, the language used in the actual Articles could mandate the creation of such a system—for example, the repeated references to “Member States shall ensure . . .” within current Article 3.

We also do not see any advantage in extending advertising regulation taken from the broadcasting environment to online and mobile services. Online advertising is the fastest growing form of advertising in the UK, with spending up 62.3 per cent in 2005 relative to an overall increase of 0.6 per cent in total spend.¹⁹ This is a clear indication the current light-touch self and co-regulatory system operated by the Advertising Standards Authority with backstop powers from Ofcom has allowed the market to flourish—providing vital funds for the growth and development of numerous online services.

The proposed Directive fails to recognise the innovative developments that are occurring in online and mobile advertising, for example in companies pursuing viral marketing and developing interactive communities of interest for their customers, and that fall outside the traditionally easy distinction between editorial and advertising content. As noted above, such sites are changing the nature of product development from a largely in-house activity—with marketing of products and services as very much an arms-length process—to one in which consumers are involved much further back in the product definition and development stages. As a recent quote from John Hayes, chief marketing officer for American Express, in *Forbes* magazine notes: “the world has been turned on its ear . . . no longer can firms talk ‘at’ consumers . . . they must find ways to listen and interact.”²⁰

Q4a. Does the Proposal sufficiently liberalise the provision of broadcasting services within the European Union?

Time constraints on programming have today become unnecessary and an excessive regulatory burden for modern media services, and go against better regulation principles. As consumer trends change and technologies enable advertisements to be skipped, advertising has to evolve, as does regulation. Quantitative restrictions such as the proposed “35 minute rule” should be lifted to allow European media service providers to better compete internationally and to sustain revenue streams to finance and invest in European audiovisual content.

Q4b. Does the Proposal contain measures that will effectively protect public interest objectives?

All commercial audiovisual services already operate under relevant national and Community law. It is likely that, with almost non-existent barriers to entry, European audiovisual media service markets will in the near-term be provided for by hundreds of thousands of content providers. These might range from an individual in their bedroom posting videos to a Google AdSense²¹-funded blog to a large media company providing a whole host of individually tailored and targeted services. In such a context, the public policy goals behind the current Commission proposal can often best be achieved through alternative industry self-regulatory approaches, that better suit the fast-moving nature of technology and allow for greater flexibility in adapting to change than do traditional regulatory edicts. Such systems would be supported by firm, generic national laws that target rogue traders who actively flout legal standards.

¹⁹ Association of Online Publishers—<http://www.ukaop.org.uk/cgi-bin/go.pl/research/article.html?uid=1039>

²⁰ http://www.forbes.com/free_forbes/2006/1016/100a.html—“Video Fixation” 1 October 2006.

²¹ See http://www.google.com/services/adsense_tour/

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Q4c. *Does the Proposal achieve an appropriate balance between the objective of harmonisation and right of Member States to control audiovisual media services which reflects national concerns and interests?*

Balance between harmonisation and the right of Member States to control audiovisual media services that reflect national concerns and interests is best achieved through implementation of the country-of-origin principle.

Q5a. *Is there agreement on the Commission's proposal to distinguish between linear and non-linear services?*

The CBI is unaware of any agreement between stakeholders on the scope of and boundaries between the linear and non-linear definitions created by the Commission. As RAND Europe has noted: "the [Directive] as drafted contains significant definitional uncertainties, especially for new forms of interactive multimedia on non-traditional TV platforms."²² As explained above, we are concerned the Directive takes an overly simplistic view of audiovisual services as either linear or non-linear. Companies are more likely to provide a mix of linear and non-linear content in services offered on their websites or via digital TV in order to enhance the customer experience. So it is questionable whether any service will be purely linear or purely non-linear in their operation, unclear how they would be regulated and difficult for companies to anticipate this in the design of their graphical interfaces with customers.

Whilst the Directive is technology-neutral in terms of delivery platform, we see value in introducing an element of technological specificity in terms of the definition of the content's format. Introducing an element of technological definition in terms of the content format (as opposed to the delivery platform) would help delimit the scope of the non-linear side to "TV-like" services, as the UK Government's tabled amendments aim to achieve. We believe this would not contradict the principle of technological neutrality—as the Commission outlines in the Directive: "the set of applicable rules shall no longer depend on the delivery platform but on the nature of a service."²³

In the transmission of "TV-like" content (ie video on demand), there has to be a sequential and interlaced ordering of the frames being shown unlike, for instance, in computer games where frames are independent of the other. As sequential frames are displayed, there is a logical ordering of the programme's transmission for the content to be viewable. In addition, the user is unable to alter the content being shown, as could happen in an interactive audiovisual service such as a product demonstration and ordering applet on a website or an interactive service on digital television. Linking the non-linear definition to the technical format of the content would help tighten the scope of the eventual Directive and create a *de facto* sunset clause for the current Directive as new media formats stay exempt from the Directive and older regulated formats are rendered obsolete by the advance of technology.

Q5b. *Does the Proposal go far enough in facilitating the free movement of broadcasting services?*

The country of origin principle is key to ensuring providers do not face 25 different legal frameworks when delivering an audiovisual service across borders. The success of the original TVWF was founded on this principle. It is vital for the continued growth of European audiovisual services that free provision continues to be ensured within the EU and that providers are guaranteed this basic level of legal certainty. Many new media businesses have also been established and developed on the legal certainty and country of origin principle provided by the eCommerce Directive. It will be important to keep this Directive as the main instrument for providing such certainty in order to support continued investment in this sector in Europe.

Q5c. *What role should industry self-regulation play in the new regulatory framework?*

Self-regulation should continue to play a major role in any new regulatory framework for online and mobile services. Self-regulatory bodies already play a strong role in user protection and can react quicker to specific issues than legislative responses. An effective approach to this issue needs to harness the commercial self-interest of service providers and empower service users. ATVOD achieves this in the UK by allowing companies to publicise their adherence to a set of objective standards, thereby allowing potential customers to make informed decisions regarding their choice of supplier.

The UK is rightly proud of the self and co-regulatory systems we have in place, the result of much hard work between industry and government. We would be very concerned if the proposed Directive forced a complete overhaul of the well-established systems in the UK. Yet the definitions of self and co-regulation

²² "Assessing the Indirect Impacts of the EC Proposals for Video Regulation" RAND Europe, 2006 p 6.

²³ COM(2005) 646 p 10.

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provided by the Inter-Institutional Agreement referenced by the Directive in Recital 25 could reduce the flexibility required by self and co-regulatory bodies to react and respond to technological developments. We see no need for new and existing self and co-regulatory schemes to have to be given a “green-light” by Brussels to operate—as they have a purely national remit, it should be a matter for discussion with relevant national authorities.

The proposed Directive also fails to recognise the increased level of individual responsibility in the online and mobile environment, and the value of media literacy as a tool for up-skilling individuals, an area in which Ofcom has been making significant progress. We strongly support the UK Government’s proposed amendments tabled in the European Council to incorporate media literacy into the Directive. The responsibility of end-users of a particular service in the online world needs to be more explicitly recognised, as visiting a site requires an active choice on the part of the user. Individuals are best equipped to judge what is (and accordingly protect themselves from) harmful or offensive content.²⁴

Q5d. Should broadcasters be given greater flexibility in respect of the commercial arrangement they enter into for the financing of programmes?

The CBI supports the proposed deregulation of advertising restrictions for the broadcast sector. As the internet continues to transform the media sector and related consumption patterns (particularly within the 16–24 year old age group) broadcasters should be allowed more commercial flexibility to seek new ways to achieve a return on investment in content production and distribution, and in new revenue streams in place of declining advertising revenues. European content producers and broadcasters have been at a disadvantage in relation to their international competitors due to product placement restrictions and we believe allowing this form of advertising reflects the current commercial reality the broadcast sector now faces.

Q5e. What controls should be imposed on non-linear services in respect of illegal and harmful material, such as the granting of a “right of reply”?

No reply.

Q5f. Do quotas continue to be an appropriate mechanism for promoting the production of “European works”?

The CBI does not see quotas as an appropriate mechanism for promoting the production of European works, particularly for the non-linear world. As bandwidth increases and storage costs decrease, individuals will be able to access the “long tail”²⁵ of content—a far more diverse and extensive selection will become available for consumers than on the distribution platforms available today. In such a situation, we have difficulty envisaging how regulatory methods might mandate the consumption of certain types of content in an on-demand world nor how quotas might benefit the end-user in a world of greater individual choice. The basic question remains how do you determine and control content production and distribution in an essentially on-demand environment?

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Examination of Witnesses

Witnesses: MR JEREMY BEALE, Head of e-Business Group, and MR WILLIAM BROCKLEHURST, Policy Advisor, e-Business Group, CBI, examined.

Q25 Chairman: Mr Beale and Mr Brocklehurst, you are most welcome. You have been sitting in, I noticed, on the previous evidence session, so you will know the sorts of lines of inquiry that we are taking, although these are very early days in our inquiry, so we are still at an extremely formative stage, as a Committee. Is there anything you would like to say by way of introduction, or are you happy to go straight into the questions?

Mr Beale: I am eager to get on to the questions, but I would like to say a few words, just briefly. The CBI is in general agreement with much of what was said by the previous speakers, and in fact we find ourselves in general agreement with most of British industry on this matter because there seems to be a large degree of uniformity in opinion, not just with British industry but with Ofcom and the Government and even consumer organisations, in

²⁴ Ofcom 2006 Communications Market Review.

²⁵ “See: http://en.wikipedia.org/wiki/Long_Tail and <http://www.wired.com/wired/archive/12.10/tail.html>

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many respects. Of course, we do not have the knowledge of detail around a lot of these issues but take a broader perspective and it is that we are most capable of commenting on rather than some of the details that the other speakers and other representatives of industry, particularly the sectors, can give you.

Q26 Chairman: Indeed, thank you, and I think our thrust is going to be on exactly that, on the rather broader front than the detailed front. On that broader front, can you see this proposed Directive either tripping over itself or being tripped over by the E-Commerce Directive?

Mr Beale: I think that is a hard question to answer; if I can portray it this way. I think this Directive is adding another layer of regulation on what companies face. Variably, they will be saying to what extent does this contradict the E-Commerce Directive, to what extent does it override the E-Commerce Directive, what exactly is the relationship with the E-Commerce Directive. Our members who represent legal firms in our discussions and companies we have talked to are totally unclear about that, so they are not able really to quite understand the way it will work. That is one of the problems they have had, that they have felt it is adding another layer of regulation without it being specified clearly how the various regulations will interact together.

Q27 Chairman: Mr Beale, should they get to that miraculous state where they do come to a conclusion, do you think you could be kind enough to let this Committee know? That is not a facetious question.

Mr Beale: I think it will take a long time to work that out, with a lot of legal wrangling in courts, and that again is the trouble, that will create a lot of expense, to find those answers.

Q28 Chairman: Do your members think, therefore, that this proposed Directive is going too far?

Mr Beale: That is where there tends to be uniformity; they tend to say this is unnecessary and it is adding regulation which is unnecessary. We are relatively clear about what we have to do at the moment. We are working out how to meet those requirements in a new online environment. We cannot see a long way ahead about how to do it but we are working on an ongoing basis. This adds confusion because it creates an elaborate new regulatory framework, consisting largely of linear and non-linear definitions.

Q29 Chairman: Are you happy then with the proposed attempts to bring the emerging media platforms into the Directive, or would your members rather see them left out?

Mr Beale: They would rather see them left out.

Chairman: My apologies, if I led you on that question, and that is rather what I thought your reply was going to be. Lord St John: a question on implementation.

Q30 Lord St John of Bletso: What do you consider the European Commission's and the Government's and Ofcom's proper role to be in this sector, and what limitations are there to reliance on a co- or self-regulatory approach in this sector, and what initiatives do you consider for industry self-regulation to be sufficient or the most appropriate regulatory response?

Mr Beale: If I can approach those in reverse order, as I indicated, many of our members are really struggling with the issue of how to meet requirements. I do not mean struggling in the sense that they are finding it terribly difficult but they are struggling because they are working in a new environment so it is a challenge to them. There is also though a long tradition, in this country at least, and a very successful tradition in many respects, of self-regulation; in other countries that is less than in the UK. There have also been examples, relatively recently, of very successful online regulation in this country; the Internet Watch Foundation. I think the evidence is that child pornography, for instance, is very low here and much of the success of that goes through the Internet Watch Foundation and private sector members that have participated actively in that to make it a success. I do think there is a real question though about the traditional forms of self-regulation, which have not been developed in the online environment, what lessons need to be learned and can be taken from them and developed in the online environment, and I think that is still what is being explored. It is still very early days in the exploration of that issue though. As I said, we have the Internet Watch Foundation as one example but not a lot of others. It is an ongoing struggle and I think there are a number of ways of looking at that question. One is, is it a matter where really there is a market, where there are very strong brands with good reputations, where the people involved are very eager to establish and maintain their reputation in an online environment, where, frankly, self-regulation can be seen to be achieved very easily. This may be another area where clearly there are rogue traders coming in, where maybe it is a matter of identifying how existing national laws, and European laws, can be better implemented in the online environment. Then there is maybe a third category, which is where new models have been

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appearing and we still have to do a lot of work on that. In relation to those questions, I think a much more tentative approach by the European Commission would have been very helpful indeed to explore that self-regulatory experience and how it related to traditional forms of regulation in the European context. How that could help economic growth and growth of good service development in Europe would have been very useful and is very much, I think, the role it could play. As I think one of the earlier speakers said, setting that kind of overall framework would be traditionally a role of the European Commission and with the UK Government very much implementing the findings of that in legislation, some of which might not need new legislation. Then with Ofcom actually taking a very proactive role, as it actually is doing, in many cases, about developing consumer education, industry education, helping the industry to develop those new concepts online; those would be the sorts of roles. I think you have to start first with what are the challenges in the self-regulatory and regulatory areas.

Q31 Lord St John of Bletso: I was interested in what you said about lessons learned and the initiatives taken. Could you elaborate on what Government and Ofcom are doing to foster desirable behaviour amongst industry participants and consumers, and are these adequate and appropriate?

Mr Beale: I am not sure if you have had evidence from ATVOD.

Q32 Lord St John of Bletso: We have had from Ofcom.

Mr Beale: Ofcom, but not ATVOD. Ofcom was instrumental in the establishment of ATVOD, which is the group of on-demand television providers and basically they sat down together and said "How can we create an on-demand environment where parents have a large degree of control over what is watched and where people using on-demand television can be clear about what they are engaging with?" They went and formed that and they talked about it with Ofcom and I do not know the exact process that happened but Ofcom gave them support. There is another thing that Ofcom is doing currently, which is, it chairs a group of existing self-regulatory bodies in the UK where this precisely is being discussed, what you need to do in an online environment to ensure safe protection for consumers and individuals. In terms of consumer education, Ofcom, as I understand it, receives half a million pounds from DCMS to develop consumer education programmes, and that is useful, certainly. I think Ofcom certainly could do more if they had more money, which is probably one of their major roles in the new environment, is that consumer education.

Chairman: I would like, if I may, to jump the order around a bit. I am thinking particularly of questions that are of a slightly less technical nature, as you said at the beginning, and rather more general. I wonder if we could go into the Country of Origin principle, and I know Lord Fearn has got some questions, and then maybe go to questions five, six and seven, in that order, then we will see whether time allows us to come back again to the other ones. We are missing three and four. Lord Fearn, would you like to have a crack at the CoO?

Q33 Lord Fearn: In your opinion, has the Country of Origin principle benefited your organisation and do you consider that it is under threat? Do you consider the UK to have a different economic interest, as the location of choice for the majority of content providers, from that of other Member States?

Mr Beale: The Country of Origin principle, I think, was well covered by many of the previous speakers, in terms of its benefits. Obviously, the CBI does not have a particular benefit that it gains, it just looks at what the benefits are to British industry.

Q34 Lord Fearn: Your members do; that is why I asked the question.

Mr Beale: Our members do, yes. I would add to what the previous speakers said in this regard. The Country of Origin principle, in many respects, reduces regulation, the need for regulation; but, of course, it works on the existing situation. If you had a big effort around standardising at a European level, that would involve a lot of resources, perhaps resources that might not prove fruitful in the end. A lot of efforts at European harmonisation, I am sure this group is aware, more than I am, the extent to which some of those have been completely unsuccessful, those attempts, and the Country of Origin principle, I think, was formulated precisely sort of to say what is a more pragmatic way of achieving some degree of harmonisation without having to rewrite the whole rule book at a European level. In that sense, I think there is a broad interest for British industry, and not just British industry, European industry, and the principle has been of major benefit in that regard. It is always under threat, or under challenge, in many respects, because, of course, there will be sectors and individual businesses that lose out in the process of competition at a European level. There will be those that will try to protect themselves against the entrants or people and individuals in their markets going to companies located in other countries to buy goods and services, so there will always be, I think, a certain resistance to its implementation and effect. The UK, I think, has benefited to a large extent from it, simply because it has been one of the

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strongest proponents of it and has taken advantage of the opportunities that it has offered. In relation to content providers, content providers do view the UK as a very good place to go; they often say to us, "We go and we invest in those countries where we're wanted, where the environment does say 'You're welcome; please come here'." I think the investment by content providers in the UK is an indication of the success of the UK in following the Country of Origin principle.

Q35 Lord Fearn: Do not all countries say "Yes, we want you"?

Mr Beale: As I understand it, no. There are countries that say "You can only come here if you do X, Y and Z, the way we think you should do it," which is, in effect, discouraging investment.

Chairman: Lord Fyfe, would you like to come in on access to content.

Q36 Lord Fyfe of Fairfield: In terms of access to content, would establishing, for example, news access rights enhance current arrangements and, perhaps more importantly, most important, benefit the general public?

Mr Beale: I hate to say, I am not exactly sure what I am being asked here; is this specifically in relation to news programmes?

Q37 Lord Fyfe of Fairfield: It is, in part, yes, in the main.

Mr Beale: I am not very capable of answering a question on that, I am afraid to say.

Q38 Lord Fyfe of Fairfield: Can we widen this sampler then, because what fascinates me often when I am looking at items like this, and I confess to being a rank amateur when it comes to anything connected with technology, is the public demand for the new facility, apart from the possibility of commercial gain. Is all of this dictated by commercial gain, by producers and manufacturers and directors, and so on and so forth, or is it in response to a perceived public need or public demand?

Mr Beale: In terms of the new content available and access to it, I think one of the problems that many of our members face is, one, generating content that they do not control, when traditionally they have been used to controlling the content that is publicly provided. Two, they are never quite sure, when they do develop the service, that it is going to last very long, in terms of popularity, so it has to be popular in the first place, but a lot of them do worry that the train is moving so fast that they will invest a lot of money in a new form of content provision which will be popular for a while but within a few years will no longer be fashionable, and it is because on

the Internet people can move very rapidly. Is that getting towards what you were asking?

Q39 Lord Fyfe of Fairfield: It is. Let me simplify this, in a way. After last week's meeting I stepped into a taxi and, lo and behold, the taxi had one of these new-fangled television sets, with all manner of controls on it, and so on and so forth. Try as I might, I could not switch this thing off. The series was about teaching people how to play poker. I do not play poker and, at my advanced age, I do not want to start to learn how to play poker. I asked the taxi-driver if he could switch it off; no, he could not switch it off and obviously he thought I was a complete idiot for wanting it to be switched off in the first place anyway. I think to myself, reducing things to their simplest, I have not been bashing on taxi-drivers' windows for years, shouting for television sets to be stuck in the taxi-cab for my amusement or entertainment, or whatever. I then started to think, who actually creates the demand for this kind of thing?

Mr Beale: If I may answer first, although flippantly, I presume the taxi-driver did not have to watch it as well?

Q40 Lord Fyfe of Fairfield: No, he did not; he was too busy talking.

Mr Beale: I sympathise with your situation. I do not think it is particularly peculiar to audiovisual delivery though. We do not have choice in many regards, about billboard advertising being put up, or much of the world we live in there is that. I think that is a general problem of modern society. It is also something maybe which could be addressed more specifically in other forms of legislation. I do not know that this Directive actually would deal with that issue, *per se*.

Lord Fyfe of Fairfield: You have been very tolerant, My Lord Chairman. I have slipped from the point, actually, but I am happy with the answer.

Chairman: Lord Swinfen, would you like to continue?

Q41 Lord Swinfen: Thank you, My Lord Chairman. I know you have already given us some written evidence on this point, but does the imposition of quotas for European works and independent production continue to make sense in the emerging environment?

Mr Beale: Generally, I would say, no. In an on-demand world, it is very hard to see how providers can determine what percentage of any content is going to be consumed. Also, even more so when consumers themselves are able to put content onto a site it is very hard to see, it will create a real dilemma, how would they measure that over time? How would they determine, say, if there was more

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of non-European content that was being put on than European content, what would they do, block certain people who were putting on non-European content, would they have to buy in a certain amount of European content to counterbalance it? It is actually difficult to see how it would work. Having said that, that is taking an extreme image of the online world; of course, the online world consists now of a variety of different media, in effect, and the totally interactive is where the problem is most extreme, and that is the one I have just outlined. I think there is some relevance of the demands, in terms of the traditional linear broadcasting environment, which, of course, many people still live, but you do not need a revision of the Television Without Frontiers Directive to achieve that in that media, because that is already covered. It is only when you get into the more interactive and online environment that there is this problem, which is why we think that the extension to that more interactive online environment is inappropriate.

Q42 Lord Haskel: As I explained previously, those of us who are uninformed depend a lot on the impact assessment and you who know an awful lot about this could tell us perhaps whether the Commission have adequately considered the impact of this proposal and the impact that it is likely to have on the sector, whether the impact assessment, in fact, gives a true picture? The other speakers and yourself have indicated that it is impossible to predict the costs and benefits of the proposal with some reliability, and so should the impact assessment just ignore this and go for a precautionary approach to regulation, even though it might suggest different proposals for change?

Mr Beale: That is a very interesting question, because, in many respects, as the representatives of the BBC pointed out earlier, the Commission and other bodies have done a number of impact assessments and there have been quite a lot. On the other hand, it does not seem to have changed the basic thrust of what the Commission is saying and proposing. I have had, over the years, not just at the CBI but in other places I have worked, quite a lot of experience of consultations and impact assessments done, and often the way they are constructed is that they construct one extreme alternative, another extreme alternative and then give the middle. Of course, usually the argument is that the middle one is the right one, because everyone wants to be sensible, because the other ones look so extreme, and in many cases I think this is what happens with Commission consultations and impact assessments and the sensible one seems to be the Commission one. I think that is very much what is happening in this case. What I would say is that there have been descriptions of what is going on, but I would agree

also with the statement that, one is, they have not been tentative enough. As I have been saying, I think this is a very, very complex and fast-moving environment and it would have been useful if more exploratory work had been done, ones that sincerely wanted to find out what was going on rather than ones that wanted to justify getting to a certain place. I would say also, and this has been expressed very, very strongly by members of ours, that they felt that the exercise of consultation and discussion was not genuine; that, though views can be expressed, only certain views were listened to and that there was this clear view really of where the Commission wanted to be and that has not changed, irrespective of what has been said.

Q43 Lord Haskel: Thank you for that, and I agree with many of your points. I just wonder whether one of the impacts which perhaps has not been assessed is the value of this for increasing media literacy. I think what you showed is a world which is divided into two parts, those who understand these things and those who do not, and the majority do not, and in your very interesting submission you did refer to this. You say: "... the value of media literacy as a tool for up-skilling individuals, an area in which Ofcom has been making significant progress." Do you think that this is an important part of the impact assessment which will be left out and that we ought to pay more attention to it?

Mr Beale: That is a difficult question to answer, simply because, I think, part of the media education that needs to go on has to be about those things that are developing.

Q44 Lord Haskel: Those are?

Mr Beale: Those means of self-regulation, of individual control; the education needs to be about those and those are still developing. Actually, the education needs to be about what is going on. An impact assessment would not be able to, in advance, tell you what effect that would be and what is developing. I think what would be useful would be, as I think I mentioned earlier, if we had analysis of the sorts of trends that are going on. Then, instead of the Commission having said, "Right, there's a dangerous territory out there, it's very difficult, let's put some regulation on it, or extend traditional regulation which we all understand into this difficult area, and that way we'll be safer," they had actually developed thinking analysis and made some proposals about how media education could be developed more extensively, how the Internet itself could be used to help consumers and individuals learn about the environment in which they exist, how companies could be supported to develop technologies, because all of these things are still in their infancy. That kind of supportive approach, I

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think, would have been, and would be, much more helpful.

Q45 Lord Haskel: If that support is there, do you think that the impact on society will be that we will all become more literate and use these technologies more effectively?

Mr Beale: Absolutely. I think the evidence so far, and I pointed to the Internet Watch Foundation as one example, the Internet Watch Foundation works with our members who are using the Internet, to understand better how individuals are using the Internet, so what advice they can give. Also they are using the Internet to understand how people who want to cause harm to individuals are using it. It is very successful when that effort and the resources are brought to bear.

Q46 Lord Haskel: Do you think this will be a legitimate part of an impact assessment, or do you think it is extraneous?

Mr Beale: An ongoing impact assessment would be very valuable to identify where successes have been achieved, and honestly there are still weaknesses and also failures. I am certainly not saying everything will be successful, but improving that understanding would be very valuable, but on an ongoing basis.

Q47 Lord St John of Bletso: If I can touch on illegal or harmful content, do effective mechanisms exist to control the types of illegal content identified in the proposal, for example, race hatred, and is the proposal likely substantially to enhance restrictions on freedom of expression? Finally, should the right of reply be extended in the manner provided for in the proposal or be limited to traditional television programmes? I know it is not your particular niche, that last question; that is more appropriate to the BBC earlier on.

Mr Beale: I am afraid, I do not think I can comment on the last one. I do not know enough about how the right of reply would work and what work is being done in that regard, so if you will excuse me I will miss that one. In terms of illegal and harmful content, it is a very, very difficult issue, because obviously it varies from culture to culture what is considered harmful and also obviously, to a certain extent, what is illegal. It is also very hard for online providers to control in advance the posting of such material. I would support, in that sense, the comments made by one of the earlier speakers, who said that really it is a matter of adapting existing instruments, such as notice and takedown, improving the speed by which individuals can notify the service providers that there is harmful or illegal content. There are others ways that can be achieved, too. For instance, if you were a member of a self-regulatory body that did notify about content, you

would have certain protection against liability compared with if you showed you did not care and did not join that regulatory body; that would speed up the process of notification, too, things like that. Again, I think there is a lot of work that could be done on improving such measures. Specifying it in regulation, the trouble with that can be that you have a particular image in mind when you put a piece of legislation or regulation in place and the law applies to that. If the environment changes rapidly, the legal response cannot deal with that new environment very easily, but self-regulatory bodies do have that greater flexibility if they are clear what they are going for and they have got the full support of those people participating.

Q48 Lord St John of Bletso: It does appear to be, right across all mediums, the one common thread is the fight against paedophilia; it is the one area where it does appear to be considered by all, to fight this menace?

Mr Beale: The argument sometimes is used that the Internet has facilitated paedophilia enormously, and we see evidence of so much of it around. You can also though put the other argument, that the Internet has been one of the most incredible means of identifying and tracking down paedophiles that we have ever known. That is why I am saying that what we need to try to focus on is developing those positive uses of the Internet, and that is where the effort should go, rather than simply sort of trying to say restrict or lay regulation on the Internet as a way of trying to stop these practices occurring.

Q49 Chairman: Just one point of clarification, in your written evidence, and I read it four times and could not work out what you were trying to say, it was such a short reply. The question was what controls should be imposed on non-linear services in respect of illegal and harmful material, such as the granting of a “right of reply”; to which your reply was “No reply.” Does that mean you did not want to reply, or you do not think there should be a right of reply?

Mr Beale: I am sorry. I apologise for that. It meant that we did not feel we were in a position to reply.

Q50 Chairman: It was not your brief. I was slightly confused because it could have meant you did not go for that.

Mr Beale: I apologise for that.

Chairman: Baroness Eccles, on the minimum content rules.

Q51 Baroness Eccles of Moulton: I am sure that the whole question of advertising must be of great concern to your members, because technological advances mean that it is much easier just not to

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watch it. On the basis of that, do the proposed rules adequately address the emerging business models for content provision over the new platforms, in your view?

Mr Beale: Obviously, advertising is important to many, many CBI members, both those that are hosting the advertising and those who want to advertise. Again, it is a very fast-moving environment, as I am sure you have seen from the papers, the Internet advertising is growing very rapidly and very rapidly in relation to growth in non-Internet advertising; having said that, it is also starting from a very small base, compared with existing forms of advertising. What I think many of our members are really trying to understand is what is the balance, because I think it is a balance. It is not that Internet advertising is going to wipe out traditional advertising, because it just adds another way of getting to your customers, of being able to communicate with them. You will still want to be able to communicate in more traditional forms. It does throw up certain challenges; again, it is much more interactive. I think also a very important phenomenon that is developing, that our members find, in many respects, very, very useful, is that their relationship with their customers is changing. In the traditional model you developed a product in-house and then you advertised it, in an arm's length relationship to your customers. The interactive nature of the Internet means that they are brought much, much more closely into the product development stage. I think that throws up lots of challenges for traditional consumer protection legislation. I do not mean it undermines it, necessarily, and says it is a bad thing, but what it does say is how relevant is it when consumers have actually been involved in that product development process. I do not think that the Directive gets to grips with that issue. One of the things that we do support about the Directive and find that it is helpful is its relaxation on restrictions on product placement. I think we mention in the submission that this is happening globally anyway so it is actually allowing European producers to be able to be competitive. I think also it throws up an interesting challenge to the overall structure of the Directive, or the proposed changes to the Directive, which is that if you allow product placement to occur in a sophisticated way, obviously not in a crude way but in a sophisticated way, it becomes increasingly hard to distinguish between editorial and advertising content. As result, it becomes very difficult to draw where the line is between a commercial service and a non-commercial service. On the other hand, that is something that the Directive seems to assume is still going to be very clear, because it says this is about commercial audiovisual media services. I would ask what would

be the difference between something that we would think of as a traditional media programme, say, a film, where there is embedded product placement of a sophisticated kind, on the one hand, and, on the other hand, a commercial offering that actually had a lot of entertainment engaged in it. We were trying to give one example in our submission, where you can imagine a James Bond film where there is a very sporty car being driven which is advertising the product itself but it is part of the entertainment. You would have what would be the determining line between that kind of a programme and a car manufacturer who was putting information on its website and has entertaining aspects to that. The Commission says this will not apply to the latter kind of service. We are saying that, if they are successful in what they are doing in one part of it, it would apply to another part, which makes it very hard for companies to see how they deal with this in an efficient and economic manner.

Q52 *Baroness Eccles of Moulton:* The commercial linear media are dependent upon advertising revenue in order to exist?

Mr Beale: Absolutely, which is why we think that the relaxation on product placement rules makes a lot of sense, that is why we say that is good, but it is the extension of scope to non-linear services that creates the problem. This is why, in many respects, we support the UK Government's proposed amendment, which is, it eventually keeps it to traditional broadcasting, in terms of its scope, but it would also encompass that reduction in product placement restrictions.

Q53 *Lord Walpole:* Then are you suggesting, in fact, that the teleshopping channels should no longer be subject to controls under this regime?

Mr Beale: Traditional teleshopping channels will continue to be regulated, would they not, because they are traditional linear services.

Q54 *Lord Walpole:* Should they be, or not?

Mr Beale: The relaxation that is proposed in the Directive, as it applies to them, would be appropriate, but I would probably hold off from going much further than that because I am not representative of that industry and do not know enough about the particular way regulation applies to them.

Q55 *Lord Walpole:* Are there any other restrictions on marketing or advertising that you would consider necessary?

Mr Beale: There are existing restrictions already on advertising.

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Q56 Lord Walpole: You are quite happy about this?

Mr Beale: Apart from in this Directive, there are, and those are the ones that our companies are familiar with, are used to, already do either obey the law or attempt to obey the law in that regard. I am not sure those restrictions proposed for this Directive add anything useful.

Q57 Chairman: Can I come back to the more general topic of the scope of the proposal, which, in the interests of time, we did not give much airing to, and I am still not quite sure where the CBI or where your members stand on this. In your written evidence you say, quite clearly: "... there is a need not to regulate emerging services under new regulation until such time as they are well established with a defined market structure and profitable business models." When I asked you, right at the beginning, I think I heard you say that you would rather have the regime restricted to, dare I say, the TV-like services and not go into the emerging services, and that would tie in with your written evidence. Are those emerging services going to be completely regulatory-free, or are they going to have a bonanza until such time as they get, in your words, well established? I am being deliberately extreme.

Mr Beale: That is quite alright. It clarifies things. This is where that continuum, I think I mentioned earlier, between the new developing services on the Internet, which are highly interactive, comes into play, and those with traditional broadcasting. There is an in-between group, I think, of new emerging services, and if we take examples of this it would be Internet TV, some mobile TV, which, in many cases, at the moment, are very much really like TV as we know it but they are being delivered on new platforms. In terms of the content that you get on them, they are still much closer to traditional television than the new Internet-based services, and that is the sort of broad distinction we are drawing. We are saying about that middle group, these are still new and emerging services, so before we impose a whole framework of restrictions on them let us find out how they themselves might deal with the issues, and I gave the example of ATVOD earlier, which is to do with pay-TV, where they themselves have developed a self-regulatory approach. It would seem to me unnecessary to apply regulation to a group of services where they are already self-regulating in ways in which the ends might be achieved better. A lot of people say, "Well, TV's regulated in this way, so why shouldn't that form of regulation be applied to the Internet where similar things are developing?" Actually, I think it is a different picture. It is actually that TV regulation has been changing over time to take account of the

proliferation of channels, of the more interactive nature of television, the way with digital television you can click on that red button to order things or to find out more. That is a restricted version of what actually exists on the Internet. We had a member recently who described the Internet as like pay-TV on steroids; everything is much more extreme. What we were trying to do and what we said was, there is this extreme, which is the pure online environment; that seems to us to be inappropriate for this form of regulation. There is the traditional TV-like broadcasting and then there are these ones in the middle that have more interactive elements but are still small, in terms of their market development. Before you impose regulation on those, why not see how they manage and what they become like.

Q58 Chairman: The final question then, and you have led me very nicely into it, and you heard me ask the previous witnesses the same thing. Do you consider that these proposals are sufficiently technology-neutral, do you consider they are future-proofed, the speed with which the whole industry is moving is absolutely terrifying, and if the answer is 'no' to either of those, or even if it is 'yes' to either of those, come to think of it, is this the right time to be amending the regulatory framework anyway? If things are moving that fast, is this the right time to do it?

Mr Beale: As you might expect, my answer is that it would have been the right time to amend regulations, in terms of removing or reducing regulation; it is not the appropriate time to impose new regulation. Things are moving very fast and that will mean, I think, that any regulations that are introduced now, in many cases, will already be ineffective, because we are dealing now, in many cases, in many circumstances, in the online world, with an international market-place and environment. What will happen is that, if Europe imposes a regulatory environment that is restrictive, consumers will just go to services based outside the EU, but, even more so, in a few years' time, the regulations that are imposed will be irrelevant. What will happen in the meantime is that UK and European industry will fall behind, it will mean that good service development, where value added is being built, where we know from informed public debate are these good, do they help consumers, do they protect consumers, do they give them the good things in life rather than the bad things, we will miss out on all of that because we will have gone through a stunted development of new services compared with the rest of the world.

Chairman: Mr Beale, thank you very much indeed. Mr Brocklehurst, thank you for giving up so much

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of your time. Whether you have learned anything I do not know, that is entirely between you and Mr Beale; but we are very grateful to you both for your

written evidence and, more particularly, for spending the time this afternoon. Thank you very much.

MONDAY 23 OCTOBER 2006

Present	Eccles of Moulton, B Fearn, L Geddes, L Haskel, L	Swinfen, L Walpole, L Woolmer of Leeds (Chairman)
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Memorandum by Orange UK

1. INTRODUCTION

1.1 Orange welcomes the Committee's inquiry into the EC's proposals to amend the existing Television Without Frontiers Directive (TvWF). The proposals are a major concern to Orange and we are therefore happy to provide further assistance to the Committee, including oral evidence.

1.2 New media services are bringing significant benefits to the UK economy. However, much of the innovation and investment in these services has yet to come to fruition and the market remains nascent. As with any new technology, there are also potential public policy challenges to be addressed. Orange recognises this and we support regulation where it is appropriate, proportionate and necessary. However, we seek flexibility so as not to deter new and creative services, such as Video-on-Demand (VOD) services and mobile TV. We advocate a self-regulatory approach to achieve flexibility whilst affording suitable consumer protection. This approach is supported by the UK Government and, to date, has been successful.

1.3 The UK is a leader in developing new media and online services—in both fixed and mobile spaces. To this extent, Orange believes the current proposals to amend the TvWF Directive could place the UK at a significant competitive disadvantage in a global marketplace. We believe the EC's proposals could severely hinder the delivery and development of innovative digital audio visual content services in the UK before they have even got off the ground.

1.4 We also believe current proposals could have a negative impact not only on new and nascent digital content services but also to existing and well established business models as many of the activities that are currently regulated by the E-commerce Directive may also be captured by the proposals.

2. ORANGE AND THE UK MARKET

2.1 Orange is no longer just a provider of mobile communications in the UK. We are now able to offer consumers and business a wide range of communications services in the home, in the office and when on the move: broadband, fixed telephony (including voice calls over the Internet), interactive "on demand" TV and the mobile communications services we already provide to 15 million people across the UK (these four services banded together are often known as "quad play").

2.2 Bringing all of these services together under one banner—Orange—is as a result of our integration with our sister company, Wanadoo, one of the UK's largest Internet Service Providers (ISPs). It is part of our parent company France Telecom's global strategy to offer a unified customer experience and is an effort to adapt to consumer needs and an increasingly competitive environment, particularly in the UK.

2.3 Orange is therefore able to offer consumers a "one stop shop" for all their communications needs. By converging our operations and services, we can combine convenience with simplicity. For example, a single point of contact for assistance, one bill for all services and an integrated fixed/mobile answer phone service.

2.4 We believe there is huge opportunity to capitalise on the power of the Internet—whether mobile, in the office or at home—as a delivery mechanism for services, many of which do not even exist yet. And, as the distinction between the various media platforms continues to blur, so the consumer is showing an appetite to want to access his or her content wherever, however and whenever. As a result, "on demand" content is becoming increasingly popular with consumers.

2.5 As such, music and video entertainment continue to be popular in both the fixed and mobile spaces. And so called "non-linear" services (whereby consumers "pull" content) are growing to meet consumer demand. Orange has a streamed mobile television service for its customers offering a choice of over 18 channels of news, entertainment, sport, weather and comedy. Each channel selected by the customer is streamed over Orange's high speed Third Generation (3G) mobile network. Channels include Channel Four, ITN, CNN, Smash Hits,

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Bloomberg, Kerrang and Bravo. We are looking to add further channels to this service, but television via a mobile handset (whether using 3G or other developing technology) is just one of the ways people can watch television and audio visual content today.

2.6 Orange will shortly launch a home broadband television service offering customers a wide range of exciting programming and content to complement existing digital terrestrial television services. A set-top box connected to the Orange wireless broadband network will offer interactive and on demand services allowing the customer to watch the content he or she wishes at a time and convenience to them.

2.7 We are also witnessing a rise in popularity of interactive user-generated content. Social networking websites such as YouTube, Bebo and MySpace allow users to publish their own content, interact with others and watch what they want when they want to. User-generated content is also increasingly popular on mobile handsets and is set to grow. This will significantly impact the way in which content is created and consumed.

3. AUDIOVISUAL MEDIA SERVICES (AMS) PROPOSAL (AMENDMENT TO THE TVWF DIRECTIVE)

3.1 The proposed AMS Directive seeks to update existing broadcasting regulation under TwWF to cover all audiovisual media services. In particular, it seeks to extend regulation into “non-linear” services. It does not clearly define the boundary between “linear” services (ie scheduled broadcasting via traditional TV, Internet or mobile which “pushes” content to viewers) and “non-linear” services (ie “pull” or on-demand content). It therefore makes it very difficult to assess the impact on current and future services. Orange believes that if “non-linear” services are to be included in the new Directive, a clear boundary definition between “linear” and “non-linear” will be pivotal.

3.2 However, we believe including “non-linear” services in the new Directive would place additional burdens on electronic communications services for fixed and mobile operators. For example, obtaining an audiovisual licence from national authorities as well as compliance with detailed rules that are not technologically neutral and are therefore not possible or enforceable in an Internet environment (such as contextual rules, watersheds etc). Orange believes this is disproportionate as audio visual media services that are akin to TV offerings are currently only subsidiary and complementary services. These only account for a small proportion of electronic communications services provided by Orange (fixed and mobile).

3.3 Furthermore those services that are not akin to TV services but are within the scope of the Directive that are either provided by Orange (or that are accessible to users via the Internet provided by Orange) are already regulated by the E-commerce Directive as well as other legislation in the UK (for example the Anti-Terrorism, Crime and Security Act 2001, Protection of Children Act 1978, Racial and Religious Hatred Act 2006, Protection of Children Act 1999, Obscene Publications Act 1959 and 1964, the Sexual Offences Act 2003).

3.4 The E-commerce Directive itself provides for the “country of origin” principle. The AMS Directive would therefore lead to double-regulation and a lack of legal certainty for electronic services providers. This approach is both disproportionate and unnecessary.

3.5 It is likely that there will be higher entry costs in the EU for new distribution platforms and this will place UK content providers at a disadvantage. This means that services provided from outside of the EU (but still accessible within the EU) will have a lower or non-existent regulatory burden and therefore this will place EU and UK business at a severe competitive disadvantage (eg US content may prevail in the UK and unnecessarily harm a very successful UK content industry).

3.6 Orange believes that lower barriers to entry to the audiovisual market will promote the emergence of new business models creating a competitive market and high demand from European content, in particular with the surge in user-generated content.

3.7 Orange understands the need to protect consumers, and in particular children. Over and above those requirements of national legislation, Orange—in conjunction with other industry members, charities/consumer groups and with the Government—have worked on a large number of voluntary initiatives to protect children. Orange participated in the Home Office taskforce for the protection of children that led to the creation of safe search guidelines and safe online guidelines. Orange is also a founding member of the Internet Watch Foundation (IWF). Working with all UK mobile network operators, Orange has implemented a self-regulatory Code of Practice to help protect children from inappropriate content and block illegal content on mobile handsets. Orange has in place an age verification scheme to ensure users of 18 years and over only can access adult material over their mobiles. We are currently working with the Home Office to put in place guidelines for the safe use of social networking sites.

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4. RECOMMENDATIONS

4.1 Orange supports the UK Government's and Ofcom's position on this issue. We welcome their support, as well as the support from other Orange companies in the EU.

4.2 We make the following recommendations to the Committee:

- The new AMS Directive should only apply to services that look and feel like TV services and that are aimed at replacing a TV service exclusively. They should not apply to non-linear services, such as on-demand services, which place a disproportionate regulatory burden on fixed and mobile providers.
- The E-commerce Directive (as well as other UK legislation) already regulates non-linear services. The AMS Directive would therefore lead to double-regulation of these developing services. To this extent, we believe it is inappropriate to re-cast the regulatory framework for these services.
- If non-linear services are to be included in the new Directive, a clear boundary between these and linear services will be essential to assess the impact on current and future services.
- In the UK, self-regulation has played a significant role in ensuring a suitable balance between consumer protection and the need for flexibility to develop innovative new services. Fixed and mobile operators have an excellent track record for developing self-regulatory initiatives, particularly those aimed at protecting children.
- Introducing new regulatory measures to existing and developing Internet and mobile services will risk placing the UK (and EU) at a significant disadvantage to global competitors in the USA and the Far East. In particular, UK business and content providers will face higher barriers to entry.

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Examination of Witnesses

Witnesses: MR SIMON PERSOFF, Director of Fixed Regulatory Affairs & Regulatory Law, and MR PAUL JEVONS, Director of Products and Innovation, Orange UK, gave evidence.

Q59 Chairman: Good afternoon, Mr Jevons and Mr. Persoff. Thank you for sparing the time this afternoon and for your written evidence. To remind you, this is being broadcast, and a verbatim minute is taken. You will be sent a copy of these verbatim minutes in draft, and if you find that they are inaccurate, then do let us know. Thank you again for your evidence. We have read it of course, with great interest; you make some quite significant points, as we would expect, and we will be asking you about follow up on those. Is there anything you would like to say by way of brief introduction? If not, we will go straight ahead, but do feel free if you would like to start by saying a word or two.

Mr Persoff: My Lord Chairman, I am Simon Persoff, and I am Director of Regulatory Affairs and this is Paul Jevons, Director of IPTV and Interactive Services. We are here representing Orange UK, which is the leading converged broadband and mobile company in the UK with approximately 14 million mobile subscribers and over 1 million broadband customers. We are also part of France Telecom, which is the leading broadband provider in Europe; and within the UK we employ over 10,000 people. We welcome the opportunity to give evidence to this Sub-Committee. While we clearly welcome some aspects of the review of the Directive, we have significant concerns, as outlined in our evidence to you. Would it be helpful

to the Sub-Committee if we explained some of our mobile and fixed IPTV products and services we are planning on offering to consumers in the UK?

Q60 Chairman: If it does not take more than two minutes, yes! This is not an opportunity, helpful though it is, to advertise your products, but to enable us to understand this. That is a very serious point. We have read your evidence and it is helpful. We have met other witnesses and we will meet others. If you feel it is going to help the inquiry, do, but I will cut you off pretty sharply if, in my judgment, it does not.

Mr Jevons: I will try very briefly—and aim for the two minutes—just to help set a context for our evidence. On the mobile side we have a combination of video clips that you can download to mobile phone and television and television-type content that is streamed and pulled by the consumer and viewed on their mobile phone. On the Internet side, IPTV, we are planning to launch services. Those services effectively are a combination of traditional broadcast; they are video-on-demand services and interactive services that could comprise content traditionally seen on the Internet, and new content that will be delivered to a television set, as well as the same content being available to consumers on a PC as traditional Internet consumption. Just to set

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that context, it is both viewed on the TV, viewed on the PC, and it is a mixture of content and content types from traditional broadcast and on-demand content.

Chairman: You met both criteria splendidly under two minutes, and very helpful to the inquiry. Thank you.

Q61 Lord Haskel: That leads very nicely into the very first question, which deals with the scope of the proposal which the European Commission is trying to bring to the emerging media platforms, specifically the Internet. Under the existing regulatory framework for broadcasting what they have is a set of rules. Do you consider that this attempt is appropriate, bearing in mind all the various services that you have just told us; and what advantages and disadvantages might this regulatory approach have?

Mr Jevons: No, we do not think it is appropriate, and there are a number of reasons for that. The existing regulatory framework obviously deals with traditional broadcast, and as I explained in my introduction, going forward the services that would come under the scope of this Directive are not services that are going to effectively replace the traditional broadcast; they are services that would exist alongside. They are services that, in the IPTV case, will address a significantly smaller part of the market, and we do not anticipate there to be in any way a displacement of traditional broadcasting.

Q62 Lord Haskel: Which part of the market is that?

Mr Jevons: The market that currently receives broadcast content. We also do not think that when you have services that are made up of such a combination of different types of content delivered through different means, whether it be on demand or streamed, that the legacy or traditional broadcast regulation can be applied to that in an effective way because you are talking about significant blurring across technology boundaries and the ability to define what would and would not fall into particular categories. It also would cause a significant overhead in trying to understand how to enforce and regulate that market because you are looking at a significantly higher number of content providers, whether that be individual users with small players in the market, and adding or extending the existing regulatory framework that existed for broadcasters would in effect play into the hands of the existing broadcast industry and against the people who are effectively making investment in the market, or even the very small players that are trying to enter and create new services and offer new services to the consumer. It would effectively put a significant barrier to entry. It would also play against UK organisations and EU organisations because in the

Internet space that content or competing services would be available from people overseas and it would inhibit our ability to compete in that space.

Q63 Lord Haskel: So as far as regulation is concerned do you see that there are two types of broadcasting: broadcasting and then the streaming—or would you just leave regulation out of the picture altogether?

Mr Jevons: There is existing broadcast content, and where we are taking, for example, a service as we envisage it where you take content that has been broadcast over one medium and you are carrying that same content, that would, in our view, be covered by the existing regulations. New content or new services, from a regulatory perspective, are covered by things that are already in place, that are either there to protect the rights-holder or to protect the consumer. The proposals would not add anything to that.

Q64 Lord Haskel: You do not think there is anything additional needed—just leave it as it is.

Mr Jevons: I agree.

Mr Persoff: To concentrate on one point of this, I think it is important to look at the context of what is happening in the market. We are clearly on the verge of a massive technological change in the way in which content is both accessed and consumed by customers, and this change will undoubtedly benefit consumers. As with the electronic communications sector, the telecoms framework, a review of the AVMS Directive was therefore widely considered both appropriate and timely, in order to make sure that the legislation was fit for purpose in dealing with these new technologies and market uses. Similarly, as with the electronic communications sector, it was widely anticipated that a key element of the review would be a full assessment of the competition policy implications of the Directive, by which I mean assessing whether regulation supported or promoted market entry, which, as I said, is from our perspective, ultimately for the benefit of consumers. While, clearly, there has been some analysis in the review of competition policy implications, for example lighter touch controls of TV advertising and the retention of the “country of origin” principle, we believe it has not been the case for every aspect of the review. Specifically, a lot of emphasis has been placed both in this sector and in other sectors on the principal of technology neutrality. This principle was developed as a way of ensuring that outmoded technology-specific regulation adapts to new technologies. It is very important to ensure that it does not act as a barrier against market entry, but rather facilitates what I would describe as healthy competition. The remedy to a lack of technology neutrality has historically

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always been to adapt the old regulation so that it allows for a level playing-field between the different types of technology. Sometimes this means removing elements of technology-specific regulations—

Q65 Chairman: That is extremely helpful to us. You look as if you are reading. How long are you going to read on for?

Mr Persoff: About another thirty seconds.

Q66 Chairman: Fine.

Mr Persoff: Some elements of the industry, including Orange, are very concerned that the principle of technology neutrality has been turned on its head, and is currently being used as a justification for imposing inappropriate and administratively unworkable regulation designed for those legacy technologies on new market entrants without any genuine regulatory impact assessment on whether it is appropriate, or what the impact on competition might be. For lack of a better phrase, this is turning into a regulatory-initiated barrier to market entry, and this is something that concerns us considerably. Given the fact that non-linear content is not limited by availability of spectrum or how near you are to a broadcast signal, we do not think it is appropriate to introduce these regulatory rules on this particular new part of technology, because, simply put, all it will do is lead broadcasters or concept-providers outside of the EU where they will be free from all types of regulation. That does not mean that we do not think that the regulation is important; but either it is covered by the existing regulation or else the ability to circumvent it is so great, there is simply no benefit from extending the regulation.

Q67 Lord Haskel: That applies to the content as well as to the technology platforms, does it not?

Mr Persoff: Yes, it does. My colleague, Mr Jevons, stated that where we are taking existing broadcast feed from another supplier, let us say for example BBC, we would be, by virtue of them being covered for the content, also covered. For example, it would be up to the BBC to make sure that the content was suitable for the audience, and all the rules applicable there. We would just carry the content and we do not believe therefore that for traditional broadcast content that we would have any additional obligations to the ones already met.

Q68 Lord Haskel: You would be originating your own content.

Mr Persoff: Correct. Where we are originating our own content, it will be a very different type of content to that being provided by our traditional broadcasters; it will be user-generated content, and we could be talking anything from thousands if not

millions of different users generating their own content. We do not think that under those circumstances it is appropriate to extend regulation, when it was designed not for this new technology but rather for a very simple linear—one broadcaster sends the content to everyone. It is very easy to control that kind of broadcasting. It is incredibly administratively unworkable to extend regulation in the situation where you have thousands if not millions of originators of this content.

Q69 Lord Geddes: I have a very simple question of clarification. You used earlier, Mr Persoff, the two words that seem to me to be the same, but you were differentiating. I know nobody used the word “viewer” but you then said “accessed and consumed”. What is the difference between a viewer accessing and consuming?

Mr Persoff: The answer there is that under the new technologies it is quite possible for the end-user, the customer, to interact with the content. It is not merely a matter of viewing the content; it is a matter of doing something with that content once they have accessed it.

Q70 Lord Geddes: That is when that customer is consuming it, is it? I see.

Mr Persoff: It goes to the heart of the issue here because we envisage under this new technology our customers not only viewing content from others, but adding comments to it, sharing their views with others and voting on that content, because on websites generally speaking the popularity of the content is judged by how many people would view it and what they thought of it. This is very important when you look, for example, at specific obligations for the right to reply. One has to ask what problem specifically the right of reply is looking to address. We would argue that when it comes to this new kind of user-generated content there is already a *de facto* right of reply in a much more interactive way than would exist under current broadcasting.

Q71 Baroness Eccles of Moulton: Mr Persoff has been referring to new technologies, but this thing about how many hits a particular advertisement or item on the Internet has is not new; that is going on already; so what is the difference between what happens now? You can play chess or bridge or anything on the Internet. What is this new technology that is different to what is happening already?

Mr Persoff: It is new in terms of the Directive did not take it into account when it was drafted or last amended. It is new in that it is only now we are talking about extending regulation to it. You are absolutely right, however; the technology is not

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new; it is just that for the first time we are having a discussion about extending regulation to it.

Q72 Baroness Eccles of Moulton: In your introduction you said there are these new technologies coming on stream which would be of great benefit to the consumer—but what are they? Are they technologies as we have been discussing?
Mr Persoff: Yes, they are.

Q73 Baroness Eccles of Moulton: They are—so they are not new! They are only new in the Directive; they are not new to the consumer.
Mr Persoff: In terms of the availability of those, it is only in the last few years that use of user-generated content has really come to its—specifically if you look at YouTube or Myspace, it is only within the last two to three years where you have seen them take off. You are right that they are existing, but it is only now that we are looking at extending regulation too.

Q74 Baroness Eccles of Moulton: So the consumer is already benefiting from these technologies; there is not some great new dawn about to burst on us; it is just that they are now coming under the scrutiny of the Directive.
Mr Persoff: Yes.

Q75 Chairman: I have been listening to both of your replies to the questions. The, for want of a better word, traditional television medium has now further developed by accessing on the Internet. Are you suggesting that there should not be a level playing-field in any way? In other words, you appear to be arguing: “It is okay to keep on regulating the old television, updated for the Internet; but new services are different to that; they should not be regulated.” That seems a pretty un-level playing field. You said that it is not competitive, these services; but you are; you are competing for advertising revenue; you are competing commercially. You do not want your technology and your services to be regulated other than existing e-commerce and others, but you are very happy to see the existing people regulated. It seems a pretty useful thing to argue, but they have got all the costs of regulation and you have not had any. That is a pretty un-level playing field. Would you go further then and say there should not be any regulation of any audiovisual service other than basic self-regulation and so on? What are you arguing?

Mr Persoff: I do not think we are going that far. Where we provide directly comparable broadcasting to our customers, as do the existing broadcasters, we submit that it is appropriate for regulation to

apply. We are talking about a completely new type of—

Q76 Chairman: I am asking why should existing broadcasting be regulated and you not.

Mr Jevons: We are saying that there is regulation for the new services. What we are saying here is that extending the broadcast regulations into the Internet or IPTV or mobile TV or video downloads is not the appropriate way to regulate those services. An example might be for mobile video downloads, where the consumer is generally snacking for a couple of minutes at a time, it does not seem appropriate to have the same regulation where in a broadcast, one to many, open access—so no need for—very low levels of consumer control to what they are viewing in the traditional medium where if they switch on a television set they are being broadcast to in the truest sense of the word—whereas these services are services that are consumed in a very different way, in a very different context. They also have built into them a much higher level of user control, user discretion, in terms of customers are actively saying, “I want to view that individual bit of content” and there is a level of control that the nature of delivery gives them. So we are not saying that no regulation applies; we are saying that it is not appropriate to take that regulation and apply it through these new media because it is impossible to distinguish between certain elements of the new media.

Q77 Chairman: For the moment you are clearly happy with an un-level playing field in a sense, and I can well understand that you are. Do you accept the distinction between linear and non-linear services as a basis for distinction? If you do, can you explain to us your own definition of linear and non-linear services?

Mr Jevons: Again, simply linear and non-linear is in itself very difficult to define, and that is one of the reasons why taking the existing regulation and bringing it in with that kind of very black and white distinction is not appropriate. An example might be that as a mechanism we can take, as an output from any website or effectively a PC and deliver that to the television as a play-out, through to someone’s TV so it looks and feels as a linear service—but they have asked to view it. So you have that area of distinction, which is quite difficult. You then have the viewing of linear services where you effectively time-shifted the content. There is technology in the market now that allows you to pause live TV or catch up TV services; so it was linear two minutes ago, but is it linear now?

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Q78 Chairman: You tell us!

Mr Jevons: Which is why certainly as we view it you have the true linear, or the TV broadcast but anything else you do around that, you need to rely on the appropriate content protection and consumer protection rather than trying to extend the broadcast regulation into a world where linear and non-linear and stream and download or broadcast—it is very difficult to make that distinction not only from a regulatory framework but in the consumer's mind and understanding when you deliver a service—all these different types of content and content-delivery mechanisms are available to the consumer to decide.

Q79 Chairman: But that distinction, which you say is actually very difficult to make, in practice, lies at the heart of the draft Directive amendment. You are saying right at the heart of the amendment to the Directive is a fundamental flaw.

Mr Jevons: It is a very grey area. It would be very, very difficult to enforce or distinguish. The fact is that every piece of content and every single new service from every single content service provider would need to go through the regulator for assessment. That overhead in itself would be quite significant, and therefore it is flawed to say that we can simply take that proposal and try and try and apply it even with that.

Chairman: We will have plenty of chance to revisit this throughout the next forty minutes.

Q80 Lord Walpole: Can we go on to the country-of-origin principle, which you have both mentioned rather briefly? In your opinion, has this benefited your company, and the UK European communications industry, and do you consider the principle is now under threat?

Mr Persoff: Yes, we do believe that the principle is appropriate, and we welcome its inclusion in the review, it remaining. It has been helpful mainly in terms of people's certainty. While Orange within the UK clearly provides products and services only to the UK, we also—as the Internet exists you can access content from anywhere. It is therefore an incredibly important principle to note that where you have an approval or authorisation within one jurisdiction, that can be applied elsewhere. It is also important to note that this is really, from our perspective, contained within the e-commerce Directive rather than in the Directive currently being reviewed. One of the things we were very keen on ensuring is that when this is looked at at the European level, rather than looking at in the vacuum of just the current Directive, we take a joined-up approach on it. Do we think it is a threat? It is a difficult question to answer because the e-commerce Directive itself is up for review quite

soon, and maybe within the next 12 to 18 months the process will start. There are clearly many aspects of the e-commerce Directive which will be reviewed. As an industry we would lobby quite hard to see that the country-of-origin principle in that Directive is retained. One of the problems with the current proposal is that they could effectively lead to double regulation. I do not see that has been properly addressed, either in the documents currently published or in any regulatory impact assessment which we would expect the Commission to publish. It does remain a theoretical problem at the moment, but until we research it in more detail as an industry in conjunction with the Commission, it is going to be very difficult to tell precisely how much of a problem it is.

Q81 Lord Walpole: Does it make any difference to you, as a company, being in two different countries?

Mr Persoff: I think it does because each country has its own specific regulatory obligations. Within the UK for example we have various statutes relating to protection of children, anti-terrorism, etc., which deal with the regulation of content including content on the Internet. It is very important that we know that we can rely on one set of laws, and that that set of laws is what we comply with, and we only have to worry about that. My real fear—and this is probably true throughout the entire European Union—is that getting rid of this principle would lead to so much legal uncertainty in terms of—have you actually checked in an EU Member State what would be the case there? I really do not think anyone would want to go there. This principle has been seen elsewhere in the electronic communications framework as well. It has not been extended throughout. There is not, for example, a single licensing regime for telecoms services in Europe. There is a framework, but it is up to each national regulatory authority precisely how they manage that framework. It is for very similar reasons. It is also important to note the principle of subsidiarity and what is appropriate to be dealt with at the European level and what is appropriate to be dealt with at the Member State level. Within the UK we have that balance right.

Q82 Lord Walpole: Would you favour greater harmonisation between Member States?

Mr Persoff: I think so, yes, but only to the extent that there remains this certainty. It is always a difficult balancing act, harmonisation versus certainty, especially for a company that happens to be based in one Member State. Clearly, there are very different rules existing throughout Europe in terms of for example of restrictions on advertising and in terms of quotas for a particular type of content. It would be regrettable if harmonisation led

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to a dilution of rules which were either considered important in the UK or the need to take on board some rules that maybe some other Member States currently have in place but which are not considered applicable or appropriate within the UK.

Q83 Lord Walpole: In other words, you would reach the lowest common denominator—

Mr Persoff: Unfortunately.

Lord Walpole: Which you would not want to do—obviously not!

Q84 Lord Swinfen: How do you deal with material that emanates from outside the European Union with the country-of-origin principle?

Mr Persoff: From my perspective, the country-of-origin principle relates to the content which we are providing to our customers over which we exercise some element of control, or we are the originator. Where we are talking about third-party content, so content which our customers access over the Internet access connection, but which we have nothing to do with, I am not sure that the country-of-origin principle is the right legal tool to look at. I would suggest that the right tool would be looking at the e-commerce Directive: there is a defence within there called the “mere conduit defence”: an Internet provider, which is the mere conduit through which a customer accesses content—we are not generally speaking liable for that content. There are some circumstances in which we, the service provider, go above and beyond our mere legal duty to do something with that content, for example virus protection, e-mail spam filtering and child-abuse images are three areas where service providers do things like log content. This is something which is quite UK-specific in some cases, such as child-abuse images, or universally accepted, as in the case of virus distribution, port scanning or spam. Clearly, there are different rules throughout Europe. This industry works together with the Government and law enforcement and international law enforcement to ensure that where there are problems that originate outside any particular country, whether within the European Union or outside, we have processes in place where we can report, for example, very bad illegal content, to that police authority; so it can be dealt with appropriately.

Q85 Chairman: In practice, I think I am right in saying that Member States in theory have the ability under derogation to tailor the existing television-without-frontiers Directive, to deal with any problems that they feel are slipping through because of the country-of-origin principle. There is in principle derogation. I think I am right in saying that there has been little or no use of derogations across the European Union—is that the case?

Mr Persoff: That is my understanding. This was a matter recently addressed by Ofcom when they were asked the same questions. My understanding is that that is not being used at present.

Q86 Chairman: You yourselves sell your services outside of the UK and outside of France. What other countries do you operate in?

Mr Persoff: The France Telecom Group operates in most countries in the world and specifically—

Q87 Chairman: In Europe?

Mr Persoff: Within Europe and within the world. Within Europe we have mobile businesses in for example Spain, Belgium, Netherlands.

Q88 Baroness Eccles of Moulton: On advertising, do the proposed rules adequately address the emerging business models for the content provision over the new platforms? There are a couple of supplementaries, and I want to slip in another one that is not there, but perhaps you would like to deal with that specifically first.

Mr Jevons: We recognise that the existing regulations require some revision around quantitative advertising, but the new proposals do not in our view recognise new business models that might be coming into different media; so there may be business models such as advertising funded content into different media, so there may be business models such as advertising-funded content that exists on the Internet, and transferring some of those principles into content that is delivered on demand on mobile. Certainly it does not take into account the fact that there are new business models, or changes to the existing business models by delivering them to a different medium. Certainly bringing in advertising regulation originally aimed around broadcast into the Internet will, as highlighted earlier, impact existing business models. There are existing business models out there and existing companies whose business models may be fundamentally damaged by extending the regulation. Also, the context within those rules would be applied, especially when looking at perhaps more extreme cases of consuming content around mobile, which is very much short, snackable content, where consumers will ultimately decide themselves whether a piece of content is still valuable if it is broken up into blocks. We see today the strength of consumer discretion about the longevity of services where perhaps that principle is abused. Consumers have a high level of discretion at the moment of simply taking those business models across. It does not take into account new services or potential new services that frankly we may not have thought of as a significant player, but smaller and more innovative companies might develop and need

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the freedom to develop; so it is not about advertising being an interruption to content. Advertising may actually be the content itself or may form a more integral part of that content. Certainly having a framework that enables that and facilitates that and does not put barriers in their place is one that we want, as opposed to a framework that potentially would constrain that and put heavy restrictions on that kind of business model and value chain innovation.

Q89 Baroness Eccles of Moulton: From your introduction I gathered that part of what Orange does would be concerned with constraints on programme-makers because you are involved in straight television broadcasting.

Mr Jevons: Part of the service that we plan to offer to consumers is effectively carrying the existing broadcast content to—

Q90 Baroness Eccles of Moulton: Not new content!

Mr Jevons: There would be some new content.

Q91 Baroness Eccles of Moulton: So when it comes to the imposition of formatting rules, like the 35-minute rule and the rest of it, you would be concerned about whether that is something that you would want to continue to support, and also there is the view that there is a huge amount of choice now for the consumer, and that any programme-maker or provider who overloads their material with advertising actually potentially will not get the same amount of audience participation, and therefore the advertisers do not want to use them any more; so that is a controlling factor in itself. Do you support that theory, or do you think it is important for formatting rules to continue to be in existence?

Mr Persoff: We agree with your general proposition that ultimately the market will decide whether or not too much advertising is being offered. While we talk about 5-minute snips of programmes surrounded by 30 minutes of advertising—I think you can be pretty sure that customers would turn off. We agree that the impact assessment and the necessity of regulation—and this is a key theme—where there is no need for regulation, the burden of proof should be on the Commission or on the regulatory authority to show that there is absolute need for regulation. If the market can sort out the issue by themselves, then let the market sort it out. Generally speaking, looking at this Directive in the whole, one has to ask whether a regulatory impact assessment has been conducted, which would include what would happen if we did not regulate; or, if it has been conducted whether it has been conducted looking at all possible questions. For example, in terms of advertising clearly there are

rules in the UK outside of this Directive which apply to advertising—tobacco advertising being one example. Even if there were no specific extension of advertising in this Directive to non-linear services, other rules and regulations would still apply. It is Orange's view that it is appropriate for laws enacted within the UK relating to this kind of content should be equally applicable. It is the specific regulations in this Directive that concern us. Again, to highlight the issue, there does not seem to have been any real analysis of whether it is necessary, proportionate or appropriate.

Q92 Baroness Eccles of Moulton: At the moment, would there be any other restrictions on marketing and advertising which you consider necessary? From what you say, it sounds as if we could anticipate your answer!

Mr Persoff: I must admit I am not the person most familiar with every single aspect of advertising regulation. I cannot think of any incremental additional regulation which would be needed to be included in this Directive which was not there already, and the reason for that is that Ofcom and the UK Government are extremely acutely aware of the need to have sensible advertising regulation, and if there was a need for something I am pretty sure they would have done it already. Therefore, one has to ask what additional thing could possibly be implemented in this Directive which is not included elsewhere already.

Q93 Chairman: Can I just clarify on the question of advertising as opposed to other matters that we are going to discuss with you. What parts of the proposed amendment to the draft Directive in relation to advertising, if any, apply to non-linear services? Are there any?

Mr Persoff: I think the real problem here is that we are not sure what is linear and what is a non-linear service. I am sorry to dwell on this point, but

Q94 Chairman: Shall I just tell you that your recommendation, in your note to us, was that the Directive should only apply to services that look and feel like TV services. Taking that as the meaning of linear and non-linear, does the draft amended Directive, where it relates to advertising, intend itself to apply to non-linear services or not? I think not.

Mr Persoff: The view we have taken is that implicitly it does, but it is unclear, and we would welcome the opportunity for the Commission to clarify that. I think there are general concerns about volume and frequency which could—I do not say does—be interpreted as applying to non-linear. The industry generally has asked for clarification on this point.

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Q95 Chairman: Again, your position in Orange, is that non-linear services, which is the bulk of your business, should not be subject to any advertising restrictions, but linear services should be?

Mr Jevons: I think we are saying that the non-linear services are covered by existing advertising restrictions, and there is nothing new to be added.

Q96 Chairman: What restrictions on advertising are there on non-linear services? Are there any at all?

Mr Jevons: In terms of the type of advertising—

Q97 Chairman: No, the quantity, the quantum—the timing, the quantum, the amount.

Mr Persoff: Our submission is that it is best to let the market decide.

Q98 Chairman: My question was: what restrictions exist at present on advertising, not content but volume—amount, timing?

Mr Persoff: None at the moment.

Q99 Chairman: Orange's position is that that should remain the case for non-linear services, but you would like to see some restriction and quantity and so on kept for non-linear services.

Mr Persoff: We definitely agree with the first statement, that we do not think they should be extended. As to whether they should be continued for existing ones, we do not really offer an opinion on that.

Q100 Chairman: I am sorry to push it, but that seems a pretty un-level playing field. There is a pretty fixed amount, a reasonably fixed amount of advertising expenditure that goes round; and if uncontrolled, unregulated in quantity of advertising goes on in that way, you have the market advantage. I am not saying whether that is good or bad; I am simply asking to understand the position for the Sub-Committee.

Mr Persoff: Where we are offering the same type of service in broadcasting, to the extent it applies to historic broadcasters it would also apply to us. To the extent that we are talking about non-linear services, which are not meant to replace traditional broadcasting but are an adjunct to, we do state that the existing regulations should not apply to them.

Q101 Chairman: Advertising expenditure is clearly shifting from traditional television broadcasting to new forms of communications, is it not? That is a fact.

Mr Persoff: Yes.

Q102 Chairman: I am trying to establish the facts. The Committee may come to a view or not on these issues, but if the new technologies of delivering new

platforms and so on continued, as you have argued forcibly, they should be unregulated in volume of advertising and so on. But if another market segment, linear, did continue to have such regulation—change perhaps—that would constitute in advertising and market terms an un-even playing field.

Mr Persoff: If I could pick up on a point that Baroness Eccles mentioned, if we did exploit that arbitrage position and we let us say doubled the amount of advertising on our non-linear IPTV channel, we would get a lower audit, and as a result of that we would be able to charge less for that advertising space; and ultimately consumers would be dissuaded from looking at our content. Our core point here is that by letting the market decide rather than regulation decide, you will eventually end up at the same place. In the absence of regulation, the market would dictate how much advertising is appropriate.

Q103 Chairman: I think you are being rather coy, I have to say, in not answering directly. Why did Google pay hundreds of million of pounds for YouTube, currently a loss-making venture, if they do not think it is going to bring an awful lot of advertising? Just be straight with us; surely that depends on there being a pretty free market in advertising? In other words, the market place anticipates a shift in where advertisers go: is that not right?

Mr Persoff: I think you can distinguish between advertising and too much advertising. Clearly, I do not want to speak for my industry colleagues at YouTube or any other company, but clearly they will make a certain amount of money from advertising, and clearly there is a benefit from that. But if all of a sudden they replaced half the screen with advertising or there was a pop-up appearing every second, then sooner or later customers would get thoroughly dissatisfied with that service. As a result of that, they might well decide to use an alternative service that did not have such a high level of advertising. Clearly there will be a shift in advertising from traditional broadcast to the Internet, which is not only the Internet as defined in the AVMS but the more general Internet. We, for example, have one of the most popular Internet website portals in the UK, and we have to balance the usability of that website against advertising revenue. There is always a fine balance to be drawn. The market ultimately decides that because I, as a consumer, would not want to visit a site where all I see is advertising rather than the content; I am visiting the site to view.

Mr Jevons: One point I would also add is that the difference is the point I mentioned earlier with the level of control and the level of discretion that users

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have for accessing through different media. Recently—and the name escapes me—there was a community website which offers its services free to millions of customers and it upgraded its services that in a way effectively allowed it to better monetise its audience. Within the space of a number of hours it had a petition of half a million from its customer base, saying “please revert back; we do not like this”. That is the type of customer discretion, customer reaction, that the Internet and other forums—where they exist—which would not exist with traditional linear broadcasting.

Chairman: We move on to a related topic, but at the same time a very difficult one.

Q104 Lord Swinfen: With regard to the legal and harmful content, do effective mechanisms exist to control the types of such content identified in the proposal, such as race hatred? Is the proposal likely to substantially enhance restrictions on freedom of expression?

Mr Persoff: I should point out that as well as being Director of Orange, I am also Chair of the Funding Council of the Internet Watch Foundation, which is the charity established to work with industry, government and law enforcement, to ensure that where we, service providers or mobile providers, host material in breach of certain statutes, that material is removed quickly. The IWF is a prime example of good self-regulation. There is no statute behind it. It sets up a process where every single ISP within the UK, every single hosting provider that deals with this type of area—if not everyone, then the vast majority of them—voluntarily removes, takes down, material it hosts where that material is in breach of, for example, the Protection of Children Act. That is where—it is the child abuse image which we at Orange would definitely consider the most repulsive of types of content out there, and in terms of illegality we would consider it our prime focus in terms of removing it. This is just one statute. There are other statutes. There is the new Racial and Religious Hatred Act 2006 and various other statutes in relation to different types of such discrimination. The remit of the Internet Watch Foundation includes racial hatred. I am not sure if I should also point out that the Specialist Adviser to the Committee also happens to be a non-industry independent board director of the Internet Watch Foundation. This is something that the industry passionately believes in, and we have taken responsibility for implementing statutes, and the obligations to remove content in some cases, or going beyond our obligations to make sure our customers cannot access the content. All of this exists outside the current Directive we are talking about. There is nothing in the current Directive that in Orange’s opinion will add anything to

enforcement or to locking content where that may be appropriate. There are ongoing discussions between industry, the Home Office and the DTI on this area, and we in the industry are quite proud of the approach we have taken to self-regulation of this kind of content. To deal with the second part of your question, in terms of censorship, there is a very blurred line between content which everyone agrees should be removed—and I think we can all think of those types of content—things that are on the borderline and things which are within the realms of legitimate freedom of speech. This is not just a problem in the Directive; it is a problem which exists in UK law generally, and probably exists in other Member States as well. At the moment, Internet service providers use their discretion as to what is appropriate to remove. On any given week, our department that deals with this, which is called the Abuse Management Department, receives complaints about content hosted on our network or activities undertaken by our customers while they are online. We would receive dozens if not hundreds of complaints, and in each of those cases it will have to decide whether it is appropriate to suspend the customer account or remove the content, or do nothing, or anything in between those. It is a very difficult decision to make. One thing that has become very evident over the last five years has been if this were purely statutory rather than self-regulatory there would be even greater problems in assessing what is reasonable and what is not. The reason for that is that at the moment we have discretion as to whether to remove content or whether to keep it up, whether to give the perpetrator the right to discuss why they think it is appropriate, or whether something should be taken down immediately. We give the complainant the right to discuss why we think the content should be taken down. If it was a statute—which, with respect to your Lordships would be set in stone—it is an act at a particular time, where a particular technology is envisaged, and where particular products and services are envisaged. Over time, that legislation becomes outdated until eventually it needs to be replaced or amended. That is not something we should be embarrassed about; it is just a fact of life. By having a self-regulatory regime, one outside the Directive we are talking about or even outside some of the other UK statutes or regulations, we act extremely quickly to changes in technology. I think we in the UK Internet industry should be proud that while we clearly cannot take down every single abusive item on the Internet, nor in most cases would we want to intervene to such a level. We are able to react and meet with our colleagues in the industry, with the UK Government and with law enforcement and find an appropriate middle way to dealing with these problems. My real fear is that if

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this piece of legislation, or any other legislation, were to interfere in the current process, which is extremely quick and reactive—for example, we are in discussions at the moment with the Home Office surrounding some current legislation around extreme pornography and the extent to which industry should react to that legislation—in what circumstances should we take it down and in what circumstances should we report it to the police? If it wasn't for the fact that we have very clear self-regulatory rules establishing how we react, I fear we would be at a standstill.

Q105 Lord Swinfen: Are you, as an industry, aware automatically of what passes through your systems or do you have to wait for a member of the public to complain?

Mr Persoff: It depends what type of content. There are some types of content where we implement a list created by the Internet Watch Foundation, a list of bad websites containing child-abuse images. Using various technical methods, the industry blocks access—industry is either blocking or planning on blocking in the near future this type of content. There, we do not need to wait to receive the reports; but, similarly no individual person, human-being, knows what that content—rather a machine checks every single request for a website address when it is typed into a browser—assesses whether that website list is on this list and then automatically blocks it. That is one extreme. The other extreme is pretty much all other type of content, and with that we normally wait for a complaint. Where we hosted that content, we have obligations under European law to deal with that content once we are put on notice. If, for example, you are a complainant, i.e., an Internet service provider, and you send me a letter or a fax or e-mail or phone call saying, “you are hosting this piece of content” and it is in breach of a civil or a criminal sanction, once I am put on notice I have to remove that content within a reasonable period of time; but I do not go out there and look for it, rather I react to complaints coming in.

Q106 Baroness Eccles of Moulton: When you say, basically, how good you are at handling this in the UK by all sorts of different means, it just occurred to me that maybe it would be a case for derogation, because perhaps not all the Member States have such an efficient way of blocking bad content, and therefore perhaps it is something that should be in the Directive but we could opt out.

Mr Persoff: I really do not have knowledge of how other Member States in the EU deal with this problem. I do know that one has in the past expressed a concern that delaying the debate to a derogation stage would be to miss the point, given

some of the very fundamental problems which it and the industry considers with the Directive, so I must take my lead from Ofcom on that one.

Q107 Lord Swinfen: You are talking about control of websites. What about pornographic material, for instance, that is sent by e-mail? Do you then have to wait until someone complains to you or is there some method of catching it?

Mr Persoff: We have spam filters which are specifically meant to deal with unsolicited mail.

Q108 Lord Swinfen: I am not talking about unsolicited mail; I am talking about e-mail between people who may well know each other, for instance they are quite happy to receive pornographic material, but the whole system is not entirely secure, as you know. Do you have methods of dealing with this, because it is obviously illegal, or do you have to wait for somebody to let you know about it?

Mr Persoff: As a general rule, we have to wait until someone lets us know about it. We do work very closely with law enforcement so that when law enforcement knows of a particular case, we are extremely co-operative with them. You will understand if I do not go into details regarding that. On the technology point, the industry has identified that e-mail is not the ordinary method of delivery for such content. Given the amount of files transferred and the size of those files, it is normally not by e-mail that such items are swapped. Clearly, the main one is via websites, which is why this approach is taken. Within the UK the approach taken by the Internet industry has been very much to focus on inadvertent access to websites containing child-abuse images, rather than intentional. It is pretty much impossible to stop a determined paedophile accessing material if they want to, and if they are intentionally in breach of the law, then sooner or later, hopefully, they will be dealt with. The Internet Watch Foundation list of websites primarily focuses on is inadvertent access, and the reason for that is that the offence under the Protection of Children Act includes an offence of making, which, due to judicial interpretation, includes an image appearing on your screen. Now, you might well have clicked on a link inadvertently, or not realising what it was, or thinking it was perfectly legitimate legal pornography but not child abuse, and then be confronted with an image that is clearly illegal. Due to UK judicial interpretation of the Protection of Children Act, that is an offence. We decided as an industry, in consultation with government and in consultation with charities that our primary focus was to stop this inadvertent criminal activity, and that is why this child-abuse blocking system was introduced. However, it is not easy but it is possible for a determined paedophile

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to get round that, and we do not feel we will ever be able to block all of those images.

Q109 Lord Geddes: In your evidence you made a point that introducing new regulatory measures to existing developing Internet and mobile services would place the UK and the EU at a significant disadvantage to global competitors in the US and the Far East. Yet there are within the draft directive, are there not, imposition of quotas for European works and independent productions? I do not quite see how your evidence—and presumably you are favouring those—maybe you do not favour those—I do not quite see how they walk hand in hand.

Mr Jevons: The Directive does provide a framework of quotas, and the reason that that would effectively disadvantage service providers based in Europe or the EU is that the consumer can today access services based outside of the EU that are not covered by those regulations, and who do not have to potentially carry the perhaps more extensive content catalogue and the overhead associated with that so they are able to operate without any quotas and effectively offer services directly to consumers, whereas the European service provider will not be able to simply base their content offering or their service offering on what the consumers most demand, but will have to comply with quotas for content that is based in the EU. The other area where a non-linear world places an unfair advantage to people based outside the EU is if you think about the implications of those quotas when looking at user-generated content; so the consumers ultimately determine what they want to watch, and not only is there no way of determining or balancing content generated within the EU to content that is effectively generated elsewhere; it is how you determine exactly where content has come from, especially if it has come off a mobile device, which could have been taken overseas and distributed on one mobile network. To enforce a quota system on just user-generated content would effectively have the potential of saying, when a European-based service provider had a top-ten favourite clips—none of the world's top-ten favourite clips would be up there because they would all come from outside the EU. It is almost impossible for a service provider to police and does not seem appropriate to base a quota where you cannot tell where the content is coming from.

Q110 Lord Geddes: Would not the European Works quota make it easier for a new entrant? Would it ease the market entry?

Mr Persoff: I think one needs to look at where in the supply chain the IPTV provider or the mobile IPTV provider says. Clearly, quotas would benefit some elements of the supply chain, namely the parts

of the supply chain responsible for creating the content in the first place. In terms of the general principle, that by applying the regulation to non-linear content we will be at a competitive disadvantage, it is really looking at the extent to which a customer of ours could access content anywhere in the world. They have a choice whether to access it via Orange or via, for example, YouTube—to pick a company at random. If one of those two companies was subject to quota rules—and I am assuming the reason quota rules exist is because it would not otherwise make it economically rational—strong words, but it would not otherwise be the top priority of a profit-maximising company to make ensure that a particular amount of content came from a particular geographic territory. We would be at a disadvantage in not being able to offer customers—not necessarily being able to offer them the content that they desire. If we had a specific content which must be located or originated in Europe, it might well be right in terms of it may well help the content producers. It might well be right that on any given day we might fulfil the quotas naturally anyway because 30 or 40 per cent of the top content which we provide may well incidentally have been created in the EU. Another day that might not be the case. Ultimately, the market will decide whether or not customers want to see different types of content. It might well be that on a given day our customers do not want to view anything based in the EU. Given that remember we are not talking about linear, so we are not replacing linear broadcasting but we are talking about an adjunct to, we do not see the appropriateness or proportionality of subjecting EU-based non-linear IPTV or mobile TV providers to rules which our brethren on the other side of the ocean are not subject to.

Lord Geddes: I remain unconvinced, but I think time is against us.

Chairman: To confirm for the record, this is a part of the draft amendment to the original Directive that would apply to non-linear services.

Q111 Lord Fearn: Can I ask on the impact assessment, has the Commission adequately considered the impact that this proposal is likely to have had on the sector itself; and if I can go on from that, is it even possible to predict the likely costs and benefits of this proposal with sufficient reliability to support the proposed changes in the Directive?

Mr Persoff: Having reviewed various regulatory impact assessments carried out at the UK level and the Commission level, it is regrettable that we do not think as wide an impact assessment has been conducted. Specifically we would have expected an assessment of both new and existing business models. We do not believe that specifically in

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relation to new business models that that has been sufficiently undertaken. To give you an example, we currently have a vibrant Internet access content market in the UK. We have not seen a clear and wide-ranging impact assessment on the effect on the existing Internet market of these regulations. Some of the impact assessment has looked at what might happen going forward to the new services; for example, IPTV—there has been some element of impact assessment. But in relation to what is going to happen to the general Internet or Internet service providers, unfortunately that does not seem to have been done to the extent we would like. As for your second question it is incredibly difficult to try and predict. These impact assessments are always very difficult. However, they do need to be done, and the reason they need to be done is to give all the parties the opportunity to flag up issues. I am confident that between now and the end of the review period that the Internet industry throughout Europe will take the opportunity to flag up to the Commission and provide evidence on the specific points going forward.

Q112 Lord Fearn: So would a precautionary approach to regulation suggest different proposals for change?

Mr Persoff: Yes, but I think you have to ask yourself: what is the *status quo*? What is wrong? What needs to be addressed by regulation? The default position here seems to have been: “We are going to extend regulation automatically unless you, the industry, can find some compelling reason not to extend the existing regulations; it will extend to non-EU services.” The approach the industry would prefer is to look at the actual problem we are trying to address. Why do we need regulation? In the absence of regulation, what would happen? It is almost shifting the burden of proof back to the Commission to show why regulation is necessary. I submit that in my opinion that burden of proof has not yet been passed.

Q113 Chairman: This leads us to a final round of issues to discuss. In a nutshell, in a way, why is the Commission going down this line at all? You touched on that. There must be some pressure somewhere within the European Union to feel that regulation of this kind is the way to go. Let me make that proposition. It has not come out of thin air. Secondly, as I understand it, the UK Government was, if not a lone voice, certainly one amongst a very small number of Member States that expressed great concern about the tone and content of this draft Directive, or draft amendment to the Directive, which again appears to show that there was not a lot of opposition to this in the early days. What is the mood like elsewhere in the European Union

about this? Where is the pressure coming from for this overarching—some would say dangerous approach to regulation and the changing and emerging range of technologies. Where is this coming from?

Mr Persoff: I start by pointing out that the Information Society Directorate General within the European Commission, which is responsible for this area, effectively regulates two sectors: the media sector and the electronic communications sector. Clearly, in listening to the views of market players and governments in relation to both of those sectors, it is always difficult for a regulator to balance the views of different markets. I would submit Ofcom has done a very good job within the UK of doing that. Within Europe there has clearly been pressure brought to bear on the Commission from those who consider, as you stated, that there is a non-level playing field. They have therefore been successful in persuading the Commission to accept, as a default position, that regulation should be extended to everything, unless there is a justification for removing it, rather than looking at the logic the other way round. Ultimately, the Commission had to choose one way or the other. From our perspective it is unfortunate they have chosen the other way, but clearly it is more than just a commissioner’s view. As you stated, the UK seems to be pretty much a lone voice. I read that Slovakia might be quite sympathetic. It is very difficult to speculate why that is the case. In the UK we were very much helped by the fact that we have a converged regulator dealing with both media and telecoms, a regulator that is able to look from an end-to-end basis at the entire market and try and assess, going forward, what that market is going to look like, what the competitiveness of that market will look like, what it will look like for consumers. I can only speculate that elsewhere in Europe they do not necessarily have such a joined-up, end-to-end view of what the market might look like. Alternatively it might well be that with any given market the media industry is considered the more powerful political force in a country than the telecoms and/or Internet industry. That is mere speculation because clearly it is up to each Member State to decide how they want to position themselves in this debate.

Q114 Chairman: The underlying motivation is always the secret to be able to counter a proposal that one feels a worry. Is it possible that in most Member States, if not all Member States, what one might call the old-established television businesses feel threatened by the shift in advertising revenues? That is why I was pushing you on it, but you are reluctant to admit this change, but it could be

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fundamental to the issue. Is it that the old-established companies, most of which in Europe include the state-owned or public broadcasting television units—hence very powerful—that they feel threatened by the new technologies, and that that is why there is support for extending the Directive to include those, to include the new technologies? Is that a possibility? You are in the business for understanding things. Dare I say that in France, France Telecom is not going to be totally unaware of what the French Government thinks about these things—not totally? You are French-owned: what is the view in France, the view of the French Government?

Mr Persoff: As you mentioned, there is speculation throughout Europe

Q115 Chairman: I do not ask you to speculate; I ask you to tell me the views in France.

Mr Persoff: My understanding of the views in France is that the French Government is broadly supportive of the review of the Directive, as per the Commission's review.

Q116 Chairman: So France Telecom, through its business in the UK, Orange, finds in France that it does not have a ready ear to the concerns you have.

Mr Persoff: I think the approach taken by France Telecom has been a very balanced approach, looking at its position within all the markets it is in—the UK, France, Poland and other countries I mentioned. It has published its statement on this

matter. It has an office in Brussels that is coordinating the response. Broadly speaking, France Telecom's position is to accept that there are both upsides and downsides in the review.

Q117 Chairman: I am bound to say that that is a very different summary of the position in your oral evidence today from the position you took in your written evidence. You have not taken a balanced position, you have taken a robust position: the Directive is unnecessary in its present form; it should exclude all non-linear services; indeed it is totally misguided—and I think you agree with me—fundamentally flawed. That does not seem to sound like taking a balanced view of things.

Mr Persoff: We very much support Ofcom and the UK Government in their approach to this. We think the approach taken by the UK Government and Ofcom has been greatly appreciated by the industry within the UK. There are always complex political issues that need to be borne in mind when any multinational company takes a position on something at a central level. Clearly, within the UK we understand the position of our parent company, and we have inputted into their response, and having reviewed their response we find some of our main core arguments found their way into the draft, and we are very happy with that draft.

Chairman: You have been patient, both in the length of time and the firmness of some of the questions, and your responses have been extremely helpful to us. On behalf of the Sub-Committee, I would like to thank you both very, very warmly for coming, and for the clarity with which you have given evidence.

WEDNESDAY 25 OCTOBER 2006

Present	Eccles of Moulton, B Haskel, L Roper, L	Swinfen, L Walpole, L Woolmer of Leeds, L (Chairman)
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Memorandum by Ofcom

SECTION 1

The Issues Raised and Ofcom's Responses

1. Ofcom's evidence to the inquiry is based on the original Commission's proposals published in December 2005. They do not reflect amendments to these proposals which are currently under discussion in the Council of Ministers and the European Parliament. The Committee will by now be aware that there have been significant developments in both the Council Working Group and the Parliamentary committees considering the proposal in recent weeks.

2. The first of three groups of questions identified by the Committee focuses on the need for a regulatory initiative in the area:

(a) *In our current rapidly converging and evolving technological and market environment, is it appropriate to try to recast the regulatory framework?*

3. Ofcom agrees that as communications services converge and new services emerge the existing regulatory framework needs to be re-examined. In particular, the television industry has seen significant changes since 1997, mainly as a result of the introduction of digital technologies and an increase in choice both of content and of delivery platforms for broadcasting services. Television broadcasting services are now delivered not only via cable, terrestrial or satellite networks, but also using the Internet Protocol, mobile and wireless networks. In addition to these new developments in television broadcasting, new audiovisual content services are emerging alongside traditional ones, and they are growing fast.

4. This is having an impact on the way citizens are accessing and viewing content. Today, consumers have wider choice both in terms of content and in terms of the device from where to access that content. Technological developments have also allowed viewers to have greater control over their media consumption and we are seeing that viewers are taking an increasingly active, rather than passive, role in the way the use and consume media content. In consequence, traditional business models, in particular that of free to air commercial broadcasting supported by "spot advertising" revenues, are coming under pressure and will need to evolve.

5. Accordingly, Ofcom welcomes the European Commission's intention to revise and modernise the rules that apply to television broadcasting. In particular, we welcome the proposals to modify the definition of broadcasting to make this truly "technology neutral", and the removal of outdated restrictions on spot advertising minutage and placement within programmes. We support the retention of the country of origin principle as the basis for the single market.

6. However, Ofcom believes that the response to the challenge of convergence should not necessarily be the extension of traditional broadcasting rules and principles to the new media services. These services are only just emerging and present very different characteristics from traditional linear television.

7. While public interest objectives in the area of consumer protection (and particularly minors) remain valid in the new media environment, traditional regulatory approaches are neither appropriate nor effective in addressing the challenges created by changes in communications technologies and consumer behaviour.

(b) *What are the advantages and disadvantages of regulating this area? Are the regulatory costs proportionate to the benefits?*

8. Ofcom believes that regulation in this area needs to be: (i) proportionate, (ii) effective and (iii) enforceable.

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9. As a general principle Ofcom favours refraining from intervention unless there are certain public policy outcomes that cannot be delivered by the market alone. The broadcasting sector has been one area where specific and targeted intervention has been applied in the form of both positive obligations on broadcasters to deliver certain forms of broadcasting that the market might not deliver or under-provide; and negative obligations to restrict the harm and offence which an unfettered broadcasting environment could cause. In such cases, intervention should be targeted and proportionate to the market failure identified. It should be consistent, accountable and transparent in both deliberation and outcome. Ofcom is required by statute to seek the least intrusive regulatory mechanism to achieve its objective. Generally speaking, in relation to new and emerging content markets Ofcom's approach has been to avoid premature intervention. We think such a precautionary approach is equally valid at European level.

10. The Commission's proposals as drafted remains broad, vague and ambiguous. It potentially, and perhaps inadvertently, catches a significant number of new media services, including Internet services. It would extend regulation to third generation mobile and web-based services, including videoblogs, online video games, webcams, online newspapers or magazines which carry significant amount of video content, and even individual websites that host user-generated content.

11. This brings potentially thousands of businesses within the scope of regulation including start-ups, SMEs and sole traders. The new media sector has the potential to be very significant in economic terms for the EU economy, but at present is at an early stage of development, and is characterised by many small firms and start-ups innovating and taking risks. An example of this is YouTube, recently purchased by Google, which was started by three friends in late 2005 and initially operated out of a garage. Earlier this year it still had only 25 employees. The existing and future European equivalents of YouTube are a major source of potential future EU creativity and competitiveness. They can be expected to contribute above average growth compared with other sectors, and, critically, have a significant enabling role in relation to other key markets such as broadband deployment.

12. These services are currently growing fast. The European mobile industry, for example, is expected to reach 60 per cent 3G handset penetration,²⁶ and over 57 million mobile TV subscribers²⁷ by 2010, while the online games industry has been forecasted to become the fastest growing by 2009, with revenues of \$2.2 billion.²⁸ Furthermore, it is estimated that the number of blogs registered worldwide doubles every five months, with over 1.2 million new entries a day.²⁹

13. Importantly, these services are also uniquely vulnerable at this stage of development, to regulatory risk and uncertainty. Furthermore, some of these services, or some elements of the value chain, are easily portable between jurisdictions. The proposals could have the unintended consequence of discouraging or delaying investment. The worst case scenario for Europe is that economic activity which would have taken place in Europe, providing jobs and stimulating growth here, will take place elsewhere, be it in the US or in the Far East.

14. In order to contribute to the debate and assess the regulatory risks of the Commission's proposals, Ofcom asked RAND Europe to conduct a study on the indirect impacts of the proposals (See Appendix II). The report highlights some important economic risks inherent in the Commission's proposals. These risks are particularly important in relation to the new media industries that RAND Europe has examined and which are strategic for European future competitiveness: IPTV, mobile multimedia and online games.

15. These risks accrue not just to shareholders of the companies concerned, but to the EU economy as a whole and hence to EU citizens. The results of the RAND Europe study are in accordance with feedback to Ofcom and the UK Government from businesses and investors.

16. Finally, Ofcom would like to emphasize the need for continued vigilance in this market, and the importance of regularly conduct research and reviewing the regulatory framework so that it reflects market and consumer realities prior to any formal regulatory measures being taken, Ofcom would argue that public authorities, regulators and service providers need to be fully informed of the nature and impact of these new services and understand changing consumer behaviour. Furthermore, Ofcom is committed to consult widely with all relevant stakeholders to assess the impact of regulatory action before imposing regulation.

17. The second group of questions addresses whether the Proposal, in its current form, can meet its own broad objectives:

²⁶ Forrester, 2006.

²⁷ Informa Telecoms & Media, 2006.

²⁸ DFC Intelligence, 2004.

²⁹ Technorati, 2006.

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(c) *Does the Proposal sufficiently liberalise the provision of broadcasting services within the European Union?*

18. As set out above, Ofcom welcomes the Commission's intention to modernise and liberalise the rules that apply to television broadcasting.

19. In particular, Ofcom supports the simplification and relaxation of the complicated rules that apply to advertising. Advertising remains the primary source of revenue for the broadcasting industry in Europe, playing a key role in maintaining the sustainability of free-to-air commercial broadcasting, and ensuring a rich, high quality and diverse programme offering. Advertising revenues are also critical for the promotion of European TV content production. As noted, however, this traditional advertising-based business model is coming under pressure as a result of increased competition between broadcasters and the effects of new technologies such as Personal Video Recorders (PVRs) which allow viewers to skip advertising breaks.

20. In this light, Ofcom supports the Commission's intention to provide a greater degree of commercial flexibility for broadcasters, while maintaining a necessary level of protection in the traditional television environment. In particular, we agree with the Commission's view that the daily advertising limits and the minimum of 20 minutes required between advertising breaks are no longer needed. The need to attract and retain viewers will, we believe, act as a discipline on broadcasters and prevent gratuitous or excessive advertising minutage, and the removal of the restriction on the location of advertising breaks within programmes will allow for breaks to be scheduled in the way which relates most naturally to the narrative of the programme concerned. We further welcome the Commission's general approach that the principle of separation of commercial content from editorial content should be replaced by one based on transparency.

21. However, we find it somewhat inconsistent that the Commission proposes to further restrict the quantitative rules for advertising in certain programme genres, including, news programmes and children's programmes, where interruptions can now only take place every 35 minutes, instead of the previous 30 minute limit. This stricter approach is not only at odds with the Commission's liberalisation policy, but it can also perversely impact on the incentives for broadcasters to produce and show these programme genres.

22. With regard to films, we believe that the minor liberalisation of the rules proposed by the Commission is insufficient. The liberalisation advertising rules for other programming will create a relative disincentive for the showing of this genre and might, in particular, discourage the transmission of non-Hollywood films by free-to-air broadcasters.

(d) *Does the proposal contain measures that will effectively protect public interest objectives?*

23. The Commission's proposals retain the public interest rules on protection of minors, incitement to hatred and advertising ("Audiovisual commercial communications" in the jargon of the new directive) as they currently apply to television broadcasting. These rules have proved effective in delivering a high level of consumer protection and harmonising minimum standards across Europe.

24. However, Ofcom considers that the extension of regulatory controls traditionally designed for television into the new media online environment is both inappropriate and likely to be ineffective.

25. While Ofcom agrees that citizens (and especially minors) need to be fully protected in the online world, we believe that greater emphasis should be put on the responsibility of content providers through the development of codes of conduct and the provision of self-protection systems to consumers such as filtering, rating or access controls. As the EU has recognised on a number of occasions self-regulation and co-regulation can prove very efficient in delivering public policy objectives and consumer protection. This is particularly the case in the area of internet delivered services, where traditional "command and control" regulation alone cannot deliver on a promise of consumer protection.

26. We need to develop a combination of instruments which include: effective criminal laws, greater consumer empowerment through self-protection tools, the development of media literacy, and the establishment of reliable self and co-regulatory structures representing all relevant stakeholders. This is, in our view, a superior and more effective alternative to deliver on that promise.

27. Specifically, Ofcom would like to emphasize the importance of media literacy in any regulatory ecology for new media. As well as a responsibility on providers of services, this new world unavoidably places a responsibility on consumers to take steps to protect themselves and their loved ones from harm and offence. But the skills necessary to undertake such self-protection requires a degree of "media literacy". Ofcom has a statutory duty to promote media literacy, and we have been increasingly active in this area (See Appendix I

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for a summary of activities). Stakeholders not only in the UK but across the EU should build on progress made to date and extensive research should be carried out on the most appropriate model(s) for content labelling going forward.

(e) Does the Proposal achieve an appropriate balance between the objective of harmonisation and right of Member States to control audiovisual media services in a manner which reflects national concerns and interests?

28. As with any other European legislation, the Television without Frontiers Directive needs to strike a very delicate balance between the objective of harmonisation and the realisation of a single European market for broadcasting services on the one hand, and the respect for subsidiarity as regards national cultural and public interest concerns on the other.

29. Ofcom believes that the current proposals fail to strike such a balance as regards online services, going beyond what are currently minimum EU standards.

30. In particular, there are concerns as regards the fundamental right to freedom of expression. The Commission proposals widely extend the grounds of the prohibition of incitement to hatred to cover things such as incitement to hatred on the basis of age and disability. These go well beyond what is currently general law in the UK, applying higher restrictions on speech to the new media sector. Whilst policy in this area is clearly a matter for government not Ofcom, we consider that it is difficult to justify applying such an approach to new media but not (say) to offline media, publishing and newspapers.

31. The third and final group of question focus on specific topics addressed in this Proposal:

(f) Defining the nature of the regulated services—Is there agreement on the Commission’s proposal to distinguish between linear and non-linear services?

32. The Commission’s proposals identify two types of services within the broader category of “audiovisual media services”. On the one hand, linear services, where the service provider determines the time of transmission (“pushed services”), and, on the other hand, non-linear services, where it is instead the user who decides (“pulled services”). A different level of regulation is then applied to each category of services.

33. While Ofcom agrees with the Commission’s underlying principle for this revision that in the new media environment, there are different kinds of protection needed depending on whether the television service is pushed to consumers or accessed on-demand, Ofcom believes that the Commission’s definitions are too broad, vague and ambiguous.

34. As currently defined, on-demand services will cover a whole range of services, going well beyond “video-on-demand”, which was the apparent target of the Commission’s proposals. The definition would extend to services that have little to do with television, and for which there is little rationale for regulation of this kind.

35. Ofcom has strongly called for improvements to the drafting in order to clarify the different characteristics of each of these services. It is Ofcom’s view that the scope of the proposals should only extend to cover services in a form characteristic of television broadcasting, which will lead consumers to reasonably expect some type of regulatory protection to apply. Examples of such services could include video-on-demand services which provide time-shifted or archive TV programmes to viewers.

(g) Jurisdiction and country of origin—Does the Proposal go far enough in facilitating the free movement of broadcasting services?

36. Ofcom supports the retention of the country of origin principle in the Commission’s proposals and believes that it does encourage the provision of cross-border services in the television broadcasting market.

37. The country of origin principle has been essential for the creation of an internal market for broadcasting services. It provides broadcasters that operate in more than one Member State with legal certainty as to the rules that apply to their services. By offering regulatory clarity and lowering regulatory costs, it has also made it attractive for international broadcasters (eg MTV) to establish their production and distribution hub in Europe, and it has triggered the launch of new pan-European services (such as Eurosport or Euronews) with distinct linguistic versions. All in all, and since the Directive was first adopted in 1989, the European television market has witnessed a significant increase in the number of cross-border channels.

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38. Not only has the European audiovisual industry benefited from this, but, most prominently, UK citizens have also gained from an increase in terms of content and programme choice. If the country of origin principle were to be weakened, or worse, abolished, then different and divergent rules could apply to broadcasters that provide services in more than one European country. This will undermine the benefits of the single market, and it will discourage the promotion of cross-border broadcasting services and the launch of new channels. It is therefore Ofcom's view that this remains the only sensible way of addressing the regulation of broadcasting at the EU level.

39. Ofcom recognises that there could be cases in which the principle of country of origin regulation might result in "forum shopping" with a view to circumventing the application of national broadcasting legislation. Such an abuse of the country of origin principle should be avoided.

40. It should be noted, however, that controversial cases remain the minority. Any possible amendments of the establishment criteria should be carefully considered to avoid the undesirable outcome of impacting on the vast majority of channels that are non-problematic.

41. The Commission has sought to address the problem of circumvention in the new proposals by introducing a procedure that allows a Member State to "adopt appropriate measures" to prevent "abuse or fraudulent conduct" of a media service provider established in another Member State that directs all or most of its activity to the territory of the first Member State.

42. Ofcom welcomes the Commission's attempt to avoid the abuse of the country of origin principle and the greater emphasis placed on the co-operation between national regulatory authorities.

(h) *Regulatory approach—What role should industry self-regulation play in the new regulatory framework?*

43. Currently, there are a number of successful self-regulatory and co-regulatory initiatives which will have a positive impact in the protection of consumers in an online environment. Examples of these are: the Independent Mobile Classification Body (IMCB), which sets a Classification Framework for commercial mobile picture-based content; ATVOD, which self-regulates in the area of video-on-demand, the Internet Watch Foundation (IWF)³⁰ which identifies and takes action against images of child pornography as well as criminally obscene and racist content; and the Advertising Standards Authority (ASA), in the area of advertising.

44. On an international level an example of an international self-regulatory initiative is the Internet Content Rating Association (ICRA). ICRA encourages content providers to self-classify their content using its rating system, which in turn enables end-users to use filtering software to block access to any websites which they deem undesirable based on the rating information. Over 100,000 internet content providers have already self-labelled using ICRA's rating system, including Microsoft, AOL, T-Online and Hustler. However, the vast majority of internet content is still not labelled.

45. Ofcom is aware that developing reliable and successful self-regulatory or co-regulatory structures is not an easy task. It requires a significant commitment and investment of time and effort by government, regulators, industry and indeed consumers themselves. Furthermore, the success of self-regulation and co-regulation will, to a large extent, be determined by the specific regulatory culture and traditions of each country, and of the sector in each country.

46. Ofcom would warn against regulatory interventions that could jeopardise current or future initiatives in this area, by giving the wrong signal on what should be the direction of travel for this industry. Rather, greater efforts should be made, both at national and EU level, to encourage and support the development of these structures.

47. Ofcom also believes that as self-regulatory and co-regulatory schemes mature, and as consumers develop the media literacy skills that they need in order to make effective use of self-protection techniques, there will be less need for direct intervention in the regulation of online multimedia content.

³⁰ The Internet Watch Foundation (IWF) in the UK is one such example of self-regulation. The IWF operates a hotline for reporting illegal content on the internet. Once content is ascertained by the IWF to be illegal, it issues take-down notices to hosting service providers, when these are based in the UK. Additionally, it supplies ISPs with details of websites containing internationally hosted illegal content, and of online user groups dedicated to disseminating illegal and offensive material. Most UK ISPs have already voluntarily agreed to block those sites and user groups. The IWF has been a successful self-regulatory strategy—in 2005, only 0.4 per cent of potentially illegal child abuse images reported to the IWF were hosted in the UK. However, the international problem of dealing with content hosted in third countries remains.

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(i) *Advertising and commercial communications—Should broadcasters be given greater flexibility in respect of the commercial arrangements they enter into for the financing of programmes?*

48. As set out above (see answer to question (e)), Ofcom welcomes the liberalisation of the rules that apply to advertising, in particular the relaxation of the quantitative restrictions.

49. In the new multiplatform environment, audiences are increasingly fragmented. Competition for viewers, and therefore for advertising revenues, has become fiercer. The advent of subscription television models and video on demand services puts pressure on traditional advertising-funded models. In addition, technological developments such as personal video recorders allow viewers to fast-forward through advertising breaks. All of this challenges both broadcasters and advertisers to innovate and to develop complementary revenue models.

50. Ofcom believes that the maintenance of a dynamic, competitive, and culturally rich audiovisual industry for Europe critically relies on the existence of advertising regulations that allow broadcasters the commercial freedom and regulatory flexibility necessary to remain competitive, while delivering public policy goals. Advertising regulations designed for an analogue era with a limited number of channels are not appropriate for the multi-channel environment. They could inhibit the future provision of high quality programming, including cultural programmes and independent productions. Policy makers have therefore an interest in enabling broadcasters to evolve in order to meet the challenges, and embrace the opportunities, that the new digital world will pose.

51. The Commission has proposed to allow product placement subject to transparency requirements, as a way to provide a new financial stream for broadcasters.

52. Ofcom believes that this is an important issue that must be considered carefully. We have recently consulted with our stakeholders on this matter in order to bring in further evidence on the benefits or otherwise of allowing product placement. It is clear that the introduction of product placement remains an issue on which there is no consensus—in general broadcasters favour a controlled introduction of product placement whilst consumer and viewer groups oppose the concept. It is also clear that before any even limited and controlled introduction could be contemplated there remain a significant number of issues on which further detailed work would need to be undertaken. Predicted economic benefits also appear to remain modest, at least relative to the size of the existing spot advertising market.

(j) *Protection of minors and human dignity—What controls should be imposed on non-linear services in respect of illegal and harmful material, such as the granting of a “right of reply”?*

53. As set out above, while Ofcom agrees that consumers should be protected in the online world, we believe that applying sector specific rules conceived and designed in a different market environment is inappropriate.

54. Instead, the regulatory model for the online world needs to rely on a combination of instruments, which include general criminal laws and effective self and co-regulatory regimes which place greater emphasis on the responsibility of content providers and consumers themselves, as well as the promotion of media literacy tools.

(k) *Media plurality and cultural diversity—Do quotas continue to be an appropriate mechanism for promoting the production of “European works”?*

55. Europe’s content production industry is vibrant and dynamic. Current multi-channel and multi-platform broadcasting markets offer excellent opportunities for sector growth for the development of the creative industries. In this area, there is a clear interest in enhancing the range of cultural expression and diversity available to European citizens through the various media.

56. Quotas for nationally produced programmes or quotas in favour of independent producers or minority groups are one way to safeguard cultural and linguistic diversity. Articles 4 and 5 of the TVWF Directive seek to achieve this.

57. The “content quota” provisions need to be understood and applied in context and in a way that is proportionate. In the case of small broadcasters or start-ups, the burden of compliance may be very onerous and quota-type of obligations do not seem to be appropriate. For this reason, Ofcom welcomes the retention of the words “where practicable” in the new proposals.

58. Further, Ofcom believes that judgements as to whether it is practicable for a broadcaster to comply with Articles 4 and 5 are best made at Member State level, in accordance with the principle of subsidiarity.

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59. Ofcom notes the rapid proliferation of broadcasting channels across Europe (Screen Digest estimate there were 100 in 1990 and over 1,000 by 2003). The fact that many of these individual channels may not yet have reached the quotas in Articles 4 and 5 should not obscure the fact that this explosion of channels has provided many more opportunities for independent and European production than existed before.

60. With respect to non-linear services Ofcom shares the Commission's view that "given the different nature of non-linear services, and the differing degrees of user control, [. . .] 'content quotas' for these services are certainly not the right instrument to achieve cultural diversity, and could even be counter-productive".

61. Therefore, Ofcom does not see a basis for introducing binding quotas for non-linear services. The advent of new digital platforms and services lowers barriers to entry to the market for EU content providers. It is Ofcom's view that a strong and competitive market for new media services is most likely to serve both the interests of European and independent production as well as the growth ambitions for the content and communications sectors envisaged by i2010.

62. The imposition of quota-type measures at this stage of development would be premature and would risk hindering the growth of these services, some of which are competing with larger and better funded providers. What is more, quota obligations might not be the best or most adequate way to encourage diversity in an "on-demand" environment, where consumers will decide what to watch and when from a catalogue covering a vast array of content material.

63. In summary, while Ofcom believes that Articles 4 and 5 of the TVWF Directive are still valid and adequate for the promotion of European works for linear services, we would find an extension of these provisions to non-linear services to be disproportionate. The Commission text rightly leaves it to Member States to determine what measures should be taken to promote, where practicable and by appropriate means, production of an access to European works. There are of course a range of other ways in which such promotion could take place, certainly not restricted to the introduction of a quota system.

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APPENDIX I

OFCOM'S WORK ON MEDIA LITERACY—SUMMARY OF ACTIVITIES

64. The relevant statutory provisions relating to the duty to promote media literacy are set out at section 11 of the Communications Act 2003 ("the Act"). Ofcom's work to promote media literacy is part-funded by grant-in-aid from the Department of Culture, Media and Sport.

65. Ofcom's definition of media literacy is "the ability to access, understand and create communications in a variety of contexts".

66. Our principal role is to provide leadership and leverage to help achieve our goal. In the early years the focus of our work will be on achieving greater understanding of the levels of media literacy in the UK, and encouraging greater awareness of and confidence and competence in the use of new communications technologies.

67. In order to gain an initial picture of the extent of media literacy across the UK, Ofcom commissioned an "audit" of how UK adults and children access, understand and create communications, with a particular focus on electronic communications. In this context, access has a much wider definition than take-up or accessibility issues: it includes understanding of what each platform and device is capable of and how to use its functions; while understanding relates to how content (such as television and radio programmes, internet websites, or mobile video and text services) is created, funded and regulated. The findings of the Media Literacy Audit were published as a series of reports which are available at: <http://www.ofcom.org.uk/advice/media-literacy/medlitpub/medlitpubrss/>

68. The Audit findings will help to target both Ofcom's and stakeholders' resources for the promotion of media literacy. Stakeholders were invited to a series of meetings across the UK in October 2006 to discuss what actions need to be taken to address the media literacy needs identified by the Audit.

69. Ofcom has created a number of partnerships to deliver activity to promote media literacy.

70. In England and Wales we worked with the National Institute of Adult Continuing Education (NIACE) to highlight media literacy as a major theme for Adult Learners' Week 2005 and 2006. In the run-up to, during and after the Week itself, NIACE encouraged colleges, voluntary and community sector providers, libraries and media organisations to offer open days, enabling adults to try out different media literacy tasters. In

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partnership with its Welsh arm, NIACE Dysgu Cymru, organised amongst other activity a media literacy conference for providers in the Millennium Stadium Cardiff.

71. Ofcom with the eGovernment unit in Northern Ireland produced a CD-Rom (Internet Made Easy). The aim of the project is to provide every household in Northern Ireland (700,000) with access to the CD to promote the benefits of technology for everyday life and work.

72. Ofcom and the Home Office are working with the industry to develop a standard and kite mark scheme for domestic internet filtering products. The aim of the project is to create a benchmark for the performance of Internet filtering, monitoring and blocking applications. This will help provide more internet users with the confidence needed so that they and their families can safely use the internet. The standard is due to be launched by the Home Secretary at a meeting of the Home Office Internet task Force in December 2006.

73. In recognition of the particular needs of older people, Ofcom organised, with Help the Aged, a series of media literacy workshops with broadcasters across the country. The workshops were for members of Help the Aged's "speak up for our age" forums and give forum members a first hand experience of news production; this experience can then be cascaded back to their forums and other membership organisations to enable them to engage with broadcasters more effectively.

74. Ofcom provided support for trainers taking part in Silver Surfer Week—a week-long event where local organisations and groups provide computer and internet taster sessions for older adults who want to learn and experience first hand the benefits of being digitally connected. Silver Surfer Week is organised by Age Concern and Digital Unite.

75. Ofcom publish a quarterly online bulletin to professionals with an interest in media literacy and has developed an extensive area of the Ofcom website with information on media literacy for both professionals and the public. The information is available at: <http://www.ofcom.org.uk/advice/media—literacy/>

76. Ofcom provide the secretariat to the newly formed Associate Parliamentary Media Literacy Group. This group, under the chair of Danny Alexander MP has developed a programme of events to help inform parliamentarians about relevant issues such as the changing regulatory environment and digital switchovers and older people.

77. We all face new challenges from emerging technologies and convergence of content delivery platforms. We anticipate the need to undertake further work to understand peoples changing expectations and experiences in new communications technologies.

78. As well as the work funded by grant-in-aid from DCMS, Ofcom undertakes and fully funds a range of work that supports this media literacy project. This includes activity in relation to Code development and implementation, consumer research including ease of use and uptake of technology, complaints and enquiries to the Ofcom Contact Centre, development and promotion of information and advice relating to digital technologies and liaison and lobbying of industry and political opinion formers in the UK and Europe.

APPENDIX II

STUDY BY RAND EUROPE ON THE INDIRECT IMPACTS OF THE PROPOSALS—OFCOM SUMMARY

79. Ofcom has published an independent study conducted by RAND Europe, which looks at the potential indirect impact of the European Commission's proposed Audiovisual Media Services (AVMS) Directive.

80. Since 1989, television services in Europe have been regulated by the Television without Frontiers Directive, which created a single market for the provision of television services and established minimum content rules in areas such as protection of minors and advertising. In December last year, the European Commission published a proposal for a new directive. The draft is currently being considered by the European Council and the European Parliament, and adoption is expected by 2007, at the earliest.

81. The Commission proposes to extend the scope of regulation to all audiovisual media services, which have been defined as services the principal purpose of which is the provision of moving images, with or without sound, to the general public, in order to inform, educate or entertain. Nine months into the discussions, it remains unclear which services are exactly caught by these proposals. However, it appears that a number of strategically significant new media sectors could potentially fall within the scope of the new Directive, including mobile multimedia, online gaming and IP television.

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82. The proposal has raised serious concerns among UK and European industry, on the grounds that it will significantly increase regulatory costs and uncertainty. Further, it has been argued that it will negatively impact on innovation, European competitiveness, and the Lisbon Agenda goals.

83. For its part, Ofcom has expressed serious doubts about the practicability and appropriateness of extending broadcasting regulation to a whole range of new media services which are very different from traditional TV, both in nature and in the manner in which they are consumed.

84. Clearly, in accordance with better regulation principles, it is important to be able to understand the potential impact that the Commission's proposals will have on these strategic sectors. The Commission, as required, published a regulatory impact assessment along with the draft Directive and asked RAND Europe to provide some supporting economic analysis as part of that process. RAND Europe identified a number of key factors which would determine whether the benefits of extending the scope would outweigh the costs. However, it was not possible within the study's timeframe for RAND Europe to look at the potential impact on specific industry sectors.

85. Ofcom believes such an analysis is critical for the purposes of assessing the full impact of the Commission's proposals. It therefore asked RAND Europe to undertake further research and to look in particular at the potential indirect effects in three key sectors: *IPTV*, *mobile multimedia* and *online games*. Indirect effects refer, in particular, to the possible effect that regulation could have on companies' investment and location decisions. RAND Europe concludes that these indirect effects, whilst difficult to quantify with precision, could be significant given that (a) the new media industries affected by this proposal may be at an early stage of development, with major investment and location decisions still to be made; (b) each of the sectors identified has elements within it that could be relocated relatively easily outside of the European Union; and (c) new media industries are often characterised by a significant number of small and medium sized firms which previous studies have shown are particularly vulnerable to regulatory risk.

86. The study concludes that:

- The new media sectors affected by this proposal are strategically significant for the EU economy. They can be expected to contribute above average growth compared with other sectors, and, critically, have a significant enabling role in relation to other key markets such as broadband deployment.
- There remains a significant problem of "regulatory risk" as a result of the definitions in the Directive being insufficiently precise. The risk arises because firms cannot state with any degree of certainty what the actual application of the Directive will be, and whether or to what degree they will be affected by it.
- In general, "light touch" regulation, wherever possible delivered through industry self-regulation, is important in both reducing the size of regulatory costs and reducing regulatory risk and uncertainty.
- In the case of *IPTV*, there are major uncertainties about the future trajectory of the industry, which is at an early stage of development. It is unclear whether *IPTV* will predominantly develop in a closed or "walled garden" environment, where content is separately licensed by its creators and owners to local or national distributors, for instance commercial broadcasters, cable and telecoms companies; or whether content owners and creators will simply distribute their own material via the open internet, bypassing the need for any form of commercial relationship with other distributors.
- If the latter model prevails, it is highly probable that much of the activity regulated by the draft AVMS Directive will take place outside Europe and hence be outside the remit of the directive. As a result, no economic benefit would accrue to Europe from this economic activity. RAND Europe recommends that more analysis is done to understand the likely direction of this industry. RAND Europe also notes that it will be important to avoid the situation in which the costs of compliance with the AVMS Directive become a critical factor in determining the prevalence of the latter model.
- In the case of *mobile multimedia* services, RAND Europe notes that the risk of "offshoring" of activity, which is significant in the case of *IPTV*, is here reduced because mobile companies have greater scope to control the services made available to their customers (and hence to restrict access to third party services offered over the open internet). But RAND Europe points out that the regulatory costs of compliance with the new AVMS regime need nonetheless to be proportionate, because otherwise there is a risk that mobile companies will have incentives to artificially structure businesses so that the regulatable activity of making and creating content takes place outside the EU. RAND Europe recommends that existing, light touch self-regulatory regimes should form the ongoing basis of regulation in the mobile sector.

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- As for *online games*, RAND Europe finds that this industry is global, and that the added value activity of creating and developing games is highly “portable”. This industry is therefore highly susceptible to increases in regulation in one territory, however small, especially when that regulation does not have parallels in other territories where development activities could easily be shifted. RAND Europe recommends that serious consideration be given to excluding online games altogether from the scope of the AVMS Directive.
- Ofcom believes that this report highlights some important economic risks inherent in the Commission’s proposals. These risks are particularly important in relation to the new media industries that RAND Europe has examined and which are strategic for European future competitiveness. These risks accrue not just to shareholders of the companies concerned, but to the EU economy as a whole and hence to EU citizens. The worst case scenario for Europe is that economic activity which would have taken place in Europe, providing jobs and stimulating growth here, will take place elsewhere, be it in the US or in the Far East. The results of the RAND Europe study are in accordance with feedback to Ofcom and the UK Government from businesses and investors.

87. Our conclusion is that legislators should:

- Make further efforts to clarify the scope of the services caught by the Directive.
- In addition to the general need for greater certainty, we think the RAND Europe study makes a compelling case for the complete exclusion from the proposals of the online games industry.
- Ensure that there is clear guidance to the Commission and national authorities to ensure that the implementation of the Directive is conducted in a proportionate, transparent, evidence-based and light touch way. Critical to this is to encourage that IPTV and mobile multimedia industries, amongst others, play a full part through self and co-regulation in shaping the rules that will apply to individual industry sectors.
- Emphasise that, when conducting a review of the Directive, and in accordance with Better Regulation principles, the Commission should examine whether or not there is a continued need for regulatory measures. Over-regulation risks otherwise driving key strategic activities outside of the EU.

The full print version of the report can be found at: <http://www.ofcom.org.uk/research/tv/reports/videoregulation/videoregulation.pdf>

Examination of Witnesses

Witness: MR ALEX BLOWERS, Head of Policy Development, Ofcom, examined.

Q118 Chairman: Good afternoon, Mr Blowers. I know that you are going to send us a comprehensive response to the innumerable questions we will ask you following this so you can tidy up anything that has been left out.

Mr Blowers: Yes.

Q119 Chairman: Thank you for that suggestion. We have read the brief summary background papers that you have published. We are going to diverge from the format that we sent you to try and hone in on some issues. We are going to try and concentrate on the scope of the Directive. We are going to discuss with you a range of issues there. We are going to discuss with you some questions around advertising, on quotas in programming, on issues of public interest and areas like that. Before we go into questions I fear we only have 45 minutes. Is there anything you want to say at all at this stage by way of introduction?

Mr Blowers: Lord Chairman, I would suggest we just dive straight into your questions. You are pretty warmed-up on this topic now.

Q120 Lord Haskel: The whole thing about this inquiry is it could be defined as the scope and I wonder if we could hear from you what your thoughts are. The proposal attempts to bring the merging media platforms, specifically the internet, under the existing regulatory framework for broadcasting. Perhaps you could tell us if you consider this attempt to be appropriate and what are the advantages and disadvantages that this regulatory approach might have?

Mr Blowers: That is a very good question. It is worth saying from our perspective that we would define “appropriate” from an Ofcom perspective in a particular way which is an area that we could regulate effectively. We could deliver on the underlying public policy aims of the Directive in a way that was effective; effective in protecting citizens and

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consumers, but also could be done in a way that was proportionate and to the extent that that would be appropriate so that other people, including no doubt government, will talk about the economic impact of these proposals. I can certainly give you our views on that, but our primary focus in this area has really been can we arrive at a directive that we, as the regulator, could implement in a way that was satisfactory. The concern that we had really right from the outset when the Commission first started talking about a revision of the Directive was that they seemed to be going a lot wider than we felt was really appropriate in terms of the scope of the proposal. The system that we have inherited from the Communications Act is very clear that we apply some very strict rules to broadcasting and that, in our view, is the right approach that broadcasting has a special duty and a special set of considerations because it is a pervasive medium. It is in everybody's home, it has been shown to be a medium that can cause great harm and offence, so it is right that we have a system which carefully calibrates the acceptable conduct of broadcasters. That goes way beyond what we apply in the UK, for instance, under general law to print media or to other forms of media expression. Where we would start in a proposal of this kind is does the proposed extension of the scope strike an appropriate balance or does it simply choose or aim to extend broadcast-type controls to things which cannot really be regulated in the same way that broadcasting can. That was the concern we had from the outset that the kinds of things which would appear to be caught by the Commission were the sorts of things that really are much more appropriately dealt with in the same intellectual and legal framework that we apply to other forms of media expression which are not broadcasting. The debate really has been in two parts: the first part was getting anybody to agree with us that the scope was not what we thought it was. As veterans of European legislation you will know that it is important to play the ball rather than the man in the sense that it is important to address the content of what is written on the Directive and not simply the spin or the aspiration that accompanies it. What we certainly feared was that many internet-type services, weblogs containing video content, online gaming, for instance, would be caught by this proposal and it was almost as if nobody had thought that that might be the implication. We were very clear that those things should not be caught by this proposal because they are nothing like broadcasting. They do not have any of the characteristics of broadcasting that we would think would be appropriate to regulate in the same way as broadcasting. There is a kernel of new services which will look and feel more like traditional TV. Some of us already have video-on-demand services delivered to our TV set and that will typically be delivering Hollywood movies, sports, comedy

programmes, documentaries, drama, formats already established and quite often programmes that have simply been re-purposed for a video-on-demand platform. There the case for some form of TV-like regulation is clearly a lot stronger. People watching this content via their TV it is content which, in many cases, has been originally designed for TV and has simply been re-purposed or it is in formats which people are used to from the TV environment. Our argument from the outset was TV-like services—perhaps there is a sub-category there of video-on-demand, TV-like services which might be appropriately dealt with under this Directive—but all the other things, the true internet content, the things which individuals are putting up in the privacy of their own homes onto their personal weblogs or whatever it might be, those sorts of things we should leave outside of the scope. Our view of that has not changed since the outset of negotiations.

Q121 Lord Haskel: Could you say how you would wish the non-linear broadcasting to be defined in the Directive?

Mr Blowers: The non-linear tier needs to be defined as essentially, as I described it, TV-like services and there are now words floating around in the system in the Council Working Group and also in parliament that will go a long way towards addressing that particular requirement. We will explicitly say that what we are regulating is a subset of audiovisual media services, a subset of non-linear and that subset is those things where consumers might reasonably expect TV-type regulation because it is a TV-type service.

Q122 Lord Haskel: Do you think that Ofcom should have no regulatory powers at all on the other things apart from what you call the broadcasting-like services?

Mr Blowers: What we require is a different kind of oversight for those other types of services. This is an important point to emphasise because certainly we are not asking and I do not think anyone else that you will meet is saying there should be a free-for-all as far as services not caught by this Directive is concerned, but there are a range of existing legal powers, legal instruments, which already regulate other forms of non-linear content and we think those are more appropriate for the things which are not TV-like; it is more appropriate that they be dealt with under those other instruments. That is a combination of the criminal law for the most heinous forms of content, if I can put it in those terms, and the e-commerce Directive which already provides a statutory legal framework around things like the identification of services and that already applies to many other things that will be caught by this Directive. Even at European level there is already a pre-existing

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framework that deals with many of these things. It is particularly important that we play a role in guiding and assisting the industry to develop effective co-regulatory systems for that extended range of services. That is something that we have been doing actively and will continue to do, so it is not a free-for-all. What we are saying is that that broadcast-type regulation cannot sensibly be applied outside of those things that I have described.

Q123 Lord Haskel: How would Ofcom keep the public informed as to where they consider types of activity to be linear or non-linear? We heard from Orange, for instance, on Monday. They said that the industry is moving so quickly it is a moving target. How would we know what kind of regulation would apply?

Mr Blowers: As always when Ofcom is involved there would need to be at least one consultation and possibly several consultations. We are famous for our appetite for consultations. We would expect as part of the implementation process to produce quite a lot of guidance as to what services we felt fell into the category that was caught and what did not. The fast-moving nature of the industry is a real problem here and it is a lot easier to deal with that through reissuing guidance and working with the industry to develop our approach in real time alongside the industry than it is to set very tightly circumscribed legal categories now. One of the other things we see as an advantage of moving away from some of the Commission's proposals on scope and the definitions that it is using is that we create an appropriate degree of flexibility so that our rules can actually evolve over time. For instance, it seemed to us quite possible that over time the TV-like nature of services may actually diminish, but potentially could increase, so consumers appetite for a particular form of protection could change over time and we need to be able to respond to that.

Q124 Lord Haskel: You may, in fact, review your regulatory activities as the thing develops.

Mr Blowers: I have every expectation that we will be regularly reviewing this area for the next several years because things are moving so fast. Certainly up until the point of digital switchover it is very, very difficult to say what the mature form of the industry will be.

Q125 Lord Haskel: So rather than just leave it alone because it is moving so fast you would just review the regulation as quickly as the industry is moving?

Mr Blowers: Yes, exactly.

Q126 Lord Haskel: Do you think you could do that?

Mr Blowers: The other thing that we will be looking to do is to—this is one of the recurring themes that comes out from the transcripts of the evidence that I have seen already so I will not labour the point—the important role of the industry working with the regulator through what we term “co-regulation” it is very, very important that we have a process to sit down with the industry and work through these problems with the industry in real-time. A lot of responsibility here will be on the industry itself. If they know that they are launching new services and new products which are likely to cause new modes of behaviour and new expectations amongst consumers and that at the point they are actually developing and launching services what are the regulatory implications of this? I do think that we are moving away from a traditional model where the regulator opines intermittently on the importance of particular things and the industry reacts to one where we are actually working with the industry in an initiative process as they develop those services

Q127 Lord Haskel: What is the difference between that and self-regulation? We seem to be getting awfully close to it.

Mr Blowers: The important thing is that we recognise the appropriate role both for the regulator and for government to have some oversight in the overall integrity of the system. Self-regulation works very well but certainly many people that we have spoken to in the industry have made the point themselves that it is important to have the parameters within which self-regulation operates clearly set out by the public institutions. There is a reluctance to take on functions of policy-making on behalf of the government and that is not what we aim to do. We are not looking to privatise our responsibilities. It is about finding that balance between the two respective roles.

Q128 Lord Roper: On the question of scope, Mr Blowers, could I ask your views on two matters: first of all, in your answer to Lord Haskel you talked about the development at a parliamentary level. There was of course the report from the Culture Committee bringing together reports from the other committees which was considered in Brussels on Monday. Do you feel that is going in the right direction as far as its concept of the scope and non-linear are concerned?

Mr Blowers: We are in much better place at this date than we were six months ago, both in the Council Working Group from what I understand the process there and also in parliament. I have to say that our watchword is really continued vigilance as far as that is concerned because we have seen in other directives that the apparent emergence of breakout of

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commonsense in parliament does not necessarily lead to a good outcome when the decision goes back into the plenary and there are many stages in both parliament and the council I suspect before we arrive at the final settlement here. I am cautiously pleased at what we have seen but I still think there is quite a bit more to do there.

Q129 Lord Roper: My second question is I understand that Ofcom recently commissioned a study from around Europe on two particular non-linear sectors: online games and mobile multimedia. Would you like to say something about that and whether that is in the public domain and whether those are two sectors which you feel should certainly be outside of the scope of the Directive?

Mr Blowers: First of all, let me explain why we asked them to do that particular study very briefly. We were concerned that the Commission impact assessment process had missed a potentially very important impact which was the indirect effect on the business behaviour of introducing these rules at a time when this industry is taking off, and we were concerned that in a very portable global world companies would respond to heavy regulation in Europe simply to up sticks and carry out the activity in a different jurisdiction. We asked Rand to look particularly at that set of issues and the conclusion was very clear. Both we and Rand felt that the online gaming industry should simply be left outside of these proposals all together. It is a highly portable industry. It is one where there are great opportunities potentially for Europe, but at the moment we are second-fiddle to other parts of the world, and it is the kind of sector where people have a discussion where they will say we are bored with being in the UK; why do we not all ship out to California? How would that be? That was an area where we felt the right approach was simply to exclude. Mobile multimedia is a little different. There is no doubt that our mobile companies will be generating exciting new content. Of course we want to get the rules around that light touch but there is more scope there to work with industry on the kind of model that I have been describing, a co-regulatory model. I do not see it as critical to exclude mobile from the scope of this Directive, although the mobile companies may feel differently.

Q130 Chairman: We will come back to the question of self-regulation later on. I have a couple of supplementary questions on that. You have said that there was some merit in having some non-linear audiovisual media services included in the structure and then you went on to say that what you meant by that was “television-like service”. I have to say that does not seem to be the kind of definition that would hold up in a court of law. If I was in the industry I

would be totally baffled if I had to interpret that. I have heard it said that you use words, for example, like films-on-demand or video-on-demand. Is this not regulators struggling to find a way of defining something so that it can regulate it? That seems totally anti-liberal and pro-regulation at all costs. Not you, but it sounds to me like someone is trying to justify regulating something.

Mr Blowers: Let me take the definition of problems first. If we did not feel it was possible to come up with a workable and vigorous proposal then we would be where we were at the outset which was let us not extend this Directive at all; let us simply tidy up the definitions of “broadcaster” and leave it at that and all these other new services we will leave to be addressed at a future time. We think that a combination of different definitional elements within the Directive, not just the TV-like language that I referred to, but a number of other important elements like references to editorial responsibility—who has editorial responsibility defines who is responsible for the service—in combination can create a definition which the industry will work with. We have had quite extensive discussions with UK and European stakeholders about whether a text along the lines that is now emerging is something that people would be prepared to live with. I do not know what industry stakeholders would say to this Committee but I do know that in those discussions we have gone a long way in building a consensus that the kind of language and the kind of text that we are supporting is one which actually is a workable basis on which to go forward. On the question of whether this is a regulation looking for a problem—

Q131 Chairman: A regulator looking for a problem?

Mr Blowers: In our case we have taken a very consciously deregulatory approach in a number of areas; deregulatory in the sense that we are trying to find an appropriate level of regulation for the issues that we are being asked to regulate. Generally speaking, in Europe there is much more of a cultural tendency to regulate unless there is a very good reason not to. If you are asking could we have lived with the current UK position of no regulation in this area, although with some reserved powers the Communications Act could be extended, as an aside that is where we are at the moment on video-on-demand. The position is that the scope of the Communications Act would be extended to catch video-on-demand, but because there is an existing industry self-regulatory scheme there is no requirement to trigger provision. That seems to me to have been a perfectly acceptable basis on which to go forward. We are where we are. We have to find a common ground with 25 Member States and Ofcom’s advice to the Government has been the kind of text that we are describing is something that we

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could live with that might attract sufficient support amongst our peers in Europe and will not have the over-regulatory effects that we have identified as being potentially dangerous.

Q132 Chairman: It is creeping regulation. To help the Committee go on to the next stage of questions, what would be the effect of the Directive upon non-linear services; that is your television-like audiovisual media services? What would be the current proposal and your view of what it should be?

Mr Blowers: The way that we unmodified the Commission proposal would have required that we introduce some form of licensing system for any service that was caught. We did a very rough calculation of how many licensable entities we thought that might involve and when we got to about 50,000 we decided to stop counting. We moved from a situation where we had 750-800 licensable content service providers to a situation where we would have had 50,000, hence our concern about the extension of scope. If the Commission were here they would say that reflects a particular UK preoccupation with licensing systems. We did look at other alternatives but we felt that if you were forced to extend the scope, probably some system of licensing would be the least onerous way of doing it. These are difficult matters to leave just to the courts. That is why the initial proposal did not butter any parsnips, if I may use that expression, in Ofcom. What we think the effect of the kind of text that is now emerging—obviously this is a moving target so it is quite difficult—if we got what we are looking for, a cut-down extension of scope only to TV-like services and an agreement that we could have a co-regulatory system of implementation, what we would then expect to happen is that we would work with industry to set up appropriate co-regulatory schemes which look very much like the existing self-regulatory initiatives but they would be underpinned in some way by Ofcom and the Government. We would give them their marching orders and we would say these are the parameters of the scheme that we would like you to put in place.

Q133 Chairman: I am trying to help the Committee to go on to the next stage. I do not want you to expand on each part but there would be certain controls/regulations of linear services—real television services—I am trying to make this distinction between “like” and “not like”. Real television services would be subject to certain regulation. Like television services would be subject to somewhat different regulation. What would be the difference? Just the headlines because we are going to go into more detail later.

Mr Blowers: Essentially the difference would be that, as now, the linear broadcasters we would regulate through a licence and that licence would require compliance with certain things like a broadcasting code and an advertising code and set out detailed rules that the licensee has to comply with. What we hoped to achieve in the non-linear tier would be very much the same substantively in terms of codes that would implement the key requirements of the Directive, but instead of having a licensing system we would have a system of endorsing a co-regulatory scheme that the industry itself would put together, so that would be the difference. Going back to the point that Lord Haskel raised, that is a system that is more flexible to deal with the real time change in the industry and it also places the onus on the industry to work with us to find the right solutions.

Q134 Lord Roper: On quotas I wonder whether you would like to say something about that? Quotas are obviously proposed to be extended but do you consider that they are at all an appropriate mechanism for promoting production of European works?

Mr Blowers: The specific question here has been whether the language in relation to support for European works in the non-linear tier is unduly onerous or not. That is definitely an area that is a moving target because, as you can imagine, there are some people in the Council Working Group who would like to raise the bar as far as quotas are concerned and there are others arguing for a much lighter touch. Our view is that the wording that the Commission has proposed in this area is acceptable. It would leave it primarily to the Government rather than Ofcom to determine the appropriate means of implementation here in the UK. That is an issue that no doubt you will raise with the Minister. Our view would be that it would certainly be appropriate to adopt a light touch regime in this area. An attempt to impose a very heavy quotas regime on new emerging services for me would feel like a mistake.

Q135 Lord Roper: You do not think that the extension which is proposed by the Commission to the online services is particularly onerous at the moment?

Mr Blowers: Not provided we retain that flexibility as to how we implement it in the UK. Small changes in language here could have a big effect and that is one of the things that we all need to keep a very close eye on in negotiation.

Q136 Chairman: Non-linear services would be subject to regulation, however light touch, on proportion of European content.

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Mr Blowers: What the actual requirement of the Directive is is that Member States have to report on what measures they have introduced to promote European works in relation to the non-linear tier. Promotion of European works could mean an array of different things: it could mean financial support; it could mean the specific tasking of particular bodies with the creation of European works; it does not necessarily mean a quota system. That is an important point here. That is why I am saying the choice of language is all important. It does not necessarily have to be a specific proportion of the catalogue.

Q137 Chairman: There would be no expectation of a proportionate quota of European content henceforth in the television or television-like services?

Mr Blowers: I am trying very hard not to duck the question but it is an issue that government will have to take a view on in due course when they implement the Directive.

Q138 Chairman: It is not in the draft Directive.

Mr Blowers: Assuming the wording stays the same as it is at the moment in the Commission's original proposal there would be an obligation on the Government to look into this area and to decide what measures were appropriate and it would then have to report on what measures it had introduced within a set timescale; I think it is three years. That is what we are being asked to do at the moment. We are not being told to put in place a quota system.

Q139 Baroness Eccles of Moulton: I am puzzled about this. It seems to me that the linear tier is relatively easily defined. When you get into the non-linear tier it seems to be multi-tiered. When one talks about the possible imposition of quotas are in any way an obligation on the Government to report back about what it is doing about the non-linear tier, it cannot be meaning everything that is within that tier because, for some of it, it would be completely inappropriate. Once again, we are in grave difficulty of definition, are we not?

Mr Blowers: Let me answer that in two ways that may be helpful to the Committee. First of all, that is why I think this flexibility for national governments to determine how we implement this provision is very important. We should not lose sight of the importance of that provision in the negotiation. The second point to make is that in other European countries this debate feels entirely different. If you spoke, for instance, to our peers in France they would say that they absolutely intend to impose quotas on video-on-demand catalogues. They would not try and impose quotas on video blogs but they would definitely try and impose

quotas on video-on-demand catalogues. I suspect that the only way that that particular circle is going to be squared is to give Member States some freedom as to how they choose to implement this. That is my sense of the raw politics around that particular provision.

Q140 Lord Swinfen: Mr Blowers, what will be the position of the BBC on product placement, bearing in mind that they are not supposed to advertise?

Mr Blowers: My understanding of the legal position would be that the BBC would be required to comply with any restriction on product placement that would take place. As far as I am aware, the position today is that the BBC, like other broadcasters, does unpaid for product placement. They have a process of where they need suitable props for a programme they will outsource those props but there is no payment in either direction. If an absolute ban remains in force on product placement then that ban would apply to the BBC as it applies to any other broadcaster.

Q141 Lord Swinfen: Do you think that the proposed rules adequately address the emerging business models for content provision over the new platform?

Mr Blowers: That can be answered in two ways. Going back to scope, it is important that we get scope right so that many of the new opportunities in new business models are not mired in overregulation. It is also important that an appropriate degree of freedom is given to traditional broadcasters to advertise. Some of the detailed rules that the Commission has proposed to remove from the Directive in our view it is appropriate to do so and getting that balance right. There is an issue here about the relative attractiveness of the traditional what we call the "spot" advertising market; the adverts that appear interspersed with programmes and other forms of advertising. If we keep the rules too stringent on spot advertising, whilst creating a very open environment for other forms of advertising, then potentially that could be unfair for broadcasters. There is a need to avoid overregulation of advertising opportunities in the non-linear tier and to progressively remove some of the rules that apply to broadcasters which, frankly, are now probably beyond their sell-by date.

Q142 Lord Swinfen: I am wondering whether there are any other restrictions apart from what has been proposed that you would want to see on marketing and advertising, particularly with regard to children's programmes?

Mr Blowers: It is important to get the balance right in this area. Our view is that the rules that apply in particular to children need to evolve with consumers

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and citizens' expectations about protection for children. As the Committee will probably be aware, there has been a lively discussion about food advertising for children which is taking place at present. We are in the process of considering our proposals on that that we will be making shortly. We therefore recognise that there are particular areas of concern in relation to advertising to children that this Directive needs to address. In fairness, I think the Directive does provide a clear framework for applying stricter rules to advertising directed at children.

Q143 Lord Roper: Is there one problem as far as this is concerned and that is so far as Article 11(3) and Article 11(5) are concerned, which they are going to put together into Article 11(2) insofar as this will mean that they will all be subject to the new 35-minute rule, this might have the effect as far as commercial television stations are concerned to form some sort of disincentive in putting either children or news programmes on. What is your view on that?

Mr Blowers: We are sympathetic to the argument that the 35-minute rule should be removed in its entirety. That has been a pretty clear UK position since the outset. The 35-minute rule reappeared mysteriously during the course of the inter-services consultation within the Commission. I do not even think that the Commission officials really believe in it. To clarify a point I was making, it is entirely appropriate to remove those kinds of artificial restrictions and certainly to look very hard at an artificial impediment to the creation of children's programming. Some of the more qualitative restrictions on advertising to children remain entirely appropriate and we do not have any issue with the maintenance of a fairly strict base of regulation as far as that is concerned.

Q144 Lord Haskel: You would be sympathetic to the view that we have had put to us that the market can take care of advertising. Those platforms which advertise too much would lose customers and the ones that advertised modestly will keep their customers. Would you agree with that?

Mr Blowers: There is some evidence from commercial radio which does not have these kinds of restrictions that that is in fact the case. It is also important to note that the removal of these particular restrictions on things like centre breaks do not alter the fact that the Directive still has some absolute maxima for the amount of advertising that can be carried both per hour and per day. We would not be relying entirely on a self-correcting mechanism market. There would still be some restrictions in there.

Q145 Chairman: The evidence to us appears to suggest that given the freedom for product placement traditional television would anticipate product placement as a sort of commercial revenue which would gradually start to replace the diminishing spot commercials and so on. Is that a fair assessment of where the market is likely to go?

Mr Blowers: We are slightly sceptical about this particular claim. The reason is that if you look at the US' experience and look at the relative size, product placement having been permitted in the US now for a number of years, if you look at the relative size of the product placement market as compared with the spot advertising market, the latter still massively outweighs the former and the evidence advanced to us in our recent consultation on product placement suggested the product placement market opportunity is somewhere in the £25 million to £100 million range, whereas in 2005 the value of the spot advertising market was something like £3.5 billion. It is important to have that sense of the relative proportions of these things. Where there is an argument in favour of relaxing product placement, I do not think we would accept the argument that it is an inevitable and necessary substitute for spot advertising revenues.

Q146 Chairman: What about the use of split screens and so on? Increasingly younger people are certainly watching the internet on their television screens and so on. The ability technically to show advertisements while at the same time having a TV programme on is already rife on the internet and could clearly easily be replicated on what I would call the real television. Presumably that would be permitted? The draft Directive seems to be framed in traditional terms—television breaks, spot advertisements, placements—but meanwhile all around the picture can be advertisements. Am I correct?

Mr Blowers: There is an interesting set of challenges around the use of multi-screen presentation or multi-advert presentation on the screen. From our perspective there is life in the old dog yet as far as the spot advertising model is concerned. With one or two exceptions, most channels are retaining that model. They could have moved to an overlay model.

Q147 Chairman: Is that kind of commercial revenue earner regulated?

Mr Blowers: It would be caught by our existing rules. It would not be permissible to have, for instance, a rolling banner ad appearing at the bottom of the screen.

Q148 Chairman: In the future internet-based media which falls under your television-like services would find that they would be regulated on their use that

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most internet media make their money from which is from these kind of adverts.

Mr Blowers: I do not think so is the answer because the specific rules that we would apply today to broadcasters in the linear tier would not seek to impose the same rules in the non-linear tier. It would be possible to produce a service that did have some of these new types of advertising in a non-linear service and they would not be restricted in the same way. The reality is that our existing rules in the linear tier are designed for that traditional model and that holds good for most of the services we are currently regulating in the linear tier.

Q149 Chairman: The question of regulating public interest issues around the theme of promotion of race-hatred and obviously issues of violence and children and so on, my understanding is that government feel that what is in the draft Directive at the moment is unnecessarily wide and that this could be simplified. Could you explain this? Clearly in the outside world if there is a difference between the Commission and the Government on what should be regulated—for example, violence and expressions of hatred—it is clearly significant. Can you explain this to us?

Mr Blowers: There are three dimensions to this. One is that every government must strike a balance as it sees fit between the freedom of expression and prohibition of certain forms of expression which may incite hatred against particular groups. The Government would argue that that balance is something which is best struck at national level by national governments reflecting the particular circumstances, the particular history and the particular considerations of their own country. There is a top level point of principle here of whether it is really appropriate to try and strike a common denominator balance between these things at European level. That is the first point to make. The second point is really about, in aggregate, the effectiveness of all the systems of control that are available to us to deal with these kinds of problems. Incitement to hatred is a criminal offence in the UK and it is right that it should be dealt with as a criminal matter. Ofcom apply a much higher standard to the expression of opinion on broadcasters. That goes back to the point I made right at the beginning of the session that broadcasters have a particular duty of care because it is a much more pervasive medium. The second point to make is that it is not appropriate to think about a broadcast-type approach to these issues being rolled out across all forms of service. I do not think that is the right approach. The third thing is have we got the right structures in place? It is work-in-progress. A lot of progress has been made by the Government, by the industry putting together self-regulatory industries and working with the

Government and there is a role for the regulator. We all need to continue to work to develop new responses because new issues and new problems are arising. The broad structure and the broad approach that the UK has adopted seem to me to be correct. I do not believe that it needs to be radically redrawn.

Q150 Baroness Eccles of Moulton: Your answer to the former question happily leads into my question. We have gained the impression during the course of the inquiry that we do quite satisfactorily operate a system of self-regulation and from what we have heard the industry is reasonably comfortable with the degree of regulation that they have to operate under now. My question really is about what damage the Directive could possibly do to the regime under which we operate at present and what your view is first of all about that? I use the word “damage” advisedly because it seems that we are all supportive of the way the industry is regulated at the moment and whether you think we are heading in the right direction or whether there is more that could be done; just a general view of the threat that could possibly be apparent.

Mr Blowers: The Directive mark I, the one which we are all none of us able to discuss as we know the world has moved on, I think would have been in our view very damaging because there would have been no place for the existing self-regulatory initiatives. We could not have used them or built on them in terms of implementation of the new requirements. As a kind of psychological consequence we would have had a lot less willingness and commitment from the industry to continue to work to develop self-regulatory systems. Why would you do that? Why would you put the time and effort in if the expectation is that in due course the Government or the regulator will step in with their own prescribed model based on this new Directive? That was why we felt that would be very damaging. Going back to the point that I made earlier, we were also very conscious that we could end up regulating not very much in the sense that a lot of these activities could in reaction to overregulation simply be taken out of our jurisdiction all together which would have left us looking particularly foolish really. The potentially good aspects of this proposal is that it has supercharged efforts in the industry, and frankly probably in Ofcom as well, to think through some of these challenges around how we can develop models of effective co-regulation going forward that will have the benefit of existing self-regulatory systems but will also underpin the Directive. You could say that at least one good aspect of it is that it has made everyone think a lot harder about how we continue to improve on the system that we have.

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Q151 Baroness Eccles of Moulton: Presumably what we do not want is to have to have a lot of new legislation which means that what is now operated on a self-regulatory basis then becomes enshrined in law.
Mr Blowers: Exactly.

Q152 Lord Walpole: Do you think that if things go the way you think it is going the regulators throughout Europe are going to be able to cope? I have no idea how you can watch 350 stations or whatever we have in England at the moment. If they are entirely self-regulatory, all right, but you are going to have to watch them, are you not? All you regulators are going to have to watch them.

Mr Blowers: We have moved to a system in the UK, and this is not common across Europe, of essentially having a complaints-led approach so we do not routinely monitor. It is actually 750 channels that we licence here in the UK. There are simply insufficient eyeballs in Ofcom to physically watch them all, so what we do is we react to complaints and only when we receive a complaint do we intervene. The short answer to the question of whether regulators will cope is we probably need more acts of cooperation between regulators. Ofcom is seen as being probably at the upper end of the scale in terms of the capabilities in Europe in this area, and we have to be because we are regulating more than half of the channels in Europe. What we are looking to do is to export and disseminate our best practice and cooperate more with other regulators so that we can try and raise the overall level of performance.

Q153 Lord Roper: The Government are very keen that the final document should contain something on media literacy and want to involve the regulators in developing programmes of media literacy. Is this something that you are looking forward to doing and have you done a plan for it?

Mr Blowers: We already have an extensive programme of activities on media literacy. I am very conscious of the time, I would be very happy to cover this issue in a supplementary note if that would be of interest.

Q154 Lord Roper: Thank you very much.

Mr Blowers: We have been strongly encouraging the inclusion of references to media literacy. If there are three legs on this particular milking stool, one is the activity of the regulator, one is the activity of co-regulatory schemes and the other is media literacy and empowering consumers to understand the issues and protect themselves in this new environment. It is a very, very important area. If you want to know more about what we are doing in that area I am very happy to cover that in a supplementary note.

Chairman: Mr Blowers, that was a *tour de force*. We are deeply indebted to you for your time, for the clarity of your answers and also for your very generous offer to take the dog that did not bark, as it were, and listen to what it would have said and send us some supplementary answers. On behalf of the sub-committee could I thank you very warmly indeed.

Explanatory memorandum on European Community Legislation

“Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities”.

“Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. Impact Assessment, Draft Audiovisual Media Services Directive”.

“Statistical Annex”

Submitted by the Department for Culture, Media and Sport

19 January 2005

SUBJECT MATTER

This document is the Commission’s proposal for the revision of the “Television Without Frontiers” Directive (TVWF).

2. TVWF Dates from 1989 (Directive 89/552/EEC). It was revised in 1997 by Directive 97/36/EC.

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Scrutiny history

3. The 1997 Directive was the subject of Commission proposals 7942/95 (COM(95)86) and 7233/96 (COM(96)200). These documents were the subject of Government explanatory memoranda dated 13 July 1995 and 8 January 1997.
4. In the House of Lords, the European Union Committee did not report on the proposal and cleared it from sub-committee B on 4 February 1997. In the House of Commons the European Scrutiny Committee reported on the first EM in their 25th and 26th report for 1994–95 and recommended a debate in European Standing Committee.
5. That debate took place on 31 October 1995. The second EM was reported on in the Committee’s 9th report for 1996–97.

The Television Without Frontiers Directive

6. The TVWF Directive has two purposes. As explained in the Commission’s impact assessment, these are to ensure:
 - the protection of fundamental public interest objectives in terms of the content of TV programming; and
 - the free movement of television broadcasting services within the EU.
7. To achieve these aims, TVWF sets minimum standards for the rules which Member States impose on the television services which they authorise. These rules concern public access to coverage of major events, proportions of European and independently-produced content, film rights, advertising, sponsorship and teleshopping, the protection of minors and public order, and rights of reply.
8. At the same time, TVWF requires that Member States do not restrict the retransmission in their territory of television programming originating from other Member States, so long as this meets the TVWF rules. This is known as the “Country of Origin” principle. In this way, the Directive creates a Single Market in the EU television broadcasting industry.

The Commission’s proposal

9. The Commission’s proposal takes the form of amendments to the existing TVWF Directive. Some parts of the Directive would remain unamended. Examples are Articles 4 and 5, the “quotas” which TVWF sets for European and independently-produced TV programming. They would thus remain in force as they stand, though their scope and thus their effect would be altered (they would apply to “linear services”, as described at paragraph 20 below).
10. One of the Commission’s proposals is that the Directive be renamed, to replace the words “the pursuit of television broadcasting activities” at the end of its long title with “the provision of audio-visual media services (Audio-Visual Media Services Directive)”.

The Commission’s reasons for proposing changes—the scope of the Directive

11. The Commission have set out their reasons for proposing to amend the Directive at section 3 (“Problem Definition”) of their Impact Assessment (document ADD1). They say that the Directive, since its 1997 revision, has been “overtaken by technological and market developments and has to some extent become outdated” (para 3.1).
12. Since 1997 a range of new technologies—including PVR’s (personal video recorders), IPTV (Internet Protocol TV) and other Net and broadband offers, VoD (video on demand), and mobile services has become available to deliver TV and TV-like products. Some of these products are scheduled services on the model of traditional broadcasting, in which it is the supplier who decides what is broadcast and when. Others consist of what the Commission call “non-linear” services, in which it is the consumer who determines what, from among the available programme options, is transmitted and when.

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13. As information society technology has developed, the different platforms are increasingly able to offer the same very wide range of services (the phenomenon known as “convergence”). The Commission’s core concern—see 3.2 of their impact assessment—is that keeping the TVWF Directive in its current form would “aggravate increasingly unjustifiable differences in regulatory treatment between the various forms of distribution of identical or similar content”.

Scope of the Directive—the Commission’s proposal

14. At present, TVWF applies to “the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public . . .” (89/552/EEC as amended by 97/36/EC, Article 1a).

15. As mentioned above, the Commission propose that TVWF should become an “Audio-visual Media Services Directive”. Its scope of application would become (any) “service as defined by Articles 49 and 50 of the Treaty, the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2a of Directive 2002/21/EC of the European Parliament and the Council” (Article 1a of the proposed revised Directive).

16. The reference to Articles 49 and 50 of the Treaty confines the scope of the Directive, in general terms, to services which are carried out on a commercial basis (including the activities of public service broadcasters such as the BBC). Directive 2002/21/EC, generally known as the “Framework Directive”, defines electronic communications networks—both it and the current Commission proposal cover the Internet, all mobile networks, and all broadcasting networks.

17. However, Directive 2000/31/EC, generally known as the e-commerce Directive, regulates the provision of “information society services”. These are defined by Directive 98/34/EC, as amended by Directive 98/48/EC, as services “normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”. Hence, the proposed revisions to the TVWF Directive would mean that the ambit of the TVWF Directive would overlap with that of the e-commerce Directive as both would relate to services provided over the Internet and all mobile and broadcasting networks.

Linear and non-linear

18. The effect of the Commission’s definition at proposed revised Article 1(a) would therefore be that the revised Directive would cover all commercial media services whose principal purpose was the provision of moving images to the general public, and which provide these images over the Net, mobile networks, telecoms networks, terrestrial, cable and satellite broadcasting networks, or over any other electronic network. These the Commission calls “audio-visual media services”.

19. These audio-visual media services would be divided into two categories, linear and non-linear. Within the basic scope of the Directive, non-linear services are defined (propose revised Article 1(e)) as those in which “the user decides on the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider”.

20. Linear services are not specifically defined, but would be broadly comparable to scheduled TV broadcasting. Proposed revised Article 1(c) says “television broadcasting” or “television broadcast” mean a linear audio-visual service where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule”.

21. The Directive would not cover sound-only services, and so would exclude radio (the existing TVWF Directive equally does not cover radio).

The Commission’s proposed rules for linear and non-linear services

22. The Commission’s proposition is that all audio-visual media services, linear and non-linear, should be subject to a “basic tier” of rules, whose details are set out at Articles 3c to 3h of the proposed revised Directive.

23. As well as this “basic tier” of rules for all audio-visual media services, the effect of the Commission’s proposal is that linear services, but not non-linear ones, should be subject to requirements about the coverage of major events, quotas of European and independently-produced programming, advertising, and rights of

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reply which are similar to those which the TVWF Directive already imposes upon television broadcasting services (in Articles 3 and 3a, 4 and 5, 10 to 20, and 23 respectively).

24. The Commission's proposals would in particular significantly simplify the rules in the TVWF Directive that relate to commercial communications. Under the current TVWF Directive (Article 18.1) there is a daily limit of 20 per cent on the amount of time that television stations can devote to advertising. Article 18.2 sets a similar hourly limit.

25. In the proposed revised Directive, Article 18 would set an hourly limit of 20 per cent, but there would be no daily one. In the proposed revised Article 11, programming such as films, childrens' programmes and news programmes may be interrupted by advertising once every 35 minutes. This compares with a limit of once every 45 minutes for films, and once every 20 minutes for news and children's programmes, at Articles 11.3 and 11.5 of the current Directive.

The Country of Origin (single market) principle—the Commission's proposal

26. As explained at paragraph 8 above, the existing TVWF Directive embodies a "Country of origin" principle which creates a Single Market in television broadcasting services. The amendments to the Directive which the Commission propose would leave that intact, while extending its scope to cover audio-visual media services (as defined at proposed revised Article 1(a)).

27. At proposed new Articles 2.7 to 2.10, however, the Commission create an exception in cases of "abuse or fraudulent conduct". These proposed Articles would allow a Member State to take proportionate measures against a media service provider which was established in another Member State if it directed "all or most of its activity to the territory of the first Member State".

28. It would be for the Commission to decide whether any measures taken in this way were compatible with Community law. If it decided that they were not, the Member State in question would have to refrain from taking them.

MINISTERIAL RESPONSIBILITY

29. The Secretary of State for Culture, Media and Sport has responsibility for policy matters relating to broadcasting and the implementation of the EU Directive "Television Without Frontiers".

30. The Secretary of State for Trade and Industry has responsibility for communication and content industries likely to be affected by the proposed amendments to the Television Without Frontiers Directive, and for the e-commerce Directive and other Directives governing electronic communications networks and services whose applicability are likely to be affected.

LEGAL AND PROCEDURAL ISSUES

31. *Legal basis*—the amended Directive is proposed under Articles 47(2), 55 and 151 of the Treaty. Co-decision and QMV (Article 251) also apply.

32. *European Parliament procedure*—Assent.

33. *Voting procedure*—The Directive can be approved by Qualified Majority Voting (QMV).

34. *Impact on UK law*—To be incorporated within three years of adoption.

35. *Application to Gibraltar*—Yes.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

36. Yes.

SUBSIDIARITY

37. The Government is content that the issues addressed in the Commission's proposals are suitable for Community action, and that it falls within the Commission's competence to propose the changes which it has. But as explained below (in paragraphs 48 and 49) the Government has important reservations about what is being proposed.

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CONSULTATION

Consultation by the Government

38. The Commission published these proposals for the first time on 13 December 2005 and the UK Government has not yet formally consulted about them. There has however been a great deal of informal consultation about the matters to be covered by the Directive in parallel with the Commission's consultations.

39. We have (jointly between the Department for Culture, Media and Sport, the Department of Trade and Industry and the Office of Communications—DCMS, DTI and OFCOM) set up a UK-based stakeholder group that embraces a very wide range of interests with specific concerns about TVWF and what the Commission are now proposing to do with it.

40. As well as broadcasters, the group includes internet service providers, mobile phone operators, the software industry and civil society groups. This group met several times during 2005 as the Commission's thinking developed, and has met again since the publication of the proposed Directive on 13 December last year.

41. Now that the Commission has published its proposals, we will carry out a formal consultation exercise on them. We will use the results of that to inform the Regulatory Impact Assessment and Small Firms Impact Assessment.

Consultation by the European Commission

42. The European Commission began their own consultation on the proposal in 2002, when they sought comments from Member States and others. The results of that can be found on their website. The UK responded to this consultation.

43. The Commission produced "issue papers" on six key TVWF issues on 11 July 2005. These papers were discussed at a major international broadcasting conference specifically on TVWF which the UK Presidency of the EU organised, jointly with the Commission, in Liverpool from 20 to 22 September.

44. The UK responded formally to the Commission's 11 July papers in November 2005.

45. Earlier in 2005, OFCOM, with support from DCMS and DTI, had commissioned an independent assessment of the impact of the Commission's proposals, as they were then understood to be, from Indepen, Ovum and fathom. Their report, published in September 2005, is available on the OFCOM website (www.ofcom.org.uk).

46. OFCOM's consultants had carried out their work on the assumption, which was current at the time it was commissioned and reflected discussion in the Commission's 11 July issue papers, that the Commission would be proposing to extend the scope of the Directive to all networked audio-visual media services rather than just to those whose principal purpose was their "provision . . . in order to inform, entertain or educate, to the general public". We believe the discussions at Liverpool played a key role in the Commission including the "purpose" of a service in its proposals.

REGULATORY IMPACT ASSESSMENT (RIA)

47. We will develop the Regulatory Impact Assessment in the light of the forthcoming consultation and of the work that has been done on behalf of OFCOM and the European Commission. Once finalised, we will forward it as a supplementary Explanatory Memorandum.

POLICY IMPLICATIONS

48. The UK Government has serious reservations about important aspects of these proposals. The discussions which we have had with industry have revealed serious concerns, especially in the online, broadband and mobile sectors, that rules of the kind proposed could dampen the growth of these vitally important and rapidly developing areas.

49. Especially given that these industries are so easily portable between jurisdictions, this could prejudice the ability of the EU as a whole to meet its i2010 targets and the Lisbon Agenda. There is also a concern that the distinction between linear and non-linear services in the Commission's proposal could rapidly become

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redundant given the speed and dynamism with which the new media industries are developing and deploying new products with which to exploit the new technologies.

50. Insofar as the proposals affect traditional television broadcasting, the Government welcomes the deregulation which is proposed but feels that it could go further, especially as it remains within member States' own margin of appreciation to impose stricter regulation of their own broadcasters if they wish to do so.

FINANCIAL IMPLICATIONS

51. Yes. Results of RIA awaited.

TIMETABLE

52. The amended Directive will be subject to the co-decision process involving the Council of Ministers and the European Parliament. It may take 18 months to two years to reach agreement, resulting in a new Directive in 2007. The UK and other Member States would then have up to three years to bring it into effect.

James Purnell

Minister for Creative Industries and Tourism
Department for Culture, Media and Sport

Supplementary memorandum by the Department for Culture, Media and Sport

NOTE: This document sets out the Department's answers to the 11 questions which the Committee has set out in its call for evidence. These answers are based on the original proposals for the amendment of the Television Without Frontiers Directive which were published by the European Commission in December 2005 (COM(2005)646 final) and which are the specific subject of the Committee's Inquiry. They do not reflect possible amendments to these proposals which have been under discussion in the Council of Ministers and the European Parliament since December 2005.

3(a) *In our current rapidly converging and evolving technological and market environment, is it appropriate to try to recast the regulatory framework?*

We agree that technological and market changes have made it necessary to reconsider the regulatory framework for television broadcasting at the European level.

2. As the question implies, these changes—in particular, the spread of digital television, broadband, and mobile networks, and the ever-increasing capabilities of the devices which these networks serve—has led to the phenomenon of convergence. As the range of what is available on each platform increases, there is increasing overlap or interchangeability in what they are capable of offering. Television and television-like content can be offered over the Internet and over mobile networks. Conversely, some types of television service can offer interactive elements that were formerly the preserve of the Internet or mobiles (TV bingo channels offer a good example of this).

3. This in turn has led to a massive expansion in the number of actual or potential products, services and business models. Some of these, such as video-on-demand delivered over the Internet, are adaptations or variants of the 20th century model of broadcasting to which we have become accustomed.

4. But others, such as interactive games and weblogs involving user-generated content, are entirely new, and are in turn beginning to erode the clear distinction that has existed in the media world for many years—indeed, for centuries—between producer and consumer. Anyone can be his own Web publisher, and convergence will increasingly mean that there will be a wide range of platforms on which this user-generated product is accessible.

5. We do not disagree with the proposition that now is a suitable time to re-examine the regulatory framework which applies to these services—although it will plainly be important to reassess the issue in not very many years' time. It does not necessarily follow, however, that we need to recast that framework to embrace all these services—and indeed the Government's strong view is that this is not what is needed.

6. At the EU level, some degree of modernisation of the rules which apply to TV broadcasting would in our view be appropriate, in particular in as far as this involved the introduction of better regulation principles and a lighter regulatory touch. But that is not what is on offer from the European Commission's proposal for amending Directive 89/552/EC (the Television Without Frontiers—TVWF—Directive).

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3(b) *What are the advantages and disadvantages of regulating this area? Are the regulatory costs proportionate to the benefits?*

7. At the national level, the power, pervasiveness and impact of television (and radio) broadcasting have always been thought to justify regulatory intervention by Governments in democratic countries. In our view they still do. In the UK, successive Governments have used their power to license and regulate, along with control of the allocation of the frequency spectrum, not only to secure fundamental standards in the acceptability of what is broadcast but also to ensure the continuing strength of public service broadcasting by the BBC, ITV, Channels 4 and 5 and S4C. We regard this as a major public benefit.

8. These national arrangements need to be kept under review and periodically updated. In particular, since they involve interference in free speech, they need to be kept proportionate to the public policy goals sought.

9. At the European level, the development of cross-frontier broadcasting technology, in particular by satellite, has provided an opportunity to realise the benefits of a Single Market underpinned by basic standards which all EU Member States are obliged to apply to their television broadcasters.

10. This Single Market is based on the rules set out in the TVWF Directive, in particular the “Country of Origin” principle which it embodies. Article 2 of the Directive sets out rules which assign jurisdiction over each TV broadcaster in the EU to its single “Country of Origin”. Article 2a, subject to a limited power of derogation, then requires Member States to “ensure freedom of reception” of these services on their territory. Articles 3a to 22a, and Article 23, set out the basic standards which Member States must apply to all TV services under their jurisdiction.

11. The Country of Origin principle in the TVWF Directive has proved central to the development of a genuinely pan-European broadcasting market. The benefits of this, in our view, come not only from the economic opportunities which it affords to multinational broadcasters (including many based in the UK) but also from the range and diversity of the TV services which viewers in the UK and around Europe can enjoy. The growth of European television services also serves to support and promote the consumer electronics and production sectors and associated services.

12. Any system of regulation comes with potential disadvantages. In this case, intervention at the European level risks having an unwarranted impact on freedom of speech and expression. It also risks affecting economic and technical development, and should therefore as far as possible operate on better regulation principles and with as light a touch as possible.

13. Beyond that, regulation at the EU level of broadcasting or audio-visual media services needs to be sensitive to the fact that it requires Member States to apply it to their own national services. Common standards which are set at Community level should be couched in terms which each Member State is able to apply in its own social and cultural context.

14. From the other point of view, the Country of Origin principle necessarily reduces the scope for the application of public policy interventions to TV services from abroad, which may take a significant share of the local market, and lead to advertising revenues accruing in another Member State.

15. So far as proportionality is concerned, the Government takes the view that the regulation of TV broadcasting at both the UK and the EU level has up to now been proportionate to the benefits which it has produced. The European Commission’s proposals for amending Directive 89/552/EEC would, in our view, enable this to continue so far as the regulation of television broadcasting is concerned (though we see room for improvement, especially in the light of increasing competition to advertiser-funded free-to-air channels).

16. But in as far as the Commission’s proposals would affect “non-linear” new media services, the Government’s view is that its regulatory costs would exceed its benefits, and by a considerable margin. The fundamental proposition underlying the Commission’s proposals is that a Single Market in these services would produce economic benefits, and that the imposition at EU level of the requirements set out in Articles 3c to 3h of the proposed amendment are a necessary condition for the creation of that Single Market.

17. There is already a functioning Single Market for these services, supported by Directive 2000/31/EC (the e-Commerce Directive). Our view is that the costs of imposing a new tier of sectoral regulation on non-linear services would be greater, and probably considerably greater, than the benefits that Europe would gain in terms of what can be only a minor improvement in the existing Single Market for them. They could cause economic damage to this dynamically expanding sector, in particular through the imposition of new, unnecessary regulatory costs which could discourage innovation and cause operators to relocate outside the EU.

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18. The partial Regulatory Impact Assessment which we published along with our consultation document on the Directive in June this year elaborated this argument. It is borne out also by a recent report from Rand Europe that OFCOM have published which concentrates on two “non-linear” sectors—online games and mobile multimedia—which could be caught by the terms of the Commission’s proposals.

4(a) *Does the Proposal sufficiently liberalise the provision of broadcasting services within the European Union?*

19. The basic rules which the existing TVWF Directive requires Member States to impose on broadcasters concern the protection of minors and public order (Articles 22 and 22a), rights of reply (Article 23), cross-border coverage of events of major importance for society (Article 3a), “quotas” of European and independently-produced content (Articles 4 to 6), film rights (Article 7) and advertising (Articles 10 to 19a).

20. The Commission’s proposals would add new elements to two of these requirements. In terms of the protection of public order, the proposals would require Member States to ensure that TV broadcasters did not transmit material which contained incitement to hatred on the grounds of sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation (new Article 3f), as compared with the existing Article 22a requirement in terms of race, sex, religion or nationality.

21. The proposals would also add a new element to the requirements on events of major importance, in that they would create a right of access to the TV signal for “short news reports” (new Article 3b). Such arrangements are currently permitted by the Copyright Directive, and are currently therefore at Member States’ discretion.

22. The Commission’s proposals do however contain important simplifications of the TVWF rules on television advertising. They also contain provisions to allow product placement. These things are however combined with a de-liberalisation in one particular area which appears to have no justification.

23. The TVWF Directive contains both qualitative and quantitative requirements on advertising—that is, rules about what can be advertised and how it can be advertised (the qualitative rules) and about how much advertising there can be (the quantitative rules).

24. With the exception of product placement (where the Commission are proposing, in new Article 3h, that Member States should be able to permit it subject to certain conditions) all of the proposals for change in television advertising rules concern the quantitative rules. The current Directive contains an array of these, set out at Articles 11 and 18.

25. Article 11 contains a complicated ‘45-minute’ rule for feature films, which means that these cannot contain an advertising break unless the film is 45 minutes long, and in broad terms says that they can then have one ad break for every 45 minutes’ duration. Article 11 also says that when other types of programme have advertising breaks these should be separated by intervals of at least 20 minutes, but that news and current affairs programmes, documentaries, religious programmes and children’s programmes cannot contain advertising breaks if they last less than 30 minutes.

26. Article 18 says, in a rather complicated way, that that the maximum time per hour that can be devoted to advertising is 20 per cent (12 minutes). The Commission have proposed the removal of much of this detailed regulation. But the 20 per cent/12 minutes per hour rule would remain. So too would the 45-minute rule, but it would be turned into a 35-minute rule and apply to films, children’s programmes and news programmes.

27. This has the effect of subjecting news and children’s programming to a rule that does not currently apply to it—that is, to the requirement that these programmes cannot contain advertising breaks unless they are at least 35 minutes long. This can only have a negative effect on the transmission of this type of programming by commercial stations, and we have not heard the Commission offer any justification.

28. The rest of these changes are welcome in as far as they go, but there is a strong argument that they do not go far enough. Except perhaps for relays of religious services—which the Commission propose should contain no advertising breaks at all—the argument for having restrictions of this kind for any type of programming is not made out.

29. In our view, the need for these restrictions is based on a broadcasting environment of spectrum and service scarcity which is largely a thing of the past. Today, there is an enormous range of television services and the universal availability of a greatly increased number of channels will be secured by the switchover to digital broadcasting. There is also increasing competition for people’s attention, often from other audio-visual services, notably the Internet, but increasingly through mobile devices.

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30. In these circumstances, it is not clear to us why Member States should not, if they want, be able to allow commercial broadcasters to decide these things for themselves and be free to strike their own balance between advertising and editorial content, subject to viewer acceptability—just as is the case with other media such as the Internet, radio and the printed press.

4(b) *Does the proposal contain measures that will effectively protect public interest objectives?*

31. The proposal bears on three public interest objectives—the protection of minors and public order, freedom of speech, and economic objectives in terms, for example, of technological development, economic growth, and jobs.

32. It would not achieve anything in the first of these areas and is potentially harmful in the other two. On the protection of minors and public order, the proposal purports in Articles 3d and 3e to provide protections in both broadcasting and “non-linear”, on-demand services.

33. In as far as they would apply to online services, the protection that 3d and 3e would offer would largely be illusory, since they do nothing to prevent adults or children accessing services from outside the EU. The use by parents of blocking and filtering mechanisms, increased media literacy, and industry self-regulation on the lines of the successful Internet Watch Foundation scheme offer far more effective mechanisms for preventing access to undesirable content.

34. For video-on-demand, there is a successful UK industry self-regulatory scheme already in existence, operated by the Association for Television-on-Demand (ATVOD). The protections which Articles 3d and 3e offer in terms of TV broadcasting services do not go beyond what is already required of UK-based broadcasters under OFCOM’s Broadcasting Code.

35. The proposal in Article 3e to apply EU-wide controls to online content that do not apply to, for example, printed content has implications for freedom of speech online. Interventions in free speech must be proportionate to the issues they are trying to address and take account of national circumstances, but we are not aware of anything which would require a measure of this sort to be taken across the EU. And the advertising rules at 3(g) would require us to introduce some State intervention in the Advertising Standards Authority’s successful and widely-respected self-regulatory scheme.

36. The TVWF Directive has up to now been beneficial in economic terms, and the Commission’s proposals would allow for the continuation of those benefits in so far as they affect television broadcasting. The extension of the scope of the Directive to non-linear services and the imposition on them of the requirements set out in Articles 3c to 3h would however in our view have very much the opposite effect.

4(c) *Does the Proposal achieve an appropriate balance between the objective of harmonisation and right of Member States to control audiovisual media services in a manner which reflects national concerns and interests?*

37. No. These proposals would impose requirements on the United Kingdom and other Member States which go well beyond the essential minimum standards on which there is a consensus across the EU. In particular the prohibitions on incitement to hatred are very broad. They go well beyond general law in the UK, where the existing prohibitions are largely confined to racial hatred. They therefore interfere unjustifiably with freedom of speech in this particular sector.

38. Similarly, the prohibitions in respect of the protection of minors go well beyond the statutory protections which are already in place applying to the on-line sector. To apply prohibitions of this kind sensitively, without a disproportionate impact on freedom of speech, would in our view require a detailed regulatory regime such as a licensing system, underpinned by codes of practice as is the case with broadcasting. Any such scheme would impose new regulatory burdens.

5(a) *Is there agreement on the Commission’s proposal to distinguish between linear and non-linear services?*

39. We agree in principle with a distinction between “linear” television services and “non-linear” on-demand services, but it is in our view possible to improve the drafting in order to make the distinction clearer. We agree that there is a fundamental difference between television services that are broadcast simultaneously to masses of people and services which—though they might contain similar material—are “pulled down” on demand by the user.

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40. “Linear” services, as we say in paragraph 7, have a power and pervasiveness that non-linear services lack. Their users have expectations of them in terms of detailed regulation in the interests of public protection beyond what is expected of “non-linear” services. Users of non-linear services have more choice and control over what they access, and how they access it, than the traditional model of “passive” viewing offers to consumers of linear television.

41. The Government therefore does not at all agree with the proposals which the Commission have made for sectoral regulation of the content of “non-linear” services.

42. We are working to minimise the extension of the scope of the Directive as far as possible. As part of that, we have promoted amendments which would limit the extent of the “non-linear” tier of the Directive, confining it to video-on-demand services.

5(b) *Does the Proposal go far enough in facilitating the free movement of broadcasting services?*

43. We think that it does—it is difficult in fact to see how it could go any further. Although the proposal would amend the TVWF Directive, it would leave the existing framework for determining jurisdiction over TV broadcasting services, set out at Article 2, intact. That framework provides a logical sequence of tests which assign jurisdiction over a TV broadcaster to one Member State—its “Country of Origin”—and one only.

44. The proposal applies this structure also to “non-linear services”, and the UK Government of course objects to that, since we do not think that these services should be included in this Directive at all. But that does not affect the suitability of the Article 2 framework for assigning jurisdiction over services covered by the Directive.

45. The proposal makes one other, minor change to the Article 2 framework, and we think this is sensible. It reverses the way in which the Directive assigns jurisdiction over satellite TV stations which originate from outside the EU, and have no head office or workforce here.

46. The current Directive assigns jurisdiction over such stations to the Member State whose satellite capacity they are using. The draft proposal assigns it instead to the Member State in which the satellite uplink—the station sending the signal up to the satellite to re-transmit back to earth—is situated.

47. This change reflects recent experience in France, whose national regulator (the CSA—*Conseil Supérieur de l’Audiovisuel*) found itself having to take action against two stations from the Middle East containing anti-Semitic propaganda which were being relayed in Europe via satellite. France in fact suggested this change, and the UK supports it. It is easier in such circumstances to act against the satellite uplink rather than against the owners of the satellite, who may not have any direct control over what is on it.

48. Under the Commission’s proposals, Member States would retain their power under Article 2a of the Directive to derogate in respect of television broadcasts which “manifestly, seriously and gravely” offend against the standards in respect of the protection of minors and public order set out at the current Articles 22 and 22a. (The Commission’s proposal collapses Article 22a into new Article 3e).

49. The United Kingdom supports retaining this power of derogation. We are in fact the only Member State to have used it, having taken action under the Broadcasting Act 1990 to proscribe five pornographic satellite TV channels from elsewhere in the EU. The most recent proscription took place last year.

50. Proscription in the UK cannot take a station off the air. But it means that a range of acts in relation to the channel become criminal offences in the UK, such as selling decrypt cards “primarily” for the purpose of watching it, advertising it here, and advertising on it.

51. The Commission’s proposals would however remove much of the power of derogation which Member States have in relation to “non-linear” services under Article 3.4 of the e-Commerce Directive (2000/31/EC). The exact relationship between the e-Commerce Directive and the Commission’s proposals is not entirely clear, but Recital 10 of the proposals says that Member States “can no longer derogate” under the Directive on grounds which the proposals cover and we assume that effect would be given to this in revision of the e-Commerce Directive in due course.

5(c) *What role should industry self-regulation play in the new regulatory framework?*

52. So far as TV broadcasting is concerned, the Government takes the view that the existing regulatory arrangements, involving OFCOM, are working well—these allow regulation to take place with as light a touch as possible. We have of course recently announced revised arrangements for the regulation of the BBC, as part of the Charter Review process.

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53. For non-linear services—in as far as these are included in the finalised proposal at all—the Government again wishes to see better regulation with as light a touch as possible. But, despite references in the Commission’s proposals such as that at Recital 25, we are clear that a revised Directive cannot allow for pure industry self-regulation—that is, regulation entirely by the industry itself, with no legislative or regulatory backstop.

54. There is a lack of clarity in the Commission’s proposals about the regulatory regimes that will be acceptable in Member States. The Interinstitutional Agreement mentioned at Recital 25 applies to regulation at the Community rather than at the Member State level. The language of the Commission’s proposals however requires Member States to *ensure* that the various objectives are attained, are we clear that this would place the Government under a duty which it cannot discharge by leaving implementation entirely to the industry.

55. That is a great pity, since UK industry has self-regulatory arrangements already in place in some of the fields covered by the Commission’s proposals, and these arrangements work. We mentioned earlier the scheme for video-on-demand, run by ATVOD and the role of the Advertising Standards Authority. Others include the Internet Watch Foundation’s work in respect of child pornography and a voluntary scheme run by the mobile phone industry.

56. Whatever the outcome of the Commission’s proposals, we have pressed for amendments to ensure that these schemes can continue with as little disruption as possible.

5(d) Should broadcasters be given greater flexibility in respect of the commercial arrangements they enter into for the financing of programmes?

57. We agree that they should, especially given the increased competition for advertising revenue which UK commercial public service broadcasters may come under. The Commission’s proposals in respect of relaxing the quantitative rules on TV advertising are welcome, subject to the comments we have made under 3b above. But there are other important caveats.

58. The Commission’s proposals allow for programme sponsorship, which is already permitted under the existing Directive. They also allow for product placement, whose status under the existing Directive is ambiguous.

59. Product placement (defined as the broadcaster accepting payment to include a product in a programme) is not allowed in the UK, though there is at least one Member State (Austria) which specifically permits it.

60. OFCOM’s rules however do not prevent broadcasters from accepting props from companies who might want to advertise them or from showing bought-in programming (for instance, US TV series) whose original producers had entered into product placement deals. We are concerned that the Commission’s proposals for identifying programmes with product placement would interfere with acquired programming in an unjustified and impracticable way, not least by focusing on a payment not only to a broadcaster or “media service provider” but to anyone in the value chain.

61. OFCOM last year launched a public consultation on product placement, and we expect to receive their report soon. We also posed a specific question about product placement in our own public consultation about the Commission’s proposals, whose closing date was September 8th.

62. We will need to consider the issue in the light of a full consideration of OFCOM’s report and the responses to our own consultation. In doing so, we will bear in mind the importance of continuing to ensure (as OFCOM’s rules currently do) that TV viewers should always be in a position to know when they are being sold to.

5(e) What controls should be imposed on non-linear services in respect of illegal and harmful material, such as the granting of a “right of reply”?

63. As already stated, the Government does not think that “non-linear” services should be subject to sectoral controls. Our view is that there is no justification for these. These services should remain—as is the case in the UK—subject to the same restrictions as apply to ordinary speech or to newspapers. What is illegal off-line is also illegal on-line, and that is the way it should stay.

64. It follows that we do not consider that there should be a legally enforceable online right of reply. Questions of principle aside, it is unclear how such a right could reasonably be exercised.

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65. To their credit, the Commission do not in fact propose one. Their proposals do not amend the existing provisions about rights of reply in the TVWF Directive (Article 23). These would therefore continue to apply to TV broadcasters only.

66. A right of reply, or equivalent, is of course entirely appropriate for TV services, given their reach and impact. In the UK, the complaints scheme formerly operated by the Broadcasting Standards Commission is now operated by OFCOM, whose adjudications can require broadcasters to transmit retractions and apologies.

5(f) *Do quotas continue to be an appropriate mechanism for promoting the production of “European works”?*

67. No. The UK has never favoured quotas. They are an arbitrary and essentially protectionist mechanism.

68. Their partial extension to online services, as suggested in the Commission’s proposals (new Article 3f), is undesirable in principle, though their obligations are not onerous. We favour other mechanisms, such as obligations on public service broadcasters, and especially the BBC, and provisions for supporting UK film production and its broadcast.

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Annex I

THE SCOPE OF THE DIRECTIVE

In its present form, the Directive concerns TV broadcasting only. The Commission proposed that it should instead be changed into an “Audio-Visual Media Services” Directive (AVMS) covering what could turn out to be a very wide range of on-demand, non-linear services and “new media” products. In the formal proposal which they published in December the Commission defined the audio-visual media services which the new Directive would cover as:

... a service as defined by Articles 49 and 50 of the Treaty the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks . . .

Examination of this and discussion of it with the Commission and other Member States within the Council of Ministers reinforced our concern about the types of service that the Commission’s formulation might cover. For example, private individuals who create and publish weblogs or personal websites can turn them into a small-scale commercial activity. They might allow third parties to place advertisements on their site, allow their site to contain sponsored links, or use micropayment systems to collect revenue from visitors to the site. These practices are increasingly common, and internet service providers supply software packages which make them easy to set up.

In our view it was quite likely that any site or blog which generated revenue in these or other ways would be liable to be treated as a “service” within the meaning of Articles 49 and 50 of the Treaty. A site which had as its principal purpose the provision of moving images—for example, a blogger delivering what he wanted to say to camera rather than putting it in writing—would then be classed as an “audiovisual media service”, and we saw this as utterly disproportionate.

Most global and national news agencies now have websites which contain substantial moving picture audio-visual content. It is very doubtful whether websites of this kind would benefit from the exemption in Recital 15 for “electronic versions of newspapers and magazines”. There is no actual printed version (for example a *Reuters* newspaper) to which they correspond.

Similarly, the existing websites of actual newspapers, many of which also have moving picture content, might also be covered by the Directive. As the moving-picture content of these sites increases, as is likely, it will become steadily clearer that delivering moving pictures for information and entertainment actually *is* their principal purpose, and steadily less arguable that they are “electronic versions” of the printed product.

There are similar issues in relation to online games and online gambling, both of which contain substantial moving picture content and are plainly there to “entertain” their users.

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PROBLEMS WITH AN EXTENDED SCOPE OF THE DIRECTIVE

The difficulty which the Government had with the extension of the scope of the TVWF Directive which the Commission proposed was that it would apply new, sector-specific, controls to the new media sector. The Commission has failed to make a sound case for harmonising the controls for these services. Nor is the online services industry asking for it.

The controls which Member States would need to apply to non-linear services under the Commission's proposals are less stringent than those which apply to traditional "linear" broadcasting services.

The exact extent of the new media services which would be covered by the Commission's proposals is not clear. It is a key priority to seek clarity on this, in as far as "non-linear" services remain within the scope of the Directive.

Unnecessary regulation of new media services will hinder their growth and development, lead to delayed or foregone investment, and reduce the jobs and other economic benefits which they can bring to Europe. This would run contrary to the Lisbon and i2010 agendas.

The Directive would impose an unnecessary extra tier of regulation. These services are already covered by the e-Commerce Directive.

Member States can and have already introduced self and co-regulatory schemes to protect minors and the public interest. Self regulation is the most effective way of achieving these ends—particularly when it comes to on-demand and online services. This Directive, however, would not allow self regulation of non-linear audiovisual media services.

Annex II

AMENDMENTS PROPOSED BY THE UNITED KINGDOM

The UK's proposed amendments cover five issues.

1. THE SCOPE OF THE DIRECTIVE

"Article 1

For the purposes of this Directive:

- (a) *'audiovisual media service' means a service as defined by Articles 49 and 50 of the Treaty, provided by a media service provider via an electronic communications network within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council, and which is either television broadcasting as defined in Article 1c) or an on-demand service as defined in Article 1e)*
- (b) *'media service provider' means the natural or legal person who has editorial responsibility for the audiovisual media service.*
- (c) *'television broadcasting' (ie a linear audiovisual media service) means an audiovisual media service provided by a media service provider, who decides upon the moment in time when a specific programme is transmitted for simultaneous viewing by the general public, that is by an indeterminate number of potential viewers, and establishes the programme schedule*
- ...
- (e) *'on-demand service' (ie a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider, which has the following characteristics:*
 - (i) *Its principal purpose is the provision of programmes which are in a format suitable for television broadcasting, for example feature-length films, sports events, situation comedy, documentary, children's programmes and original drama;*
 - (ii) *The specific programme is viewed at the individual request of the user on the basis of a catalogue of programmes selected by the media service provider; and*
 - (iii) *The nature of and means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive."*

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Supporting Recitals

Recital 13

“The definition of audiovisual media services covers only audiovisual media services, whether scheduled or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. The scope is limited to services as defined by the Treaty and therefore covers any form of economic activity, including that of public service enterprises, but does not cover activities which are primarily non-economic, such as private or semi-private websites. Nor does it cover services consisting of the provision or distribution of audiovisual content generated by users for the purposes of sharing and exchange within communities of interest. The definition excludes all services not intended for the distribution of audiovisual content, ie where any audiovisual content is merely incidental to the service and not its principal purpose. The definition also excludes services such as gambling services and online games.”

Recital 14

[Deleted]

New Recital 16a

“A media service provider must exercise editorial responsibility over his service. Editorial responsibility means the exercise of prior control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.”

2. IMPLEMENTATION AND REGULATION

“Article 3

...

3. *When implementing and enforcing the provisions of this Directive, Member States shall promote self-regulatory and co-regulatory regimes. These regimes shall be such that are broadly accepted by the main stakeholders and provide for effective enforcement in the respective Member States.”*

Amended Recital 25

In its communication to the Council and the European Parliament on Better Regulation for Jobs and Growth in the European Union, the Commission stressed that a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation and self-regulation should be considered. [. . .] Experience showed that co- and self-regulation instruments implemented in accordance with different legal traditions of Member States can play an important role in delivering a high level of consumer protection, *since these objectives, particularly in the context of new media services, can best be achieved with the active support of the providers. Co-regulation and self-regulation instruments should therefore be used, in line with the different legal traditions, for the transposition of the Directive in the Member States. Broad acceptance of the regulatory procedure by stakeholders within the meaning of this Directive relates to the Member State, not to the Community.*

New Recital 25a

“In the area of on-demand audiovisual media services, self- and co-regulation can be an effective alternative to regulation for the purposes of delivering public policy objectives such as the protection of minors or the fight against incitement to hatred. Accordingly when implementing this Directive, Member States are encouraged to take the utmost account of the possibility of implementation by means of self- or co-regulatory mechanisms. In particular, Member States should avoid unnecessarily disrupting existing self- and co-regulatory schemes where these already provide a high level of consumer

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protection with regard to the matters addressed in this Directive, and should ensure that implementing measures provide a coherent system of protection alongside self-regulatory schemes already established in accordance with the requirements of Directive 2000/31/EC.”

Amended Recital 33

“None of the provisions of this Directive [. . .] necessarily requires that the measures in question be implemented through prior control of audiovisual media services. *Member States are encouraged to put in place self- and/or co-regulatory systems.*”

3. MEDIA LITERACY

“Article 3

. . .

4. *Member States shall, by appropriate means, advance the development of media literacy amongst consumers.”*

New Recital

“Media literacy refers to the skills, knowledge and understanding of consumers to enable them to use media effectively. Media literate people will be able to exercise informed choices; understand the nature of content and services; be able to take advantage of the full range of opportunities offered by new communications technologies and be better able to protect themselves and their families from harmful or offensive materials.

It is therefore of crucial importance that Member States and national regulatory authorities actively advance the development of media literacy in all sections of society and that they conduct regular research to monitor these and to inform their approaches to content regulation.”

4. INCITEMENT TO HATRED

“Article 3(e)

Member States shall ensure by appropriate means that television broadcasts provided by broadcasters under their jurisdiction do not contain any incitement to hatred based on sex, racial or ethnic origin, religion or belief, age or sexual orientation.

Member States shall ensure by appropriate means that on-demand services provided by audio-visual media service providers under their jurisdiction do not contain any incitement to hatred based on racial or ethnic origin.”

5. ARTICLE 11 AND THE “35-MINUTE RULE”

Article 11

1. *Member States shall ensure, where advertising or teleshopping is inserted during programmes, that the integrity of the programmes and the rights of the right holders are not prejudiced.*

2. *No advertising or teleshopping may be inserted during religious services.*

Examination of Witnesses

Witnesses: MR SHAUN WOODWARD, a Member of the House of Commons, Parliamentary Under-Secretary of State, MR CHRIS BONE, International Branch, Broadcasting Policy Division, and MR CHRISTOPHER DAWES OBE, Deputy Head of Division, Department for Culture, Media and Sport, examined.

Q155 Chairman: Good afternoon, Minister. Thank you very much indeed for sparing time to be with us this afternoon. I hope it is agreeable to you if we take about an hour. I am not entirely sure of the division situation in either House, so I hope we do

not get interpreted and, if we do, not too much. I can see that you have two people from your Department with you; perhaps you would like to introduce them before we go any further.

Mr Woodward: Thank you very much indeed, my

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Mr Shaun Woodward, MP, Mr Chris Bone and
Mr Christopher Dawes, OBE

Lord Chairman. Good afternoon to you and to the Members of the Committee. It is a pleasure to be here this afternoon. I have brought two of my colleagues who have done much of the work on this Directive over the last year: Chris Dawes, who is the Deputy Head of the Broadcasting Division at DCMS and Chris Bone, who has been working on much of the technical detail of this extraordinary Directive as it has been evolving over the last nine months, who is the head of our International Branch in broadcasting at DCMS.

Q156 Chairman: Thank you. Could I say in the light of the written evidence we have received and your helpful letter, and we understand entirely the nuances of that letter for this afternoon, we have had a pre-meeting discussion amongst ourselves about how best to focus on a limited range of issues. So rather than going through all the questions you will be deeply relieved to know that today we will try to home in on a few things. We would like to discuss with you the scope of the Directive, as you may expect, the question of advertising, some issues of public interest, the issue of quotas briefly, and some of these are much briefer than others, and the final one is the issue of regulation. Minister, before we go on you may wish to make an opening statement. I think things have moved on and it might be helpful if you could tell us what you feel you can tell us at this stage on the record.

Mr Woodward: I think I can pretty much tell you most things on the record, and to some extent I am very happy to interweave into my answers in responses to your supplementaries more general comments rather than giving you a party political broadcast at the beginning of my message.

Chairman: That is fine. Lord Haskel.

Q157 Lord Haskel: Thank you, my Lord Chairman. Of course, this whole inquiry is centred on what should and should not be included, so the scope is terribly important. The proposal tends to bring emerging media platforms, specifically through the internet, under the existing regulatory framework for broadcasting. Do you consider this is appropriate? Perhaps you could list what advantages and disadvantages this regulatory approach might have.

Mr Woodward: Let me just say, if I may at the beginning, that when I came into this post in May of this year, having been in Northern Ireland, and I am not sure if that was not a rather good experience for this job, for me this was a return to television. I spent 10 years working in television in the 1980s until I became involved in politics in the 1990s. I have to say that just as I found as a journalist going to Belfast as Security Minister that

there had been a revolution on the streets of Belfast since I was last there in 1990 when I went back in 2005, so too has there been a revolution in television since I was the editor of *That's Life* going out to 18 million viewers a week. I say that because I have no doubt in my mind that there is a need for any regulation to be updated, particularly when a revolution is at hand as a consequence of the digital revolution that is taking place and the convergence and emergence of new platforms. I begin by saying I want to mark the fact that we need an updating of the previous Directive. We need more liberalisation. I am totally in favour of regulation so long as it is self-regulation and it should only be state regulation when self-regulation cannot work, by and large because I think the experts are better at regulating themselves than those of us who are not experts and we are more likely to keep up to speed with their industry. I say all of that because really it is the preamble to saying that I think in some ways you could argue that this Directive is incredibly well-intentioned. For example, who would not want to protect children? I helped set up Childline, a charity, nearly 20 years ago. I would be the last person to say we should not be protecting minors. The question is "Does this regulation do it, is it effective, is it efficient and does it achieve at the end of the day what it is trying to do?" My concern, therefore, is not about the intention, it is about the efficiency and the efficacy of the proposal. I know that before you this afternoon you start with the proposal that was originally laid out by the Commission last December. As you know, both in meetings of ministers and, indeed, as it has worked its passage through the European Parliament towards its first meeting next month in December, it has changed a lot, and the reason it has changed a lot is frankly an awful lot of it does not work and it lacks clarity. When you consider that just for the UK alone the creative industries taken together, including broadcasting, publishing, advertising, film, music and so on, account for now nearly 8 per cent of our economy, we had better get this regulation right because the consequences of the damage if we get it wrong are enormous. Answers that I have heard too easily from the Commission along the lines of, "Well, if we have not got it quite right we can sort out some of the detail later on" or, "it can be tested in the courts" I do not think serves 8 per cent of the UK economy at all well. The truth is if we have not got it right we had better get it right because it really is not good enough to our own industries to say we will work it out later. That means, for example, one of the things that terrifies me is the inadequacy of the Impact Assessment that has been done. I do not know if you have had the time to look at their Impact Assessment but when

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you look at it the thing that strikes me, and this is entirely in relation to the scope of the proposal, this report, I think the bit I want to refer to is on page 44, records: "Only in three cases are there conditions that a deterioration would be caused by this being implemented". You have had Orange before you and they have told you that it will place EU and UK businesses at a severe competitive disadvantage. We have spoken to Yahoo! who undoubtedly talk about it creating huge opportunity costs, to Telewest who talk about being in no doubt that non-linear content providers would locate outside of the EU, to Microsoft who talk about thousands of small businesses and start-ups within the scope of the regulation undoubtedly being hindered in terms of future economic growth of the sector in Europe. That is four, that is one more already than the Commission managed to find. It really does terrify me to think that the Commission in their Impact Assessment managed to produce a volume which has no figures in it whatsoever and yet the four groups that I have just cited, one of which I know has been before you, are all straightforwardly concerned about the consequences of this. In moving into scope, in the definition that they have come up with, what worries me is that it is too ambitious, too burdensome, too costly and too onerous. I think what we have managed to do in the amendments, which I am not sure if you are aware of, that we have been arguing for, is to say: "We can see that if it talks like a duck, walks like a duck, it is probably a duck", in which case if we currently regulate linear television programmes there is in principle a case for saying it is not a question of what you are getting or how you are getting it, but simply if it is a television programme, if you get it on-demand or it is transmitted, regulate it for as long as you think you should be regulating it at all, but for those things which are not a television-like programme then do not try and do this because the chances are, even with the best intentions, you have to recognise that the limits of your authority are only, after all, the European Union. There is a world out there where the bad services you are trying to stop will go anyway. The problem is the consequence of the burdensome, onerous and costly regulations you will impose on the good services will mean that they too will go elsewhere and also, of course, the new ones will not start up. That was the point that was being made by Microsoft in their argument. It will not work and the really awful truth is that the thing we apparently did this for, to protect our children, will still be happening and it will be up to individual Member States to introduce their own controls to stop those children having access to it. The irony is that at the end of the day the intention of this probably will not be achieved

but what will happen is that the UK's and other EU economies in the creative industries will be severely damaged and impaired and we will put ourselves at a competitive disadvantage. I do think it is incumbent on the EU Commission to come up with numbers and it should worry us severely that they do not and that when you have interviewed some of those service providers and they have told you it will damage them, it amazes and astonishes me that the EU has managed to proceed as far as they have and apparently not find that material in any of their inquiries.

Q158 Lord Haskel: As you know, most of the witnesses we have had before us have said that the non-linear should be left to develop itself, it should be left unregulated, and the linear should be regulated as it is today. Where would you draw the line? How would you decide which is linear and which is non-linear because, after all, we still have a moving target? You have told us that there is a revolution in TV but it is still going on.

Mr Woodward: Absolutely. Because it is difficult does not mean to say we should not try and work it out. I accept that it is difficult but I equally accept that if we impose huge burdens on businesses and they are very clearly telling us that they will go elsewhere, we had better pay attention and, therefore, the difficulty ought to be worked out by us in the definition of a television-like service rather than telling businesses they ought to go elsewhere. I would say that the distinction here is to be made first of all in relation to linear and non-linear services and if we understand the difference between the two and the growing market in on-demand services we then need to look at what it is we are trying to do and what we are trying to achieve, and what can be achieved. Again, I come back to reminding the Committee that it is not our intention in any shape or form to remove any protection from any children, just as, for example, I entirely respect in Germany because of the history of Nazism and because of the history of neo-Nazism post the Second World War that they have particular concerns about incitement to hatred. It is particularly important to Germany that it has the power through the eCommerce Directive to derogate and invoke within German general law the power to control and access what some people can see. There is a particular problem of balance of free speech and content in Germany which is not something that we experience here. I believe it is important that Germany has that flexibility. I come back to saying to you that I equally believe it is important that we protect our children. I am not in any shape or form saying that there should be a market out there which has no regulation

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whatsoever, it is a question of how you do the regulation. The choice is not between state regulation or no regulation, the choice is not between state regulation and some kind of minor ineffective regulation, the question is how do you do what you want to do and I believe, for example, a regulatory body in the UK like Ofcom, and our general law here which protects our children, the prevention of people from being able to download obscene material which involves the abuse through representations of children in pornography, protects us very well from that far more effectively than what is being proposed by the European Union. It is a question of balance. I would also say that I do believe, Lord Haskel, very, very strongly in the principle of saying that self-regulation can be extremely effective. The example I give the Committee is the video games industry. Three or four years ago you may remember there was a video game which appeared which had a very significant content of physical violence and inappropriate sexual content. The Government said to the video games industry, "We can regulate you or you can regulate yourselves" and the industry responded and said, "Leave it to us to regulate ourselves". They changed a number of their classification systems, they changed the way that retailers worked in relation to video games and they cleaned up their act. I believe that is an example of self-regulation working. We are more likely to be effective by getting the industry to regulate itself than we are by saying that what we are going to do now is watch and view and regulate every single individual who blogs audiovisual images, it is completely unrealistic, it will not work, it will fail, and the awful and regrettable thing is I believe it will also bring the EU into further disrepute in the eyes of those who think that it oversteps its mark and tries to do things it should not and in those cases that it is not even effective when it tries to do that.

Q159 Lord Haskel: You spoke of balance, the balance between the freedom of expression and the prohibition of expression, and how it varies from country to country, and you gave the example of Germany. From that I conclude that what you really believe is that it is best for each country to regulate itself in its own way and that the European Commission is best just keeping out of this.

Mr Woodward: I do not believe that we should regulate for the sake of regulating. I believe that if there is a proven need and a problem that needs to be addressed we should address it. But the next port of call, having demonstrated there is a proven need for some kind of regulation, is not to assume that the state should do it, the next port of call is to see whether or not existing regulations could be

effective or whether or not self-regulation may be more effective, whether or not Member States may be more effective and ultimately, and only finally, if there is a need for the European Union to regulate at a European level. I think part of the mistake of the somewhat over-ambitious Commissioner, although as I say I have no quarrel with Mrs Reding on the intention, the intentions are entirely honourable, that is not my quarrel, is whether or not she actually achieves the end she set out to. I do not have a problem with regulation per se, I only have a problem when people invent it for the sake of it. When you look at many of the protections we enjoy in the UK, whether it is for minors or against incitement to hatred or, indeed, for the broadcasting industry as a result of the Communications Act or Ofcom, I think we are very well served. My concern here is that we are actually producing a set of regulations for on-demand services which are ineffective and inefficient and if they do not work I am not quite sure why in some cases we set out to do so. Having said that, the progress that has been made in the last nine months has been huge. I say this with great respect to my colleagues here today. The UK set out alone in December of last year to demonstrate to the other 24 countries that the idea of extending the scope right the way across all on-demand services was erroneous and mistaken. I do congratulate DCMS colleagues and those in the DTI who persevered with only until recently, as you probably know, Bratislava as our soul mate, and we are very grateful to the Slovaks for their support. I am glad to tell you that our support has somewhat widened recently but it has been a tough time.

Chairman: We are delighted to hear that.

Q160 Lord Roper: Minister, I am not quite sure how far the amendments which the UK have proposed are in the public domain and I can refer to them, but in the third subsection of subsection (e) of Article 1 which you have put forward, which does try and define what an on-demand service is, the first two definitions are perfectly clear but the third you provide is: "The nature and means of access to the service would lead the user reasonably to expect regulatory protection within the Scope of this Directive". I have to say I find that a little difficult to understand or to know how it would operate in practice.

Mr Woodward: I wish it were unique amongst EU regulations that you only find that one difficult to understand.

Q161 Lord Roper: This is your amendment.

Mr Woodward: Absolutely. I have to say to you that it is couched in language that, do not forget, has to be translated in terms that work for the

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Commission. I think as most of us around the table would acknowledge if EU regulation was in plain English we would be in a much easier place. My colleague, Chris Bone, has been dealing with the details of this because, as you know, it has not yet come finally to the Council of Ministers. This is in negotiation at the moment.

Q162 Chairman: Before you come in, could I pose another question in relation to the same amendment so you can deal with them at the same time. It concerns this attempt to define “non-linear”. Minister, based upon your own deep experience of these matters, you said if it walks like a duck, quacks like a duck, it is a duck. The problem is it is not really entirely clear in this rapidly changing world quite what is real television or television-like programmes and so on, which is precisely one of the problems. I have two questions. There is an attempt to define “non-linear” by meaning effectively television-like programmes, which were the words Ofcom used to us, and you do not define this, it seems that it has got certain characteristics, and then it says “for example”. It does not try to define it, it simply says what you mean by “non-linear” is on-demand services, and I assume it is any on-line demand services, but some on-line demand services have certain characteristics and it says, “for example, feature length films”. That is saying that a feature length film bought on-line is the same as television. That is the implication of this. This is not robust at all, it is very fudgy. The issue with that is the industry. People in the non-conventional television business have got to decide whether what they are doing does or does not fall into non-linear services that for the purpose of this Directive would come under the Directive, because clearly there are other non-linear services that do not fall within this attempt to confine them that do not fall under the Directive. Effectively we are trying to distinguish between television, on-line television-like services, they come under the Directive, under the amendment, and other on-line services which are very much more substantial in volume that would not come under the Directive at all. The question to back up Lord Roper’s is in this ever rapidly changing technological world where the distinction between television and internet is increasingly blurred, can that be a very helpful and meaningful basis for the industry to know where it comes within the regulation? Is this something that is going to be robust and stand the test of time? It will not be implemented for three or four years, I assume, and in 10 years’ time it will probably have changed completely. That is not meant to be casting doubt on the attempt to do what you are trying to do but trying to look at whether it offers certainty, which

is what you said industry would really like. If they feel that they might get caught they will go offshore.

Mr Dawes: In the Communications Act 2003 we grappled with the same problems, as Parliament did at that time, and produced a definition which distinguished between television with a number of characteristics of simultaneity, availability and means of transmission, and what was not a television programme. At that time we took out the TV-like video on-demand services from regulation. That was difficult to conclude but we achieved it then. What we have looked at here in trying to narrow the Commission’s definition is rather than taking a very broad set of criteria which, as the Minister indicated, embrace a huge range of these sorts of services, is try to distinguish the crucial criteria which might justify some form of regulation which are those characteristics of services like video on-demand services which share a number of the characteristics of broadcasting in that they are mass media, they expect to have a large audience, the crucial distinction is they are available on-demand and the principal purpose of the service is the provision of programmes, television-like programmes. That has to be the principal purpose of the service, it is not just a general service where someone happens to have uploaded a television programme. Also, there is the important question of editorial responsibility. There has to be someone who takes control of determining the catalogue which lists all of these programmes. Those are the kinds of services that are currently available: Homechoice and there are proposals by BT and other companies to promote similar services. We thought if you added all those characteristics together you ended up with something that did provide a reasonable amount of certainty now, so this is a pragmatic approach, if you like: what are the sorts of things that we think are in the on-demand space and which are effectively competing with television, what are their characteristics, let us include those in the definition. One of the ones which we added was user expectations which you have questioned. This is an element which has been described as particularly Anglo-Saxon but it is one that is already in the Communications Act and we had a provision in that Act whereby what could be licensable as television might be altered by secondary legislation subject to meeting various tests, one of which was user expectations. I realise that is slightly uncertain and changes over time and can only be determined with research, but it is something that is crucial to the job we are trying to do because you only want to regulate where people are expecting regulation and where that regulation is necessary; if people do not expect it or need it then you should not need to regulate it. Overall, you have

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to look at these various factors, including that last aspect. Certainly in discussions with industry and the broadband stakeholders' group they are fairly confident certainly as to how we would apply it and they are fairly confident that it does produce a rational result now. Of course, it is not entirely future-proof but we have also proposed that there should be quite stringent review clauses in the Directive should it be necessary to change. It does already have a bit of flexibility in it because as TV changes so "TV-like" might change, but all of these characteristics will apply.

Q163 Chairman: If it manages to restrict the scope of the Directive then obviously we wish you well.

Mr Woodward: It may be helpful just to say to the Committee that notwithstanding the difficulty of getting the definition right and notwithstanding the points that Lord Roper drew our attention to in his question, at the moment despite the extraordinary speed with which convergence is taking place and new platforms are appearing, most people know the difference between a television programme and not a television programme. If the Committee has had the opportunity, as I have because I have got younger children, of seeing things like MySpace and YouTube, they are not television programmes. Our point about a feature film in relation to your question, my Lord Chairman, is if it is transmitted at eight o'clock on BBC tonight or you decide to watch it as an on-demand service, it remains a feature film. The BBC is not going to transmit MySpace or YouTube tonight. On the other hand, on the internet you may be able to call up MySpace and you may even generate your own content and put it on to YouTube or MySpace. On the bulk of these content issues I think the consumer can make up their mind as to whether it is a television-like programme or it is not. There will be a grey area, there often is, and there is a grey area here. For example, what happens, as I know has happened in America, when a major television studio sees a fantastic marketing opportunity by making a soap effectively for YouTube without the consumer on-demand realising they are actually watching something made by Fox Television? I am not suggesting for one moment that issue is not there but I do believe by and large it is at the margins and the difficulties that are posed in the clarification of a non television-like service poses us a problem in a relatively small area. Yes, we have got to focus on that and, yes, we have got to get it right and, yes, we have to work with our colleagues in the European Union to get it right, but for the vast majority of the services on-demand it is perfectly clear—*Newsnight* watched on demand is a television

programme whether it is seen at 10.30 at night or you call it up on your Apple Mac this evening.

Q164 Lord Swinfen: Minister, do the proposed rules on advertising adequately address the emerging business models for content provision over the new platforms?

Mr Woodward: I think the first thing I want to say is that we actually have some pretty good advertising rules already. My problem with the proposals by the Commission is in a sense they are trying to play the role of futurologists and look into the future. This is a world which is changing so fast and they are trying to pin it down and hold it where it is. Even if they have got it right now, and I am actually going to suggest to the Committee that they have not, I think what they are trying to regulate will already have changed in one or two years' time anyway and they are going to need to revisit this. I think we have to be careful, even if we have got it right now, in saying to ourselves this is perfect in terms of where we are trying to go with this because this is such a fast changing world, new platforms emerging, that I believe it is too early to try and regulate in the way that they are doing. Then you come down to asking is it better to proceed with general advertising controls or sector specific controls. Again, my view in relation to this is we have got some effective rules at the moment but this has been a conversation we have had inside the Department and it may be helpful again in terms of the detail of this if—I am very fortunate they are both called Chris and I am not sure which one is going to deal with it—Chris would like to explain where we are going.

Mr Dawes: On television there is some liberalisation, notably the relaxation of the 20 minute rule, but still the liberalisation is not very great. There is also a curious new proposal in the Commission's original draft to introduce a 35 minute rule requiring 35 minutes to elapse between advertising breaks in children's programmes and news, which is a new constraint that does not exist in the current Television Directive. That seems to be going in the opposite direction from liberalisation. In broadcasting terms, the slight liberalisation overall that is in the Commission's proposal is welcome but they could have gone further, for example they are still proposing isolated spot advertising should be very exceptional and that is something that broadcasters have said, with personal video recorders, et cetera, they should be able to do and that we should allow advertising more to find its own level, as with radio, rather than have very strict regulation. That is where we are on television. On on-demand services, the Directive only has provisions in Article 3G relating to what should not

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be advertised and there we find it very curious that one needs to have these provisions which are being applied specifically to certain on-demand services rather than to all advertising. Why not just use a horizontal directive, like the Unfair Commercial Practices Directive, what is so special about on-demand services that they need special rules? There we think it is an unnecessary intervention and is likely to mean that in the UK where the Advertising Standards Authority currently exercises regulation of on-demand advertising on a self-regulatory basis that we would need to impose some kind of co-regulatory structure at the very least.

Mr Woodward: This brings me back to my concern about whether or not, despite arguably if you share the intentions, this manages to achieve those intentions. I think what Chris has just demonstrated is that at best it is likely to be inefficient and ineffective. What worries me is the speed of the technology because to some extent the arguments about programme duration in relation to adverts, and there is a divided view on this, can be rendered completely irrelevant because of personal video recorders. It does not really matter whether the programme is of any duration, we are going to have a generation of personal video recorders that will simply edit out the adverts. There is also a very lively debate to be had about product placement. We have a considered view in the UK, and Ofcom have just produced a report, there is a diversity of views within Europe and it is a very important and intelligent and healthy debate to be having. It has to be said that in a very different television market, but nonetheless one that sells a great deal of programmes to the United Kingdom, the USA, in the face of declining advertising revenue because of falling audience shares, commercial television stations there are developing product placement and indirect product placement. It may well be the case that we do not want to have that here but, on the other hand, it is an interesting question to consider that if, for example, the group of people (who are now somewhat middle-aged) of *Friends* decided to make the eleventh series and bring it back and instead of Central Perk it became Starbucks, that would not half put us all in a bit of a dilemma as to what we would do because arguably that would be product placement of an extraordinary kind. Would we be saying to the commercial stations here "you cannot buy it"? Would we be trying to digitally paint it out? I put that on the table because this is such a fast changing world that even if we got it right today we would probably have to revisit it in two years' time. The danger is that we are probably not even going to get it right and then we end up with the absurdity of trying to create special rules for special sectors along the way that Chris has just

outlined, in which on-demand services would be saying, "Why are you picking on us?" The Commission set out with an intention, they saw they could not quite get it right, they are now adapting it and twisting it to see if it is possible to squeeze it in in some way and the result of this is a mess. We have made some progress on this but the debate is wide open on the advertising area and product placement. We welcome liberalisation in relation to advertising but it has to be said that is not a view which is entirely shared by some of our fellow EU Member States.

Q165 Lord Swinfen: Thank you. Are there any other restrictions on advertising that you would like to see brought in or, indeed, on the marketing side of it?

Mr Woodward: If we are entirely frank, we are not looking to bring in more EU regulation. What we would be up for undoubtedly is if, for example, Ofcom came in and they said it was necessary to look at this area of advertising in the UK, we would want to do so. I think a very good example of this is in relation to children and obesity. I think it is incredibly important in the UK, which arguably has a bigger problem with obesity in children than any other EU State at the moment, that we have the flexibility to be able to respond to that. As you know, the debate out there ranges from those who want to put a ban on all products marketed at children which contain certain high levels of fat or salt, and there is a discussion about a watershed time and so on. I think it is extremely important that there is a debate that happens. I think it is incredibly important that we have a regulatory body like Ofcom which can remind us of the need for things to be proportionate. It is incredibly important that this can be judged in relation to British culture. It is a very worrying dimension when we start to see this responsibility to a bureaucracy which is far removed from the area of the problem. In relation to advertising and television advertising, the issues of product placement, nothing perhaps so importantly illustrates the importance of flexibility and proportionality than the advertising of children's food and the need to keep this local unless there is a very strong argument for moving it from local to EU state level.

Q166 Chairman: What is the burden of the amendments you are seeking to achieve in this regard? Is it essentially to leave it to the marketplace, in other words a very liberal approach to advertising, or is it seeking to get rid of the 35 minute rule? I am trying to understand your broad stated approach.

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Mr Woodward: For example, on this—

Q167 Chairman: What do you want to see at the end of the day?

Mr Woodward: There were rules in relation to adverts only being able to happen every 20 minutes and those are being swept away in this Directive and I think that is a very good example of the Directive dealing with the world as it is rather than the world as it was. It is interesting to note when we were preparing for the Committee yesterday we were trying to think of examples of whether or not that is always consistent, and I was suddenly thinking about those times when I watch *Sky News* and I just seem to be only watching adverts, and my colleagues pointed out to me that is because the programme has finished and the next one has not begun and it is in-between the weather or something. There are interesting ways already in which people find a way around it and, therefore, liberalisation is not just about saying “Let us leave it to the market”, it is about getting ourselves up to speed with where we are. As a general approach our view is not to simply say, “The market will sort it out”, we do not believe that. What we do believe is that self-regulation is what by and large best sorts it out. We have authorities in this country in relation to advertising which work extremely effectively. We have bodies like Ofcom which develop very strong views and also, with huge respect, my Lord Chairman, the speed is very important. Ofcom can move very, very quickly on an issue if we need them to. The flexibility to respond very quickly can sometimes be extremely important. When you have to countenance the views of 25 Member States it takes a very long time and you become an inflexible, slow moving body. If we look at some of the things in advertising, who knows what product we could find being advertised in the next few months on television. It is incredibly important to have a body that can respond to that very quickly. We do not want a body that responds to it in two years’ time. Unless my colleagues have something to add, I think our response would be to say that it is an informed but not an unfettered market but it is, on the other hand, respecting the fact that self-regulation works better than state regulation and it is better done at Member State level than at European Union level.

Mr Dawes: Could I just add a point of detail on the 35 minute rule. Our amendment is specifically to get rid of that, but in relation to the other advertising rules unfortunately there has been inadequate discussion in Council. This is something that is very unsatisfactory and, as the Minister indicated, our instinct is more liberalisation but, frankly, as he also indicated, a number of other Member States and some of the Parliament actually are going in the

other direction and realistically where we currently are it would be difficult to get more liberalisation than a reduction from the 35 minute rule to a 30 minute rule, which the Commission appear willing to concede.

Mr Woodward: I think something that may be important for the Committee to note which it may not be aware of is that we have also introduced an amendment on media literacy because we believe that the most powerful tool in all of this is the consumer and ultimately the consumer should decide, and will decide, and the consumer should only be protected from themselves if they really do need to be protected from themselves. This summer we introduced a media literacy amendment which will promote media literacy in Member States and put a requirement on Member States to promote that. I think that has to be seen as part of the debate, whether it is about advertising or, indeed, programme content.

Q168 Lord Roper: On media literacy we put the same question to Ofcom and they are going to let us know what their plans are in developing work on media literacy. I would be very interested to know what sort of response you have had on the issue of media literacy both from the committees of the Parliament and from other Member States.

Mr Woodward: I can comment on some of the governments that I have visited in the last month, which is to say that it has been universally welcomed. In fact, I cannot think of a single country which has not welcomed it, and welcomed it extremely enthusiastically. My colleague, Chris, has done the detailed work on this.

Mr Bone: I think it is fair to say as well that within the Parliament and among Member States on the Council it is also playing very well. It is not an issue that anybody actually opposes, it has got a generally pretty warm welcome all round. There have been amendments introduced by MEPs on their own initiative which will also promote media literacy through the Directive.

Q169 Chairman: Could we turn briefly, very briefly, to the question of programming quotas, proportions of European content and so on. Can you just remind the Committee what the current position is and how the Directive as currently drafted changes that, if at all, and what the view of the Government is on this?

Mr Bone: The Directive which currently applies to television only contains Articles 4 and 5, provisions which require Member States to ensure that broadcasters under their jurisdiction reserve 50 per cent of programming time for works of European origin and 10 per cent of programming time at least

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for works which have been produced by producers who are independent of broadcasters. There are some exceptions in the case of news broadcasts, sports broadcasts and so on, but that is the overall position. The proposal which the Commission made in December would retain that for what the Commission now calls linear services rather than TV broadcasting, but basically the same animal. It will also have introduced I think what was originally Article 3G, in fact, originally Article 3F, a proposal that both for the linear and non-linear services, but more importantly for the non-linear services, there is a requirement for Member States to ensure that providers of non-linear services promote where practicable and by appropriate means production of and access to European works. This is a kind of European quota by the back door except there is no percentage mentioned and Member States are simply required to ensure that people promote these things, which you might take as being a fairly meaningless requirement. Indeed, the view which we have taken throughout this discussion is we do not think that setting quotas in the way that is currently done in Articles 4 and 5 is a particularly helpful thing for European legislation to do. For example, we do have lots of independently produced programming and home produced, ie European programming, on British television at the moment which is all nailed into place by agreements with the major public service broadcasters. The European Directive does not really add anything to that. Similarly, as far as non-linear services are concerned we believe that the notion that you can set quotas of any sort for any type of programming on services which by definition have a very large back catalogue potentially, an enormous long tail of programming which people can get access to, is not going to achieve anything and is perhaps not even worth the paper it is written on, but that might be an extreme view.

Mr Woodward: It is also worth pointing out to the Committee again that it seems to me this is a view about a world of television that has long since gone. The whole nature of on-demand services is that it is up to you to decide what you want to watch, what you want to call up. We cannot make people choose from a catalogue, the catalogue they have got is global. The idea that in some way if we could only persuade enough people to make European content that will fulfil the quotas is patently absurd and it immediately poses the question how are you going to regulate it anyway. You are not going to. It also poses the question that since much of the content that will be on non-linear services, on-demand services, is going to be user generated, and some of it will be both, and some of it will be user generated in more than one part of the world, part of it might

be European, part of it might be American, how do you define MySpace? I find myself again saying that what the Commission is trying to do here is vastly over-reach itself even if it is quite well-intentioned and certainly the outcome of this would only be ineffective because it cannot be done. It will impose a bureaucracy on governments, it will impose a bureaucracy on the larger companies and it will involve costs and all of those costs, all of those bureaucracies, we are being told, will not only damage the larger companies like MySpace, Yahoo! and so on, but will also drive out the start-ups of small and medium-sized enterprises from Europe in the first place because, of course, outside of Europe none of these quotas or regulations will apply.

Q170 Chairman: If your proposed changes to the extent of non-linear services are included in the Directive, we are talking about—I simplify it—television-like offerings, not programmes. Is the objective of the Government's thinking in the discussions to seek for non-linear services as narrowly defined for the purpose of going forward with the Directive?

Mr Woodward: Yes.

Q171 Chairman: But they would not be included, there would not be requirements in relation to quotas or reference to it.

Mr Woodward: We would like the references to quotas removed altogether but we are pragmatic about this because, if we are entirely frank, what the Commission is proposing is, first of all, not mandatory, it requires governments to write to people to see if they can do them a favour and meet the quotas. It is not suggesting that there will be an imposition of penalties. Of course, it does create a bureaucracy and, as I say, we would like to see it not there at all but so long as this is effectively voluntary if the Commission feels a compelling need and Mrs Reding can sleep better at night by having this in the Directive we can live with it.

Chairman: Can we return to the question of self-regulation.

Q172 Baroness Eccles of Moulton: Minister, this is a theme that has run through the whole discussion but if we could just focus on it quite hard for the moment. It seems that the Directive has presented a threat to the way in which we self-regulate, co-regulate, through Ofcom, through the industry, and it has appeared to us both from the point of view of the regulator and from the point of view of the industry that the players are quite happy that this is a good way to proceed. It has also become apparent that we started off as being quite a lone voice in wanting to defend, as it were, the status quo

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so far as the UK is concerned and most of the other Member States seem to have been quite supportive of the extension of controls over the non-linear services. I suppose really there are two questions that I would be interested to ask. One is whether we are going to end up in a position where we will have a Directive which means that we can continue to co-regulate and self-regulate as we have done up until now. The second question is why it is that the arguments that have been so strongly put today and by other witnesses have not found favour with enough of the rest of the Member States for it now to become almost a non-issue?

Mr Woodward: They are very good questions. If I may take the second question first. The UK's initial position, and our position has changed, against any change was one that allowed us to put the argument on the table in a very, very forceful way. It was the case that most people did not entirely agree with us, of course that was the case. It is perhaps a little disingenuous if we think the difference between the support of the government in Bratislava was then people were entirely against us. What was indicated to us in the course of that first five or six months was that other countries were coming to be persuaded of the argument but were not persuaded that there should be no change and, therefore, the position that we worked out through May, June and July, when I came into this office and worked with my colleagues through the summer, was one in which we believed we could have a principled argument which was if we already regulated television services we should not worry about how they are transmitted but beyond television-like services we should not regulate. What was extraordinary was the speed with which once we put that amendment down we found enormous support. I believe that in relation to advertising it is important to update and liberalise the current Directive, so I think there is a need for a Directive, and that being one case in point, I am not remotely suggesting we do not need one at all but we did not need the Directive that was originally on the table last December. There has been considerable change, there will be a Council of Ministers, as you know, in the middle of November when I think the Finnish Presidency will try, although we will know more from Coreper at the end of this week as to whether or not they indeed will go for trying to bring this to fruition. There is the 10-14 December meeting of the Parliament for first reading which will look at the amendments that have come through the committees. I think this is a very timely moment for us to have reached this stage of debate. The arguments that we are strongly putting today are no more or less strongly put than they would have been a year ago, the difference is that since the summer we have actually won a great

deal of support from other member countries with our proposals. The adding in of media literacy I cannot over-emphasise enough, I think that is a huge step forward. In relation to where we end up with self-regulation I think if the amendment that the UK is putting forward, with the support of Spain and other countries, in terms of scope as it now is if we only regulate television-like services that will leave self-regulation the role of dealing with those areas that do not fall into that domain. I think it is probably worth pointing out to the Committee that this is not because the Government believes there should be no regulation of those services that are not television-like, that is absolutely not the case. The Government does believe that there should be regulation of those services, it is just that we believe they should be self-regulated. It is only if self-regulation fails that Member States should step in and if Member States fail then the EU may well have a role. We believe it does not start from the other end of the telescope. I see an enhanced role for self-regulation as a result of this Directive, not a lesser role. I see regulation as continuing to serve the public, continuing to protect minors, continuing to prevent incitement to hatred, but I do not believe it follows that an inflexible European Union bureaucracy is the best instrument to do it. I hope that we have managed to persuade enough of our European colleagues to come with us on this journey now to recognise that state regulation is not the only way of dealing with on-demand services and that self-regulation is likely to be more effective, more responsive, more flexible, not least because this is such a fast changing marketplace that we need a very flexible method of self-regulation otherwise it will fail the very people it is setting out to protect.

Q173 *Baroness Eccles of Moulton:* Do our fellow Member States have the confidence in their own internal systems to be able to self-regulate effectively or do they really rather hope that perhaps the EU will do it for them?

Mr Woodward: I think one of the hallmarks of the debate that I have found interesting in the last five or six months, and of course the Government from time to time is accused of not being as close to the ground with its ear to the ground as it might be, is that industry has been quite good at connecting with the Government and government departments and sharing its concerns, and I think the UK Government has by and large pretty faithfully reflected the balance of the needs of the industry and the consumer in framing our response.

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Q174 Baroness Eccles of Moulton: Across Europe? *Mr Woodward:* Across Europe. I think what has been interesting as we have toured around Europe has been seeing how that same connection and closeness does not exist in many other Member States. It has been very interesting to see how a number of other Member States' industries—the equivalent of Orange, for example—would have gone straight to Brussels with their concerns and, therefore, I have to say it is all the more alarming that those concerns have not been reflected in the Impact Assessment of the European Commission.

Q175 Chairman: We have heard so much criticism of the Commission's Impact Assessment and there being clearly significant shifts in attitudes amongst other Member States about some substantial matters within the draft Directive as it was, how could the Commission have gone forward with a proposal in such a rapidly changing area of one of the forefront industries of the modern era and got it so wrong?

Mr Woodward: That was my very first question when I came into the job and I am afraid that after five months I am still unable to assist you with that enquiry.

Q176 Chairman: When we meet the Commission it is not in any way the purpose of this House or yourself to be antagonistic but simply to draw the lessons. It was only a year or two ago the Commission were talking about better regulation, better Impact Assessments, more consultation, more careful thought, and then this happens. It really is disappointing.

Mr Woodward: Perhaps it might be of assistance if Chris answers, who has had the pleasure of dealing with the detail of this with the Commission. One of the very first people I saw when I came into this post as Minister for Creative Industries was Viviane Reding because I do regard this as one of the four or five most important priorities in my job in terms of dealing with them. We had a very good discussion. As I say, I do believe that Mrs Reding is extremely well-intentioned, I do not believe for one second we are looking at somebody who is poorly or ill-intentioned, but she also believes that this is a comprehensive Impact Assessment. It is not just the bureaucracy that believes that, this is the Commissioner who believes that this is a thorough analysis of the impact of this regulation on industry. As you say, it is quite extraordinary that anybody could convince themselves that—when dealing with regulation which could affect something in the order of seven to 8 per cent of the European Union's economy—they could possibly settle on such an

inadequate report. Chris had the pleasure of dealing with the Commission on a daily basis.

Mr Bone: Just a couple of comments. The first is that the Commission do still regard this as being a thorough and detailed Impact Assessment. I think what they mean by that is that they have covered all the angles, all the objections, all the types of industry that might be affected, they are all mentioned in there somewhere and they all get a plus or a minus on the Commission's balance sheet. The difficulty, of course, from our point of view and from the point of view of industry and other Member States perhaps is that there are no actual hard figures attached to any of this stuff so you cannot take an overall view as to what is the best thing to do. That is one observation. The second is, and it is not my role any more than yours is, my Lord Chairman, to be critical of the Commission or anybody else, one particular thing that struck us was in the Commission's work leading up to the production of this Impact Assessment of December last year which involved assembling various focus groups and stakeholders to discuss all the issues which would eventually be put into the Directive what we noticed about that very strongly, and noticed it in the run-up to our own Broadcasting Conference which we ran in Liverpool last year where the main parts of the forthcoming Directive were discussed, was the bias towards bringing existing broadcasting interests into these discussions but not including enough of the telecoms industry, the software providers, the software houses, the games developers and all the other people who potentially could be affected by this. If you look at the list of official consultees in the Commission's focus groups, they are almost all broadcasters. I think that had the effect of casting the Commission's proposals back to an almost bygone age of five or 10 years ago when it was the big dinosaur broadcasters who stalked the landscape and there was no-one else in this field. What it points to is the importance of not just consulting with stakeholders but also identifying them.

Mr Woodward: As always, Chris is very good at drawing our attention in the Department to critical issues and one of the issues that has concerned me in the Department has been the video games industry. I do not know if the Committee has had a chance to look—I only recently did—at the report which was made for Ofcom, the RAND Report, and in the introductory section on page 14 they talk about the impact of this on online games. That is just one illustration. They say: "Whilst large publishers could mitigate costs by integrating administration with existing quality management, developing and hobbyist SME developers would face disproportionately high impacts. However,

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precisely these small players constitute Europe's comparative advantage in the global market." I think the fact is that the games industry has a specific problem and yet that problem is completely put to one side in the course of the Impact Assessment and it would be of great assistance if your Committee, my Lord Chairman, feels that the Impact Assessment is inadequate if that could become something of an even broader discussion about the nature of Impact Assessments because it really is a very serious worry that such significant legislation as this Directive, which I believe is potentially as sclerotic as the Common Agricultural Policy and it has taken us 50 years to try and get rid of that and we are still trying to do it, has the possibility of impacting on these newly emerging industries which are a huge source of wealth and jobs in the European Union and yet no account whatsoever has been taken of these.

Chairman: I think we may have shot Lord Roper's fox!

Q177 Lord Roper: Not totally. The point you make does suggest that in the process of consultation the Commission tends to look backward or to look at the existing rather than to look forward and in an area like this that is clearly a mistake. I have a slightly wider question. It has been very interesting, Minister, to hear you talk about the way you have dealt with this in the last few months, and it is not just dealt with by officials in a Council working party but you have said that you have spent a certain amount of time going round Europe seeing your colleagues in other comparable departments. I wonder if you could just say a little more about that and what proportion of your time it may have taken up over the last four or five months.

Mr Woodward: I think you had better ask my children, they were looking for a slightly different September from the one they enjoyed. Part of the programme of work that I saw before in May was undoubtedly, as I said, to make four or five priorities in the Department and I see this as absolutely one of those. Because of the demands of the parliamentary timetable it was difficult to find parliamentary time in June and July to travel but obviously the recess presented an easier opportunity. Having a chance to talk with colleagues face-to-face makes a huge difference and whether it is about this regulation or any regulation if you have the chance to meet people and talk to people you are more likely to find common ground. I cannot thank my officials too highly for the preparatory work that they did. If they had not done this work we would not have made the progress that we were able to make. As a consequence of the work of my officials it was

possible for us to go, find common ground and find, I hope, what will emerge as a way forward. Very clearly the big decision for the Finnish Presidency is whether they bring this to a head. It has to be said that since the Parliament will have their first reading on 10-14 December matters will come to a head to some extent within the Finnish Presidency before the Germans take it up. I have no doubt that in the event that we do not have a successful Council of Ministers in November it will be the wish of the German Presidency in May to bring it to a head, and that probably feels like a more realistic timescale. There is a very important caveat here. Although it was not in the original proposal but has come in since the original proposal, so long as the changes we have seen to Country of Origin are not implemented I believe it will be possible for us to find common ground in November. In the event that those proposals on Country of Origin were to look as if they were something the Finnish Presidency wanted to go with then the UK would do everything in its power to resist that.

Q178 Chairman: That was going to be my last question, Minister. Could you update us on what is going on? What is it that is emerging in relation to the Country of Origin principle?

Mr Woodward: Unfortunately, I think it is an example of people having a rather overzealous view about the capacity of the European Union because the argument has shifted away from the original Country of Origin principle to those who think Country of Destination would be a better way of looking at it. Again, it comes back to the test of will it be effective and will it be efficient? Of course, it is impossible for a programme maker now anyway to imagine where a programme might be destined for in 20 years' time and who might be watching it. This is an area we need to look at. Chris has had the responsibility recently of following this up. It is a very fluid situation. We see from day-to-day almost the numbers rise up and down in relation to this. You might be able to give us the current position, Chris.

Mr Dawes: Yes, Minister. The Swedish proposition in relation to Country of Origin has been the one that has gained most favour. That initially would effectively have meant that if one Member State disliked the service from another Member State which was targeted on them they could require the Member State where the broadcaster was to take action on public policy grounds against them. To take a Swedish example, if there was advertising to children from a UK-based channel targeted at Sweden then the Swedish Government would be able to make a case to the UK to change that broadcaster's behaviour. In our view that clearly

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went against the Country of Origin principle in practice even though it paid lip service to it in drafting terms. That has not been adopted but some of the concepts of it have been included in the Finnish text in relation to requests coming—at the moment requests rather than requirements but who knows whether that will remain—so we have to consider whether the real risk to the current text from the Swedish intentions will be fulfilled in the Directive. There are other elements of the text which are less bad which include ECJ case law which is somewhat more helpful, the TV-10 case in relation to circumvention. It is not 100 per cent clear yet whether it is a real destruction of Country of Origin or whether it is more like what my colleague described in relation to the on-demand quota provisions as a process which is tiresome but would not necessarily produce a bad result. Clearly we prefer no such text because it does introduce uncertainty to industry, but it is not yet clear that it is absolutely fatal to the Country of Origin principle which is so fundamental to this Directive.

Chairman: It would be extremely helpful, Minister, if we could have a brief note on the arguments being put forward. We came across this, you will not be surprised, in the Services Directive where this blew up into a big issue. There is a mood around the Union of moving away from Country of Origin, not just in this area, and it would be helpful to have a note. I said mine was the last question but Baroness Eccles is quite reasonably using a Baroness' prerogative to ask one more.

Baroness Eccles of Moulton: It is a rather cheeky question and you might rule it out of order.

Chairman: You had better tell me what you are going to ask then.

Baroness Eccles of Moulton: As we are going to Brussels in 10 days' time I just wondered whether the Minister would have any idea about the most telling question we could ask.

Q179 Chairman: That is something best discussed outside this room. Minister, you have been extraordinarily generous with your time, informative and very impressive in your evidence today, we are very grateful to you. We did not exactly follow the team sheet, so if there are one or two questions where we feel on reflection you have probably prepared something on the background that we could have a note on may we do that, but we will not do it unless it is helpful to us.

Mr Woodward: First of all, can I thank the Committee for your time. Certainly we would be happy to answer not only any questions you had on your sheet that there was not time to ask but any supplementaries that emerge in your deliberations as you prepare your report. Very often it is the case that it is only when you sit down and you see the first draft of a report that you realise you would have liked to have asked me another question. Our only interest is in getting this right for the UK. If there are any questions that arise out of your deliberations or questions that arise from evidence you take from other stakeholders on which we can assist, my officials would be more than happy to help the Committee in answering any questions whether from today or otherwise. Thank you very much indeed.

Chairman: Thank you, and, of course, thank you to your two officials. Thank you very much.

MONDAY 30 OCTOBER 2006

Present	Eccles of Moulton, B Fearn, L Geddes, L Haskel, L Roper, L	St John of Bletso, L Swinfen, L Walpole, L Woolmer of Leeds, L (Chairman)
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Memorandum by the Mobile Broadband Group

1. The Mobile Broadband Group (“MBG”, whose members are O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to submit evidence to the House of Lords’ inquiry into the proposed amendment of the Television without Frontiers Directive.

MAIN POINTS

2. The MBG recognises that it is timely to review the TVWF Directive. However, we believe that further changes are required to the current draft to make the Directive fit for purpose.
3. In particular non-linear services should be excluded from scope. Current broadcast regulation is predicated on command and control being effective and efficient. Where content is supplied from all over the world over the Internet other strategies are needed.
4. Self-regulatory schemes that work well, are valued by customers and are efficient must not be de-railed by this new Directive. To the extent that the state has to be involved by law, it should just provide minimum back-stop cover.
5. Changes to the definition of “Linear” are still required, so that it just includes traditional real time broadcast services. At the moment too many new types of service are potentially captured unnecessarily.
6. Further measures could be taken to liberalise the rules on advertising. All rules relating to the quantity of advertising should be relaxed. Consumers now have the power to influence the quantity (and indeed quality) by choosing not to watch channels with too much advertising. The quantitative rules are not suitable for other platforms such as linear content supplied over mobile platforms.
7. New markets and services (such as mobile TV) need much work and investment by industry. They must be allowed to develop in an appropriate regulatory environment that does not assume the old rules will be suitable for these new models.
8. It is already difficult to source high quality content and obtain rights clearance. Service providers should be allowed to develop new formats based on business models (ie quantity of advertising, product placement and sponsorship) that suit their market. They should not be lumbered with quotas from the outset.

INTRODUCTION

9. The mobile phone is rapidly developing from being a communications tool to becoming a multi-functional information and entertainment device.
10. Audio visual material available on a mobile device is now very diverse: sports highlights, music videos, computer games for mobiles, personal video blogs, internet content accessed from mobile browsers. It is mostly non-linear at the moment. The first examples of advertising on mobile are just emerging. Operators in the UK and other European countries are also starting to announce the first broadcast mobile TV services.
11. As a consequence, the new Directive has the potential to have a very direct impact on mobile operators and their customers in the UK and throughout the EU.
12. The MBG agrees with the Committee’s assessment that the Commission’s proposal “would substantially amend the terminology and terms of the existing measures” for content regulation.

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A. *The need for regulatory initiative in this area*

13. The MBG recognises that the Directive needs to be amended, in order to bring it up to date with current market circumstances and to reflect the circumstances of the audio visual communications market today and in the foreseeable future.

14. For example, the rules on advertising and product placement, drawn up in the days of limited spectrum and channel choice, must be relaxed in order to reflect today's realities—when customers can exert pressure on broadcasters not to overfill schedules with advertising, either by choosing not to watch their service or skipping through advertising altogether with the use of a personal video recorder (PVR).

15. The MBG, while not entirely agreeing with the Commission's approach, also supports the basic objectives of the Directive, such as promoting the single market, protecting minors and human dignity and promoting cultural diversity and media plurality. We strongly support the country of origin principle.

16. Along with many other stakeholders, we question the wisdom of bringing non-linear services within the scope of the Directive. The UK Government, almost alone among European authorities, has been very public in taking this line, as have been a number of European representative organisations.³¹ Our arguments are set out more fully in the second section of our evidence.

17. In answer to the Committee's question are there advantages of regulating this area, we would respond that with respect to linear broadcast services³² there may still be advantages.

18. First, the general public still has an expectation that content on television will be regulated. And because the physical infrastructure for broadcasting is generally located within the EU and radio spectrum is controlled by member states, it is reasonably practical to do so.

19. Regulation of TV services in one jurisdiction for broadcast throughout the EU (albeit with some derogation for the more extreme content) has generally been cost effective and beneficial for producers and consumers alike.

20. Content delivered via the Internet, on the other hand, has developed in a completely different regulatory environment. Audio-visual content appears in all kinds of formats, from short clips to full length films. Some content is professionally produced but much is self-generated by individuals (some of which is commercial and thus potentially in scope). And, although many people have concerns over the content available, as they do with TV, the great majority want to take responsibility for what they and their children access on the Internet. For the most part they do not see this as primarily the role of Government.

21. People also recognise that it would be impossible for the UK government to regulate content that can be distributed from anywhere on the globe by any one of the hundreds of millions of people that can upload audio visual content onto the Internet.

22. As a consequence people are developing their own strategies for protecting themselves, such as applying filters to their Internet access service. In the mobile sector, all the mobile operators offer filtering of Internet content for customers under the age of 18.

23. The MBG does not believe that it will be cost-effective, or even effective at any cost, to require the national regulator to regulate the providers of non-linear content. The regulatory regime is being set up to fail.

B. *Can the proposed Directive, in its current form, meet its broad objectives?*

Does the Proposal sufficiently liberalise the provision of broadcasting services within the European Union?

24. The MBG supports some of the proposals that the Commission has made to liberalise broadcasting services, such as the move to allow product placement. We also support the continued restrictions on the advertising of cigarettes etc.

25. However, we feel that the Commission can go further in its drive to liberalise the quantitative rules on advertising, particularly the 20 per cent rule and the 35 minute rule.

³¹ For example The European Internet Service Providers Association, GSM Europe, European Telecommunications Network Operators, Bitcom (Germany).

³² That is as we currently understand the broadcast TV definition, not the definition in the Directive.

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26. The MBG's overall view on the rules on quantitative advertising is that they are anachronistic. We have sympathy with policy maker's desire not to "Americanise" television with over frequent interruptions for advertising. However, the consumer now has enough choice (and technical tools) to exercise power over broadcasters to persuade them not to insert too much advertising.

27. A further reason for relaxing the rules is that new models, such as mobile TV, are emerging. Trials to date suggest that mobile TV is not a substitute for but is complementary to domestic TV. Customers watch mobile TV in much shorter sessions, while they are out and about, filling in downtime. The quantitative rules invented for domestic TV do not make sense for mobile TV, particularly the 20 per cent rule, which we would like to see removed. Research recently published in the UK by Strategy Analytics indicates that the average mobile TV user watches three times per day for an average of five minutes at a time.

28. New platforms such as mobile TV need to be developed in regulatory environment that is suitable for the way these services are used. If the services are to become viable, they must not be lumbered with quantitative advertising rules developed for domestic TV but must be given the freedom to develop business models, supported by advertising, sponsorship and product placement, that are suitable for their market segment (which, research shows, is very different to domestic TV).

29. The MBG would like to see the Commission go further and abolish quantitative rules altogether. The TV market is now so diverse that such tinkering is unwarranted. Regulators should exercise a preference for non-intervention on the workings of the TV advertising market.

Does the Proposal contain measures that will effectively protect public interest objectives?

30. As stated above in paragraph 16, the MBG has grave doubts about setting national regulators the task of regulating non-linear services.

31. To address services supplied from all over the world over the Internet (by individuals in their bedrooms and large corporations alike), we must move away from a command and control mentality and develop new models for dealing with public policy issues.

32. There are, after all several tools at our disposal—the general law, technical tools, self-regulation, community regulation (eg e-bay), customer education and even, where appropriate, co-regulation. In any given situation all can be deployed individually or in combination. In the long term, this will be a much more effective way of dealing with the global phenomenon of content delivered over the Internet. It is not realistic to try to ring fence the European market or meaningful just to attempt to control what goes on inside its boundaries. The MBG would like to see non-linear services removed from the scope of the Directive.

33. To the extent that the Directive covers non-linear services at all, it should be tightly defined only to those on demand services that are designed to be a substitute for traditional television, where the regulator has a realistic chance of being able to identify the market players and exercise a measure of proportionate regulation.

SPECIFIC QUESTIONS

Is there agreement on the Commission's proposal to distinguish between linear and non-linear media services?

34. The MBG agrees that there is some rationale for making a distinction between linear and non-linear, because there is still an expectation among the public that TV will be regulated. The public, in general, expects to take responsibility for their own viewing habits for non-linear (eg on-line) services. It is also reasonably practical for regulators to regulate linear broadcast services.

35. However, we do not agree with the current definition of Linear Service and there is still work to be done to define more clearly the difference between linear and non-linear services. An example of a service under threat of being defined as linear, is a subscription service where the content is downloaded to a subscriber's device at a time of the provider's choosing (say during the night) but watched by the customer at a time of his or her choosing—ie viewing is on demand rather than simultaneous to the broadcast. Also content that is provided on a continuous loop and is more in the nature of an on demand service should not be deemed as linear. It is not a substitute for traditional television.

36. The definition of linear should only cover what we today understand as traditional real time TV broadcasting, which is designed to be transmitted and viewed simultaneously.

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37. However, even with the definitions amended, the MBG anticipates that there will be many, as yet unthought of, examples where it will be not quite clear whether a service is linear or non-linear. The Commission should therefore also be seeking to liberalise further the rules for linear (for example in respect the quantitative advertising), so that the distinction becomes less important.

Jurisdiction and country of origin—Does the Proposal go far enough in facilitating the free movement of broadcasting services?

38. The MBG strongly supports the country of origin principle. The Directive does go far enough in facilitating the free movement of broadcasting services. We do not see that it is necessary for this Directive to address non-linear services. There is no evidence from industry that the inclusion of non-linear services confers any benefits beyond those that already accrue from the e-Commerce Directive.

Regulatory approach—what role should industry self-regulation play in the new regulatory framework framework?

39. In 2004 the MBG members published a Code of practice for visual content.³³ It represents some of the strictest regulation in the content market (eg customers cannot get access to adult rated commercial content until they have produced independent evidence that they are at least 18). It has proved efficient to administer and effective in achieving its aims.

40. The AVMS Directive should not be allowed to derail voluntary self-regulatory schemes that are proven to be working (such as the mobile content code). This would dissipate all the advantages that come with self-regulation—responsiveness to changes in the market, quick settlement of disputes and cost effectiveness. If the state has to be involved at all by law, in order to transpose the Directive, it should be at the minimum possible level.

Advertising—should broadcasters be given greater flexibility to in respect of the arrangements they enter into for financing programmes?

41. The MBG welcomes the measures being introduced to relax the rules on product placement and sponsorship and we would like to see these introduced into the UK market. New business models will be key to the continuing existence of traditional broadcasting models. They will also be vital for the establishment of new broadcast platforms such as Mobile TV. As stated above, the Directive could go further and relax the quantitative rules on advertising, such as the 35 minutes rule and the 20 per cent rule.

Protection of minors and human dignity

42. The MBG completely agrees with the policy objectives of protecting minors and human dignity. That is why we published the Code, referred to above, in 2004. All MBG members are subscribers to the UK's hotline for reporting illegal content³⁴ on-line. Nevertheless, for reasons stated elsewhere in this evidence, we believe that the approach taken in this directive with respect to non-linear services is wrong and that there are other ways of keeping people, particularly children, safe on-line: technical tools (such as filters), the general law, self-regulation and information for consumers, to name a few.

Media plurality and cultural diversity

43. The MBG supports the EU's objective for the European Union to remain an attractive location in which to invest in and create new audio visual media services. We also believe that there is a strong demand from consumers for content that is culturally familiar and attuned to its citizens. One of the great benefits of making content available on-line and on-demand is that it is easier to promote cultural diversity and to cater for fringe minorities (eg Gaelic speakers in Scotland) whose size may not justify a large amount of broadcast airtime (the "long tail" effect). However, on demand content is different to broadcast content, in that, self-evidently, it is only accessed if it appeals to its audience. Quantity of material available is not a very interesting or meaningful thing to measure if nobody is downloading it.

³³ The UK Code of Practice for the self-regulation of new forms of content, <http://www.mobilebroadbandgroup.com/social.htm>, and www.imcb.org.uk

³⁴ The Internet Watch Foundation.

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44. The MBG does not support any quota requirement for non-linear services, on the grounds that it would create uncertainty, reduce programming flexibility, discourage investment in new services and be extremely difficult for the regulator to make any meaningful measurement.

45. Just as the traditional platforms were given time to work up to quotas, the new broadcast platforms, such as mobile TV, should also be given this opportunity and not be subject to a raft of quota regulation at the outset. These mobile broadcast technologies have exciting prospects and trials indicate that they will be popular with customers. Nevertheless, the concept is in its infancy, the services require heavy investment to set up and the market needs careful nurturing—not regulatory interventions that will make it harder to succeed from day one.

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Examination of Witnesses

Witnesses: MR HAMISH MACLEOD, Co-Ordinator, Mobile Broadband Group, and MR DARIO BETTI, Data Marketing Manager, T-Mobile, examined.

Q181 Chairman: Good afternoon, Mr MacLeod and Mr Betti. Thank you very much for sparing the time to come and meet us this afternoon. We are very grateful to you, and for the written evidence that you kindly submitted too. You can take it that we have read the written evidence, and certainly we will refer to it as we go along. We have a lot to cover, so unless there is something you would like to say initially, I would like to go straight into questions. If there is something you would like to say, by all means do.

Mr MacLeod: No. Fire away.

Q182 Lord Haskel: We thought we would start on the scope of this whole thing, because the proposal attempts to bring the emerging media platforms, specifically the internet, under the existing regulatory framework for broadcasting. We would like to know if you consider this appropriate, and what are the advantages and disadvantages that this approach might have as far as regulation is concerned?

Mr MacLeod: We basically share the views that have been fairly clearly expressed by the UK Government and by Ofcom that the non-linear services should be kept out of the scope of the Directive. The reasons we are saying this is that on principle, it is the wrong approach for regulating services that can be delivered from anywhere in the world via the internet, and we are setting up our regulatory system to fail if we expect them to be able to devise rules and enforce rules that will work.

Q183 Lord Haskel: Is that because you think the thing is under development and it is a sort of moving target and it is very difficult to define the scope of a moving target, so to speak?

Mr MacLeod: That is certainly one aspect of it but I think the major aspect is the territorial issue, in that these services can be delivered from anywhere, which will be far outside the territorial authority of our national regulator, or indeed any European Union regulator. You can make it partially effective perhaps

for services that are created within the European Union, but it will be ineffective for any other type of content.

Q184 Lord Haskel: So you think that anything that goes through the internet it is impossible to regulate because of the territorial question?

Mr MacLeod: I think it is very difficult and very impractical and the instrument of a Directive, which will set up all sorts of responsibilities for our national regulator to enforce, is just not the right instrument.

Lord Haskel: What about content? Do you think it is possible to regulate content or is this a matter of self-regulation?

Chairman: We can come on to content next. Let us try to stick to scope if we can.

Q185 Baroness Eccles of Moulton: It would be quite interesting to hear your views about the difference between linear and non-linear, because it would seem that now there is such a huge choice of what can be seen over the linear system that maybe the difference between the two is not quite as great as it was before either the linear expanded so much or the non-linear came into being.

Mr Betti: I work more closely with the consumer rather than the regulatory side. I work in T-Mobile International. These definitions interest me as well. It is on one side understandable what linear is right now, because it refers back to the television world, where the model is existing and easy for us to understand. However, once we try to look a bit more closely at what the user might want of a mobile television, linear, here we start looking at the unknown because actually right now we have something that is embryonic, a new thing that is developing, and we do not know exactly where it is going in the first place. So the definition of linear and non-linear is a very interesting one because it is a very grey area at the moment, I would say. It is a very difficult one. It seems we are using technology terms

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almost to define a consumer area, and the technology terms we are using are still the old technology terms. There are quite a few examples of things that are difficult to place at the moment. Just to mention one, since we started discussing this, user-generated content has come into being, and that in itself is an interesting way of redefining non-linear. Also, if I look at what we offer now on some of the mobile TV services, we have plenty of looped content. This would be effectively seen as a linear service but then we would apply a different framework of regulation for the same content which is available as a non-linear download service, hence some of the confusion over the content at this moment. Nevertheless, we think there should be a distinction between what is considered linear and non-linear, which should probably be better argued and better thought through. However, we are not in a position where it is clear as yet where we are going or what the consumer will eventually want. It is almost a bit too early to define classifications.

Q186 Baroness Eccles of Moulton: How long ago could you first receive an image on your mobile?

Mr Betti: We are talking about the technology?

Q187 Baroness Eccles of Moulton: Yes.

Mr Betti: The first time I saw one was probably in 2001 but it was not anything you could properly define as real television.

Q188 Baroness Eccles of Moulton: Surely, you would not link the words “broadband” and “mobile” until that was possible. Up until then broadband was only relevant as regards PCs, was it not?

Mr Betti: Indeed. The speed over time was very much limited compared to what you used to get in 1995-96 with the narrowband version. In terms of quality, obviously we are moving forward, and it is not just the technology world that is changing. One of the ways we are looking at this is purely as technology convergence, but there is a service view of what the consumer might end up doing with this, and that is more difficult to guess and more difficult at the moment to really understand, hence some of the questions we probably share on where the boundaries are.

Q189 Baroness Eccles of Moulton: I suppose what we are leading towards is that the technological advance is moving at such a speed that these definitions are going to become increasingly difficult to adhere to.

Mr Betti: It is increasingly difficult. When these discussions started, probably two years ago, not just for technology but some of the services, such as user-generated content which we mentioned before, were not even considered or thought of, and this is now

possibly one of the most important elements we might have to face in terms of the services. That is in two years by the time this framework comes into being, who knows what will have happened in terms of both technology and service?

Mr MacLeod: I would just like to make one point about this non-linear regulation. The Directive as it is currently framed is predicated on command and control-type regulation continuing to be effective. It has been absolutely fine for what we understand as broadcast regulation because all the players have been operating within the markets that the NRAs can control and they have had control over the spectrum and things like that which have allowed them to exercise this control. When it comes to the non-linear content providers, distributed throughout the world, command and control will not any longer be effective.

Chairman: I promise you we will come back to that.

Q190 Lord Haskel: On the question of the scope of non-linear, Mr Betti spoke about user-generated. Where would you draw the line between a programme which is transmitted at a specific time and the same programme which you can call up and watch whenever you particularly want to? The programme is the same; it is only that the timing is at your discretion. Would you call that “user-generated non-linear”?

Mr Betti: I am sorry. Let me see if I understand correctly. Are you saying if we were to define it?

Q191 Lord Haskel: Yes, as far as defining the scope of non-linear is concerned.

Mr MacLeod: “User-generated” is really the term we use for amateur production, where somebody sits at home in front of his webcam and does his own thing. There is no professional service provider involved.

Q192 Lord Haskel: So if you have a programme which is transmitted at a specific time but you can also call it up—all the cable companies offer this facility—how would you define that programme, if you called it up at time that suits yourself?

Mr Betti: Would that be non-linear?

Q193 Lord Haskel: That would be non-linear.

Mr Betti: So on-demand?

Q194 Chairman: It would be, by your evidence, your preference, but when the Minister was before us, he made clear that in the compromise that had been reached at European Council level, the Commission, that they would support a definition of non-linear that would include TV-like services.

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Mr MacLeod: Yes.

Q195 Chairman: Can I ask you two questions, one to lead to that: the general public who are reading this—if they ever do read minutes of these proceedings—would be baffled by linear and non-linear. Can you explain to the ordinary citizen what is a linear service and what is a non-linear service? When you have done that, I then want to ask you about defining it.

Mr MacLeod: I recognise that it is extraordinarily difficult, this whole area, but what we think should be linear is what we understand by traditional broadcasting services where the schedule is developed by the service provider and transmitted at a time of his choosing. That is basically the linear. The easiest definition of non-linear would be . . .

Q196 Chairman: Everything else?

Mr MacLeod: Exactly. The compromise situation that the Government have suggested I think recognises the political realities of what is achievable, and I think it also recognises what was really intended when they first started to review this regulation three years ago, where they were thinking you are going to be able to look at television on your television and exactly the same content downloaded at your convenience over the internet. They were thinking perhaps in order to create this so-called level playing field we need to introduce regulation for both these types of services. But in the mean time, the world has moved on considerably and we have this huge amount of user-generated content which is becoming available on services such as YouTube, which people are managing to commercialise. So technically, they will come within the scope.

Q197 Chairman: In your evidence to us . . .

Mr MacLeod: In our evidence we put the hard view, yes.

Q198 Chairman: You do. You say that it should only include traditional, real-time broadcast services, including if you are on internet.

Mr MacLeod: Yes.

Q199 Chairman: But the compromise being suggested does go wider than that. What is your view about the meaningfulness of “TV-like broadcasts”? Explain again to the public what it means.

Mr MacLeod: The simplest way of describing it would be content that you are able to see on your TV being distributed through the internet. It is the same sort of content. It might be Coronation Street or *Eastenders* or whatever, but pulled down through the internet; professionally produced.

Q200 Chairman: Your members would then be subject to regulation for some part of your content that you offered, which you will presumably offer, if not now, ultimately, the ability to pull down TV content off schedule that has previously been scheduled. Am I right?

Mr MacLeod: Yes.

Q201 Chairman: I would not say your members are happy with it, but they understand and would live with the situation where you were regulated for some of the things you did but not regulated for other things that you provided. Is that correct?

Mr MacLeod: Correct.

Q202 Lord Roper: Would you be regulated or would the people who actually produced the material which is then pulled down over your broadband?

Mr MacLeod: Again, that is a very good question. Principally, it will be the content producers, the audiovisual media service providers, that will be regulated, but in as much as we are not only platform operators but also audiovisual media service providers, we would also be regulated, yes.

Q203 Lord Swinfen: On that surmise, you would be responsible for content that emanated from outside the European Union that you then distributed?

Mr MacLeod: I do not think so, no. If you were just the mere conduit/platform that was giving access to that content, no.

Q204 Lord Swinfen: But surely you are just a platform giving access to content that is generated within the European Union. You are in exactly the same position.

Mr MacLeod: Not always, no. There are services that, as an operator, you provide as a content provider.

Q205 Baroness Eccles of Moulton: Could you give us an example?

Mr Betti: We do have a TV service in Germany as part of T-Mobile International. We have a TV platform where the content is sourced from the broadcasters for public and private broadcasts in Germany and we then deliver that straight to our users. That also includes some channels that we commission to independent producers to package for us. So for certain channels we simply simulcast, we present what is available or a large amount of what is available on traditional TV, and on the other side we do commission directly certain programmes. But all of those are done within the country itself.

Q206 Baroness Eccles of Moulton: Like a soap opera?

Mr Betti: That is one. We do have a soap opera channel and we also have a comedy channel.

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Q207 Chairman: Can I just press you on this issue of practical working definition? When the Minister was before us, he went further than your interpretation of “TV-like”. I think I am right in saying that he suggested that if somebody offered a catalogue of programmes or films, which may never have appeared on television before, these would be regarded as TV-like services. So if someone offered a catalogue of films, for example, I think I am right in saying that would come under TV-like services.

Mr MacLeod: Again, we cannot answer any of these questions with bounding enthusiasm but yes, I think the position the Government is developing seems to be within the bounds of what is possible and sensible. What they are seeking to exclude are the amateur-type products that are uploaded on to the internet and are somehow commercialised, which within the current definition would fall within the scope, but there seems to be quite a lot of support for actually recognising that we really do not want to be regulating every bit of amateur, user-generated content. So let us just concentrate on professionally produced.

Q208 Chairman: I want to just finish this line, because when we come to read your evidence and come to write our report, it is extremely important to get clear what the industry understands by what the Government has in mind. One of the criteria for TV-like services delivered over mobile phones and internet was services where the user reasonably expects regulated protection within the scope of the Directive. Do you think users of your service reasonably expect downloaded films that are nothing to do with the television to be subject to the Directive? It is a test of “the user reasonably will expect” regulated protection. Do you think that is the case?

Mr MacLeod: I must admit, that is an extremely difficult question to answer definitively, but if it has been professionally produced for public consumption, and the public does at the moment have expectation that their TV content is regulated, and anything that has the look and feel—and I agree it is not a hard and fast definition—of professionally produced content, we think that is what the Government means.

Q209 Chairman: I hope you re-read the evidence that you are giving today. In your own written evidence to us in paragraph 20 you say that “although many people have concerns over the content available, as they do with TV, the great majority want to take responsibility for what they and their children access.” That seems at odds with what you have just said. I say again, do you think your users will expect a package of TV film choices to be equated with TV-like services, and that they

should therefore be regulated in the same way as television? We are very near, as I understand it, to potential agreement being reached, so these are important questions for clarity, are they not?

Mr Betti: I will probably step away from the regulatory side, but if I look at what we have seen from the user, what I would like to say is a minimum element of decency, for instance, and request for laws to be met by the users. Also, as a mobile operator, we are very much interested in protecting our brand and our users. With the on-demand, however, we also see that automatically the user is actually starting to make a decision on what they want to see, and is being more active. I believe that there is a different world in the non-linear than in the linear world, where there is more editorial control by the channels. Hence, so far we have seen the user reaction. I also see how partly there is the awareness that they are making the choice on non-linear to watch something at a certain time, and also to go in search of something else, because the choice is so much wider. So I do see a bit of a distinction between the necessity of regulation of the two from looking at the consumer side.

Chairman: Can we go on to content, because they clearly merge, service and content issues and so on.

Q210 Lord Geddes: On advertising, on the content side, you have a number of bits of evidence on your written evidence, and if I could just quote from paragraph 6 and paragraph 41, you begin paragraph 6 by saying “Further measures could be taken to liberalise the rules on advertising. All rules relating to the quantity of advertising should be relaxed . . . The quantitative rules are not suitable for other platforms such as linear content supplied over mobile platforms.” That is pretty clear: further measures could be taken. Then in paragraph 41 you say you welcome the measures being introduced to relax the rules. So, number one, is there enough relaxation in the draft or do you want more relaxation?

Mr MacLeod: Paragraph 41 refers to product placement and sponsorship.

Q211 Lord Geddes: I was going to bring that up. It does not say anything about advertising as such, what I understand as advertising—linear advertising, dare I say it?

Mr MacLeod: Yes. At the moment there is what is in shorthand known as the 20 per cent rule, where you have a maximum of 20 per cent of advertising content in any hour’s broadcasting, and that is one rule which we think could be relaxed. There is now so much choice. Those are rules that were made up when there were very few channels, and now there is such a huge choice for customers to watch, and there are technical techniques of actually skipping

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through the advertising, that we think the regulators should basically have a bias against intervention. When they can see that the market will do its stuff, then they should step back. This is one area where they could step back further. The second reason is that in the fullness of time the market for linear content over mobiles will develop strongly and we are not convinced that the rules that were invented for domestic broadcasting read comfortably across to the mobile TV type of situation, where people use the service in a completely different way.

Q212 Lord Geddes: The nub of my question—and your answer may be delightfully short to this—is: do you consider that the proposed rules adequately address the emerging business models for content provision over those new platforms?

Mr MacLeod: No. I think we could be given more flexibility.

Q213 Chairman: So the draft Directive as it stands, applied to some of the services you will offer, it appears that—I would not use the word “happy”, but you would go along with. Some of the services you offer potentially will be subject to some regulation regarding advertising, so rules around advertising—the amount, the frequency and so on—you are content with. That would apply to some of your services but not to others.

Mr MacLeod: Where it relates to advertising on the linear services which are transmitted over mobile, no, I think we could do with more relaxation of the rules around quantity.

Q214 Chairman: But would TV-like services, e.g. films, be regarded as coming under those quantitative advertising?

Mr MacLeod: That is not my understanding, no.

Q215 Chairman: You are positive about that?

Mr MacLeod: The non-linear. The 20 per cent rule I do not believe refers to the non-linear.

Lord Roper: The 20 per cent? Are we talking here about the amount that is European in content?

Lord Geddes: No, it is timing.

Lord Roper: No more than 12 minutes.

Q216 Chairman: I have just checked with my adviser. He thinks, as I do, that when the Government is talking about “TV-like” services on internet, for example, or delivered through mobile phones, including, as I say, for example, a catalogue of films, not just television services that you can access by chance or design, that they would not be called non-linear. That was widening the definition of linear.

Mr MacLeod: Again, that is not my understanding. The Government’s compromise move is to keep linear as it is, but if you must bring non-linear into scope, let us try and tightly define which non-linear services will be subject to regulation.

Q217 Chairman: But they would not be subject to the current regulation, advertising and so on, at all.

Mr MacLeod: The quantitative aspects of it, is my understanding, no.

Q218 Chairman: Under the draft Directive as it currently stands, what would be regulated for in this narrowly defined non-linear service?

Mr MacLeod: There are things like the protection of minors and human dignity.

Q219 Chairman: What else?

Mr MacLeod: There is the quota stuff.

Chairman: We will come to that. I did not want to discuss them. I just wanted to understand from you the answer.

Q220 Lord Swinfen: I am going to come on to my supplementary in a moment, but concerning illegal or harmful content, do effective mechanisms exist to control the types of illegal content identified in the proposal, e.g. race hatred, and is the proposal likely to substantially enhance restrictions on freedom of expression?

Mr MacLeod: The Directive is not specific about how each NRA should go about restricting the availability of illegal content, but I am pretty happy that the systems we have in the UK for restricting access to illegal content are very thorough and are getting more so. Your specialist adviser, of course, is a director of the Internet Watch Foundation, as am I, and all the significant internet service providers and mobile operators are subscribers to the Internet Watch Foundation, and it has been very successful in tackling the whole area of illegal content. The Directive will not impact on the arrangements, as far as I can see.

Q221 Lord Swinfen: In answer to Baroness Eccles we were told that you thought it was in order to regulate the distribution of programmes made in, say, Germany within the EU but in an even earlier answer to me you said you did not think it would be right to regulate programmes that you distributed that emanated from outside the EU. I do not understand the difference between the two of them, particularly when you are talking about content that may be either illegal or harmful.

Mr MacLeod: Illegal content we are addressing in this country in a very specific way, which is not really available for general application. With illegal content, the Internet Watch Foundation compiles a

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database of all the known sites around the world where illegal content is known to be available and the internet service providers have access to that database, and if their customers try to access those sites, access is blocked. That is a very specific response to a very specific problem. It is not something that can be used for a general application.

Q222 Lord Swinfen: It does not cover anything that might be in a film that is being distributed by one of your members on the internet?

Mr MacLeod: If the content was available from Malaysia or somewhere like that, we would not be said to be the provider within the terms of this Directive.

Q223 Lord Swinfen: But you are distributing it.

Mr MacLeod: No, no. We are not distributing it. We are just providing the connectivity to the site.

Q224 Lord Swinfen: Am I not right in thinking that if you were to take it directly from Malaysia with the object of distributing it immediately, you have actually got technical devices that can store it for a few minutes while you view it and decide whether or not to take things out before you actually distribute? Does that then not make you responsible?

Mr Betti: Could I try to see if I understand correctly? What we are doing you can define at two levels. One is the service provision, where we act effectively as an aggregator of channels, and we provide to our customers a service which they can have a look at, what is effectively a programme guide, picking up the channels and so on. This is very much a closed access system, where we have a direct control over the partners we like to work with and who we select as a content provider. Then there is another side. If we open the internet, obviously, it is up to the users to go and select where they want, and effectively what you just mentioned, being a real-time service, we might not store the content. The content might be fetched from Malaysia and distributed directly on behalf of . . .

Q225 Lord Swinfen: Can I stop you there? There are certain programmes that are delayed by a number of seconds so that they can bleep out swear words. If you can do that to programmes on the television, surely you can do that with the programmes that you distribute?

Mr Betti: That is the equivalent of the first kind of service provision, so we can do that with a package of channels that we control, 16 channels, which you know where they are from and you can monitor. This is already being done by the broadcasters themselves that provide the content to us. We are probably talking worldwide of millions of possible

distributors, and we might not even know when they start and when they disappear within the internet, and in that case we would act as a pipe; we do not listen into all of the millions of hypothetical TV channels that are coming from all over the world.

Q226 Lord Geddes: I have two quick questions before we move on. You have been very helpful for the record in defining the 20 per cent rule. Again, for the record, could you define the 35-minute rule, just so we have it on paper?

Mr MacLeod: I have to say that is not one that really directly impacts on us very much, so I cannot pretend to be an expert on the 35-minute rule, but I believe they are thinking of moving to a 30-minute, which would be less disruptive to producers.

Q227 Lord Geddes: I will try other witnesses on that. We have talked a lot about the quantitative side. We have begun to get on to the qualitative side. Are there qualitative restrictions on marketing or advertising that you would consider to be necessary?

Mr MacLeod: We have not objected to any of the proposals in the Directive on the qualitative side as far as advertising is concerned.

Q228 Lord Roper: That suggests that that is an area where you believe there is a need for regulation.

Mr MacLeod: Basically, we have not taken up a position on that one. We are happy to go with what is being suggested on alcohol and tobacco and prescription drugs and things like that.

Q229 Lord Roper: So to that extent you would accept regulation?

Mr MacLeod: Yes.

Q230 Lord Roper: But who do you feel would be the appropriate person to do this regulation? The Commission or Ofcom or self-regulation?

Mr MacLeod: In this country we have the Advertising Standards Authority who administer both the broadcasters' cap code and the printed media cap code, and that seems to be extremely successful.

Q231 Lord Roper: Whether that would be accepted by the European Union, because it is not formally a governmental body, would have to be examined.

Mr MacLeod: Yes, and I think it is a very good example of why we should not be allowing extremely successful self-regulatory models that have been developed in this country over a number of years to be derailed by the Directive.

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Q232 Lord Roper: What about co-regulation? Do you see that that plays a useful part? You have yourselves drawn up a code of conduct but that is self-regulation.

Mr MacLeod: It is indeed self-regulatory. We published in 2004. All of the members of the MBG are prominent brands and we recognised that, to protect our customers and our reputations, we had to distribute content in a responsible way. So in many ways, by the time this Directive comes into force, whenever it is, they will be telling us to do something that we have already voluntarily done six or seven years after the event. We are not arguing against the fact that things have to be regulated; we are just arguing against the principle of the whole approach.

Q233 Lord St John of Bletso: I notice in paragraph 22 of your evidence that you said that in the mobile sector, all the mobile operators offer filtering of internet content for customers under the age of 18.

Mr MacLeod: Yes.

Q234 Lord St John of Bletso: How likely is this to be made compulsory?

Mr MacLeod: Compulsory in what sense?

Q235 Lord St John of Bletso: In the sense of anyone who is given a mobile device under the age of 18 would automatically have this filtering put on.

Mr MacLeod: Made compulsory by the state?

Q236 Lord St John of Bletso: By the state, yes.

Mr MacLeod: I hope that it will not need to get to that, because I think, even within the terms of the Directive as we see it, there should be enough flexibility for national regulatory authorities to say “Please implement some self-regulatory scheme to protect your customers, and if you do not, we will come after you, but if you do and it works, then we will not.” As far as we can tell—and we have had our code in place, as I say, for two years—filtering is available and is extremely successful, and there is no call for it to be made compulsory.

Q237 Lord St John of Bletso: What is the danger that the Directive will encourage content providers to relocate outside the European Union?

Mr MacLeod: Again, I think that is very difficult to assess, because it slightly depends on the implementation, and if it is sensibly implemented, then perhaps it is a reasonably low risk, but I think you have to ask yourself is it a risk that we need to take?

Q238 Lord Walpole: I am just going to ask a silly question. What I do not understand is, if you are purely a broadband provider, how the hell do you have any control over what your customers pick up?

Mr MacLeod: We were talking about the filter there.

Q239 Lord Walpole: Indeed, yes. So presumably things that are absolutely obscene or whatever are filtered out but apart from that, you do not have any control, do you?

Mr MacLeod: You say “absolutely obscene”; the bar is not that high. It is 18-type content, and if you are a minor and the filter is applied, you are not going to get hold of it.

Q240 Lord Walpole: How do you know it is a minor and not someone using his father’s mobile?

Mr MacLeod: We do have processes in place to try and stop that happening but we are in a similar position to a supermarket that sells a bottle of whisky to an adult who then irresponsibly gives it to a minor. We try and prevent that through our processes but it is not ultimately completely preventable.

Q241 Lord Walpole: Ultimately, I do not think you can stop them.

Mr MacLeod: I think that is right.

Mr Betti: It is an active process as well, if I understand correctly. You have to voluntarily say that you want your phone to be activated for receiving things, so your phone, even if you are 18, would not automatically receive adult content. It is a two-step process.

Mr MacLeod: Your question is not a silly one. It gets at the nub of the problem. If you can access content over the internet through the basic connectivity given to you by your internet service provider or your mobile as an internet service provider, there is very little that is going to stop you.

Q242 Lord Walpole: This may be an even sillier question: how many of your mobile members are actually using the thing at the same time? Are there hundreds of thousands of things going on at the same time that your clients are accessing through broadband?

Mr MacLeod: We like to think so, yes. The first 20 years of mobile has all been about communications, about voice and text message, and the next 20 years will be about developing it as an information and entertainment device. So it is all fairly young.

Q243 Lord Walpole: Yes, but one knows even with a mobile phone that the station you are trying to get into is sometimes full, very often full. If you are coming across the Channel for instance, the Isle of Wight gets totally jammed, as you probably know.

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I hope it is not one of yours. It is just that the quantity of stuff is inconceivable, is it not?

Mr Betti: Currently it is probably manageable by new networks but over the long term, you are right. We are already looking at alternative ways of delivering broadcasting-like services to users.

Q244 Lord St John of Bletso: A very brief question, that is not really within the scope of what you have given evidence on but what has been the take-up of 3G so far?

Mr MacLeod: The published numbers are just under 5 million subscribers in the UK, I believe.

Q245 Lord St John of Bletso: Because obviously, as the take-up increases, the threat increases of more content being downloaded which is of an improper nature.

Mr MacLeod: The opportunity, yes.

Q246 Chairman: Can I turn to the most positive side of things. These are fundamental questions. The theme running through your evidence and that of others is that in some way, if this Directive was got wrong and the draft Directive as initially published was, in your view, wrong in some regard, this could do two things. It could stifle a nascent industry, and a very important one, and secondly, it could drive the industry offshore, outside of the European Union. We can understand those as general propositions but I cannot quite understand what it is about the draft Directive that could have such Draconian consequences. What is the draft Directive as it stands proposing that would threaten this nascent media services industry? What specifically? Some people might say you were crying wolf about this. What no-one has actually said is "This is the threat." What is it?

Mr MacLeod: It is very dangerous, obviously, to cry wolf, and I think the Commission to a certain extent think we did that the last time. Let me just take two things. I will treat linear and non-linear separately, however we choose to define them. If we say linear is traditional broadcast, some mobile services will fall within the definition of linear because they will be very comparable to what is produced by BBC and ITV. There are a few measures in there that we think should be relaxed, and we have referred to them already really. The advertising rules I think could be relaxed. The second aspect is the quotas. There are quotas of European works and quotas of independent production and that sort of thing, which, when the Directive was first introduced, Member States were given time to build up to the quota levels, whereas as the Directive is currently drafted, any linear service will be expected to meet the quota requirements from the outset. I think that it is a bit disproportionate to expect mobile linear

services, which are only just starting in the market, to have to worry about quotas. The same goes for the advertising quota on the linear side. On the non-linear side of life, are we all going to relocate to the Bahamas, etc? It all depends on the implementation rather than the Directive itself, I think, because the terms of the Directive are quite specific: national regulators shall ensure that services are not made available in a way that might harm children. They are very specific on that. But at the moment it is really too early to say what will be required of national regulators in order to do that, or how indeed they will go about fulfilling that obligation, and how indeed the European Commission will go about enforcing those requirements on Member States. It is much too early to say but there is no doubt about it; the potential is there to be damaging and we are saying: is this a risk that you need to take? Is this the right approach?

Chairman: That leads us into the question of the original impact assessment by the Commission.

Q247 Lord Fearn: Mine could be rolled up into three questions, I think, on impact assessment. Has the Commission adequately considered the impact that this proposal is likely to have on the sector? Is it even possible to predict the likely costs and benefits of this proposal with sufficient reliability to support the proposed changes in the Directive? Thirdly, would a precautionary approach to regulation suggest different proposals for change?

Mr Betti: We have seen four impact assessments, I believe, so far, within which the effect on mobile especially mobile linear services—was not covered as much. Some of these implications we have spoken of are the quotas. We have seen the impact assessments from Ofcom, RAND, the DCMS and the Commission itself.

Q248 Chairman: Could you discuss the Commission's impact assessment first?

Mr Betti: I believe the Commission did not analyse very closely the impact on the mobile elements. We would like to have a chance to comment on some of the generic assumptions. One of them, I believe, is that there is an overall net neutral effect, which we might disagree with. The assumption right now is that the overall business case for the mobile TV or mobile video services are very solid and possibly not affected by changes in advertising rules or quotas, and actually that might not be the case. We still think, as we have said, it is a very new market. Every year important things change in terms of our understanding of how it is going to develop, and definitely over the last year and a half we have had more insight into what could be. But it is still a bit too early to say that we have looked at them in detail for the mobile-specific side. We have seen so

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far the one study that looks more closely at the mobile-specific aspects, I believe was the Ofcom one, but even there were elements that were not covered, such as the non-linear.

Q249 Lord Fearn: What about the likely costs and benefits?

Mr MacLeod: It is very difficult to assess those. They did not put any numbers to them, or even particularly attempt to put numbers to them, and we would struggle to do. I must admit, that is a big task to quantify these. You can really only point to where are the potential pluses, where are the potential minuses, which is actually an approach the Government took. Honestly, it is difficult to say where the potential pluses are. There are some minuses, which have been alluded to. We do not know how big they are. The pluses are more questionable, I am saying that, on the balance of probabilities, it would come out negative.

Q250 Baroness Eccles of Moulton: If you are confronted with an impact assessment based on a draft Directive and it does not contain any numbers, therefore you cannot calculate the cost benefit, does that not say something rather worrying?

Mr MacLeod: Yes, I think that is a very fair comment, but then I do recognise how difficult these impact assessments are to do, because they are dealing with so many unquantifiable issues.

Q251 Baroness Eccles of Moulton: This is something that could possibly become law.

Mr MacLeod: I recognise that.

Q252 Chairman: Lord Fearn, I assume with that in mind, asked whether a precautionary approach to regulation would have suggested different proposals. With a precautionary approach, as I understand it, you say "Look, be very careful. Don't do something that might lead to problems if you are not sure about it." You would be careful about it. You would do the minimum required. You appear to be saying to us that the Commission did an impact assessment, put out proposals on the basis of that that you are unhappy with, and you say you could not put numbers to them. Does that not suggest to you the Commission should have been very much more careful about what it proposed?

Mr MacLeod: I think we would agree with that, certainly.

Q253 Chairman: Were you consulted by the Commission?

Mr MacLeod: Not specifically, no. Obviously, we have had an opportunity to give input now, but way back, when they did the original thinking about this revision, no, we were not directly consulted.

Q254 Chairman: Why do you think that is the case?

Mr MacLeod: I do not think we were really on the radar at that time. The whole market has changed considerably. When they originally thought about this, it was all about television and services like television that you were going to get through the internet. It was not about mobile or user-generated content or anything like that.

Q255 Lord Geddes: Following that up, things moving at the speed they are, is this Directive, whatever form it may take, going to be out of date before it is printed?

Mr MacLeod: I think there is a good chance of that, yes.

Chairman: Which then suggests a precautionary approach.

Lord Roper: Is there a European body which brings together bodies like yours from other Member States? If so, are you co-operating with them and do you have a common position on this?

Q256 Chairman: If you can finish, we have two or three minutes before we need to go and vote.

Mr MacLeod: All my members are also members of the GSM Association.

Q257 Lord Swinfen: I am just wondering if your members have tried to cost the impact assessment, because it could have an effect on their future plans.

Mr MacLeod: Yes, and the answer is no, we have not come up with a pounds, shillings and pence number, but what we have tried to assess is what is going to be positive here and what is going to be negative, and the balance seems to be negative. How negative is very hard to say.

Q258 Lord Haskel: My question is very similar to Lord Swinfen's question. Have you made an assessment of what effect this Directive will have on the business of your various members?

Mr MacLeod: Yes, we have, and that is why we are taking a huge interest in the development of it.

Q259 Lord Haskel: What would that effect be?

Mr MacLeod: The best case outcome is that there will be no impact because, as I mentioned earlier, we have our code in place, it is very successful, and if the final implementation requires us not to make any changes to that code, and we have a very low cost of regulation, etc, we could have a reasonably liveable outcome, but we do not see any better position than that. We can only see a downside.

Chairman: Mr MacLeod and Mr Betti, this is most unusual, but it was so near the end, thank you very much indeed. You have been patient and willing to give us answers to a lot of questions, and you have put up with this division bell to finish off the

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meeting. Thank you very much indeed. We will now adjourn for the division and we will take the next witnesses after the division. Thank you very much.

The Committee suspended from 5.29 pm to 5.41 for a division in the House

Memorandum by ITV Network Ltd, Channel 4 Television Corporation and Channel 5 Broadcasting Ltd

ITV, Channel 4 and Five are the three commercial public service broadcasters (PSBs) in the UK. Between us we spend nearly £1.7 billion on programmes every year, the great majority of it on original UK programming. We have significant commitments to the provision of news, current affairs, regional programming, children's programmes, arts, religion, science, history, documentary, drama and comedy.

Although we are competitors for audiences and revenues, we have common concerns about the existing Television Without Frontiers (TVWF) Directive and the proposal to amend it via the Audio-Visual Media Services (AVMS) Directive. It is on that basis that we are jointly submitting this memorandum.

We welcome the inquiry being undertaken by the House of Lords Sub-Committee into the proposed Directive, and are glad of the opportunity to submit evidence to it. In this short paper we comment firstly on the background to the new Directive and its appropriateness to the current position of television, and in the process attempt to address the first two sets of questions posed by the Sub-Committee. We then go on to discuss the specific issues raised in the third set of questions.

THE NEED FOR A REVISED DIRECTIVE

The Television Without Frontiers Directive has been the principal EU instrument for regulating television since 1989. But the television landscape has changed hugely in the last 17 years, and despite some amendment the Directive belongs to another era. The traditional model for regulating commercial broadcasting involved granting a limited number of licences, guaranteeing limited competition in return for prescriptive regulation. Such regulation has been both positive (such as requiring investment in European production) and negative (such as limiting the amount, nature and scheduling of advertising). This has been justified on the basis of protecting the interests of viewers who had limited channel choice.

But today market entry is straightforward and cheap and viewers have almost unlimited choice. In short, the supporting assumptions of traditional television regulation are breaking down. It is important to understand in this context that the advertising revenues of the commercial PSBs are under real pressure from two main directions: increased channel choice and new media.

Today over 70 per cent of households in the UK have multichannel television via the Sky, cable and Freeview platforms. This has meant a fragmentation of viewing, as audiences have ever more choice from an increasing number of channels, and as a result advertising revenues for the public service broadcasters are coming under increasing pressure. A growing proportion of TV advertising revenues are now going to digital channels which typically have much lower levels of original content and rely to a greater extent on repeats and acquired content.

The growth of broadband and mobile telephony is leading to the development of new media platforms that provide a great variety of audio-visual content, funded at least in part by advertising. This means television is facing competition from a greater range of sources than ever before: the US studios' distribution arms, new media players with a global reach (eg Google and Yahoo!) and other companies with no historical connection to television or content at all (Wal Mart and Tesco have both recently announced plans for online delivery of content). Online and mobile activity is competing with television for viewers' time and advertisers' budgets. So far we see few signs that these new entrants will invest much in original European content; and at present they face no restrictions on online advertising or product placement similar to those on television.

As broadcasters we are responding to these changes by developing our own new businesses. But we believe it is also in our viewers' interests that the Directive be updated, since the alternative would be for the existing highly restrictive Directive to continue to apply to traditional television while the new media that compete increasingly with television remain unregulated and unrestricted—an increasingly unlevel playing field.

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Our main concern as broadcasters is to ensure our ability to compete effectively with new entrants in the tough new markets of the future and to continue to generate the revenues that will pay for the high quality programming on which we have built our businesses and our reputations.

Over 90 per cent of our funding comes from advertising revenue. For over 50 years UK viewers, whether rich or poor and wherever they lived, have benefited from advertiser-funded television providing them with quality programmes free of charge. We wish to continue to provide such rich and varied schedules, in spite of the increasingly competitive environment in which we have to operate. But to do that we need a more flexible Directive, with far fewer detailed controls over how we raise revenues, that also treats all television-like services on a comparable basis.

We also believe the new Directive must address the audio-visual landscape that lies ahead, not just the one that exists today. The Directive is likely to be in force well into the second decade of this century, and so needs to be based on a full appreciation of trends towards greater choice and competition, the continuing emergence of new platforms and the likely convergence between traditional television and internet-based content.

DEFINING THE NATURE OF THE REGULATED SERVICES

We support the draft Directive's distinction between linear and non-linear services. Our main concern is that new services which have the characteristics of television should be regulated like television. So services where a provider decides whether and when programmes are transmitted or made available according to a schedule setting out when a particular programme will be available, and where the objective intention of the service provider is that all viewers will receive that programme at the same time, are to all intents and purposes television services. This would be true whether services are provided via traditional television platforms, via IPTV, or via mobile television, and whether they are encrypted or unencrypted.

It has been suggested that online transmission of individual live events such as sports matches or music concerts should not be classified as linear services. But an event relayed live (by whatever technical means) is provided at a single point in time decided and publicised by a service provider, with the intention that all viewers receive it at the same time and so by definition should be treated like other linear services. In particular, such services should not be able to evade the rules on listed events or on advertising when they are essentially forms of television service.

We believe that one of the strengths of the linear/non-linear distinction is that it is technology neutral, and so should survive the proliferation of new ways of delivering television content in future.

JURISDICTION AND COUNTRY OF ORIGIN

We strongly support the maintenance of the Country of Origin principle, which has underpinned the existing Directive and should be maintained in the new one. We would be seriously concerned by any dilution or scaling back of this principle, as that could easily lead to confusion about where regulatory responsibility for a service lies. The UK has a strong and rigorous regulatory system that we are obliged to comply with. It would be costly, burdensome and bureaucratic if in addition we had to comply with the regulations of other territories in which our service could be received.

REGULATORY APPROACH

As television broadcasters we are used to complying with the terms of the licences issued to us by our regulator. However, we recognise that in appropriate circumstances co-regulation and self-regulation can provide effective alternative models for compliance with legislative requirements.

Over the last two years we have had experience of the new co-regulatory arrangements for broadcast advertising content, which we believe are working well, have the trust of our viewers, and have benefited from the involvement of the advertising industry.

However, we find the reference in the draft Directive to the inter-institutional agreement on co-regulation unhelpful, as its inclusion may require unnecessary changes to existing regulatory regimes that are working satisfactorily and inhibit the development of appropriate self- and co-regulatory arrangements in other areas (examples include the Advertising Standards Authority in its regulation of non-broadcast advertising, and the Association of TV on Demand (ATVOD), set up to cover television video-on-demand services).

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ADVERTISING AND COMMERCIAL COMMUNICATIONS

Our primary concern is to remove the restrictive and intrusive rules about advertising contained in the current Directive, so that we have greater flexibility in future to raise the revenues we need to finance our investment in programming. Although the draft Directive goes some way in this direction, it does not go far enough and in one important respect is extremely retrogressive.

We welcome the removal in the draft Directive of the 15 per cent daily limit on advertising time and of the “20 minute rule”, which rigidly prescribes how much time must elapse between commercial breaks and hence prevents broadcasters experimenting with more flexible break patterns.

But we strongly oppose the introduction of a “35 minute rule” for news programmes, children’s programmes and films. This rule would prevent half hour news and children’s programmes from continuing to carry a centre break—even though in the UK such programmes as ITV’s nightly evening news have had centre breaks for decades, with no complaints from viewers. The rule would make very little difference in practice to the current restriction on how many breaks can be taken during a film.

The primary effect of a “35 minute rule” would be to make broadcasters less likely to invest in such programming in the future. News and children’s programmes are amongst the least commercially viable genres at present—severely restricting the amount of revenue we can raise around them in increasingly competitive markets would render them even more marginal. It would also mean that a channel like Channel 4’s Film4 free-to-air channel—which currently devotes 40 per cent of its schedule to British, European and other world cinema titles—would come under increasing pressure to rely on more mainstream—“blockbuster” titles, without a meaningful relaxation of this rule.

We would also like to see the deletion of the rule that isolated spots can only be shown exceptionally. We do not see this rule serving any useful purpose, and it will inhibit broadcasters from experimenting with alternative break patterns that might prove more attractive to viewers. In addition, the rule could inhibit the development of viable new media businesses such as mobile TV.

In principle we welcome the proposal in the draft Directive to allow product placement for the first time, with appropriate safeguards. We believe product placement can help broadcasters maintain the attractiveness of television to advertisers, as part of our overall advertising proposition, and hence strengthen our ability to continue investing in original content. But we also believe that product placement must be carefully regulated so our viewers are aware it is taking place and it does not interfere with the editorial integrity of our programmes nor appear unduly prominent.

Although we broadly welcome the provisions in the draft Directive, we have some reservations about aspects of the way in which they are framed. Although it is essential for viewers to be made aware of product placement, we do not believe they necessarily need to be informed at the beginning of each programme; the specific manner in which transparency is achieved should not be specified in the Directive but left to Member States to determine. And the Directive should be amended to ensure that product placement rules extend neither to prop placement (which is permitted already in the UK under the Ofcom Broadcasting Code) nor to acquired content (since acquiring broadcasters can have little control or knowledge over the inclusion of product placement in such programmes; again, this is recognised already in the Ofcom Broadcasting Code).

PROTECTION OF MINORS AND HUMAN DIGNITY

We question to what extent the sort of proscriptive content regulation with which we are familiar as broadcasters can be applied easily to the wide range of non-linear services available on the internet.

MEDIA PLURALITY AND CULTURAL DIVERSITY

Each of us exceeds the existing European production quotas, but primarily because we are in the business of satisfying the tastes and preferences of UK viewers (and have had sufficient revenues historically to compete on this basis) rather than in response to regulation. The increasing proliferation of consumer choice is likely to make it more difficult to enforce production quotas on content providers.

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Examination of Witnesses

Witnesses: MR JONATHAN SIMON, Senior Manager Corporate Relations, Channel 4, MR MARTIN STOTT, Deputy Head of Corporate Affairs, Five, and MR MAGNUS BROOKE, Controller of Regulatory Affairs, ITV, examined.

Q260 Chairman: Good afternoon Mr Stott, Mr Brooke and Mr Simon. I am not sure if you were all sitting there patiently at the back listening to the previous witnesses but certainly I saw a couple of you. Thank you very much indeed for coming along this afternoon. The written evidence we received some time ago was short and sharp and very much to the point, so thank you very much for that. We would like to push on because we have only got 50 minutes and there may or may not be another division which that may cut us short. If there is and if the Committee can still be fitted in, I would like to give you at least 50 minutes. Can we go straight into questions? Although we have got it in writing, for the record, Mr Stott, Mr Brooke and then Mr Simon, it would be useful to read into the record who you are and who you work with.

Mr Stott: My name is Martin Stott. I am Deputy Head of Corporate Affairs at Channel Five.

Mr Brooke: My name is Magnus Brooke. I am Controller of Regulatory Affairs at ITV.

Mr Simon: My name is Jonathan Simon. I am Senior Manager in Corporate Relations at Channel 4.

Chairman: Thank you very much. We will go straight into scope of the proposal.

Q261 Lord Haskel: The proposal attempts to bring the emerging media platforms, specifically the internet, under the existing regulatory framework for broadcasting. Do you consider this to be appropriate? What are the advantages and disadvantages that this regulatory approach might have?

Mr Brooke: In a sense we start from a slightly different place because we start with the adequacy of the current regulatory framework for broadcasting and we abstract from that. From our perspective, we see the current framework as based on a premise of limited competition in exchange for rather detailed regulation, both positive and negative in relation to advertising regulation, in a world where there was limited choice for viewers and relatively limited competition, and therefore there was a need for quite tight regulation of television broadcasting. There is no doubt that has delivered enormous benefits for consumers and viewers. Between us we invest around £1.7 billion a year in original content, that is a by-product of that system of positive and negative regulation. What is clear is that our revenue is under real pressure and therefore very strict regulatory framework for broadcasting probably is not appropriate in a world

of enormous multi-channel choice where roughly 70 per cent of householders have multi-channel television and the internet is potentially a very powerful competitive force. I think we need to look again at the scope of the Directive and, in particular, at some of the detailed rules. Our starting point is therefore not necessarily to extend the current broadcasting rules to the internet. We also think there are practical issues of extending—as you have just heard from some of the gentlemen from T Mobile—the current regulatory framework to the internet, particularly the question of exactly what you bite on in relation to internet service providers and other providers of content who are established overseas. However, the nub of our concern in relation to a possible extension of scope is that services which are like scheduled TV services, services where a provider decides on the moment of transmission of broadcast content with the intention that that content should be received by viewers at the same time, which is essentially classified as a linear service under the current Commission draft Directive, should all be regulated in the same way. I have to say that is our priority, particularly since the Directive introduces two tiers of rules, one for linear services and one for non-linear services with greater obligations on linear services than non-linear services. We face a higher tier of regulation as the providers of linear television services, scheduled television services, compared with new entrants providing non-linear services. Our concern is to make sure that there is not a loophole between the definition of linear and non-linear services such that if you are providing, for example, live streaming of a sports event or a pop concert, which is, in effect, live television provided via the internet, where you decide the moment you start streaming it to viewers and viewers watch it live over the internet then from our point of view that is a television service and that should be regulated as a television service and the quantitative rules on advertising, the rules on product placement and, indeed, the rules on listed events should apply to those broadcasts and those should be classified as linear television services.

Q262 Lord Haskel: Thank you for that definition of linear and non-linear, but we have heard from other people that the whole thing is in a state the flux, it is changing and there are new things coming on all the time. How would you deal with all these various new television concepts coming into the market, for instance the programmes which are

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prepared by the viewers themselves and that sort of thing?

Mr Brooke: Conceptually, provided you take a technology neutral approach, I do not inherently see that the development of new technology should necessarily invalidate the Directive. For example, you can take a basic approach of saying that a linear service is a service where a service provider decides on the moment that service is made accessible to the viewer and the objective intention is that viewers should receive that service at the same time, which is essentially what television providers do, we schedule content and we make it available at a particular point in time and those people who are interested can view it. The reality is we can do that, and indeed to some extent are already doing that, over a variety of different platforms, so we stream ITV 1 over a mobile platform, for example, but essentially we are providing by and large, the same services we are providing to you via your television set. There is no particular reason why if we are doing that over the internet, for example, it should necessarily be any different, we are just providing the same service over a new medium. We have done that for some time, from terrestrial transmission to cable to satellite. One is talking about new means of distribution here I think to some extent, and I do not necessarily see why a set of definitions should not keep up with that. The separate point you make is about user-generated content and the question of the scope of regulation, should you be regulating a video made by a rugby club or something somebody makes in their bedroom? I think the answer to that is probably no, you should be looking to regulate the mass media in some shape or form, so people who are essentially economic actors who are putting themselves in the market place, not people who are putting their own home videos on the internet.

Lord Haskel: Thank you, that is very clear.

Q263 Baroness Eccles of Moulton: It seems that so far what you have described does throw up all sorts of grey areas because if you said, "Right, okay, linear can be defined as mass media professional production which is then streamed out and available as it is being produced and against that you put the amateur, where do you draw the line". The distinction between amateur and professional can so often be blurred and you might have something that is being produced on a very, very low budget which is just for a niche market? Where would that fall? Would that be linear or non-linear? The definitions can become very difficult, can they not?

Mr Brooke: I think you are right to highlight that, but I am not sure that falls into the issue of linear and non-linear, it is a question of whether that is caught by the Directive at all. There is a very clear category of people who are manifestly doing this not

for economic reward but I think you are right, there is a category of people who, if at all possible, would be doing it for economic reward but have not sold the film, the video or whatever it is the person is putting it on the internet. Again, I think that would fall into the category of user-generated. Where you have got a business which is seeking to put content on the internet specifically to make money, I think there is an argument that that content should be regulated.

Q264 Chairman: It is important to have clarity of definition because this is law at the end of the day. In relation to your definition, if someone or body puts material on the internet, for example, and they announce that certain aspects of this will be available at certain times and anybody can look at it because anybody who was viewing it would view it at the same time, that would come under linear and that would come under, in the Government's words, "TV-like services" according to you. That is potentially a very wide definition.

Mr Brooke: To step back for a second, our interest here is in a directive which is in formulation, and our concern is in relation to the distinction we see in the two tiers of regulation. We see ourselves being subject to quite stringent regulation on advertising and on things like listed events in circumstances where we can foresee potential competitors subject to very few quantitative limits on advertising. In the end, our ability to continue to invest in original production depends on us operating on a level playing field to other people who are putting content out essentially as a television service.

Mr Simon: From the new services you are starting to see emerge I think the vast majority of the content which is available is on-demand, it is not scheduled, so if it is caught in the Directive at all it would be non-linear. I think the range of content which we are most concerned about is the very small subset of things which might be like live events, sports and music, where the only way you can watch it is at the same time as everyone else. It is that content we are arguing should be classified as linear, but everything else, which is the vast, majority of what you are seeing on the internet, is either non-linear or should not be caught by the Directive at all.

Q265 Chairman: In evidence to us, the Minister said that TV-like services would include, for example, someone who put out a catalogue of films on the internet and you could source them on demand and that does not seem at all like what you are talking about.

Mr Stott: I think the use of the phrase "TV-like services"—

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Q266 Chairman: That is the Minister's phrase.

Mr Stott:—may not be the most helpful of phrases because there is a distinction between, on the one hand, services that look like television, which might be a definition of TV like services and perhaps on the other hand, the rather narrow distinction we are trying to draw between those services which are available to be viewed at a particular point in time. That is the essential distinction between linear and non-linear and that is the crucial point.

Q267 Chairman: With services on demand where you can call a service up and not everybody would necessarily want the same part, then your feeling towards this definition is it would not come under the definition of TV-like services?

Mr Stott: It would come under the definition of a non-linear service. You can either use the word TV-like services meaning linear services, which is what we would tend to use, but if you wanted to use TV like services to mean linear and non-linear services then obviously you need to distinguish between linear and non-linear within that definition.

Q268 Lord Roper: Some TV like services are in a subset of non-linear programmes which are comparable with what you are doing and would perhaps be subject to the same regulation.

Mr Stott: I think the sort of regulation to which we are subject may be quite difficult to apply. For example, some quantitative rules on advertising could be quite difficult to apply to a service which was available on a non-linear basis. The draft Directive makes this distinction between the rules that can be applied to linear and non-linear services and those that can be applied only to linear services. I think we accept that in principle. Part of our concern is the height of the hurdle to which linear services have to jump because I think in a more competitive world we would prefer the level of detail which falls on linear services to be made lower and closer to that of non-linear services because this is a world in which we are having to compete as a linear television provider with non-linear services.

Q269 Lord Geddes: Is it too simple a definition to describe linear services as scheduled services?

Mr Brooke: That is certainly an element of the definition, but I do not think it is quite enough to capture the whole element; the notion of the schedule is an important one. However, a schedule should not necessarily mean lots of different programmes, in other words you could have a single event that was scheduled at a particular point in time.

Q270 Lord Geddes: It would still be scheduled though?

Mr Brooke: It would still be scheduled, exactly, but not necessarily part of "a bigger schedule". In addition to that, you would need some sort of notion of the provider deciding on the particular programme which is put out at that particular point in time and there would be some notion that the intention is that people generally should have access to that particular content, broadly speaking, at that particular time, with some delay for transmission and so on, but that is the objective intention of the service provider. I think essentially those are the elements and it should be delivered over any platform, so a platform neutral definition

Q271 Lord Geddes: This is a rather different question, and I am sure all three of your organisations have done this research, what sort of overlap and confusion is there going to be with this proposed Directive with other EU directives? I am thinking particularly of the E-commerce Directive?

Mr Brooke: There is a possibility of some confusion and it would mainly relate to non-linear services. My understanding of the E-commerce Directive is that it effectively carves out broadcasting services. Presumably that would need to be reviewed in the light of the revision of the TV Without Frontiers Directive. However, I think we are talking largely about non-linear services which are not our particular area. My understanding is in general terms where there is a sector specific directive generally specific rules would overrule the general rules of the E-Commerce Directive. Of course there is a degree of ambiguity about which are the specific rules and which general rules they overrule. There are legal precedents which will deal with that.

Q272 Baroness Eccles of Moulton: This is a question about the level playing field and the fact that at the moment you see it being quite unfair to have to stick to the existing Television Without Frontier regulations if other people in the game do not have to. This is hypothetical, but from your position of representing independent television, if you were able to say in the light of everything that is happening and the inclusion of part of non-linear services in the Directive, what now do you think would be a sensible degree of regulation to have in any revised directive?

Mr Stott: It is not a question of what is in our interest as much as what is in the viewer's interest. Free-to-air television has been incredibly successful over the last 50 years in delivering high quality programming to audiences without them having to pay for it at the point of viewing. When the original Directive was being drawn up 20 years ago—it is about what the Minister was saying earlier—we lived in a world where there were very few viewing channels, my channel had not even been thought of

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and Channel 4 was only a few years old, therefore there was limited competition and you could have a fairly restrictive and detailed set of rules about our main concern, it would be helpful to have that advertising directive and so forth. We now live in a world where there are hundreds of television channels, there are new on-demand services being made available to mobiles, television, the internet and so forth and we are going to be facing a world which is far more competitive which impacts on our ability to continue to deliver high quality programming to our viewers. We think there needs to be a levelling down of the detailed rules, a levelling down of this level of regulation and there should be far fewer detailed rules. There should be a form of rules of principle within the Directive and far less micro-management telling us how long we can take between an ad break, whether we can have an ad break with only one advertisement in it, all these sorts of rules are a level of micro-management. We need to remember that this draft Directive, when it is finalised, is going to be regulating television for the next decade or more when the trends we have been talking about are going to be even greater, so we need a minimal level of regulation because of the new situation we face.

Q273 Baroness Eccles of Moulton: We are going to come later on to the question of regulation and then you will be able to give us a clear idea of what you mean by broader principles rather than micro-regulations. It will be interesting to know what you think should continue to be regulated.

Mr Brooke: One of our crucial concerns in relation to definitions is that we should not find ourselves in unfair competition with somebody for World Cup television rights, live television rights, who is proposing to stream that event live on the internet in 10 year's time if we are all watching the internet on the television. The danger is that the person bidding is not covered by the advertising rules and, therefore, could effectively generate a lot more income and, therefore, bid more money but, also, frankly, would not be subject to the listed events rules. Potentially they could charge a subscription and really undermine part of the purpose of the Directive, which is to ensure that these events of high importance are available free for people to watch.

Q274 Chairman: That appears to be saying that your preference of approach is to let the whole question of non-linear services look after themselves and worry about themselves. Your overriding concern is with the linear service element and your overriding desire in the light of a changed marketplace and much more competition in conventional TV channels is to have a much more

liberal lighter touch approach to regulation. That is it in a nutshell.

Mr Brooke: Yes, that is a very good synopsis.

Q275 Chairman: But with the added little frisson at the end there that you would rather like to see the definition of linear services extended so that competition from new sources does not threaten advertising revenues because advertising revenues are very important to free-to-air services.

Mr Stott: If they are linear services, if it looks like television, feels like television and smells like television then it ought to be regulated by television; I think that is our point.

Q276 Chairman: For the Committee's sake I am trying to distil down to the essence of the issue. First of all, you want a much more liberal approach, lighter touch to regulation in a number of areas which you were telling us about because the world has moved on. There is a lot more competition in conventional television services and there is a lot more media out there for advertising, so you want lighter touch regulation for TV services or TV like services. The second thrust which you are coy about is that the definition of what is linear and non-linear is important because it goes to the heart of ensuring, from your point of view, that other services which are in the same pool as you for a certain kind of programming and content against advertising revenues are not able to be free of certain regulation that you are not free of, so boring though it is, a definition of linear is important.

Mr Brooke: Exactly so.

Q277 Chairman: I say that to the Committee because I know eyes glaze over, occasionally Members' eyes do glaze over, it is so boring to you all, what do you mean by it but, at the end of the day, this will be law. In terms of business certainty out there, for a lot of people producing a lot of material they will want to know, are they going to be caught by these regulations or not? It is important, is it not?

Mr Brooke: Yes.

Q278 Chairman: I only want to get us agreed on that point. We may not agree on what the definition is but it is important to try and get the definition. Is that right? Those are the two issues?

Mr Brooke: Yes.

Mr Stott: Yes.

Mr Simon: I want to add one thing to the very last thing you said which is that a number of people have argued that it is very, very difficult, almost impossible, to draw a distinction between linear and non-linear and almost suggest it is futile to even attempt to do so. I do not think we agree with that.

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You are never going to get it 100 per cent perfect but I think a reasonably workable definition along the lines we have just discussed is achievable.

Mr Brooke: It is also worth saying that, of course, there has been litigation on the current Directive and the meaning of television broadcasting. The *Media Kabel case*, which went to the European Court of Justice a year or two ago, was a case on what the current definition of television broadcasting is, so I do not think we can assume that definitions are ever perfect.

Q279 Lord Haskel: In view of what you say about the lighter touch regulation and accepting your quite clear definition of linear broadcasting, how would this impact on your business as public service broadcasters because there is another aspect of your business, you have a deal that you are going to give a certain amount of time to public service? Would you see any change in that? Would you see it impacting on your duties as a public service broadcaster?

Mr Stott: In so far as we are a public service broadcaster we are obliged to perform certain public service functions as part of our licence. Clearly, if there were more restrictive rules on advertising and our ability to earn revenues then that impacts on our ability to deliver public service.

Mr Simon: I agree with what Martin was saying. To add to that, a lot of what we say may make us sound like very traditional, old fashioned broadcasters boxed into one technology, and one thing we all need to do is embrace all these technologies and make sure that we deliver impact for our public service programming. We are getting our content out across all platforms, on mobile, video-on-demand, across the whole plethora of services which would be available, and our business models will change accordingly. I think what we are all keen to preserve—some of these business models may involve different ways of adding revenues but the core of our activities remains advertising—as Martin said before, is the ability to provide content for free in return for advertising which we want to be able to protect as much as we can do.

Q280 Chairman: We are going on to content now, but I presume that you—as businesses you probably already do—could clearly run your programmes on the internet as well as conventional televisions and that internet services could have a variety of non-linear services attached to it. In other words, you could run a business that is not just a television type business, just as some newspapers now are increasingly shifting to the internet and a service where when you access them they are a lot different from the newspaper hard copy.

Mr Stott: Indeed. We all recognise that even though we may be in the old world of television we also need to be in the new world of new media, and therefore currently, and increasingly in the future, we will be providing a range of services, some of those services and maybe our core business, will be a linear service which needs to be regulated as a linear service, some of them will be on-demand or non-linear services where it will be appropriate for them to be regulated differently. We recognise that it is in our business interest to be present in both worlds.

Q281 Baroness Eccles of Moulton: Can you tell us where your main revenue will come from with your non-linear internet exposure?

Mr Stott: The new media world is, in many ways, still developing and the business models are still developing. If you go to the Five website you can download a new episode of the most popular programme in the world, *CSI*, for the price of £2.50, 15 episodes, whether that is a business model which proves successful, because it has only been up there a matter of weeks, into next year and the year after, we do not know. We are trying these things out and seeing what will work.

Q282 Baroness Eccles of Moulton: You switch on the television, you have your credit card in your hand and you give them the number before you can watch it?

Mr Stott: This service is available over the internet, so it will be available through your PC rather than through you television.

Mr Simon: Perhaps the easiest way to answer that is to say there are three different models which are already being experimented with. One is with the pay-as-you-go model where you pay for one episode or whatever. Another thing which is being done now with the cable companies, which Channel 4 launched weeks ago, is if you are a cable subscriber you now get Channel 4's video-on-demand service for free, or at least it is bundled in with your cable subscription, so that is effectively a subscription but it is still a pay model. We are also seeing experiments in the US with a model where you can get on-demand content for free with the adverts still in it, and they are developing technologies to try and stop you skipping the adverts. Again, even in the States it is very new and nobody knows what is going to work but we are all going to experiment with different things and see what consumers will accept.

Q283 Chairman: We are going on to content now. Would that last example be linear or non-linear?

Mr Simon: Definitely non-linear because it is on-demand.

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Chairman: I do urge you to read the Minister's evidence to us of last week because in my view that is very clearly caught in the TV like production.

Q284 Lord Geddes: Effectively the last page of your very impressive written evidence was entirely on advertising and particularly on the 35-minute rule. Since I know that at least two of you were sitting behind when we were talking to the last witnesses, could you put on the record your definition of the 35-minute rule because I still do not get it. Although you spell it out quite nicely there, I still have not got it 100 per cent.

Mr Stott: The 35-minute rule is a restriction on how many commercial breaks you can take in certain genres of programmes. The three genres are: news, children's and films, and what it says in essence is you can take one advertising break every 35 minutes. If you take a film, for example, that would run for 105 minutes, which is three times 35, we would be able to take three advertising breaks in the film. Obviously for news programmes and children's programmes they are rarely of that length and that is one of our major complaints about the draft Directive. News and children's programmes tend to be 30 minutes typically, sometimes shorter, and the effective new Directive would mean it would be impossible to have a commercial break in such programmes because they are less than 35 minutes long.

Mr Brooke: We are talking about interruptions to the programme here rather crucially, so the beginning break before the programme starts and the end break do not count. It is just interruptions in the programmes, so centre breaks.

Q285 Lord Swinfen: Effectively you can only have two breaks in a programme of 105 minutes?

Mr Stott: You can have three, one for 35, one for 70 and one for 105.

Q286 Lord Swinfen: If you count the 105 you are still within that period?

Mr Brooke: Just.

Q287 Lord Geddes: That is really helpful. Clearly, and I am sure the whole Committee understands this, in the business which you three represent advertising is absolutely crucial to your commercial well-being, I understand the 35-minute rule and your very strong objection to what we are really talking about, the 30 minute rule. Would it be even worse if it came down to 30 or is it slightly better?

Mr Brooke: Thirty minutes would be slightly better on the basis that programmes on the whole tend to be 30 minutes long. If you can interrupt once for a period of 30 minutes you could at least run a break in the *News at Ten* or whatever else.

Q288 Lord Geddes: All of which is understood. Again the evidence we have had so far is an increasing tendency to go towards placement rather than what I would call "direct advertising", what are your views on that?

Mr Brooke: On product placement?

Q289 Lord Geddes: Yes.

Mr Brooke: In the UK at the moment product placement is not technically allowed, and the UK takes the view that the current Directive does not allow product placement, per se, for example the paid inclusion of particular products or particular brands in programmes. That is not a view which is universally shared, I have to say, and the Austrians, for example, take the view that product placement within programmes is allowed under the current Directive. Frankly, our objective is to try and get some clarity in Europe and ideally to free up the rules on product placement so that we are free to take carefully regulated product placement within some genres of programming. We would certainly support a carefully regulated relaxation of the rules on product placement. There are a number of caveats and, in particular, safeguarding the editorial integrity of our programmes is absolutely fundamental, and to that extent we would certainly support a rule on undue prominence. We would also support appropriate identification obligations as it is fundamental that viewers are aware of the existence of product placement within particular programmes. We also support the Commission's proposed proscription of certain genres where product placement would not be allowed, such as news and current affairs and so on. To pick up your more general point, I think product placement is one—it is not an enormous contributor to revenue—potential way of us developing new sources of income and potentially retaining advertisers in a world which is becoming very competitive, where competition for advertising is becoming quite profound and, as Jonathan alluded to, the technological possibility of skipping adverts is quite considerable. We would certainly support a carefully regulated liberalisation of product placement.

Q290 Lord Geddes: What is your understanding of what the present draft Directive says on product placement?

Mr Brooke: Is this the Commission draft Directive?

Q291 Lord Geddes: Yes.

Mr Brooke: My understanding is that it would allow product placement in all genres of programming except the proscribed genres, in other words news and current affairs, children's programmes, documentaries and possibly religious programmes,

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subject to the various rules on sponsorship and product placement which are set out in the Directive, so appropriate identification at the beginning and end of the programme. There are rules on editorial integrity, a prohibition on specific calls to action, so no specific promotional references, as it were, so it is just the inclusion of the product in the programme. That is my understanding of the way the Directive works. One of our concerns about the drafting of that—we have got a number of concerns—is it would catch what is known as “prop placement”, which is an activity that takes place at the moment in the UK, and to some extent all broadcasters take props for free for inclusion in programmes. Where a producer says, “I have got a scene where this particular character would in character drive a Land Rover—or whatever it happens to be—because they live in a rural area”, from time to time broadcasters will, instead of having to pay hundreds and hundreds of pounds to hire a Land Rover, go to a prop placement agency and a prop will be provided. My understanding is that is a practice which goes across most broadcasters and in the end it is simply an inclusion which would happen anyway. What we are proposing in relation to product placement is that this editorially justified inclusion of a particular product, which frankly is included only to bring realism to what is going on, should at least give us the possibility of earning some revenue from it. However, my understanding is that the Commission would catch even prop placement that as product placement, so that would be classified as product placement even where there was no money in return and no contractual obligation to inclusion. The thing about prop placements at the moment is if you are the Land Rover provider there is no contractual obligation that your product will be included in the programme. The second area which we have got some difficulty with is acquired programming where the Commission is proposing that acquired programmes, films or other programmes that are acquired from abroad, should also be subject to the laws on product placement, so effectively where we acquire a programme from America, France, Germany or anywhere else, if that programme contains product placement we would have to treat it in the same way as if we produced a programme and received some money for the inclusion of a particular product in that programme. That is an issue particularly and it is an issue for all UK broadcasters because the current Ofcom definition of product placement excludes acquired programming. Effectively, where you see an acquired programme, for example *American Idol*, which is one of our programmes, it is an American programme, that includes some product placement and we are allowed to show that programme.

The Committee suspended from 6.17pm to 6.26pm for a division in the House

Q292 Lord Swinfen: If I may, I would like to stay with the 35-minute rule for the moment. If this was to be enforced on documentaries and children’s programmes—it would probably be impractical for the news—would this make that sort of programme totally unviable?

Mr Stott: Perhaps if I can talk about children’s programmes, it does not affect documentaries, it affects news, children’s and films. As far as children’s programming is concerned, the fact of the matter is the economics of children’s programming are fairly fragile already and it is quite difficult to make a profit on a commercial channel by broadcasting children’s programmes. Five has a slot of between six hours of children’s programming a week and we are very proud to do so, but it is not the most profitable part of our business. There are going to be some restrictions on food advertising to children and that will make the economics even more fragile. If there is now a 35-minute rule, which means you are not able to take a centre break in a 30 minute programme anymore, that will put even more pressure on the economics of children’s programming. That would mean either that, sadly, we will make less children’s programming or we are likely to have less original kids’ programming and we will have to buy in cheaper imports. All other things being equal, the effects of such regulation would be far from protecting children’s programming, which might appear to be its objective, it would make it less likely that you would see well funded children’s programming on television.

Mr Brooke: That is an ironic consequence of taking the most commercially vulnerable genres and subjecting them to additional rules, so the 35-minute rule. In the case of news, for example, it is an extremely expensive genre of programming and there has been a centre break in the *Ten o’clock News* since 1967, I think, with no obvious viewer detriment or complaint, and obviously to some extent that helps fund the programme and helps us provide an international news service at no cost to the viewer at all. It is slightly odd that we have got these insertion rules which, in effect, penalise the provision of core public service content and make it much harder to generate any revenue at all from providing that content. It is a very strange thing to us.

Mr Simon: Also, in terms of film, and this includes documentary film as well as fiction film, there is a general point that people like watching films on TV and any kind of restriction will limit the amount of films that can be shown. There is a particularly

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perverse incentive in that in terms of film, the 35-minute rule would replace what is currently a 45 minute rule which applies to films, although, in fact, it is indistinguishable. This rule was brought in after lobbying originally by certain Member States who wanted to protect the integrity of films as being somehow a higher form of art. There is a real irony here where if you look, for example, at the Film4 channels Channel 4 took free to air this year, this used to be a subscription channel and it had about 300,000 subscribers and by going free-to-air it is now in 18 million additional homes. This is a great platform to promote British and, indeed, other kinds of European films. We have made a commitment to dedicate 40 per cent of the schedule to British, European and world films. British films have been getting ratings of over half a million, which is incredible for a small digital channel. Ironically, this rule could have major detrimental impacts on this channel because it takes out a substantial amount of advertising across the whole channel because it is now funded only by advertising, so a rule that was somehow intended to protect European films could be counterproductive and work against it. If we do not get any liberalisation of the 35-minute rule, the Film 4 channel could end up having to show more American movies because they generate more money, which would be a real shame for the European film industry.

Q293 Lord Swinfen: That is very interesting, thank you. You have given an indication as to why it is in the draft and a number of countries are lobbying for it, do you know of any other reasons why you think it might have been in the draft? Were any of your organisations asked about this when the draft was in preparation?

Mr Simon: The 35 minutes specifically?

Q294 Lord Swinfen: Yes.

Mr Simon: Our understanding is there was last minute horse-trading. We have been making a lot of trips to Brussels jointly and speaking to a lot of MEPs. Absolutely nobody has come up with a justification for how the 35-minute rule was arrived at, everyone says it got agreed last minute as various people were bartering over different things. We have not heard anyone speak out in defence of it.

Q295 Lord Swinfen: Were you asked on the drafting of it?

Mr Simon: We were not asked.

Mr Stott: Not as far as I know.

Q296 Lord Geddes: Does that apply to all three of you?

Mr Brooke: As far as I know, I have only been with ITV since July, but we can certainly confirm that in writing if that would be helpful.

Q297 Chairman: You do not want the 35-minute rule, which I am sure the Committee can well understand, but what do you want for children's programmes?

Mr Simon: The ideal would be that there would be no rule at all at the European level. Every Member State has their own pet topics, for example in Germany it could be product placement, in Scandinavia they do not want any adverts in children's programmes at all, that is fine for them but allow Member State level, national governments and regulators, to set their rules just as Ofcom in the UK and DCMS set rules in Britain. We do not see any need for this kind of micro-management to be made at the European level.

Q298 Chairman: If the Country of Origin principle is to remain, presumably if some country objects to regular advertisements in children's programmes which are emanating from this country, then they will stop showing your programmes in their region. Will you be able to broadcast your programmes to them?

Mr Stott: Not if there is a Country of Origin principle under the internal market because that says you abide by the rules of the country in which you are based. I think all three of us are very strong supporters of the Country of Origin principle. The question as to whether there should be special rules for children's programming, news programming and films, we would argue there should not be, that in a more competitive environment these types of programmes have to compete against entertainment programmes, comedy programmes, drama, all other sorts of programming. If you restrict how many commercial breaks you can take in those programmes you will make it more difficult to make those programmes, therefore we do not see the justification for any set of rules specific to those three types of programmes.

Q299 Lord Walpole: Personally I watch the *ITN News* in favour of another one and I do not even notice the advertisements. I am not saying I do not know what they are but it does not affect me in the slightest. I am slightly worried about product placement. Before that, if you advertise too much you are going to put people off the channel anyway, are you not?

Mr Brooke: I agree, and I do not think any of us would necessarily propose that what was referred to before as the 20 per cent rule should increase, in other words, that the total volume of advertising in any one hour, the total threshold, should increase.

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Indeed, we are subject to stricter rules than the 20 per cent threshold at the moment in UK law.

Q300 Lord Walpole: When we get to product placements, do you not think the public will find it irritating? I know I would.

Mr Brooke: I am not sure you would necessarily notice it.

Q301 Lord Walpole: This is the danger and what worries me. I suppose you will tell me that the best product placement is subliminal?

Mr Brooke: Subliminal is something you cannot even see, it is invisible to the naked eye. Of course you can see the particular product or particular brand in the programme and, indeed, we would certainly be in favour of transparency so that you should be able to know through appropriate identification that that programme contains product placement. I think the reality is at the moment when you go to the cinema, or when you watch some American programming, there is already product placement there. Indeed, at the moment on all channels, including the BBC, as I understand it, there is prop placement which is essentially the provision of props for free. We are talking about an extension of a practice which is already commonly accepted and, indeed, totally legitimate under the Ofcom Broadcasting Code. I accept that, and you are absolutely right to be concerned about that. It is our responsibility to make sure that any rules are appropriate and there is appropriate regulatory controls and that we abide by those. Ofcom commissioned some deliberative research from viewers which went through a number of different ways of continuing to pay for public service broadcasting, one of which was product placement, and there was a feeling that product placement was preferable to other potential mechanisms, like subscription, of maintaining revenue for commercial public service broadcasters in preference to other means of doing that. Viewers like realism, frankly, and not having fake beers on *Coronation Street* and things like that, and having a sense that this is the real world we all inhabit and the reality is brands are everywhere and it is part of the world we live in.

Chairman: We have seven minutes left so it would be helpful if you could keep the answers a bit briefer, not because they are not enormously interesting and helpful but because of the time. There is another question in the area of content with Lord St John of Bletso and then we are going to go on and look at issues of self-regulation and impact assessments.

Q302 Lord St John of Bletso: Thank you, my Lord Chairman. Unfortunately I have to slip away in about five minutes so I will ask all three questions

at the same time. First of all, considering illegal, harmful content, do effective mechanisms exist in the Directive to control these types of illegal content? Is the proposal in the Directive likely to substantially enhance restrictions on freedom of expression? That is my first question. If I can slide my other one in as we have the seven minute rule! With the increasing convergence of traditional television and internet-based content, which you mentioned in your submissions to us, does the imposition of quotas for European works and independent productions continue to make sense in the emerging environment?

Mr Simon: If I can answer the first of those questions. Rules on illegal content are by definition already covered by general law and also as broadcasters in the UK we adhere to the Ofcom Broadcasting Code which goes a lot further than the TV Without Frontiers Directive in terms of harm and offence, but it does it in a far more subtle and nuanced way which makes reference to context and that links into your freedom of expression point. It is very important to us that one strength of the UK media is that it has a long tradition of challenging taboos and prejudices and addressing difficult contemporary issues and Channel 4 does this as much as any broadcaster. You can do it by a variety of means: you could have a documentary which could portray people with very extreme and prejudiced views and the point of the documentary is to expose them; you could have a political satire which presents but actually ridicules very extreme views; or you could have a discussion programme which portrays a range of views, some of which might be very offensive. I think it is important as broadcasters that we can preserve this level of freedom of expression. We need to make sure nothing creeps into the Directive which prevents us from doing so, but from doing so in a responsible manner to as we always have done.

Mr Brooke: Staying with European quotas, from our point of view we produce European content for two reasons: firstly because viewers like it and that is what they expect and, secondly, because we have got the revenue to pay for it, and I do not think that is a function of the quota, to be honest. We broadcast 86 per cent of European content across our schedule, so we are a long way ahead of the quota. The key thing is there is no point having a quota unless you have the revenue to fulfil the quota. On independent production, again, we commission the best programmes and the network centre is responsible for commissioning the best programmes. We make more money out of broadcasting successful programmes than we ever would on producing a programme which is not very good, so there are massive incentives, from our point of view, to commission the best programmes.

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Provided independents continue to produce good programmes then we will continue to commission them. Again, I do not think it is a function of the quota.

Q303 Lord St John of Bletso: Time has run out but I was interested in your comment from your evidence where you mentioned that over 90 per cent of your funding comes from advertising revenue, and I would be interested to expand your answer from earlier on when you were talking about the different frameworks, the way that revenue can be generated by other sources other than advertising. It would be interesting to know how you see the revenue split between advertising and other sources of revenue in the next five or 10 years with the convergence of the on-line services in respect of what companies are offering.

Mr Simon: I can give you a very brief answer which is we do not really know. As we were discussing before, we are going to be experimenting with a whole range of different new business models for new services and they would probably include types of pay as well as new types of free services. It is too early to predict with any degree of certainty what kind of models will work and what the impact in terms of what percentage advertisements will be.

Q304 Chairman: I was not clear from your answer to Lord St John of Bletso whether you feel that the Directive as currently drafted restricts the freedom of expression which was referred to. When the Minister was before us last week he gave us the distinct impression he was concerned that the Directive as originally drafted did raise some issues of restriction which he would not want to see going beyond the current UK position.

Mr Simon: It does, and we know that the wording in the proposal in Article 3e talks about not allowing incitement to hatred based on: "sex, racial or ethnic origin, religion or belief, (without stating what belief means) disability, age or sexual orientation". Again, there is no reference there in the way Ofcom is careful to put it into context in its own Broadcasting Code. I think there is a potential worry.

Q305 Lord Haskel: Has the Commission adequately considered the impact that this proposal is likely to have on the sector? Is it even possible to predict the likely costs and benefits of this proposal with sufficient reliability to support the proposed changes in the Directive? Would a precautionary approach to regulation suggest different proposals for change?

Mr Brooke: The big issue is the extension of scope, and as you probably heard from our evidence in terms of the extension of the scope to on-line, from our point of view that is not an absolute core issue.

We already have compliance systems in place to deal with that extension to the extent that we develop those sorts of businesses. I would not say that was necessarily an area where we could go into huge detail about what the impact would be, but clearly there would be a significant extension of regulatory compliance obligations on those providers. I think an area we do know about is the 35-minute rule where clearly there will be a significant economic impact for us. It is not obvious to us that the Commission have carried out an impact assessment, and manifestly it is fairly straightforward to quantify what that impact would be. You can take the number of centre breaks or the number of additional breaks that you might be allowed in films and, to some extent, quantify what those would be. If the extension of scope was an area where it was hard to say exactly what the overall figure would be, I think there are areas where we are involved where it would be slightly easier, to be honest, partly because you are talking about changing existing practice. Effectively you are talking about an enhanced restriction from the position we are in at the moment, so you are taking the existing situation and tightening regulations and saying what will the impact of that be.

Q306 Lord Haskel: If a person could choose, would they go for something like you mentioned, *Coronation Street*, the *X Factor* or something like that?

Mr Brooke: In what sense?

Q307 Lord Haskel: For advertising there are more people watching these programmes.

Mr Brooke: Yes. It depends on what you are trying to achieve through the advertisement. If you are trying to reach a particular sector or a particular sort of person or reach a mass audience, it depends on what your objective is and therefore how much money you want to spend to reach that particular segment of the audience, or whether you want to reach as many people as you possibly can at the same time. In broad terms, the more people watching the more valuable potentially the airtime is.

Q308 Chairman: On impact assessment, did the Commission look as rigorously as you would have liked at the very liberal option which you clearly would prefer, very much lighter touch, little or no regulation of advertising and so on, given the complete change in the competitive framework and so on? Was that looked at thoroughly?

Mr Stott: I do not think it was looked at thoroughly enough is the short answer.

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Q309 Chairman: The question at the end of all this is given that the draft Directive is produced in an area which is probably as important as anything to the average citizen, young and old, and given this potential extension, why do you think the Commission came forward with the draft Directive having had an impact assessment done, because you have had a consultation, and you have got a number of areas which clearly you are unhappy about and other areas where you feel they did not go as far as they might have done or at least discussed them as an option? What does this say about the impact assessment process?

Mr Stott: I think you are asking us to look into the minds of the Commission.

Q310 Chairman: No, it is affecting you and your viewers.

Mr Stott: I accept that, indeed. Each one of us has spent a lot of our time trying to put that right as best we are able. We feel that the proposal is far from satisfactory in that it lacks clear coherence and is not based on a clear assessment of what the impact of it would be.

Q311 Chairman: Are they listening to you now?

Mr Stott: We would like to think so.

Mr Brooke: To be fair to the Commission, not everybody in Europe shares our views sadly. The Germans appear to be very much in favour of liberalisation of the advertising rules, but our experience is not necessarily that every other European country sees the logic of our arguments. I suspect to some extent that may have coloured where the Commission ended up as opposed to it necessarily being the result of a linear process of impact assessment and modification.

Chairman: We are in Brussels next week so we will hear a number of other views. We entirely understand that point.

Q312 Baroness Eccles of Moulton: Earlier on you referred to principles that should be regulated for and also that micro-regulation is inappropriate and light touch is important. Obviously with such things as self-regulation and co-regulation, which would be done by the Member States, presumably there will remain some principles which will need to be regulated for at Commission level, at the European level. I am talking hypothetically in a perfect world. What would you consider those regulations to be bearing in mind that you want to try and preserve as far as you can some sort of equality between the linear and non-linear, however they are defined?

Mr Simon: I think it is perfectly appropriate for the Commission to have as an objective the promotion of the circulation of European works and the Country of Origin principle is completely key to that. What it

needs to recognise, which it does not always do, and this comes back to the micro-management point, is where there are cultural differences across the EU they should not be flattened out, they should be celebrated and each Member State should be free to continue to promote the things which it wishes to. That is where conflict can arise in this. There is a risk where every country has got its own little pet obsession and they try and force that into the Directive. We are saying it should be the lowest common denominator approach where you only regulate what you need to at the European level. The opposite often seems to be happening where every little bit of national regulation gets thrown into the European agenda and you get rules which make sense in one Member State and suddenly the risk is they are going to be applied across the whole of Europe.

Q313 Baroness Eccles of Moulton: Can you say what should be regulated?

Mr Stott: Just talking about advertising, which we have been spending quite a lot of the last hour doing, if one had a directive which prescribed a maximum amount of advertising per hour and also said that commercial breaks could only be taken at a natural point which is consistent with the editorial integrity of the programme and also there were to be some qualitative rules about the type of programming you could have, such as those that are contained in the basic tier, I think that would be a perfectly reasonable set of rules to be applied at the European level. It is when you get into saying how many minutes you can wait before you have a break, whether or not you could have an isolated spot or whether that can only be an exception, those sorts of far more detailed rules are the ones we want to see. We would be more than happy to agree with broad principles.

Q314 Baroness Eccles of Moulton: You can see that the viewer must be afforded some sort of protection against unacceptable content, but I am quite surprised that you would not be prepared to let the market decide on whether advertising is being correctly applied or not. Why do you have to have regulation for advertising?

Mr Simon: We come from an environment where we are extremely regulated at the national level as much as at the European level and there is a degree of media literacy as well that is needed alongside a more liberalised approach.

Q315 Baroness Eccles of Moulton: That is the first time we have heard media literacy mentioned.

Mr Simon: It is something we are all involved in. It is unrealistic to say that we should completely wipe away every regulation which exists. As Martin was saying, there should be an absolute minimum set of regulations at the European level, have a national

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debate based on the national context of what concerns people the most in each Member State and apply a relevant set of regulations, which may themselves become relaxed over time and realistically they probably would. The long-term game is there probably will be less and less need for any kind of restrictions at all because there will be more self and co-regulatory models, as we were just mentioning, and people will be more used to these models and that should be the long-term game.

Mr Brooke: What this boils down to is how each country chooses to find its own national broadcasting. In a sense, if you take public service broadcasting, there are very clear rules in the state aid rules that each

Member State ought to decide within a very, very broad European framework its own public service broadcasting system and then fund it. There is very little European interference in that. This is the kind of commercial side of that and yet we are in a situation where there are incredibly detailed rules in Europe about how commercial investment in a particular country's content is arrived at, which seems a very odd anomaly; I have never quite understood it.

Chairman: That is a very good last note on which to end. Mr Stott, Mr Simon and Mr Brooke, thank you. You have gone beyond the call of duty. I have to say, you have been excellent witnesses and have been very helpful.

MONDAY 6 NOVEMBER 2006

Present	Eccles of Moulton, B Fearn, L Haskel, L	Walpole, L Woolmer of Leeds, L (Chairman)
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Examination of Witnesses

Witnesses: MR GREGORY PAULGER, Director, and MR JEAN-ERIC DE COCKBORNE, Head of Audiovisual Policy Department, Commission DG Information Society, European Commission, examined.

Q316 Chairman: Can I thank you very much indeed for meeting us. We are very grateful to you. I think you know that we are a Sub-Committee of the House of Lords Select Committee on the European Union which operates by a series of delegated committees and we deal with all aspects of the internal market. For the record, Mr Paulger, would you like to say who you are?

Mr Paulger: My name is Gregory Paulger. I am the Director responsible for a Directorate called Audiovisual Media Internet; that is the subject matter of the Directorate in the Commission and we are the directorate in charge of this particular directive. To my right is Jean-Eric de Cockborne who is Head of the Audiovisual Policy Department.

Chairman: We have seven broad areas we would like to try and get through and I wonder if we could start on the question of scope.

Lord Haskel: We consider the scope of the thing to be central to the whole directive. We just wondered what it is you are trying to achieve by the directive. Are you satisfied that you have a workable definition of the various services, the linear, the non-linear and the other things? What is the scope of the directive?

Q317 Chairman: I should say that throughout we will be talking, I assume, in terms of the revised draft.

Mr Paulger: As you know, the first television directive was adopted in 1989 and its regulatory architecture, and indeed the substance of its rules, reflect the television landscape of the 1980s where each Member State had two or three mainstream channels and audiences were more or less captive. The directive was and still is based on two Pillars. One of these Pillars is the Country of Origin Principle and the other is the set of co-ordinated fields, the fields in which the rules are co-ordinated throughout Europe, and this combination allows broadcasts to flow freely throughout Europe on the basis of the Country of Origin Principle. In 1989 when the directive was adopted we were on the eve of the explosion of satellite television. It was in the eighties that we saw the number of channels available multiply, first of all by tens and then by hundreds, so the directive provided a very successful framework for this development. It was updated in 1997 where some amendments that had become necessary were

made. For example, there were outdated rules that had the effect of forbidding dedicated tele-shopping channels to come into existence. That is a detail and it is one of the details that was sorted out at the time, but basically the same architecture remained. From about 1999/2000 onwards it became clear that this 1980s structure was not going to be good enough for the first 20 years of the 21st century so there were increasing demands in the industry and also in the European Parliament for modernisation of the directive. There was an important report in the previous legislature by a Mr Roy Perry, a UK MEP, which called for a new directive updating the current directive, simplifying but also expanding the scope to cover not just television but also television-like services. This was followed up early in the current Parliament by a report that went in much the same direction by a French MEP, Mr Henri Weber. That sets the institutional context. The Commission responded to this early on by launching a large scale consultation. In December 2001 we adopted a communication to the Parliament and the Council announcing two types of measure. The first type was a measure designed to plug the gaps, as it were, pending the revision of the directive because we knew it would take a long time, and so the Commission adopted what was called an interpretative communication, notably on the advertising rules which had shown themselves to be particularly out of date. They do indeed date from the 1980s. We did as much as we could through interpretation and we also announced the launching of a wide consultation using not only the classic consultation procedure of hearings and on-line contributions but also working through focus groups which were chaired by Mr de Cockborne. There were three focus groups: one on scope, one on advertising and one on the right to information. From all this emerged the outline of a proposal that was discussed at a conference organised with and by the UK Presidency in Liverpool last October and the Commission then proceeded to produce its proposal. What the proposal sets out to do basically is to extend the successful internal market formula used by the current television directive to TV-like services. We believe that, just as television has a European dimension and a European economic dimension to

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it,—and I am talking about trans-frontier channels—the emerging services that deliver television-like programmes and compete with television should be able to benefit from the same framework and that, conversely, since they are competing with television there should be a level playing field and the same basic rules of the game should apply to those delivering similar services whatever the delivery platform. I would summarise the two main aims as providing the right internal market framework for competitive industry to develop and creating a level for television and television-like services.

Q318 Chairman: Can I come in on those two points? What you have told us, and you have explained very usefully the process by which we have got to the current position, is that there are two driving forces to scope. One is to reform the legislative framework for television services and the second is, in your words, to extend television to TV-like services, in other words to extend the scope, by which in shorthand I would suggest you mean in some sense to liberalise further the regulatory framework for existing television services in the light of the modern era and then to extend the scope. I wonder if we could separate out the two because in principle you could seek to liberalise further the situation in existing television, whatever one calls it, without doing anything in relation to extension or you could seek to extend without liberalising. Why are you trying to extend into TV-like services? You used two justifications. One was that they should be able to benefit from this. I am a bit puzzled by what that means. The second was that there should be a level playing field. By going beyond TV services you are going into regulation of some aspect of service delivery on the internet. That is correct, is it not?

Mr Paulger: Yes.

Q319 Chairman: So the Commission is getting drawn into seeking to regulate what is on the internet on the justification of it being of benefit to those services and a level playing field. Why should there be a level playing field between television as traditionally known and what is on the internet? Can you explain that? That is an assertion. Why should there be a level playing field? They are different lots of services.

Mr Paulger: The reason why we say “benefit” is that we believe the internal market framework based on the Country of Origin Principle is of benefit to companies because the alternative is that companies that want to provide trans-frontier services are faced with up to 25 or indeed 27 different sets of national rules.

Q320 Chairman: But surely on the internet there is now a single market: it is global, far beyond Europe?

Mr Paulger: Indeed, my Lord Chairman, but I think one needs to distinguish between the internet as a platform and the internet as a vehicle for delivering through internet protocol TV-like services. Here you will have the internet, be it the public internet or indeed closed-circuit services that use IPTV, delivering linear television channels, the same ones that are available very often on cable or on satellite or over the airways, and you will have them delivering non-linear services, that is, services that are on demand. These may be films that are called up on demand or these may be catch-up programmes where viewers have missed the previous evening’s series and want to see it and catch up with it. These services are competing with each other. The general rule of the economic reasoning underlying the treaty is that one tries to avoid distortions of competition. The directive is platform neutral. One often says it is technology neutral, but everything is digital so “platform neutral” is perhaps a better term. Take an ordinary linear television channel. Why should it be given different regulatory treatment, perhaps more favourable regulatory treatment, because it is transmitted through the internet rather than by satellite or over cable?

Q321 Chairman: That all assumes that you can in some meaningful way identify some services that are effectively the same as television. I think you used the phrase “TV-like”. In a sense everything on the internet in advertising terms is as competitive for commercial revenues as television. We were reading in a newspaper the other day that Google or Yahoo has commercial revenues now that are equal to those of one of the main commercial TV channels in the UK. Under that criterion of competing for revenues, for example, Google would be competitive. I am struggling on behalf of the Committee to understand this idea of competitiveness. Everything that is on the internet that earns revenue for revenue purposes is competitive. How are you delineating what is TV-like? In the draft there is a proposal that on-demand services are TV-like. How does one justify that?

Mr Paulger: It is clear that the Commission never intended to regulate everything on the internet, and indeed companies compete in the real world and in the virtual world, completely different companies, different kinds of companies, different kinds of services, for commercial advertising revenues. In the real world we would, of course, never have dreamt of subjecting every company that competes for advertising revenues to a television directive and in the virtual world it is the same thing, so this is why we have produced what we consider to be a very tightly defined definition of the scope with the six criteria, because TV and TV-like are words that one can understand but to define them in law is difficult. The Commission’s initial proposal was based on six

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criteria. They had to be services within the meaning of the treaty, of course, in other words economic activities, service activities, the principal purpose of which is the provision of moving images, with or without sound, in order to inform, entertain or educate, intended for the general public, in other words mass media, and provided by means of electronic communications networks. They were the six criteria in Article 1(a) and in Article 1(b) of the Commission's proposal reference was made to the editorial responsibility of the media service provider. We thought this was a fairly tight definition of the overall scope. I am not at the moment talking about the difference between linear and non-linear; I am talking about the overall scope of the directive. Some Member States were happy with this proposal. Others were unhappy because they thought the criteria proposed by the Commission were not tight enough or not clear enough, so they requested that work start under the Austrian Presidency on examining and clarifying the text. The European Parliament sent some similar messages. The Rapporteur, Mrs Hieronymi, said at the outset that there was a need for clarification and better demarcation, so the two co-legislators, the European Parliament and the Council, have been going in the same direction. They have added to the scope two important elements. One is that they have moved the notion of editorial responsibility into the main criteria in Article 1(a), so we are talking here about editorial activities, and they have added a definition of programmes in Article 1(aa). These are major elements of clarification of the definition that make it clear that we are talking about TV and TV-like. The current text as discussed in Council, because there is no official text in Parliament yet except for the committees consulted for opinion, quite clearly says that "programme" means "a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting". Examples of programmes include feature-length films, sports events, situation comedy, documentaries, children's programmes and original drama, and there is a series of recitals that clarify that. Google came to Brussels last week to inform about its position and to seek information. There was a discussion between Mrs Hieronymi, the Rapporteur, and one of the chief executives of Google who came over, and Mrs Hieronymi said, "Do you exercise any editorial control? Are you an editor of programmes?" and the answer was, "No, we have no editorial responsibility. Under US law we have no editorial responsibility and therefore we would not consider that we would come under the scope of this directive". If they have no editorial responsibility they would not come under the scope

of this directive. There is also one thing I do not quite understand in their position and that is that there would be no territorial competence because, as far as we understand it, it is not a media service provider established in Member States of the European Union. It is a company that provides services from outside the European Union and therefore its services are subject to the laws of the 25 Member States and not to a European Union directive.

Q322 Lord Haskel: I just wonder if you have consulted your lawyers on this because it seems an absolute minefield.

Mr Paulger: It is a minefield and we consult our lawyers all the time. The Council Legal Service and the Commission Legal Service are working very hard on this and are contributing to the text that is emerging in Council and I think the Member States on the whole are relatively happy with the text now. Article 1(a) defines the overall scope of the directive and there is no way that it can inadvertently catch anything else. Within this scope you have two kinds of services. The first kind is television broadcasting, linear audiovisual media service, and that is clearly defined as a service "provided by a media service provider for simultaneous viewing of programmes . . . on the basis of a programme schedule", and you have an on-demand service, that is, a non-linear audiovisual media service, which is a service "provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his/her individual request . . . on the basis of a . . . catalogue of programmes selected by the media service provider". The demarcation line between the two within the overall scope has also become very clear, and we will see the result at the Council of Ministers next week, but broadly the Member States are in two groups now. There is a group of Member States that thinks that this is the correct text and has struck the right balance and can support it, and that group includes the UK, and there is a group of Member States which says, "This is going a little bit too far down the TV-like road because we do not want to say that on-demand services are just television. We do not want to inadvertently not make any progress and we do want the directive to be future-proof", so they are starting to get worried that this is going a little too far. Among those Member States who have made public declaration about this are France and Germany, so you can see that the balance of power is emerging.

Q323 Chairman: Can we deal with that point before we move on? In 1(aa) of the revised draft as it stands and recital 13a there is an attempt to specify "TV-like services", non-linear services, to avoid, I assume, the danger of catching a great deal on the internet that is not the intention.

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Mr Paulger: Absolutely.

Q324 Chairman: Because almost any major internet site effectively has a catalogue. You can choose from different elements. If you did not you would not know how to work your way around the site. It has a number of things. For example, in recital 13a “they compete for the same audience as television broadcasts and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection . . .”. These are, I would suggest,—and I only ask you if you think they are—potentially contentious and litigious. Arguing that something competes for the same audience as television broadcasts, that the nature of it is such that a user would reasonably expect regulatory protection and that they have a form and content comparable with TV broadcasting—in a sense these are very rigorous tests. Given that the Commission has reflected upon it—it must have done by this point—can you give us two or three non-television internet sites that would be coming within this definition, actual practical examples? Can you give us two or three, either today or in writing after today, just so that we know what actually will be caught by this?

Mr Paulger: If I take an example in the UK, you have a service called Home Choice, which is based in London and which, thanks to an EU directive, that on local loop unbundling, delivers down the telephone lines using the IP protocol an on-demand service where you can use it to see an ordinary TV channel in real time, you can use it as a catch-up service or you can use it as a video on-demand service to see particular films. That would be covered under the definition, as it stands, of “TV-like”.

Chairman: Is it possible to give us another one, not necessarily today but it would be useful if you could let us have a note about it? That is a good example where it would be difficult to deny that a service that provides the same programmes as television but at a delay as is TV-like. It is when you move away from that, and Home Choice which you gave me has two different kinds of services. It is the on-demand element that slips in.

Q325 Baroness Eccles of Moulton: Which platforms could you receive Home Choice on? Many, only one or several?

Mr Paulger: Home Choice you can only receive on its proprietary platform, which is a DSL, down-the-telephone line platform using the IP protocol.

Q326 Baroness Eccles of Moulton: So it would come on to a PC screen?

Mr Paulger: No, it comes on to a television screen through a box.

Baroness Eccles of Moulton: So it is getting pretty TV-like, is it not?

Q327 Chairman: I do not think the Commission mean at all (I hope they do not) that because something can come through what we traditionally call a television set it gets caught because that is true of internet and now you can have internet on television or television on internet. I do not think for one minute it is anything to do with the screen on which you receive it. I think I am right, am I not?

Mr Paulger: You are, yes.

Chairman: We had better push on, but you will gather that the Committee is greatly concerned that this is not a future-proof draft even as it stands and I rather think, although I must not speak too strongly because we have not yet come to a final view, that this does look like an attempt to define something that is going to be very difficult to pursue and will lead into great difficulties, so you will gather that we are rather sceptical at the moment. Can we go on now to minimum content rules?

Q328 Lord Walpole: Do the proposed rules go far enough in liberalising advertising given the current pressures on spot advertising? Why is there a continued need for the imposition of quantitative rules, such as what you have now converted to a 30-minute rule on programme makers?

Mr Paulger: Do they go far enough in liberalisation and why the 30-minute rule? The 30-minute rule is an attempt at simplification because the current directive contains a number of different rules: the 20-minute rule (20 minutes must elapse between each break), special rules for films and films made for television, 45 plus 45 plus 20. These rules may have been appropriate for the 1980s. They are no longer appropriate today. They have proved sometimes difficult to apply because it is difficult to interpret them and there have been several court cases on the application of these rules. For example, one of the things that is not clear is whether these rules apply to—the case came from Germany so I will use the German terms—*brutto* or *netto*, in other words, including the time of advertising or not. This went all the way up to the court and the court said, “These are restrictions. Therefore they must be interpreted narrowly. Therefore it is the most generous interpretation that must be given and that means *brutto*”. As I say, there have been some difficulties, so the Commission’s purpose was to simplify as well as liberalise these rules. The Commission is a political body. Commissioners have political debates. There are liberals within the Commission and there are people who believe more in protecting the consumers and the viewers so, like with any other political body, a proposal will tend to try to strike a balance between these views, whence came the initial proposal for 35 minutes, so the rule would be that not the programme maker but the broadcaster or the media service provider could interrupt that programme by

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advertising for each period of 35 minutes. There is no restriction on when this interruption should take place. It is not after 35 minutes. It is once for each period during the 35 minutes, so it could be 15 minutes after it had started the programme, for example, and that is for an insertion. Then, of course, you have the breaks between programmes which are possible. That is a degree of liberalisation that is quite considerable and the broadcasting industry is happy with it. There is an argument in the Parliament and in the Council that there should no longer be any quantitative restrictions and therefore not a 35 or 30-minute rule, indeed not even an hourly rule of 20%, 12 minutes, the reasoning being that free TV is having to face more and more competition from other service providers for advertising revenues, so if we want the free TV model to survive we have to loosen up the rules a bit through simplification. The initial 35 minutes proposed by the Commission has become by general consensus 30 minutes. There are those of a mind to say that there should be no restrictions and, apart from defending the free TV model, the reasoning is that the advertising rules, the quantities of limits, are based on the idea that the audiences are captive still, which they are not. If a channel overdoes it in terms of advertising then it is quite likely that the audience (they have a remote control) will switch over to another channel very easily, and indeed they do, so the market would find its right balance. Some Member States in Council and some parliamentarians in Parliament are pleading for the deletion of all the quantitative rules. The Commission, and I speak for Commissioner Reding more than the Commission as a whole, has some sympathy with that view. However, the reality of the situation is that it might be a bit premature for most Member States to remove all the quantitative restrictions which they see as an important element of consumer and viewer protection.

Q329 Lord Walpole: As far as I am concerned, I am a great fan of ITN News and I really do not mind advertisements coming in the middle of it. In fact, it is quite a good moment to relax. Could I ask you now about the imposition of quotas for European works and independent productions? I do this from living in a block of flats in Hammersmith where we have an enormous amount of available television if you pay for it or free television if you do not want to pay for it, but a lot of the programmes are obviously designed for other people in the flats, Chinese, Turkish, Arabic languages, Swahili languages and all the rest of it. Where do you put those? As long as they are produced in Europe is that all right? I am just a little concerned about “European works”.

Mr Paulger: First let me say that the European works requirements in the current directive, which apply therefore only to television broadcasting, apply

where practicable. There is a recital that says they do not apply to channels that broadcast in non-European languages and that recital remains valid because the Commission has chosen not to touch one hair of what represents a historical compromise, and that is the compromise on Articles 4 and 5 of the current directive on European works and independent works. Mrs Reding has qualified it as a religious war. It was a long struggle between the Member States and that was the compromise they reached and it is based on the notion of “where practicable”, which provides the necessary flexibility, and so we did not want to upset that particular apple cart or open that particular can of worms again. The question of non-linear services, of course, is different. The proposal does not propose, nor do we have any intention of proposing, quotas for on-demand services. Quotas in the Oxford English dictionary are “quantitative restrictions”. There are no quantities and there are no restrictions in the Commission’s proposal. The Commission’s proposal is that Member States should ensure that media service providers promote, again where practicable, European works. There are three reasons for this. First, we think this reflects a general European consensus on the need to promote European works and thereby cultural diversity, and indeed every Member State has recently signed up to the UNESCO Convention on Cultural Diversity, but nonetheless that is just another demonstration of general consensus on the need to promote cultural diversity. Indeed, we have the same thing in the treaty because Article 151, paragraph 4 of the treaty says that the Community must—it is an obligation—take account of the need to promote cultural diversity in its other policy instruments. This is an internal market instrument so we have the obligation to do something. Secondly, we believe that the European production industry, because it is the beneficiary of this kind of measure, is an important industry in itself. It is an industry that can contribute to the Lisbon goals. Commissioner Figel has just produced a study on the economy of culture, on the creative industries, and one of the figures that the authors of the study have produced is that the overall value of the cultural industries in Europe is higher than that of the automobile industry in Europe, so its potential is enormous and we are transforming ourselves into a service economy. This is *par excellence* a cultural industry and a service industry, so creating an environment favourable to the development of European works is important in itself. The third reason is that we are here dealing with an internal market directive. An internal market directive functions according to a particular scheme. You have the Country of Origin Principle and Member States cannot restrict the free flow of broadcasts or transmissions that conform to the rules that are set

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out in the co-ordinated fields. In order for this to work you have to have the right co-ordinated fields but also enough co-ordinated fields. This is, as I said, *par excellence* a cultural industry. If there were to be no co-ordinated field measures for on-demand services there would be a gaping hole in the internal market construction because Member States could oppose the reception of on-demand services coming from other Member States on the ground that there was no Community harmonisation on European works, so it would be a very incomplete directive without such a provision.

Lord Walpole: That was very helpful.

Chairman: There are many things we could pursue on that but because of time we must push on, I am afraid.

Q330 Lord Fearn: Concerning illegal or harmful content, do effective mechanisms exist to control the types of illegal content identified in the proposal, such as race hatred? I think that is mentioned somewhere. Is there a danger that the proposal will substantially enhance restrictions on freedom of expression?

Mr Paulger: The control mechanisms take place at several levels. Your first question, my Lord, was how to apply the rule and the second was on the substance of the rule. With regard to how the rules apply, the European co-legislators adopt a directive. A directive is not an instrument that is directly applicable except in some very rare cases, so it is applicable through the Member State's implementation into its national laws or administrative rules and so on. It is up to the Member State to achieve the result set by the directive and the Member State is free to a certain extent to choose the means whereby it achieves that result. What will a Member State do with a provision like the one you mentioned, which says no incitement to hatred on grounds of race, et cetera? It may do it through general law. It can be a criminal offence to incite to hatred on grounds of race. Indeed, in many Member States it is a criminal offence. There are very blatant cases which would fall under criminal law. There are perhaps less obvious cases that would need to be looked at by a regulator. There could be cases where you would need a regulator to set some more detailed upstream rules to avoid these cases arising.

Q331 Lord Fearn: Who would bring the regulator in?

Mr Paulger: The national government implementing the law would entrust the regulator with the application of that law or it could entrust a self-regulating body with the application of that law. We very much believe in self-regulation as a modern technique for achieving regulatory objectives, not only with regard to on-demand services but also broadcast services. As to the substance, will it

substantially restrict freedom of expression, the rule exists for television already and I do not think anybody would say that a ban on incitement to hatred on the grounds of race would be an unjustified restriction on freedom of expression.

Q332 Chairman: Does the draft directive not go further than the existing wording in the original? I think it does, does it not?

Mr de Cockborne: Not in the new text from the Council. The original text of the Commission was using the same terminology as in the Treaty of the European Union where there is sexual orientation, et cetera, and a number of elements have been added in the treaty itself, so the Commission proposal took over this same terminology and the present situation with the Council is that it has gone back to the existing text.

Q333 Chairman: So the revised draft goes back to the existing directive, the old directive?

Mr Paulger: Yes.

Q334 Chairman: That is helpful to know.

Mr Paulger: The amendments in the Parliament go in that direction too. The initial proposal was based on the list that appears in Article 13 of the treaty, which is not about incitement to hatred; it is about the fight against discrimination, so that reduces the risks for freedom of expression considerably. Also, some of the concerns about freedom of expression were based on the concerns about scope because some people initially thought that the directive might cover the electronic press, for example, and so on. Now the demarcation lines are much clearer as regards scope the risk of restrictions on freedom of expression are much less than they would have been as the scope had been understood to be in the beginning.

Q335 Baroness Eccles of Moulton: We are moving now on to the Country of Origin Principle. I hope you will not mind if I refer to it as CoOP. In light of the revised Article 3 in the Presidency text what is your view of the current status of the Country of Origin Principle in this directive? How in practice will the principle now operate, because there are some changes?

Mr Paulger: There are some changes. The Commission is very much attached to the Country of Origin Principle and I would venture to say that this is more important than scope: this is the heart of the directive. That being said, a certain number of Member States upstream of the proposal expressed concerns about the working of the Country of Origin Principle, concerns that took the shape of a declaration made at a meeting of the Council in May 2004, and 13 out of 25 Member States signed up to this declaration. That is a political reality. That

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means you have a political problem; you cannot just say, "Go away". The Commission looked at it and said, "What can we do?". We said, "The Country of Origin Principle is the cornerstone of the directive". This directive gives effect to two of the fundamental freedoms of the treaty: the freedom to provide services across frontiers and the freedom of establishment. These freedoms are guaranteed by the treaty but they are not absolute. There can be limitations on these freedoms, on certain very specific grounds. They can never be economic grounds but they can be grounds of general public interest, such as the protection of minors or indeed the fight against incitement to hatred. We also looked at the case law of the Court of Justice and the Court of Justice has set some limits on the freedom to provide services when there is deliberate circumvention, in other words, abuse of the treaty rules, that is, when a broadcaster moves out of a Member State in order to avoid the rules that would apply to it if it had stayed in the Member State and continues broadcasting exclusively to that Member State. There is quite a lot of case law on circumvention in the services area. There is the *Van Binsbergen* case law, which is the milestone case law, but there is also a sector-specific piece of case law called the *TV 10* case where a channel broadcasting in the Netherlands to the Netherlands in Dutch, in order to escape the rules that applied to it in Holland, moved out of Holland to Luxembourg, broadcasting back to Holland, so a clear case of circumvention, and the court said, "In that case the receiving Member State is entitled to treat the broadcaster as a domestic broadcaster". We looked at this and we said, "This is law". The problem for the 13 Member States who have concerns is that this law is difficult to apply because they have to either attack another Member State, which the Member States never do, or somehow or other get to court, but this can take some time and in the broadcasting world four years down the road your channel is established and it is difficult to switch off. We therefore proposed to codify the case law in Article 2, paragraph 7, and set in place an operational procedure whereby the aggrieved Member State notifies the Commission and the transmitting Member State of the measures that it intends to take to correct what it perceives as a case of circumvention and the Commission has to check that these measures are proportionate and in line with Community law and so on, so we offered that in the proposal, while not weakening the Country of Origin Principle, as a means to take account of the concerns of the 13 Member States. In the negotiations the Commission's proposal has not had much success, I must say. The Member States that have expressed those concerns, and they are very often small Member States with a big neighbour sharing the same language so one can see where they are coming from,

were not happy with this and what we have now on the table is something that is linked to the very nature of the directive as a minimum harmonisation directive. The directive sets out rules at community level but Member States can go beyond those rules for broadcasters under their jurisdiction, in other words, they can establish stricter rules for their own broadcasters, not other people's broadcasters. Those Member States were saying, "The real problem is our capacity to sustain this system of being able to make stricter rules in areas of the general public interest, such as the protection of minors, when broadcasters are coming in that do not respect those rules but respect only the minimum rules, so there is not a level playing field and there is circumvention of our stricter rules". The whole system therefore has been moved to Article 3, which is where the stricter rules provision appears, out of Article 2. Part of the debate that has taken place between the Member States, and the UK has played a leading role in forwarding this idea, is that prevention is better than cure so that co-operation upstream of problems happening, co-operation between regulatory authorities, for example, or between governments, could be a way of avoiding these conflictual situations. The Finnish Presidency has, in the first part of this new paragraph, put in a co-operation procedure whereby the aggrieved Member State asks the transmitting Member State to ask the broadcaster to comply with the stricter rules. This is not a binding procedure, it is a co-operation procedure and reflects the results of discussions between Member States, in particular at an informal meeting of ministers organised by Belgium last June. If this co-operation procedure fails then we fall back into a binding procedure whereby the aggrieved Member State notifies its intention to take measures against the offending broadcaster and these measures are notified to the Commission and to the transmitting Member State and are subject to the same compatibility check as we had proposed.

Q336 Baroness Eccles of Moulton: Does that not then take you right back to square one, which was the speed with which, under the old system, any restrictions could take place? It seems to me that if you are going to go through the conciliation process and then move on to the binding process it is all going to take a very long time and surely the basic requirements that exist are already sufficient? The third point, I suppose, is that, okay, you give the example of Belgium and Luxembourg, but people who were wanting to broadcast into Belgium and who could not do it because it was against the internal rules, as it were, could just move somewhere outside the EU and then they would be free to transmit into Belgium and nobody could stop them doing it. It seems as if the latest proposals are in a way

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trying to satisfy only 50 per cent of the Member States who are objecting and it is taking account of objections that are perhaps covered by other means. I can see the advantages of the non-binding recommendation, that there should be a process of trying to satisfy the two parties, but to take it beyond that into law would appear perhaps to be rather overdoing it when it is only for the sake of 50 per cent anyway of the Member States who are objecting.

Mr Paulger: Yes, I think the Commission would agree with that. We do not like this provision.

Q337 Baroness Eccles of Moulton: Why not just do away with it?

Mr Paulger: We do not like this provision. By the way, moving out of the EU is not a solution.

Q338 Baroness Eccles of Moulton: Why is that?

Mr Paulger: Because then the national law applies and so you just turn off the signal.

Q339 Baroness Eccles of Moulton: I see. Then there you are.

Mr Paulger: What gives the freedom of movement is the EU directive. If you move out of the EU then you have to face the 25 national laws and in the case in point, the Netherlands and Luxembourg, the Netherlands is a very heavily cabled country. All they would have had to do was turn off the cable if the broadcaster had been broadcasting from somewhere in eastern Europe at the time, for example. Moving out is not a solution.

Q340 Chairman: This does apply to non-linear services as well?

Mr Paulger: No, not yet. Some people want it to but it does not.

Q341 Baroness Eccles of Moulton: Not even to the TV look-alike?

Mr Paulger: No. That has not been requested by the 13 and so we are certainly not going to request it.

Lord Haskel: They could broadcast by satellite.

Q342 Chairman: Can I just be right on this? I am looking at Chapter II, Article 3, which refers to only a provider of a television broadcast, not on-demand broadcasting?

Mr Paulger: That is right. That is the case.

Q343 Chairman: So if I have right Baroness Eccles' basic point and question to you, is this not in danger of restricting the Country of Origin Principle?

Mr Paulger: This is a measure that would weaken the Country of Origin Principle. As I said, the Commission is deeply attached to the Country of Origin Principle; therefore we do not like it.

Q344 Chairman: As we are too.

Mr Paulger: We do not like it, and we think also that it is a little bit over the top because we are talking here about a tiny percentage of the total volume of broadcasting in the European Union. This must be under 5 per cent, so it is perhaps a slightly disproportionate measure, but for the Member States in question it is very important and we have to take account of that political reality and so the Presidency has gone down that road.

Q345 Baroness Eccles of Moulton: Can I ask whether there have been concrete examples of when the tiny number of Member States who are affected have seriously had to receive material that has been offensive to their public that would not be offensive in other Member States?

Mr Paulger: I would not use the word "offensive". One has to distinguish between the rules in the directive and the stricter national rules. A stricter national rule can ban advertising to children. An advertisement for teddy bears is not necessarily offensive but it does contradict the stricter national rule. There are cases of broadcasters operating under the regulatory regime that applies in their country of origin who target other Member States which have stricter rules, and advertising aimed at children is one of the classic examples. One of the longstanding examples of this is TV3, which is a company that broadcasts from the UK to Norway, Sweden and Denmark under the UK advertising rules which are in conformity with the directive but not in conformity with Sweden's stricter rules. The Danes do not mind at all. They think this is good for their public because they have another channel and there is more pluralism, but the Swedes object very strongly to what they consider to be something that undermines one of the fundamental elements of their broadcasting system, that you do not advertise to children, so they complained. The Irish have a big problem because they have banned advertising for alcohol on television. The UK has not. Of course, in Ireland, given the proximity and the language, this is a ban that is rather difficult for the Irish to sustain if broadcasters coming from Britain have lots of advertising for alcohol. You can understand their position but from our point of view we are prepared to go so far but no further because the Country of Origin Principle is the cornerstone of this directive. We think that this proposal goes as far as the Commission is prepared to go. It weakens the Country of Origin Principle but we do not think it seriously undermines it.

Q346 Baroness Eccles of Moulton: It is not seen as a chink in the edifice of not giving way too much to Member States' sensitivities that it applies far too severe rules across the board? I am not talking just

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about this directive but of the Commission principle that on the whole you have to be very careful not to be too responsive to minority sensitivities.

Mr Paulger: Indeed. As I said, the Commission does not like this provision. It does not consider that it undermines the Country of Origin Principle to the extent that it would no longer be effective and, if faced with a qualified majority, the Commission would have to live with it. There will be no unanimity for it.

Chairman: It is helpful to know why it is in here and what the Commission feels.

Q347 Lord Fearn: Can we move on to impact assessment? How did the Commission seek to quantify the likely costs and benefits of the proposal? Is it even possible to predict these costs and benefits? What groups did the Commission consult? Was there too little consultation of new media players and too much of established “traditional” broadcasters? Do you agree with the findings of the RAND Europe study for Ofcom, which suggested that the proposal would drive EU-based content providers offshore?

Mr Paulger: May I ask Jean-Eric de Cockborne to respond to this question?

Mr de Cockborne: The Commission did not attempt to quantify the actual evolution of the market because this is impossible to do. We could have asked a consultant to do it as Ofcom has done it. The consultant would come with figures, but it is very difficult to have accurate figures and we would only know after about a year if those figures were accurate. We have rather had a very broad public consultation. There are about 1,500 pages of comments which are available on our website from all interested parties. It was an open consultation and we have had a lot of comments from new entrants. We have looked at trends. We identified nine groups of stakeholders: the public sector broadcasters, the free-to-air broadcasters, pay-TV, the written press, transmission companies, including cable, telecommunication, ISPs, the IPTV linear service providers, video on-demand providers, including mobile video on-demand, independent producers, consumers, national authorities, the Commission itself, and we have also looked at the effect on fundamental rights. For each of these nine groups of stakeholders we have looked at whether the proposal would have a negative, a positive or a neutral effect. We have looked at five possible options. The first one was to repeal the directive, the second one you are familiar with, so we looked in detail at three options which were only a clarification of the terms, a comprehensive change in order to cover also non-linear services, or full harmonisation, and the impact assessment prepared with the help of RAND, which is available on the web, shows that the option chosen is the one which has the most favourable effect on the

largest number of providers. Another important point is that the Ofcom approach was to say, “What is the cost of regulating?”. We thought there were two problems with this approach. The first is that it is not really a choice between regulating and not regulating because most Member States are already regulating for the objective of general interest for the new services; the second is, whether the cost of complying with one harmonised set of rules at European level is higher than with 25 or 27 different rules?

Q348 Lord Fearn: Does that mean you agree with RAND?

Mr de Cockborne: RAND actually worked successively for the Commission and for Ofcom and came up with opposite conclusions. The other question is that in regulation for general interest there are some elements which are very difficult to quantify. The cost of regulation is relatively easy to quantify. Benefits are more difficult if you take, for instance, ensuring that there is appropriate protection of minors, what are the benefits and how do you quantify those benefits? We think it is very difficult, and that is why we had this approach with trends.

Q349 Lord Haskel: In view of the revised proposal are you going to do any more work on the impact assessment?

Mr Paulger: That is a good question because, strangely, the system provides that the Commission must do an impact assessment before it produces its proposal but there is no obligation on the Council, that is, the Member States, or the European Parliament to provide any assessment, impact or otherwise, of their proposals during the legislative procedure, so the answer is no.

Chairman: That is something on which we ourselves on a number of occasions have expressed concern, but as of today I think we must push on to the last question.

Q350 Lord Haskel: On the matter of implementation, you have told us about self-regulation. Does the revised draft mean that there is going to be a change of emphasis? The earlier document seemed to be against self-regulation but this document seems to be much more in favour of self-regulation so does that mean that, for instance, self-regulation can continue in the UK under Ofcom as we have it today?

Mr Paulger: Mrs Reding, as Commissioner responsible for this area, is very much in favour of self-regulation as a means of achieving objectives set down by the public authorities, and she believes that the media world is becoming a world where everything goes faster, it is more complex and the media operators are themselves best placed to

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organise themselves through codes of conduct or whatever in order to respond to the need to respect the general objectives set down in Community directives or in national laws, so we are very much in favour of co- and self-regulation as a regulatory technique. This was our position at the outset. The reason why in the initial proposal self-regulation is not mentioned, but co-regulation is mentioned in the Articles and co- and self-regulation were only mentioned in the recitals, was that there may be a legal obstacle, and that is the existing inter-institutional agreement on better law-making which has a section on current self-regulation. Our lawyers were not sure that we could mention self-regulation in the body of the directive so it was in the recital. However, thinking has moved on. The Parliament has shown itself to be very favourable to the development of co- and self-regulation, and the Council too but with different emphasis. Of course, self-regulation is more developed in some Member States than in others as a regulatory technique, so regulatory traditions vary, but in the Council generally there is a favourable approach to self-regulation. It is the first time a proposal for a Community directive has mentioned self-regulation even if only in the recital, and then co-regulation in the Article, so that is a bit of an innovation. Now the negotiations in Council have put self-regulation back

into the Article, so it is stronger; you are quite right, my Lord, and the mechanism whereby we would see such a system working is where a Member State wants to use self-regulation to achieve the results of the directive because the Member State is bound by the results to be achieved but is free as to the means that can be used. Where a Member State wants to entrust a self-regulatory body with the achievement of those objectives that is fine as long as the entrustment mechanism is clear and there is a link between the entrustment and the results to be achieved, because, of course, if the results are not achieved then the system is not working. We believe that with the right entrustment mechanism Member States could make much greater use of self-regulatory bodies to achieve the objectives set out in this directive in their daily operations.

Q351 Lord Haskel: And who will decide whether the objectives have been achieved or not?

Mr Paulger: There is a monitoring provision where the Commission reports regularly on the basis of input from Member States.

Chairman: Mr Paulger, you have been beyond the course of duty. We are quite exceptionally in your debt for the time you have given us. I find typically with the Commission that you are frank, positive and helpful in your discussions with us. We are grateful to you and to your colleague for your time today.

MONDAY 6 NOVEMBER 2006

Present	Eccles of Moulton, B. Fearn, L. Haskel, L.	Walpole, L. Woolmer of Leeds, L. (Chairman)
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Examination of Witnesses

Witnesses: MR JIM MURRAY, Director, The European Consumers' Association (BEUC), examined.

Q352 Chairman: Good afternoon, Mr Murray. Many thanks for agreeing to meet with us. We are very grateful to you. We read the submission you made to the Commission which has been very helpful to us. We have a number of questions we would like to ask you although, as always, we have far too little time but we will try to get through what we can. We would like to discuss the scope of the proposal, some issues about minimum content rules, the Country of Origin Principle and the question of self-regulation, and if we have time we would like briefly to talk about some aspects of impact assessment. I do not know if there is anything you would like to say by way of introduction.

Mr Murray: No, not at this stage.

Q353 Lord Haskel: On the question of scope, the proposal attempts to bring the emerging media platforms, especially the internet, under the existing regulatory framework. In your submission you talk about "the new threats". We just wondered what you meant by "the new threats".

Mr Murray: Oh, dear, I did not think it would come over as quite so apocalyptic. One reason why the audiovisual industry is looking for an updating of the previous Television Without Frontiers Directive is precisely that they see advertising and commercial communication migrating from the old traditional media into new media. I am not quite sure that that is as large a threat to them as they suppose. Probably the multiplication of channels is much more of a threat at this stage than the migration to new media, but taking account of the fact that there is a migration of advertising and commercial communication to new media, since we have always accepted (although one may argue about the extent of it) the need for regulation of commercial communication and advertising, it makes sense, although it is by no means easy, to try to follow commercial communication wherever it goes in terms of regulation. It is not a question of trying to regulate what somebody does in their mythical garage or something like that, but if we take a large company, let us say Procter & Gamble, and regulate how they advertise on television, how they advertise in the printed media, it would surely be sensible that we should try to extend the same principles to how they advertise on-line in the non-linear media. I do not say

it is easy but the principle is that we cannot say, "Let us stop regulating now because it has all got too difficult".

Q354 Chairman: If I may follow that up, you said that if Procter & Gamble advertise on television that is regulated, but when you talk about them advertising on-line do you mean anything on the internet should be regulated in advertising? That would appear to be what you said.

Mr Murray: I think one has to start with maintaining the principle that commercial communication, advertising, is defined as the making of a representation and so on in order to promote products. We try to do this for any advertiser, at least within the jurisdiction. It gets more complicated when the advertiser is outside the jurisdiction. If somebody publishes a false trade description on-line, the fact that it is on-line does not in itself prevent action under the Trade Descriptions Act in the UK or the equivalent legislation in other countries. Yes, advertising, commercial communication, should be regulated wherever it is done to the extent that we can. As I say, clearly new challenges arise on-line but that is not a reason for saying let us just stop at the linear media.

Q355 Chairman: We will come later to quite what it is you would like to regulate.

Mr Murray: Oh, indeed. That, of course, is different. You cannot simply apply the same rules. You cannot apply the quantitative rules, for example.

Q356 Chairman: Indeed. Your starting position on any of the elements of what is to be regulated would be in principle that your organisation would wish to extend whatever those regulations are, if it were possible to do it practically, to anything on the internet as well as on conventional television?

Mr Murray: Yes. Arguably they already apply because even under the Misleading Advertising Directive advertising is defined as the making of a representation in any form in order to promote the supply of goods and services. One may say that already in itself it is not a shocking thing to suggest that the internet should be regulated. One uses the phrase "the internet should be regulated", and of course this conjures up all kinds of problems but the

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fact of the matter is that the internet is there, it is used as an advertising medium and it is used as any advertising medium may be used, by fraudsters and people of evil intent as well as by the vast majority of reputable advertisers.

Chairman: You are beginning to talk here about a specific activity to be regulated which we are going to come to in a minute.

Q357 Lord Haskel: You spoke about the multiplication of channels as being a threat right at the very beginning, but of course to the consumer it means more choice.

Mr Murray: Yes, indeed, this is the case, but if one looks at the fate of an individual channel, it is under revenue pressure from a variety of sources. The usual thing the industry will say is that it is all due to the internet and therefore if we want to preserve any kind of traditional television we must allow more revenue sources, more advertising. We are questioning that and we are saying that first of all the threat to the revenue of the business or any individual station is not necessarily coming all from the internet. I am sorry: it is, of course, coming from the internet to a degree but it is also coming from the sheer multiplicity of channels. I would like at some stage to say something about the overall place of advertising and commercial communication in our culture, though I will not do so now. What we have is a situation in which the revenue has been spread more thinly over a larger number of channels. People are saying, "We cannot get enough revenue from advertising to keep our station so let us have more advertising", and it becomes a kind of escalating circle as things go up and up. In 10 years' time there will be some other problems and they will say, "We need some other source of revenue and therefore we need more advertising". Underlying everything I say is let us not look just at this particular step but let us look at it as part of a wider trend.

Q358 Lord Haskel: But presumably if you increase the advertising the point will come where people will switch off or switch to another channel. It is self-defeating in a way, is it not?

Mr Murray: It is, and that is in fact what is happening in this situation. As people are switching off and are getting tired of the more direct advertising the industry is looking for forms of indirect advertising, such as product listing, for example, which we would characterise as hidden advertising, and the other forms via marketing and so on, and all the time looking to erode the distinction which used to exist, at least in principle, between advertising and programme or editorial content. Again, therefore, we have a situation where things are in a kind of vicious circle. The more people turn off the more advertising

people want to throw at them one way or another and, of course, it goes on like that.

Q359 Chairman: Does that mean that in this much more competitive and varied world that has moved on since television was first regulated you would accept the gradual demise of free television in that sense? In other words, if people want to have television that is relatively free of advertisements and so on they will have to pay for it? In other words, what model do you have in mind, given that this whole thing started years ago when there was very little choice in television, they were virtually monopolies, and that was the origin of it? It was not that anybody sat there and thought about this very competitive, multi-choice world. It was, "There is no choice; therefore, regulate because they are monopolies".

Mr Murray: Indeed.

Q360 Chairman: Do your organisation and the people you represent have in their mind a view of the future? Is it that they want to maintain certain restrictions on advertising even if that results eventually in the actual business model not being capable of sustaining television as we know it? Where are you coming from ultimately? In other words, you could regulate the advertising as you want but in the end there is nothing to regulate because the channels disappear.

Mr Murray: We do not know exactly what will happen, let us be clear immediately about that, and there is a possibility that at least in some markets free-to-air would be under threat. Given the vast amount of advertising revenue which already goes to the very many channels which we have there will be change and it may be that there are too many channels out there. It may be there will be changes of models, though that, of course, may vary from one market to another within the European Union, depending on all kinds of other things, so we cannot say that we have a precise model where we say, "This is what we want to see all over Europe". To some degree there is a move away from free-to-air in those cities and regions which rely largely on cable provision. They are in effect paying. Some of those channels you could get on free-to-air with an ordinary antenna but there is already a move away from that. I hesitate to say, "We do not care about free-to-air", which in itself has great advantages, but if we look at the situation at the moment there is almost certainly enough revenue out there from commercial communication, and maybe from licence revenue too, to preserve a variety of models without necessarily having to say, "It is Domesday. We must extend it". One swallow does not make a summer but I just reflect on the fact that I have signed up to 42 television channels in a new apartment for €12 a

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month. Most of them are in a language I do not understand, let me say immediately, but it is there and I think €12 a month is less than the BBC licence fee now; it is certainly less than an Irish one. I cannot say that there is a precise model out there but we would say let us not be so worried about the use of the word “threat”. Yes, we do see threats all the time but not quite in the same way that some broadcasters have seen them.

Q361 Lord Walpole: I am wondering how much of the question Mr Murray has answered but I will ask it anyway. Do you agree with liberalisation of quantitative rules and do you consider the need for tightening of the rules? I know that it has gone down from 35 to 30 minutes. Do you consider the proposed rules on product placement and sponsorship adequately protect the interests of consumers?

Mr Murray: I think the answer to all of those questions is no. First, take the issue of quantitative restrictions on advertising. It is here where I want to paint a broader picture, if I may, and that is to look at the role of commercial communication in our culture generally, to look back at how it was 20 or 30 years ago and also to think of how it might be in the future because this is only one small step in what is an overall trend. One of the difficulties we have in dealing with situations like this is that we tend to consider them just as a step at a time. For us the proposal would add greatly to the exposure to commercial communication, both by removing the quantitative restrictions and by allowing product placement. I mentioned before this question that we need more advertising because there are more channels and there are more channels because we have more advertising and so on and there is the problem of tuning out, but the real issue and the one I would particularly ask you to consider is that commercial communication is more and more a part of our daily culture. It is a culture as well as simply a means of financing other things. It is a culture in itself. It is in our schools, it is in our hospitals and it is in our political work. Party congresses are very often sponsored. European Presidencies now are sponsored or consist of activities which are sponsored. I recently attended a Finnish Presidency meeting at which there were 32 commercial sponsors, which is the record so far. Obviously, they pervade our culture, our sport, our entertainment and our hospitals, as I know from my own direct experience although people told me I should not have noticed it. In a labour ward the changing mats are sponsored by a particular nappies company. Among certain kinds of so-called celebrities we are now familiar with sponsored weddings and sponsored births, it seems. We have not yet had a sponsored funeral but it may not be long before *Hello* is invited by somebody to share their grief at this bad moment in their life. From

our point of view this is changing our culture and it is also changing our relationship to consumption. We are a consumer organisation and we strongly believe in consumer choice and all of those things, but we do not believe that consumption is the end of life. All of this does in a cumulative way influence content. Even if there is no direct contract between sponsor and advertiser and the broadcaster or producer of a programme, overall the process and the way in which we are commercialising all our life has its effect. This is particularly the case, of course, in relation to children where they are surrounded by commercial communication and by a culture of commercial communication everywhere. I do not know enough about this but concerns have been raised in the UK about childhood and the shortening of childhood and so on. In a vague kind of way—and I cannot say this is a form of submission—it seems to me that there is to some degree a connection between the fact that children are growing up in a culture which is totally pervaded by commercial communication.. It is why, for example, in one area we certainly want to see a tightening of the rules, and that is in relation to the advertising of certain foods to children. We are quite clear now about this. We would like to see a ban on the advertising of certain foods, foods high in salt, sugar or fat, to children, not just in children’s programmes but also in the other programmes up to, I suppose, a watershed time, which make up something like 70 per cent of children’s viewing. This is not at all to argue that commercial communication is the root cause of obesity or a bad diet; of course not, but what it does is add pressure on parents who are already under pressure. All parents’ decisions about food are compromised very often between what the child wants and what the parent thinks is right and the time available and so on. In work done in particular by our UK member when they have carried out focus group discussions with parents commercial communication is identified as a very strong source of pressure in this area. For us it is not that commercial communication makes children fat; it is that it makes it harder to be a good parent, and it makes it too hard at the moment in our view to be a good parent. That is why we would like to see—it is not in the Commission proposal but we still have hope that something may come through the Parliament—a ban on the advertising of snack foods. In itself it will not solve everything but it will be at least a way of shouting “Stop!” against this wider trend that we have talked about where commercial communication is just more and more part of our culture and where we can hardly ever get away from it. Yes, we need a tightening of the rules there. On product placement, it is in large measure hidden advertising. Ten or 20 years ago it would have been held immediately to be in breach of the International Chamber of Commerce rule on separation of

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advertising and programme content; there would simply have been no doubt about it, but that principle has been elided over the years because it became convenient to do so. I do not know if you have seen them, but I have brought some DVDs from the Writers' Guild of America who are also opposed to product placement for their own reasons, some of which coincide with ours, so they have sent us some examples of what can happen. In our view something like this, although it would not be the same, of course, could happen here.

Q362 Baroness Eccles of Moulton: Who is it who is opposed to product placement?

Mr Murray: The Screenwriters' Guild of America. They find that they are being asked to change the script, for example, to suit the product placer or sponsor or whatever. You will see one there in particular where it is important that all the characters in the situation comedy should eat only a particular brand of biscuit but also should play with the biscuits and say, "Oh, isn't this nice?", and so on. The writers were required in effect to incorporate this into the script. They also have some worries about royalties but that is a different question. In looking for a tightening of the rules against that wider background, do we simply, as most people do, say, "Oh, isn't it terrible, all the advertising at Christmas, Halloween, here and there and everywhere?", do we simply shrug our shoulders and say, "It is inevitable, it is the way of the world, it cannot be helped, we must not complain", or do we say, "Wait a minute: what kind of world do we want? What kind of daily culture do we want?"

Q363 Chairman: Given the draft as it currently stands, that is, the 20 October one, what tighter rules would you like to see? You are not happy with product placement. Are there any rules that you would like to see tighter than in the current draft?

Mr Murray: In product placement one has to distinguish the good end where nobody wants to stop somebody from mending a sofa to a theatre production or something like that.

Q364 Chairman: Which they can do now.

Mr Murray: Which they can do now. Donations of what are termed production aids or something like that we would see as fine, but there should not be payment for showing the product and any agreement on content in return for the supply of a product should flatly be declared to be illegal. This is in the directive itself.

Q365 Chairman: What about sponsorship of programmes and the amount of advertising per hour and the breaks between? Are you content with the draft as it now stands?

Mr Murray: Because of the wider issues which we have talked about we would prefer not to liberalise advertising at all—

Q366 Chairman: But maintain the position?

Mr Murray:— but maintain the position. Talking to broadcasters, they have spoken about some room for some slightly different arrangements but not to the extent that they increase the level of commercial communication and so on. They do not want to be absolute about it, not to that extent, but shifting advertising from times when people do not watch to times when they do is exposing more people to more advertising, even though quantitatively you can say there are exactly the same number of minutes. One has to be careful about that. We are working with the Parliament at the moment on some quite specific amendments that we have proposed to members of the Parliament, with what success I have to say remains to be seen, because we are coming from a long way back. We are trying to put something particularly on children into the directive which is not at all proposed by the Commission, so what success we have remains to be seen but I would be happy to make some of those available to the Committee.

Chairman: That would be very helpful.

Q367 Lord Fearn: Concerning illegal or harmful content, do effective mechanisms exist to control the type of illegal content identified in the proposal, such as race hatred? Is the proposal likely to substantially enhance restrictions on freedom of expression?

Mr Murray: That is a more difficult one when we are talking of areas outside purely commercial communication, where restrictions that are accepted on commercial communication are not accepted on the expression of private opinions. One always has to draw a distinction between these two and that is accepted even under the First Amendment of the American Constitution. As a consumer organisation we are not really very competent to talk about how to regulate the expression of race hatred. Normally it is not something that is done for a commercial purpose. I remark in passing that it is obviously a difficult one because it is something which in the end is going to have to be enforced by Member States and they may have a different view of it, as is clearly the case at the moment. I express no views on whether it was right for Germany or not, but clearly to deny the Holocaust is not an offence in Ireland, so there are different views about it and, as I said, it rather extends beyond our core area, which is the relationship between commercial operators and consumers.

Q368 Chairman: The E-Commerce Directive has certain obligations upon on-line providers of services, has it not, outside of this?

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Mr Murray: Yes.

Q369 Chairman: We did not give you notice of this, so you may reasonably say that you need time to reflect upon it, but insofar as the E-Commerce Directive had certain obligations upon internet providers, did that directive provide adequate safeguards against harmful content and so on as far as your organisation is concerned? I am not here talking about advertising.

Mr Murray: I am not aware of it having been an issue.

Q370 Chairman: You did have notice; I apologise.

Mr Murray: This may be my fault, so to speak, but I have not heard of it as being a special issue. Again, it is something which depends very much on the national culture.

Lord Walpole: Does the imposition of quotas for European works and independent productions adequately meet the demands of European citizens for diverse and local content?

Q371 Chairman: Or, put another way, does your organisation regard this as something that is important to consumers or is that a matter for Member States to be bothered about?

Mr Murray: It is largely for Member States. We would be concerned about the possibility that minority groups would be deprived of some of the choices they should have in a purely unrestricted market, but, given that we are not always happy about protectionism in the wider sense, this is something that I have some misgivings about. The idea of preserving choice and particularly preserving choice for minorities if that cannot be done in the market we would absolutely be in favour of.

Q372 Lord Walpole: I ask this one particularly because in the block of flats that I live in we do have a very wide range of television programmes available, obviously, in Arabic and Chinese and all that sort of thing. It is a question of whether they are European or independent. The inhabitants of the flats want them, do they not, and if they were banned in any way some of them would want some of them?

Mr Murray: They may come in a package.

Q373 Lord Walpole: Yes, I think they do come in a package. You have just bought yourself one.

Mr Murray: As I said earlier, I am getting 42 channels and I only want six of them, but it is nice to have the others. It is also a question, but this very much extends outside our remit, of preserving an industry or something like that. This may well be a legitimate thing to do but it is a difficult thing for us, particularly when we use the word "demand", because if there is a demand there may well be a

supply. It depends on the level of demand. That will vary also. Our French members would, I think, answer, "No, it is not enough and we want more, more, more". We tend to be somewhat sceptical about anything which implies a privileged position, whether it is for farmers or for business.

Q374 Chairman: You are the first witness who has managed to bring the common agricultural policy into our inquiry. Only an Irishman could achieve that.

Mr Murray: It is called biting the hand that feeds you.

Q375 Chairman: Indeed! Now is a good time for Ireland to say that it is about time it finished.

Mr Murray: I have no objection to that!

Q376 Baroness Eccles of Moulton: On the subject of the Country of Origin Principle you have some quite strong words in your position paper, particularly relating to material that originates in another Member State and also on the question of non-linear services. In your opinion has the principle been beneficial or harmful to consumers? Do you consider it appropriate to reconsider this principle and would you also favour greater harmonisation between Member States for a reduction in Member States' discretion regarding implementation?

Mr Murray: It is difficult. First of all, the Country of Origin Principle is obviously a practical one because it is very difficult to maintain any other, so generally speaking it would be the Country of Origin Principle. There are a number of areas, one of which we will have to exclude immediately and that is the question of the rights of consumers who are dealing with something from another country. That perhaps is something we dealt with in e-commerce, so I will leave that out for a moment. It is a different kind of thing. The real difficulty here is to what extent may a Member State maintain, for good non-protectionist reasons, its own traditional standards, particularly again in relation to children. I suppose the most obvious example of that is the Swedish case. There have been other examples but I think in the Swedish case nobody would seriously argue that the restrictions which they wish to maintain arose from a purely protectionist instinct, to stop people buying non-Swedish goods. That argument has been made about the Greek case, that it is protectionist in intent, although I do not know about that, but certainly in the Swedish case it has not. It is an odd question. To some degree it is to do with the question of subsidiarity, not as a legal principle because that is quite narrowly defined, but as a general principle. When it was first introduced I noted that in the UK it was seen as something to stop Brussels from interfering, but in the Nordic countries it was seen

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more as maintaining freedom to do their own thing and stopping Brussels stopping them from doing their own thing. In the UK it was, “Now Brussels cannot tell us to do something”, but in the Nordic countries it was, “Now Brussels cannot stop us from doing something which we were doing before”. The UK analysis was correct, by the way. The only thing the subsidiarity principle does is stop the European Union from doing something. It does not *per se* give Member States any increased competence. This is the issue and, representing as we do a diverse group of consumers, in many cases from countries which have tended to be more restrictive than the UK, not just in this area but in many other areas as well, their plea is, if I can put it crudely, “We do not want the UK model imposed on us”, whether it is financial services or advertising or whatever. This is at the root of it, and yet we would also accept that many of the claims for particularity that individual Member States have made, claiming that they do so in the interests of their consumers, are in fact simply protectionist. We are well aware of Member States saying, “We are doing this for consumers”, when, of course, they are not.

Q377 Baroness Eccles of Moulton: What about the non-binding proposal in the latest amended directive that there should be a process of co-operation between the country that is having the material transmitted from it and the country that is receiving it? That should perhaps solve the problem of teddy bears?

Mr Murray: I do not know if I am supposed to officially know about this one or not, but—

Q378 Chairman: Knowing whether you have actually read it and fully understood it would be helpful, but you may not have known about it. We have only just had a chance to look at it in the last few days.

Mr Murray: Would it work? The question is to what extent can a Member State for a good cause say, “Look: we insist that anybody broadcasting to our market, certainly in any quantity, should respect certain of our cultural views or our tradition or whatever”, and none of them is a Saudi Arabian culture, but there are differences and it is the subversive end that we are talking about. I do not have an easy answer. I am not sure whether in itself it might work. It might need some form of umpire, if I can put it that way, to judge when the demand of a Member State is appropriate or not because otherwise, if it is purely voluntary, you could have France or Sweden or whatever coming to you all the time and saying, “Please stop this”, or, “Please stop that”. Whether those matters could be solved bilaterally I do not know.

Q379 Baroness Eccles of Moulton: But you believe in the principle as a principle?

Mr Murray: Yes. It is part of respect for the autonomy and culture of individual Member States though it can be very difficult to apply in practice. It is a principle that by and large would have very little application to UK or Irish consumers because the regimes are relatively liberal there. It might happen in Ireland where there is increasingly a move for more restrictions on the advertising market, but is the Dublin Government going to go to ITV and say—

Q380 Baroness Eccles of Moulton: But you do extend your comments to embrace non-linear as well?

Mr Murray: Yes, and that is more difficult. Again, I suppose that the part of non-linear which we focus on is the part which would be most akin to broadcasting, the part which is aiming at a relatively mass market, again drawing on my example of Procter & Gamble, not, by the way, that I would expect Procter & Gamble to do this; Procter & Gamble would, I think, have more sense than to antagonise Sweden, for example, in its advertising on-line or not, but we are looking more at the mass market. This is not just here but right across. It is a very complex problem of on-line that there tends to be a continuous spectrum, but at one end on-line is just as much broadcasting as traditional broadcasting, whereas at the other end, of course, it is not.

Q381 Lord Haskel: Can we move on to self-regulation? This is all to do with implementation. What do you think about the revised draft? It emphasises self-regulation whereas the original draft did not mention it at all. Do you think this is a way in which these rules could be implemented in a proper manner?

Mr Murray: Broadly, no, but I would qualify that. In our view, and I have said this in another context, the Commission’s and the regulators’ and governments’ attachment to self-regulation is a bit like second marriages: the triumph of hope over experience. Self-regulation can work within a defined legal framework sometimes. It can work better, by the way, in some Member States than in others; there are clearly areas where it works relatively well, such as in the UK, but it does not seem possible simply to transfer the model very easily to many other Member States. For example, I do not think it would work at all in Italy, but the real question is to define what it is and to link it. At the end of the day regulation, whether directly or indirectly, is a matter for public authorities. It is not something that you can completely abdicate and there is a contradiction in self-regulation. Is it purely self-self-self-regulation and, if so, how do you judge it as an instrument of policy? As soon as you ask the question you say, “Well, of course, it should meet certain criteria”, and so on, but the more you say that

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self-regulation should meet certain criteria the less you have self-regulation and there are other criteria set out in the directive or in a neighbouring act or whatever. There is a conflict there which has never really been satisfactorily resolved. It is usually resolved by slightly ignoring it or being slightly inconsistent. We can see self-regulation as being possible within a very clear legal and institutional context but not in the kind of context in which it has appeared in recent directives in that Member States are to encourage self-regulation. This is a nonsense.

Q382 Lord Haskel: Do you think this document gives that background, that reinforcement of self-regulation? If it does not work then institutions can step in?

Mr Murray: There are two different models. There is the kind of model where, usually for want of political will but maybe for other, better motives, a government will say, "We will try self-regulation", and the matter is left to industry, and the thing goes on and then nasty people like my organisation say, "It does not work, it is terrible", and controversy breaks out and we have lots of meetings and so on and the government says, "It does not seem to be working and you have to be careful", so everybody pulls up their socks and goes on. This goes up and down all the time. There is a different way, which is if you can link self-regulation to other means of dealing with complaints, and the UK managed to (I suspect by accident but that is another question) some time ago in the implementation of the Misleading Advertising Regulations in the UK, going back to the eighties. The Director-General of Fair Trading, when he gets a complaint, can consider whether other means exist to deal with that complaint or not. I suspect this was put in because of the dislike at the time of the UK Government of implementing almost anything from Brussels, but at least the Director-General of Fair Trading can decide. If you get a complaint about misleading advertising he can ask himself, "Is there another way in which this complaint can be dealt with? Yes, I think ASA can deal with it or maybe some other authority", and that is it. If it were to happen that ASA fell on hard times in the UK, then *pro tanto* the Director-General of Fair Trading would stop saying, "I think ASA can deal with this", and would say, "ASA are not very good at the moment. I think I will have to deal with this myself", so there is a link between the two. One does not have to argue every five years that ASA is working or not working and so on. I do not suggest that that is the precise model but I propose it as establishing some kind of legal or institutional framework within which self-regulation can work and can develop and within which there is a corrective mechanism if there are problems. The same situation exists also in the Nordic countries but

in a different way, where there is a general duty not to do anything which would be contrary to good marketing practice. The consumer ombudsmen say what they think are good marketing practices, they issue guidance notes or whatever, industry may or may not agree, but if the ombudsman thinks the trader is engaging in practices which are contrary to good marketing practice he can take the trader to the market court for a declaration. If the trader is doing something which is contrary to the generally accepted standards of the profession it is very likely the court will decide that this is contrary to good marketing practices, but if the trader simply says, "I am doing everything that my professional code says I should do", the court may say, "We think that is not enough", and so again there is an interaction going on there all the time. Obviously, as the market court breaks new ground that new ground will be incorporated into the codes of practice of the relevant trade association, so again there is a dynamic inter-relationship between the two rather than this kind of extreme of the either/or and the fight every five years or so and the threats and the minister and the Commission or this, that and the other.

Q383 Lord Haskel: Is this the view of *Which?* in Britain?

Mr Murray: *Which?* Do not have a very high opinion of ASA, so this may influence the view of the relationship that I mentioned under the Misleading Advertising Regulations, but I cannot directly speak for them on a British issue, obviously. *Which?*, of course, have fully taken part in our discussions on self-regulation more generally. They extend, of course, far beyond this and they are certainly at one with this idea of having this inter-relationship of some kind, but whether they agree with a particular arrangement, whether it is the UK one or the Nordic one, I do not know.

Q384 Lord Fearn: Has the Commission adequately considered the impact that this proposal is likely to have, on the sector first, and on the consumer second?

Mr Murray: I do not think they have considered it at all in relation to the wider cultural issues that I was talking about. These have not been considered at all. If you take a consumer simply as a passive consumer of whatever, you may well say, "The more advertising the better", but it is not our view of the matter. As for the industry, of course, I do not know. I am not really competent to answer that but I do find it odd that much of the discourse is always about the threat of new media and a tendency, as I said earlier, to overlook the fact that some of the problem, if you like, is a side effect of having more and more channels.

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Q385 Chairman: I do not know the answer to this myself, but in the consultations that the Commission had, and I have no doubt they consulted yourselves or you were one of the stakeholders, did they seek, perhaps through consultants, to ascertain a consumer view of advertising? Clearly you are an important representation in that but to your knowledge did they seek across different Member States to examine and explore consumer attitudes towards advertising?

Mr Murray: I do not know. I would only say in comment that there are different ways of exploring consumer views. If you ask people in the street if they like advertising, they would, like me, say, "Oh yes". It is only when you look more closely, as *Which?* did in their focus groups, at parents with young children and so on, that you get what I think is to some degree a truer picture of the situation. This would be particularly so, of course, in relation to parents because parents will not easily confess to being overwhelmed or not doing the right thing by their child. Any parent passing by in the street will say, "Oh, yes, I determine what my child eats".

Q386 Chairman: Quite a lot of what you have said, and this does not diminish the importance of it at all, is about understanding about children's advertising, and you then brought in obesity as an issue. Is there anything else that we have not touched on that the consumer groups would wish to see limited in advertising? You have mentioned alcohol, and tobacco is one, and you have also mentioned obesity. Is there anything else?

Mr Murray: No. Obesity is one aspect, much of the aspect, of the general problem of diet. We have moved from a situation where we have more or less reasonably safe food and the institutions to deal with it. We face the more general problem now of diet and nutrition.

Q387 Chairman: Let me put a naughty suggestion to you, which I am not going to suggest again, but if you took the view, and I put this up only to be argumentative and to see the reaction, that issues of real public concern should be reflected in limitations on advertising, and if world climate change really was regarded as very important, carbon emissions and so on, would you support restricting advertising on television of cars? You see my drift of thought?

Mr Murray: Yes. What about aeroplanes?

Q388 Chairman: Air travel. Where would you draw the line in law?

Mr Murray: I have to say, to be frank, that the consumer part of being a consumer organisation would not at the moment encourage us to demand restrictions on flights.

Q389 Chairman: I thought I would pull your leg. You have been enormously generous with your time and given us an insight in your evidence that we have not received from other witnesses and that has been valuable to us.

Mr Murray: I am glad to have been of help.

Chairman: Mr Murray, on behalf of the Committee thank you very much.

TUESDAY 7 NOVEMBER 2006

Present	Eccles of Moulton, B Fearn, L Geddes, L Haskel, L	Roper, L Swinfen, L Walpole, L Woolmer of Leeds, L (Chairman)
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Examination of Witnesses

Witness: MRS MARY HONEYBALL, a Member of the European Parliament, examined.

Q390 Chairman: Good morning, Mrs Honeyball. First of all, my apologies for the slight delay but we are now going to proceed. May I thank you very warmly for sparing the time to see us; I know you have rearranged things so you can be with us today and that is very greatly appreciated. We have a number of questions to ask you; we will aim for 45 minutes and if we go a little bit over I hope you will forgive us. We have seven topics we would like to cover with you, but before we start I wonder, Mrs Honeyball, if you would like very briefly to explain to the sub-committee your role in all this yourself and then we can go forward.

Mrs Honeyball: I am a Labour Member of the European Parliament, I am one of the MEPs representing London, and I am only a substitute member of the Culture and Education Committee, but I am actually the only British Labour MEP on the committee. The UK is not generally very well represented; there is one Conservative full member as well so we are the two British members on the committee who actually attend meetings and are active. The Culture and Education Committee is probably not one of the most important committees in the European Parliament, but it is the lead committee on the Television Without Frontiers Directive and as such that means the Directive goes first to the Culture Committee and the main rapporteur is a member of the Culture Committee—I understand you were meant to hear from her and were not able to. Other committees are then asked to give opinions, and that is basically how the legislative process works, it will go to the lead committee and other committees first. Committees table amendments and sometimes amendments will be compromised if there is agreement on certain things. The full committee vote on that and then what has been voted will go to the plenary session of Parliament for first reading; it will then go to the Council and the Council will produce a common position which will then come back to Parliament and there can be amendments at that stage, at second reading, but no new information. It will then go back again to the Council if there are any points of difference and then if we still do not get agreement we will go into what is called the co-decision procedure where there are discussions between the Parliament

representatives and the Council to hopefully come up with a final agreement. We are not there yet, it has just gone through Committee and it is coming up for first reading, that is where the legislation is now, so you are actually getting it at a good time. My role is really to be a member of the committee; I have put down amendments on this which you may or may not have seen and I have been actively interested in it.

Chairman: Thank you very much. We appreciate entirely that when we are asking questions today you are giving your view as a member of the committee as opposed to speaking for the committee. First of all we would like to address the question of scope and Lord Haskel and I will start this. Lord Haskel, would you like to start?

Q391 Lord Haskel: We think that the scope of the proposal is central to this because the proposal is attempting to bring the emerging media platforms under the existing regulatory framework. We wondered if you would consider whether this attempt is appropriate and what are the advantages and disadvantages which this regulatory approach might have for citizens of the European Union.

Mrs Honeyball: The whole issue of scope was very difficult right from the beginning and there was quite a lot of discussion about it. Some of the Member States, notably France and Germany, wanted much greater scope at the beginning than we have ended up with now and wanted it to cover not only what we call linear television but also some element of regulating the internet and what you might call new media. It has now ended up in its current form being mainly concerned with linear services, with some extensions but not a lot. I think that is probably where it needs to be, there are lots and lots of issues about new media and regulating the internet and quite how you do that and how you justify that with freedom of expression—the internet is not a controlled television environment on the whole. People should be able to write their own blogs and do whatever and all Member States have legislation in place to prevent criminal things happening, so there are safety nets in terms of the internet already. We have been right to exclude that because it would be impossible to regulate that and a lot of it I do not think needs regulating, but we need to be aware of two things here

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really. The first is what I think is a great gap in this directive, in that we have not really dealt with internet service providers, how we relate to them and how we discuss regulation with them and what they should and should not be doing. There is some element of that in the e-commerce directive but we have not really addressed it in this particular one and that is quite an omission actually, but I am not sure that we can go back and deal with it now. We need to bear it in mind when this comes back again, as it inevitably will because this is a very fast-moving area. The other thing which we need again to be aware of for the future is internet services becoming more like television. Google is now seeking to do this and to effectively broadcast programmes, but what we need to do with this whole issue is just keep very much on top of it and be aware that it is very, very fast-moving, probably one of the fastest-moving things that we will ever have to deal with. We need to just take that on board really. Having said that, those are two things that perhaps are not recognised enough so far, but in terms of where we have got to with it now it is easy to regulate linear services and I am quite happy with that. I have had a lot of discussions with Ofcom and the BBC and we have come up with something which they are now relatively happy with.

Q392 Lord Haskel: As it is so fast-moving, as you say, do you think that the proposals are what we call “future-proofed”, or do you think that now is not the right time to be doing this, we should wait and see what happens and then think about what regulations there are because, after all, we are not quite sure what we are trying to achieve. Are we trying to protect the TV firms from going bust through lack of advertising, are we trying to make sure there is plenty of choice for the consumer? I wonder whether now is the right time to be doing this.

Mrs Honeyball: This is one of those things where there is never a right time, because there will always be something else. I do not think it is future-proofed enough and I do not think there is enough recognition that this probably will not last very long actually to make any sense, which is why of course we are doing it now, because the last one was out of date. It is just an area which will move very fast, as we discussed. In terms of what it is attempting to do, the way I view it is that it is essentially about consumers and what the public wants, and also there is some element of consumer and public protection. That has to be the focus of it and that is what broadcasters should be doing; this is basically what it is about actually, to answer that question.

Q393 Lord Haskel: There is plenty of public protection in the local laws. We have got Ofcom which gives the public plenty of protection so what is it that the EU can add to this?

Mrs Honeyball: What it does do is actually offer cross-border protection, if you like. Television and broadcasting is actually very international, I have actually been quite surprised when I have been in other European countries actually how many English and American programmes there are, though very often they are dubbed. I have genuinely been surprised how much is exported, so there is a need to deal with this on a European-wide level but this is probably less of an issue for the UK than other European countries where there are obviously borders which can be crossed by television signals. We are in a slightly different situation here, we are not part of a large mass of land; the boundaries are not quite so obvious.

Q394 Lord Geddes: Just one point, if I may, My Lord Chairman, which is a point of clarification. You spoke in your opening remarks about where you were and what the process was with your committee and coming up with amendments. Are you talking of amending the 20 October 2006 draft or the December 2005 draft; which draft is your committee amending?

Mrs Honeyball: It is the Commission’s proposal.

Q395 Lord Geddes: The original proposal, not the Finnish Presidency’s redraft.

Mrs Honeyball: No.

Lord Geddes: Thank you.

Q396 Chairman: That is very helpful, what you said, but could I just ask a couple of questions. What do you think the fundamental objectives are, is there real clarity of objectives behind the desire to redraft and are they objectives to look at television as it was regulated and ask whether those regulations, that framework, is still appropriate in a world whether there are hundreds and hundreds of television channels and more choice? Is that the objective, to maintain the internal market and readjust the regulation in the light of that choice, or is the objective to say we have always regulated television, therefore we should regulate anything that is what is now called audio-visual media services and just because we regulate television in a particular way so we should regulate the new delivery platforms, the internet. What is the starting point, do you think, in the European Parliament when they look at this, or are the two mixed up? You have been very clear in your mind that at this stage the regulation should not really be going into the internet.

Mrs Honeyball: The two are mixed up and it is actually an update of something that was there before, it is not the first one, and that was the original intention, that the Commission wanted to move the thing on a bit. That was their objective and I do have some sympathy with what your view is, that you do think this is trying to be very clear, and I do actually

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have some sympathy with that view because there are quite a lot of unanswered questions to this. At the beginning the Commission did think that some sort of regulation of the internet was a good idea, and they are now finding, in the course of this going through committee and further discussions, that this is a very difficult area and perhaps the level of regulation that they were hoping they would get is not desirable. That is not necessarily a bad thing, that is what happens when legislation goes through Parliament, it is actually part of the job that we do, so I would not necessarily criticise it.

Chairman: We must push on, but if you are dying to bring something in could you bring it in at an appropriate point as we go on. We have six more topics and Mrs Honeyball has been very clear on the first area. Baroness Eccles is going to introduce the country of origin issue.

Q397 Baroness Eccles of Moulton: Mrs Honeyball, we have gathered through various discussions that this is quite a knotty one, the country of origin principle, and we understand that there are different views about it across the Member States. In your opinion, has the operation of the principle in respect of the provision of broadcasting services benefited European citizens and Member States and do you consider this principle to be now under threat, particularly as the revised presidential draft, the Finnish draft of 20 October, makes some proposals about the country of origin principle, and whether this would weaken it? It is really a general view about it and also a specific on the Presidency proposals, the Finnish draft.

Mrs Honeyball: European legislation, up until the Services Directive, was always based on the country of origin principle, it is a very clear part of the way that things operate. We are still becoming familiar with the fall-out from the Services Directive, where the whole thing has changed quite considerably. So far we are still maintaining the country of origin principle in this legislation, which I actually think is probably the only way that you can sensibly do it, but there has been quite a lot of discussion within it as to how the country of origin principle will work, and I actually did have discussions with Ofcom yesterday about it. The Swedes want some sort of mandatory principle of co-operation, which Ofcom really do not want at all because they would then be having to deal with potentially 26 Member States on particular issues, which is probably not very sensible. I know Ofcom's solution to this is to have some element of voluntary co-operation where you can actually do it in a more unwieldy fashion really, so I suggest that we need to look at this and think how it would work in practice. We should uphold the principle in general.

Q398 Baroness Eccles of Moulton: You have actually helped to answer something that has been bothering us a lot about whether the Swedish wish—and we know what that is—would be binding or not, but co-operation that would be mandatory is something different. The two terms do not actually combine because if you are doing something that is co-operation, how is it mandatory?

Mrs Honeyball: Exactly, but that is what the Swedes want, they actually want mandatory co-operation. They have particular issues with this because they have very strict regulations and there is a broadcaster which has set up in the UK which broadcasts to Sweden and gets round a lot of the Swedish regulations. The Swedes are therefore very anxious to maintain what they already have, and this is part of an attempt to do that, and I think that is right. Different Member States will have different views on things and you do not necessarily want to stop that altogether. What they do is actually better than what a lot of Member States do and that should not be undercut and undermined.

Chairman: Can we push on then and have a first look at minimum content rules; Lord Walpole is going to introduce that.

Q399 Lord Walpole: Good morning. On advertising, do you agree with the liberalisation of the quantitative rules and do you consider that they need tightening or do you think they could be liberalised further?

Mrs Honeyball: There has been an awful lot of discussion about advertising, the breaks that you have to have and how long you can go before you have a break and all that kind of thing. We have had a lot of discussion about it and there has to be a balance here. Most Member States do not have the BBC and they are not used to public service broadcasting in the way that it is done in this country, so there is much more reliance on advertising and it is much more of an issue in Europe than it is in many ways here. We have discussed this and come up with something which the Committee feels is all right, and I do not really feel that I can argue with that particularly because we have quite a different regime here in a way. We have probably got there on advertising and also if you are broadcasting services which actually need advertising revenue to exist, you cannot cut back advertising to such an extent where it is going to be problematic. You have to balance these two things.

Q400 Lord Walpole: You think you have got it about right.

Mrs Honeyball: I think so, yes. The other issue about advertising is product placement.

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Q401 Lord Walpole: I was about to ask you that one, yes. Do you consider the proposed rules on product placement and sponsorship are appropriate?

Mrs Honeyball: We have had an awful lot of discussion in committee about this; I think quite a disproportionate amount of discussion. Even in the United States where product placement is accepted, it is a very small part of the amount of advertising that there is available in the United States, something like two or three%. You have to start from that basis, that this is not necessarily going to be as big a deal as perhaps the Culture Committee thinks it is going to be, but you do need some sort of safeguards for this and people need to be aware that there is advertising and there are various ways of doing that.

Q402 Lord Walpole: There must be a lot of people like me who feel that the whole concept of product placement is appalling and will switch to another programme immediately, so it is possible that people will turn off if they do not like it.

Mrs Honeyball: They might do. This whole issue about being able to turn off advertising is quite a general issue anyway because with the new technology that exists now you do not necessarily watch television in absolute real time anyway, and you can fast forward the advertisements which are actually happening at the time. This may well be something that comes up when we look at this directive again in the future, how advertising on television works when people effectively do not have to watch it. What you have talked about is probably part of a wider issue.

Q403 Chairman: That could point to the fact that for the Commission, Member States, Parliament and ourselves it would have been a better use of time to concentrate on television services and think harder about whether or not to intervene in their business models in a very different competitive environment. I must say I thought you were a model of sanity in these matters; is there any sympathy at all in the European Parliament for the view that law-makers should think very, very hard in a world where there is enormous choice and enormous competition as to what they really do need to try to regulate by law? Has there been any consideration at all, or is the starting point there is a directive in the past so what can we do with that directive to keep some controls? Is there any sympathy at all for questioning whether in the modern era the technology you describe and the competition are really pretty fundamental to television and there should be no limitations at all, or is that a step too far?

Mrs Honeyball: At the moment that is probably a step too far. That certainly has not been the way this subject has been approached.

Q404 Chairman: I just wondered whether in the committee there was—

Mrs Honeyball: No, not really, no.

Chairman: Qualitative issues, my Lord Walpole.

Q405 Lord Walpole: Are there any additional or purely qualitative restrictions on marketing or advertising that you would consider necessary under this proposal?

Mrs Honeyball: There are a few things I personally would like to see more of. When this came out I was quite interested in the whole question of children because there is a whole thing about children and broadcasting and advertising and how you deal with that, and not only children I should think but the general public. I never liked the idea that there is no need to protect the public, but I do think that there are ways of actually doing advertising and also the sorts of programmes you should have; there are things that should be done with all of that. In terms of advertising, we have not advertised tobacco for a long time and I do not think we should be advertising alcohol on television and I also think we should be very careful about advertising foods which are not great—sugary and fatty foods—to children. All those sorts of things we need to be very aware of; we all know the reasons why and I would like to see restrictions on that. We also need to be very clear about some sort of watershed, before which you cannot show things which might not be in the best interests of children.

Q406 Lord Walpole: Presumably that all gets tied up with the same thing. I was involved with the Gambling Bill here and gambling is another thing that you can get access to under the same sort of heading, can you not—you can watch a race, have you put your money and all that sort of thing. What concerns do you have about the impact of advertising on editorial control?

Mrs Honeyball: Certainly, the way it has worked in this country I do not think it has ever been a problem; it is not a problem but it could be. I have never in my life watched a lot of American television—and I am quite relieved I have not in a way—but you do see the blurring of advertising and programme content and sometimes it is quite difficult to know which is which. I certainly would not like that to happen here and I do not actually think it will; there is nothing in this directive to assume that advertising will become part of editorial content, or the other way round. The two are very popular and they are throughout Europe; I do not think it is an issue particularly for any European country.

Q407 Lord Walpole: You think it is an American issue mainly.

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Mrs Honeyball: I think so, yes. I have to admit, I have not watched lots of television but I have watched French and Belgian television quite a lot over the years actually and it is very clear. French television has blocks of advertising and they start by saying this is advertising, there is a long time and then they say it is finished. It is very, very clear that it is advertising.

Q408 Lord Fearn: My question is in two really. Concerning illegal or harmful content, do you consider that effective mechanisms exist to control the types of illegal content identified in the proposal, such as race hatred? The second part is, is the proposal as amended likely to substantially enhance restrictions on freedom of expression?

Mrs Honeyball: Actually the controls on this are all right. Something that the European Union generally has been quite sensitive to is race hatred and those sorts of issues, so I think it is actually not too bad. There is always the ultimate sanction of Member States being able to use their own legal system and their own criminal law in cases where they need to, so I actually think those things are probably all right.

Q409 Lord Fearn: Freedom of expression?

Mrs Honeyball: I am not aware that freedom of expression in the EU in terms of television has ever been a problem. I do not have any particular issues with any of that, I think it is probably all right.

Q410 Lord Fearn: Do you think the Member States such as Sweden would have their own restrictions and stick to those?

Mrs Honeyball: It comes down to how you define freedom of expression really. What we were talking about earlier about Sweden having rules and regulations that stop half the things being advertised to children is actually good; I do not think that is actually an imposition or a restriction of freedom of expression. I suppose it depends where you are coming from on this, but I think that the balance is all right.

Q411 Lord Swinfen: I want, Mrs Honeyball, to ask you about quotas for “European works” and “independent productions”. Do you think that they continue to be an appropriate mechanism for addressing the demands of EU citizens for diverse and local content?

Mrs Honeyball: Again, this is much more of a European issue and it is less of an issue for us than it is for other European countries. Actually in a world where there are lots of television channels and they are increasing all the time it becomes quite diffuse. These days if you wish you can have access to 30 odd television stations and I am not quite sure how you can do this sensibly. I am not sure that a country such as France would agree with that necessarily, where

they are much more aware of the whole kind of cultural thing and they want to keep—

Q412 Lord Swinfen: Keep everything French.

Mrs Honeyball: Yes, exactly, which is a reasonable point of view in terms of this, but I am just not sure you can implement it sensibly any more. How can you divide the quota to cover 30 odd television stations in 27 Member States?

Q413 Lord Swinfen: I will not do the multiplication.

Mrs Honeyball: Exactly, it just gets to be a difficult one, like a lot of this, and we are probably not approaching it in quite the right sort of way. What I do think in principle is that we should encourage European productions and European works, and there should be ways of doing that.

Q414 Lord Swinfen: You would not use quotas to do it; that is fair enough. How about non-linear services, are you worried about that at all?

Mrs Honeyball: In terms of quota?

Q415 Lord Swinfen: Yes.

Mrs Honeyball: If you cannot do it for linear services how on earth you do it for non-linear services I do not know. In a way I think the internet is quite interesting because it is so English-dominated—I mean English-speaking and American. I do not know quite where you start with it so I do not think you can do it.

Lord Swinfen: I understand that, there are 22 countries all in English. Thank you very much.

Q416 Lord Roper: I am not absolutely sure whether you have seen the revised Presidency draft?

Mrs Honeyball: I have to admit I have not. I have a pretty good idea what is in it, but I have not actually read it. I have to be honest here, we were in recess last week so I have not caught up with one or two things.

Q417 Lord Roper: This is on the question of industry self-regulation and there is a suggestion that the revised Presidency draft in Article 3.3 does represent a change of emphasis from the original draft. You may have had a chance to discuss this with Ofcom, but the question I would really like to ask you is if there has been this change of emphasis in the revised Finnish draft compared with the original document to the Commission, does this mean that the UK will be able to maintain self-regulation under the oversight of Ofcom?

Mrs Honeyball: That is certainly what the Government wants to do and we have had a lot of discussions, not so much as a committee but I have had discussions with the BBC, with Ofcom and with Government representatives about this and it is very clear that what we are looking for is co-regulation between the broadcasters and the regulators. I would

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be very surprised if the British Government lets anything go through Council which does not allow for that.

Q418 Lord Roper: It is at page 13 of the revised Presidency draft, Article 3.3, which My Lord Chairman is about to present you with.

Mrs Honeyball: Thank you. I am sorry about this, “Member States shall encourage co- and/or self-regulatory regimes in the fields coordinated by this Directive to the extent permitted by their legal systems.”

Q419 Lord Roper: Does that encourage you?

Mrs Honeyball: I do not see that that need necessarily be a problem.

Q420 Lord Roper: What I am suggesting is that this is a change from the Commission’s original proposal that the Finnish Presidency is now putting forward, and I am really asking you whether you agree that this means that in the UK self-regulation under the oversight of Ofcom, which therefore provides an element of co-regulation, can continue.

Mrs Honeyball: I think so, yes.

Q421 Lord Roper: Thank you.

Mrs Honeyball: That is just my view, but I think so, yes.

Q422 Chairman: Was there any difference of view in the committee on the issue of self-regulation as against having all the regulations embodied in domestic law?

Mrs Honeyball: We have discussed it to some extent and I have discussed it with outside concerns, with the BBC and Ofcom, rather more than within the committee. It has been an issue and the BBC has always been very much in favour of co-regulation and that has been very much the Ofcom line as well.

Q423 Chairman: The question of self-regulation is not seen in some Member States as weakening controls and hence weakening the arguments for country of origin principles.

Mrs Honeyball: It is a little bit. I think we have probably got through that and there is now the agreement on where we are with it. That is generally in line with what is the draft actually.

Chairman: We hope so and we hope that the Commission will feel able to get behind that Presidency text.

Q424 Lord Roper: Perhaps I could just ask you a supplementary question because it has slightly confused me. Supposing that this Presidency proposal is taken to the Council of Ministers, which I think is on 16 November, what would your

committee then work on? Would it then move away from the Commission’s original proposal and work in future draft amendments to this new document?

Mrs Honeyball: Yes.

Q425 Lord Geddes: I am extremely grateful to Lord Roper because that was exactly the question I was about to ask, My Lord Chairman, before I get onto the specifics of the impact assessment, because it is very germane to it. The first question deals with the December 2005 draft and the second question deals with the October 2006 draft. On the 2005 draft, do you consider that the Commission adequately considered the impact of it on the sector?

Mrs Honeyball: I think they did, and I know they did do a lot of work on it and had public consultations. I have to admit that in more general terms I just wonder whether any way the Commission does this works very well because they are always looking at producing legislation for the whole of the EU in very different environments, so it is not like doing it in a single Member State. Given those constraints they did actually do a reasonable job on this.

Q426 Lord Geddes: I think I am right in saying—but I will be corrected by our clerk if no one else—we have taken quite a lot of evidence very quickly and I do not recall one single witness when we asked them saying they had contributed to the impact assessment. I may be wrong to be as sweeping as that, but certainly the vast majority of our witnesses said no, we were not contacted.

Mrs Honeyball: We certainly did in the Parliament, it is quite standard practice before anything comes forward for there to be public hearings on the issues, and that certainly happened in this case. I was consulted, even if nobody else was.

Lord Geddes: It was on the whole some of the people who are producing the new media services who were the people who felt that they had not been consulted. I am sure that the Ofcoms and the BBCs were consulted, but do you have any feeling as to whether some of the newer providers—mobile phones for example, which may in the future be used for audiovisual services—were consulted?

Q427 Chairman: Before you respond to that, could I add to that that some of the oral evidence to us, particularly from new media services, was that they felt that they may have had a chance to say something, but given the fact that the draft directive extended regulation to them they had not been given the same weight in the considered issues than the long-established, previously monopolistic, large television broadcasters were, and that in a sense the directive was drifting into new territory without counterweight being given to that. That might add to the flavour of the kind of response being given to us,

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so I wonder if you have had any feeling of that in the committee at all.

Mrs Honeyball: Not particularly in the committee. I tend to agree with what you are saying and it is a weakness of the way the Commission works that they do not always think about bringing in the elements that they need to, and that is probably very true in this case, partly because it is something they have not done before. A lot of these new media services are very new and I would agree it probably has been an omission. If they have been saying to you that they felt they should have been consulted and they were not, I am not going to argue with that, it is obviously the way they feel.

Chairman: I thought it was simply worth you knowing that that is what they said. Lord Geddes, do you want to carry on?

Q428 Lord Geddes: If I could now carry on to the more recent draft, the Presidency draft of 20 October this year, do you believe and indeed in your opinion is it possible that an impact assessment should be conducted on that 20 October 2006 draft?

Mrs Honeyball: That is not traditionally what happens. When legislation gets to this point it is going through the process, so it would be unusual.

Q429 Lord Geddes: Do you think it should, do you think there should be such a thing?

Mrs Honeyball: What might be useful, if there are these people from the new media who feel that they have not been listened to enough or talked to enough, it would not do anyone any harm to bring them in, but I am not sure quite how that would affect the parliamentary process. It is like, in the UK system, when something comes to your House someone is suddenly saying let us go and find some more evidence; it is difficult. I am not saying it is not desirable, I am just saying it is difficult.

Q430 Lord Geddes: With either of the impact assessments on the original draft or maybe one on the new draft, are you happy that the likely costs and benefits are sufficiently reliable to support the proposed changes in the directive? Is the impact assessment a good enough, rock-like base if you like, or is it built on sand?

Mrs Honeyball: I know that the Commission has done work on this and I think that generally by the larger broadcasters it has been welcomed. We were talking earlier about the scope of it and those sorts of issues and there are things there which perhaps were not thought through, but in terms of where it is now I do not think it is built on sand. It may be could have been better than this, but it is kind of workable now.

Q431 Chairman: If we as a sub-committee wish to come to a view and understand how many businesses are so-called non-linear TV-like services—a phrase that causes us considerable concern—and if we want to know how many such businesses would be brought under regulation, do you think your committee would be able to tell us, or the Commission?

Mrs Honeyball: I certainly could not tell you off the top of my head now.

Q432 Chairman: I was not really trying to question you; I would say that we have struggled with this and if one passes laws and certainly goes into a completely new area of business one ought to know how many businesses are going to be regulated. We have, frankly, no idea, and when we asked the Commission yesterday if there was to be an impact assessment done so we can establish it, he said—as you have said—no, the Commission does not carry one out now, it is now with the Presidency, the Presidency does not carry out impact assessments, the European Parliament does not have to, so this legislation could go through into a new area, something called “TV-like services” and nobody can tell us how many businesses would be affected. Would that be a matter of any concern to your committee—it bothers us as a committee in terms of scrutiny—as to how many businesses are involved: is it ten, is it a thousand? We are not challenging it through you and your committee but asking does anybody bother about that kind of question.

Mrs Honeyball: I would say it has not come up in the committee; this has not been something which the committee has exercised itself on. I understand your concerns and I actually agree with them.

Chairman: It makes it very difficult if we are asked how many businesses are actually going to be involved in this across Europe, and we say to our regulator in the UK “We have no idea”, that is a pretty poor basis for passing law, is it not? I do not say it is any better in the UK or worse, but simply our job is to scrutinise European proposals and certainly we would be most grateful if it is something you might care to give weight to in your discussions and answer that question. Lord Roper.

Q433 Lord Roper: At an earlier stage when we were thinking about possible expansion of the scope we were talking about covering internet service providers; do you have any idea how many internet service providers there are in 27 Member States?

Mrs Honeyball: There actually are not very many but they are expanding. There are not at the moment a lot.

Q434 Chairman: On a different angle to the same problem, it is not entirely clear—but you may be clear—quite what bodies or organisations in each

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case would be regulated. Is it the publisher or who is it on the internet-based services who would be regulated?

Mrs Honeyball: The whole thing about the internet scope of this is actually a huge problem. It also comes under the scope of the e-Commerce Directive as well, they are the two things which would involve the internet, and it is the e-Commerce Directive which talks more about internet service providers. That is probably the only way you can do it and we have said that individual blogs and that kind of thing are going to be out of this altogether, but the internet is expanding all the time and it is a very difficult one.

Q435 Chairman: It is possible to argue of course that you do not need to regulate the internet other than, of course, for issues of decency and so on, but in the broader sense we do not need to regulate internet services to create a single market because there is a single market in the internet. This is why, if I may, I come right back to my first question: what was the purpose of the revision? If the purpose is to create and ensure a single market continues it is very difficult to argue that you need this directive to be revised in order to create a single market in internet, which is one of the reasons we are somewhat puzzled. We understand how it got to where it is but puzzled by the direction. Is there anything you think we have missed in your discussions that concerns your committee that you think would help us in our own consideration of the proposal?

Mrs Honeyball: I am not sure there is actually, you have been very thorough. I do not have anything else outstanding that I wanted to raise with you really; we have covered all the points and more indeed than have been discussed with the committee.

Q436 Lord Haskel: Could I just ask one last question? Yesterday we heard from the Commission this phrase “TV-like services” and the whole purpose of it, as it was explained to us, is that it should be technology-neutral and forward-looking—future-proofed, if you like. Do you think that is the way forward and do you think that is the right way to define the context and define the scope?

Mrs Honeyball: It probably is, given where we are at at the moment. That would mean something like Google actually broadcasting which it is probably going to do.

Q437 Lord Haskel: It could do partly broadcasting.
Mrs Honeyball: Yes, which would mean that it would come under the regulatory regime. It is difficult to know how else to do it. It is not a perfect definition, but I have not come up with anything that works any better; which I know is not very satisfactory, but I think that has been the problem with a lot of this, there is this feeling that something needs to be done but we have not quite worked out always the right way of doing it. That is the nature of it, this is a very difficult area.

Q438 Lord Walpole: I wonder if you consider that the definition of broadcasting will have to change because at the moment it is messages of one form or another that go out over wireless waves, but a lot of it now goes out along the telephone wires, whether it is fibre optics or copper or aluminium or what have you. Do you think it needs to change?

Mrs Honeyball: It probably does actually, yes indeed, and that is the technology neutral bit which is a really strange European phrase, but that is what it means, that it is actually a service that is provided rather than how it is provided.

Q439 Chairman: Of course, if one went too technology-neutral one might find that most things simply cannot be regulated, and law-makers do like to pass laws in our experience—I am sure you have the same experience. I suspect true future-proofing and platform-free and technology-free might actually lead one to the conclusion that much less regulation is possible rather than more; I will just leave you with that thought.

Mrs Honeyball: Yes.

Chairman: Mrs Honeyball, thank you so much.

Lord Haskel: Hear, Hear.

Q440 Chairman: You have been, as we always find with Members of the European Parliament and in the Presidency yesterday, frank and helpful in your evidence. Thank you very much.

Mrs Honeyball: Thank you.

Written Evidence

Memorandum by the Advertising Association

ABOUT THE ADVERTISING ASSOCIATION

The Advertising Association is a federation of 31 trade bodies and organisations representing the advertising and promotional marketing industries including advertisers, agencies, media and support services. It is the only body that speaks for all sides of an industry worth almost £19 billion in 2005.

THE PROPOSAL FOR A REVISED DIRECTIVE

While the AA welcomes a revision which would modernise current rules relating to broadcasting, it is concerned that the Commission proposal does not particularly represent a modernisation and in some ways seems to impose additional restrictions on those who will be included in its scope.

In its response to this consultation, the AA will answer questions relating directly to the advertising industry. Those questions are:

1. *Jurisdiction and country of origin*—Does the Proposal go far enough in facilitating the free movement of broadcasting services?
2. *Regulatory approach*—What role should industry self-regulation play in the new regulatory framework?
3. *Advertising and commercial communications*—Should broadcasters be given greater flexibility in respect of the commercial arrangements they enter into for the financing of programmes?

1. *Jurisdiction and country of origin*—Does the Proposal go far enough in facilitating the free movement of broadcasting services?

The Country of Origin approach to regulation of the EU broadcast market is acknowledged by the Commission, some Member States and industry as a successful way of facilitating free movement. The AA supports the Country of Origin approach to regulation of the audiovisual industry in Europe and makes the following observations:

- Since the Directive is designed to ensure a properly functioning internal market in broadcast and is minimum harmonisation in its nature, a strong Country of Origin clause is necessary to guarantee the free movement of programming and advertising across the EU.
- Any disputes resulting from broadcasts out of one Member State into another should be resolved on a bi-lateral basis, using the Contact Committee. Extensive changes to Article 2 of the Directive, which would weaken the Country of Origin Principle, are not acceptable.
- The AA stresses that the rules contained in the revised Directive must be general in their nature. Their content and their detailed interpretation should be left to the discretion of Member States. This scenario, backed by a strong Country of Origin Principle, will ensure the free movement of programming.

2. *Regulatory approach*—What role should industry self-regulation play in the new regulatory framework?

Self-regulation is an important tool available to Member States in the implementation of legislation. It is a better way of regulating because it is more flexible, can be updated more rapidly than legislation and is an effective, less expensive way of handling consumer complaints. For the UK advertising industry it is the well-established means of ensuring the highest possible standards of conduct.

Across the EU, self-regulatory systems are in place or are being developed with the support of the European Advertising Standards Alliance. DG SANCO has recently published a paper supporting the work of EASA and its members which can be found at: http://ec.europa.eu/consumers/overview/report_advertising_en.pdf

As mentioned earlier in this submission, the UK advertising industry has a well-established system of self- and co-regulation in place. The wording put forward by the Commission in its proposal relating to self-regulation would undermine that system. The text should therefore be amended to allow Member States to choose whether to use self-regulation or co-regulation as a permissible way of implementing this Directive. The rigid wording incorporating the definitions of self- and co-regulation from the Inter-Institutional Agreement (IIA) should be removed from the text.

It is encouraging to see that in some of the proposals for revisions to the Commission text by Parliament and Council, the reference to the IIA has been deleted and self- as well as co-regulation has been encouraged. The AA supports this position. For more detail please see the AA amendments put forward to Parliamentarians appended to this response.

3. Advertising and commercial communications—Should broadcasters be given greater flexibility in respect of the commercial arrangements they enter into for the financing of programmes?

In light of the evolving market in audiovisual content delivery, broadcasters should be able to explore new methods of funding programming in order that a level playing field be maintained for all providers of audiovisual content. To this end the move in the Commission proposal to modernise rules relating to advertising and sponsorship is welcome and necessary. Broadcasters should be given more flexibility when investigating means of financing programmes.

The AA welcomes the removal of the daily advertising quotas and agrees that it is still appropriate to maintain the hourly quota, though it favours greater flexibility in this area. The AA also welcomes the Commission's move to modernise how advertising is inserted by abolishing the rule which allows the insertion of advertising spots only every 20 minutes.

However, the AA does have some concerns about elements of the Commission proposal which seem more limiting than liberalising. The AA believes that a truly forward-looking Directive would no longer contain prescriptive rules on advertising breaks relating to specific types of programmes. This should be left to the discretion of Member States. The AA's particular concerns relate to the following:

ISOLATED SPOTS

The AA disagrees with the Commission's decision to maintain limitations on isolated spots, as it is unclear what purpose this rule serves and it could inhibit greater flexibility in television advertising in future.

The Commission proposal allows isolated spots only during sports programming. This represents a minor liberalisation of the advertising rules and would be beneficial in so far as it would allow broadcasters to schedule short breaks during live sports programmes. However, the maintenance of the current rule for all non-sports programmes is highly regrettable.

The greater pressures on advertiser-funded television in future years mean broadcasters will require greater flexibility in scheduling advertising. Single spots could well have an important role to play. Maintaining the current arbitrary constraint inhibits that flexibility for no clear public purpose. Keeping an isolated spot rule while abolishing the 20-minute rule could lead to the anomaly that a commercial break with two 15 second advertisements would be acceptable but a break with one 30 second (or longer) advertisement would not be.

35-MINUTE RULE

It is the AA's opinion that the proposed "35-minute rule" for films, news and children's programmes, is an unacceptable new restriction.

The Commission has merged two of the existing rules in Article 11 without conducting a proper impact assessment and without taking into account that 35 minutes has no meaningful application to existing programme lengths. As a result, the proposed advertising break rules relating to children's and news programmes are more restrictive than the previous rules—an absurdity in a Directive that is supposed to be future-proofing for a digital, converged media environment.

Furthermore, the proposed rules for breaks in films provide no meaningful liberalisation. This discourages broadcasters from showing films and has a disproportionate effect on films with more limited audience appeal, including many European films. Furthermore, without further liberalisation investment by broadcasters in European films may also be at risk. The AA is concerned that these proposed rules could undermine the commercial rationale for these programme genres.

The proposal also lacks the “scheduled duration” wording contained in the current Directive. This is essential to provide clarity of application of the rules, based on existing practice. Any interpretation that these rules are based on the running time of the programme, instead of its scheduled slot, would be unworkable in practice.

PRODUCT PLACEMENT

The AA supports the Commission’s proposal to allow product placement. With audience fragmentation and revenue pressures, broadcasters need to diversify their income streams in order to maintain levels of investment in programmes. Permitting broadcasters to access a supplementary source of commercial revenue such as product placement, at a time when new technology such as PVRs and the drift of advertising revenue towards new media is putting pressure on traditional sources of advertising income is sensible and proportionate.

The method of identification of product placement should not be prescriptive and where in the programme it takes place, should be left to the discretion of the Member States.

The AA believes a controlled liberalisation of the product placement rules, with clear identification to the viewer, is important and if it is permitted within the Directive, the UK government should reflect this fact in its implementation.

CONCLUSION

The Advertising Association and its Members have been involved in the debate on the revision of the TVWF Directive from an early stage in its development. Although we welcome a revision which will make more sense in the rapidly changing audiovisual arena, we are concerned that the drafting of the Commission proposal could be “tighter”.

With this in mind the AA reminds this enquiry of its key issues relating to this Directive:

- The Country of Origin principle should not be weakened;
- Self- and Co-Regulation both play an important part in the legislative landscape surrounding this Directive and should both be considered as implementation tools for this Directive. Member States should have the discretion to decide how/if they will use these tools; and
- Modernisation of advertising rules is to be welcomed but should go much further.

Attached at Annex 1 are the amendments which the Advertising Association has sent to Members of the European Parliament, based on the original Commission text.

3 October 2006

Annex 1

The Advertising Association Draft Suggested Amendments to Commission Text AVMS Directive August 2006

Commission Text	Suggested Amendment
Self and Co-Regulation	
<p>Recital 25 In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union the Commission stressed that a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self regulation should be considered. For co-regulation and self-regulation, the Interinstitutional Agreement on Better Law-making provides agreed definitions, criteria and procedures. Experience showed that co- and self-regulation instruments implemented in accordance</p>	<p>Recital 25 (25) In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union the Commission stressed that a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self regulation should be considered. For co-regulation and self-regulation, the Interinstitutional Agreement on Better Law-making provides agreed definitions, criteria and procedures. Experience showed that co- and self-regulation instruments implemented in accordance with</p>

Commission Text	Suggested Amendment
<p>with different legal traditions of Member States can play an important role in delivering a high level of consumer protection.</p> <p><i>Justification</i></p> <p><i>The approach to Self and Co-Regulation in Member States is diverse. The common point of reference which makes their use in the implementation of legislation should not be whether the method is called self or co-regulation but whether it has been proven to work and provides an appropriate “legal link” which makes it enforceable. The text above provides that link when it mentions that models should operate within a legal framework.</i></p> <p>Article 3.3</p> <p>Member States shall encourage co-regulatory regimes in the fields coordinated by this Directive. These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement.</p> <p><i>Justification</i></p> <p><i>See above</i></p>	<p>different legal traditions of Member States can play an important role in delivering a high level of consumer protection. Both self- and co-regulatory models which operate within a legal framework should be considered as effective means for the implementation of this Directive.</p> <p>Article 3.3</p> <p>Member States shall encourage co-regulatory regimes in the fields coordinated by this Directive. With a view to implementing and enforcing this Directive, Member States shall promote self-regulatory and co-regulatory regimes. These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement in the respective Member States.</p>

Product Placement

<p>Article 1k</p> <p>“product placement” means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within audiovisual media services, normally in return for payment or for similar consideration.</p>	<p>Article 1k</p> <p>“product placement” means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof by or at the request of the media service provider so that it is featured within audiovisual media services, in return for payment or for similar consideration except that</p> <ul style="list-style-type: none"> — the inclusion (other than in return for payment) of or reference to a product, a service or the trade mark thereof where such products or services have been acquired at no, or less than full, cost and where their inclusion within an audiovisual media service is justified editorially and is not unduly prominent; or — prizes awarded in programmes and branded merchandising products in programmes <p>do not constitute product placement.</p>
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Justification

It is important that new regulation on product placement does not accidentally regulate existing and legitimately practiced formats in programming. For instance, broadcasters and producers regularly source items such as props for use within television programmes. These items are often provided for free or at a reduced cost to the broadcaster/producer (which might be thought to constitute “similar consideration”) but there is no guarantee that such items will appear on screen. This existing activity is widespread across public service and commercial broadcasters and helps production budgets to go further. However, it is not akin to Product Placement where there is usually a guarantee of inclusion in return for payment. We assume that it was not intended to catch this existing activity within the definition of product placement since it would be very difficult to appropriately credit all items used and also introduce product placement and credit those items too.

Commission Text	Suggested Amendment
<p>Article 31hca New text ahead of Commission article 31hc</p>	<p>Article 31hca new <i>(c) they must not contain product placement which presents products in an unduly prominent manner. The “Undue Prominence” shall be determined by the recurring presence of the brand, good or service in question or from the manner in which it is presented, having regard to the content of the programmes in which it appears.</i></p>
<p>Justification</p>	
<p>Product placement should not interfere with editorial freedom and we would support a guarantee that neither product placement (nor the inclusion of props or other items mentioned above) should be unduly prominent in programming. The undue prominence restriction has been used in many Member States to protect viewers’ interests and will help to ensure that undesirable forms of product placement such as product integration are not used in European productions. The Commission put forward the undue prominence criteria in its Interpretative Communication on certain aspects of the provisions on televised advertising in the Television without Frontiers Directive (2004/C 102/02) in order to help national authorities to distinguish between surreptitious advertising and lawful reference to goods, services and brands.</p>	
<p>Article 3h1c Viewers must be clearly informed of the existence of a sponsorship agreement and/or the existence of product placement. Sponsored programmes must be clearly identified as such by the name, logo and/ or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or end of the programmes. Programmes containing product placement must be appropriately identified at the start of the programme in order to avoid any confusion on the part of the viewer.</p>	<p>Article 3h1c Viewers must be clearly informed of the existence of a sponsorship agreement and/or the existence of product placement. Sponsored programmes must be clearly identified as such by the name, logo and/ or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or end of the programmes. Programmes containing product placement must be appropriately identified at the start and/or the end of the programme in order to avoid any confusion on the part of the viewer.</p>
<p>Justification</p>	
<p>Flexibility should be built into the rules on signalling of product placement in the same way that they are in sponsorship. The additional flexibility provided by this amendment leaves the decision about signalling to the individual Member State and respects the principle of subsidiarity.</p>	
<p>Isolated Spots</p>	
<p>Article 10.2 Isolated advertising and teleshopping spots, other than in sports programmes, shall remain the exception.</p>	<p>Article 10.2 Isolated advertising and teleshopping spots, other than in sports programmes, shall remain the exception.</p>
<p>Justification</p>	
<p>As this Directive has as one of its aims the increase of flexibility for linear broadcasters in a changing market, it is unhelpful to limit isolated spot advertising in this manner. The general rule on insertion at article 11.1 is adequate to ensure that the use of isolated spots does not effect the integrity of the programme it appears in.</p>	
<p>35-Minute Rule</p>	
<p>Article 11.2 The transmission of films made for television (excluding series, serials, light entertainment programmes and documentaries), cinematographic works, children’s programmes and news programmes may be interrupted by advertising and/ or teleshopping once for each period of 35 minutes.</p>	<p>Article 11.2 The transmission of films made for television (excluding series, serials, light entertainment programmes and documentaries), cinematographic works, children’s programmes and news programmes may be interrupted by advertising and/ or teleshopping once for each period of 35 minutes.</p>
<p>Justification</p>	
<p>See above.</p>	

Letter from the Advertising Standards Authority

1. INTRODUCTION AND SUMMARY OF THE ASA SYSTEM

1.1 The Advertising Standards Authority (ASA) is the UK self-regulatory body responsible for ensuring that all ads, wherever they appear, are legal, decent, honest and truthful.

1.2 The ASA is grateful for the opportunity to provide written evidence to this inquiry.

1.3 The ASA has regulated non-broadcast (eg print, outdoor) advertising for more than 40 years. The ASA is recognised by the Government and the Office of Fair Trading (OFT) as the established means for enforcing the Control of Misleading Advertisements Regulation (1988) (as amended); the OFT acts as the ASA's legal backstop regulator for the purposes of these regulations. The success of advertising self-regulation was recognised in 2004 when Ofcom contracted-out the regulation of broadcast (TV and radio) advertising to the ASA system. The decision was approved by Parliament and permitted under the current legal framework of the Television without Frontiers (TWF) Directive.

1.4 This contracting-out arrangement created a "one-stop shop" for advertising content standards in the UK. There are effectively two systems operating behind a single shop front: a self-regulatory system for non-broadcast advertising and a co-regulatory system for broadcast advertising.

1.5 A synopsis of the UK's system of advertising self-regulation and co-regulation is attached at Annex 1. Further information can be found at www.asa.org.uk and www.cap.org.uk

1.6 The ASA is a member of the European Advertising Standards Alliance (EASA).¹ Advertising self-regulation is a recognised and, reliable means of ensuring high levels of consumer protection across the EU25 via EASA members.

2. SELF-REGULATION AND CO-REGULATION

2.1 The ASA one-stop shop enjoys the support of the Government, regulators, advertisers and consumers and is a model that is internationally admired. We are rightly proud of our work and are keen that it should continue.

2.2 The ASA agrees that a level playing field for industry and high levels of consumer protection are key goals for advertising regulation regardless of the media in which the ad appears. However, we believe that advertising self-regulation is best placed to deliver this.

Advertising self- and co-regulation within the proposed Directive

2.3 The status of advertising self-regulation within the proposed directive is the ASA's main concern: the proposed text of the AMS Directive could severely inhibit the continued operation and development of effective advertising self- and co-regulation in the UK and across the EU-25.

2.4 The European Commission has repeatedly expressed its intention to promote advertising self-regulation as an effective consumer protection tool. Commissioner Reding recently expressed her support for advertising self-regulation during the Culture and Industry Committee on the review of the TWF directive: "In all policies you need to give industry a chance and there is only need to act if the industry shows that it will not or cannot solve the problems . . . The advertising self-regulatory authorities have reached good results and have done good preparatory work so they deserve to be trusted". In addition, the Explanatory Memorandum² that accompanied the publication of the proposed Directive stated that the Directive explicitly referred to co- and self-regulation, suggesting that Member States would be able to employ flexible regulatory tools to achieve the Directive's aims.

¹ Established in 1992, EASA (www.easa-alliance.org.uk) is an association of EU self-regulatory organisations and European industry associations, representing advertisers, agencies and media. One of its first actions was to establish a credible system for handling cross border complaints about advertising.

² Paragraphs 331, 341 and 342 of the Explanatory Memorandum (<http://europa.eu.int/eur-lex/lex/lexUriServ/LexUriServ.do?uri=CELEX:52005PC0646:EN:NOT>)

2.5 Despite this apparent support for self-regulation, a specific reference to self-regulation has been omitted from Article 3 of the proposed AMS Directive, leaving only a reference to co-regulation and an instruction in the recitals to use the Inter Institutional Agreement (IIA) on Better Law Making. The effect of this wording appears to be to prohibit the use of self-regulation and to permit only a very narrow form of co-regulation.

Why is the wording problematic?

2.6 The IIA's prescriptive definition of co-regulation does not recognise that there is no "one size fits all" approach to regulation. The reality is that differing legal traditions in each Member State have allowed very different models of advertising self-regulation to be developed across the EU-25.

2.7 For example, although the ASA system is not compliant with the IIA definitions of either self-regulation or co-regulation, the ASA is still widely recognised as a highly successful and best practice regulators. Given that the ASA is operating very effectively and is well-linked in to partner statutory regulators, to require changes of it would be nonsensical and a discredit to European legislators.

2.8 The inclusion of a direction to use the IIA is at odds with Article 249 of the Treaty establishing the European Community, which states that a directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". This principle was exemplified when Ofcom contracted-out broadcast advertising to the ASA system: the UK is still achieving effective implementation of the TWF Directive, even though the ASA's structures do not comply with the IIA.

2.9 Of particular concern is that the IIA definition of co-regulation essentially restricts industry participation to funding the regulatory system, but without providing sufficient motivation for doing so. It ignores the positive impact of practitioner recognition and support for "their" system.

2.10 The lack of flexibility in the proposed wording means that this Directive could force the ASA to restructure into an organisation in which the industry patently would not want to invest. Let there be no mistake about it: the proposed text puts the ASA at great risk. Losing the benefits of a "one-stop shop" might ultimately decrease the level of consumer protection in the UK.

2.11 Although not explicitly required by the Directive, it seems likely that Ofcom would introduce licensing for new media providers that fall within the scope of the Directive. The effect of this would be to shift a large amount of non-broadcast advertising from the self-regulatory part of the ASA system into co-regulation. As new media is a major growth area in non-broadcast advertising, this could, in the long term, have a destabilising effect on the self-regulatory system.

Why use self- and co-regulation in New Media?

2.12 The ASA firmly believes that laws are there to be enforced. They are not enacted to be mere statements of good practice. where a law cannot be effectively enforced it brings both the law in general and those attempting to enforce it into disrepute.

2.13 This point is particularly pertinent in relation to the AMS Directive; the Directive will attempt to regulate a rapidly changing industry that operates in media without any global borders. Pursuing this aim through statutory enforcement seems destined for failure. Any Directive that might encourage businesses to move outside the EU25 to avoid regulation, whilst still allowing those businesses to target EU consumers is unsatisfactory. This, in itself, provides a strong case for allowing flexible self-regulatory mechanisms to tackle the challenge instead.

2.14 It is for policy makers to decide how policy aims can best be secured, but passing rigid laws, hiring more officials, and pursuing cases through the courts might not be the best way. Flexible but effective self-regulation would appear to be the most sensible and useful approach in an industry that is changing rapidly and when jurisdiction is difficult to establish.

2.15 Self-regulation can respond more quickly and appropriately to changes in fast-moving technology in respect of advertising regulation and a "one-stop shop" is able to act on advertising content regardless of "linear"/"non-linear" distinction.

2.16 The Codes cover all advertisements in paid-for space (including internet pop-ups and banner ads and text messages) with a few notable exceptions eg on pack claims, in-store promotions, election advertising, classified ads and sponsorship.

2.17 Finally, the CAP Code already covers advertising that falls within the scope of the proposed AMS Directive and the industry is aware of need to extend the structure of the UK system to include formal representation of new media stakeholders in its Committees and has been working on this challenge independently and ahead of this proposal from the European Commission.

If you have any queries or questions about any aspect of this submission or the work of the ASA, please do not hesitate to contact me.

2 October 2006

Annex 1

Introducing a New One-Stop Shop for Advertising Complaints

BACKGROUND

On 1 November 2004 the biggest change in the regulation of advertising for over 40 years took place. The introduction of a one-stop shop for all advertising complaints makes it simpler and more straightforward for consumers to complain about advertisements they find misleading or offensive.

Since 1962 the Advertising Standards Authority (ASA) has controlled the self-regulation of non-broadcast advertising, including print, posters, direct mail, sales promotions and some Internet ads. But the ASA has never been responsible for TV and radio commercials. Instead, the Independent Television Commission, the Radio Authority, and most recently, Ofcom have been the statutory regulators for broadcast advertising.

Following a public consultation in 2004, Parliament approved Ofcom's proposals under the Communications Act 2003 to contract out responsibility for the regulation of broadcast advertising to the ASA. Working with the advertising industry and Ofcom, the ASA developed a One-stop shop for all advertising complaints that launched on 1 November 2004.

In the first 10 months of 2004 to 1 November, the ASA had to turn away around 6,000 people who tried to complain about a broadcast advertisement. The one-stop shop ended this confusion, with all ad complaints received and resolved by the ASA. The ASA accepts complaints online, by post or by phone.

TWO SYSTEMS WITHIN A ONE-STOP SHOP

Designed to be simple for consumers to access, behind the scenes the one-stop shop operates two parallel systems for regulating broadcast and non-broadcast advertising. This is because the ASA's contract with Ofcom differs from the existing arrangements for regulating non-broadcast advertising.

The ASA is accountable to Ofcom for its effectiveness in regulating broadcast advertising and is able to refer any broadcaster who does not co-operate to Ofcom for further action. However, Ofcom's remit does not extend to non-broadcast advertising. Here, the Office of Fair Trading continues to provide a legal backstop for advertisers who refuse to comply with ASA adjudications on misleading ads. Although consumers just see a single ASA, two systems operate alongside each other, with separate funding streams, and specialist teams of staff assessing complaints according to the relevant Codes.

Adjudications are made by the ASA Council. Some Council members judge only broadcast complaints while others focus on non-broadcast advertising. Most Council members are lay people, but one-third has experience of the advertising industry. The Council's Chairman is Lord Borrie, QC. Its decisions are published on the ASA's website every Wednesday—www.asa.org.uk

THE ADVERTISING CODES

The establishment of the one-stop shop meant that Ofcom handed over responsibility for maintaining standards in broadcast advertising content to the advertising industry. A new body—the Broadcast Committee of Advertising Practice (BCAP)—has taken charge of setting, reviewing and revising the broadcast advertising Codes. The Advertising Advisory Committee (AAC)—a new independent committee of lay people—advises BCAP. Any changes to the Codes proposed by BCAP must be agreed by Ofcom. Ofcom is also able to insist on changes to the Codes, although it would not normally seek to do this.

TV and radio ads still have to be pre-cleared before they can go on air. The pre-clearance bodies—the BACC and the RACC—operate independently of BCAP.

The Code for non-broadcast advertising (The British Code of Advertising, Sales Promotion and Direct Marketing or the CAP Code) continues to be managed and enforced by the advertising industry via the Committee of Advertising Practice—the body that has been responsible for advertising standards in non-broadcast media for over 40 years. Ofcom’s remit does not extend to the CAP Code.

FUNDING

The ASA is funded by the advertising industry via the Advertising Standards Board of Finance (ASBOF). ASBOF collects a levy on display advertising and direct mail expenditure from advertisers and passes it on to the ASA. ASBOF’s role means the ASA never knows how much an individual advertiser contributes—helping to preserve the ASA’s independence.

Under the new one-stop shop, this income stream is supplemented by a similar levy on broadcast airtime. The broadcast levy is collected by BASBOF—the Broadcast Advertising Standards Board of Finance. Although the two levies both fund the one-stop shop, the two income streams are managed separately.

Memorandum by Professor Richard Collins

In our current rapidly converging and evolving technological and market environment, is it appropriate to try to recast the regulatory framework?

1. Yes, broadcasting is changing from a “push” medium in which the content, sequence and time of consumption were controlled by the broadcaster, to a “pull” medium in which users are able to select their preferred content and the time at which it is consumed from a host of potential providers across the globe. Governments can no longer control entry to broadcasting and so established systems of regulation are becoming less and less effective. This may be regarded positively, as enhancing freedom of choice and expression, diversity of sources of information etc, or negatively, as increasing user vulnerability to fraud and exposure to harm. These factors point towards a new regulatory order that guards against harm and provides users with effective redress without compromising their enhanced choices and freedoms.

What are the advantages and disadvantages of regulating this area? Are the regulatory costs proportionate to the benefits?

2. Regulation is required, first, because, broadly defined broadcasting markets (including Internet—non-linear—delivered content) may fail to provide sufficiently for universal access at affordable prices to content and for the services required for full social participation and for the public good. Regulation has a role (though one that will increasingly be discharged through subsidy and other forms of fostering desired behaviour rather than inhibiting undesirable behaviour) in securing delivery of such content and services.

3. Second, because, in spite of the changes indicated above, incumbent broadcasters dispose of significant market power. If pluralism, diversity, innovation and effective competition are desired, regulators should evaluate the effects of incumbents’ behaviour (and sometimes curtail it) in order to ensure these objectives are secured.

4. Further, and third, regulation can help inhibit the provision of undesirable content and services. However, such regulation is increasingly likely to be effective as *ex post* regulation (eg through the application of general laws) rather than the *ex ante* regulation traditionally associated with broadcasting. This means increasing recourse to general provisions of law (eg on competition, defamation, indecent display and so on) rather than dedicated sector specific agencies, to self and co-regulation (designed to secure voluntary pro-social behaviour by content and service providers) and to public subsidy and support.

Does the Proposal sufficiently liberalise the provision of broadcasting services within the European Union?

5. No, it promises, if effective, to damage freedom of expression by applying old practices in new circumstances. It will be more and more difficult to distinguish between traditional broadcasting and new forms of delivery (or, if such a distinction is possible, the application of different regulatory regimes to broadcast—linear—and new forms of delivery—non-linear—will incentivise provision of services by non-broadcast means) and so the application of traditional broadcasting regulatory principles and practices will

tend to suppress choice, diversity and competition. The freedom of expression pressure group, Article XIX has made the well founded comments that:

“It has become trite to note that the Internet is unlike any other form of mass communication and cannot be regulated in the same manner as the broadcast sector or the print media . . . the scope of the right to reply with regard to Internet publications would be analogous to granting a right of reply in relation to every published book, and even to pamphlets . . . the administrator of the website of a human rights organisation would have to grant space to the spokesperson of a military dictatorship or any undemocratic government to respond to alleged factual inaccuracies that may be impossible to verify. Or a government representative would be able to post a mandatory reply on the site of a political opposition party, to refute allegations of corruption. In the latter case, a refusal to comply might lead to reprisals being taken against the website, including it being ordered to shut down . . . The scope for abuse of a right of reply, thus formulated, is significant. Governments or other powerful figures in society would be able to crack down on critical websites by launching abusive requests, using up the limited resources of such organisations”.

Does the Proposal contain measures that will effectively protect public interest objectives?

6. Yes, but it emphasises insufficiently the importance and potential of fostering self and co-regulatory measures and proposes measures that are too stringent (eg in respect of right of reply).

Does the Proposal achieve an appropriate balance between the objective of harmonisation and right of Member States to control audiovisual media services in a manner which reflects national concerns and interests?

7. No, the shift from a “country of origin” to a “country of reception” regulatory locus will damage UK interests (by reducing the UK’s attractiveness as a location for “footloose” broadcasters and providers of content and services via new media) and will inhibit free flows of information throughout the EU.

Defining the nature of the regulated services—*Is there agreement on the Commission’s proposal to distinguish between linear and non-linear audiovisual media services?*

8. No—the distinction is now hard to draw and will become even harder. In consequence regulation will either become non-technologically neutral, applying different regulatory requirements to linear and non-linear services, which will incentivise migration of service delivery to the more permissive (non-linear) environment or it will inappropriately apply broadcasting (linear) requirements to non-broadcast (non-linear) services. A better course is to establish a technologically neutral scheme of regulation, which may be more permissive than current broadcasting regimes, and foster “media literacy” in users, encourage self and co-regulation and apply effectively relevant principles of general law (competition, defamation, fraud etc) to the services in question.

Jurisdiction and country of origin—*Does the Proposal go far enough in facilitating the free movement of broadcasting services?*

9. No, as stated above, the shift from a “country of origin” to a “country of reception” regulatory locus will damage UK interests (by reducing the UK’s attractiveness as a location for “footloose” broadcasters and providers of content and services via new media) and will inhibit free flows of information throughout the EU.

Regulatory approach—*What role should industry self-regulation play in the new regulatory framework?*

10. It should actively be encouraged and play an important role.

Advertising and commercial communications—*Should broadcasters be given greater flexibility in respect of the commercial arrangements they enter into for the financing of programmes?*

11. No. It is important that users (viewers and listeners) should be able clearly to distinguish between advertising (including sponsorship) and editorial content. However, one may doubt whether the Commission’s proposals on product placement are likely to be effective without an excessively intrusive apparatus of enquiry into programme making arrangements (did Citroen pay for the producers of “Maigret” to show Maigret driving in a Citroen? Did the producers of a Bond film receive payment for showing Bond driving a Bentley?).

Protection of minors and human dignity—*What controls should be imposed on non-linear services in respect of illegal and harmful material, such as the granting of a “right to reply”?*

12. In respect of illegal material the ordinary provisions of the law should apply. In respect of putatively harmful material there should be clear “labelling” of this material. A “right of reply”, for the reasons given above, is likely to be excessively damaging to freedom of expression. However, debate and difference are the stuff of democracy and it is desirable that self and co-regulation should recognise the desirability of the publication of replies.

Media plurality and cultural diversity—*Do quotas continue to be an appropriate mechanism for promoting the production of “European works”?*

13. No. Quotas are a very blunt instrument even in “linear” services (quotas can be filled by cheap and unedifying material) but in respect of “non-linear” services they are either close to meaningless (because difficult to monitor and enforce and because of the lack of linkage between provision and consumption) or, if meaningful, likely to incentivise location of firms outside EU jurisdiction.

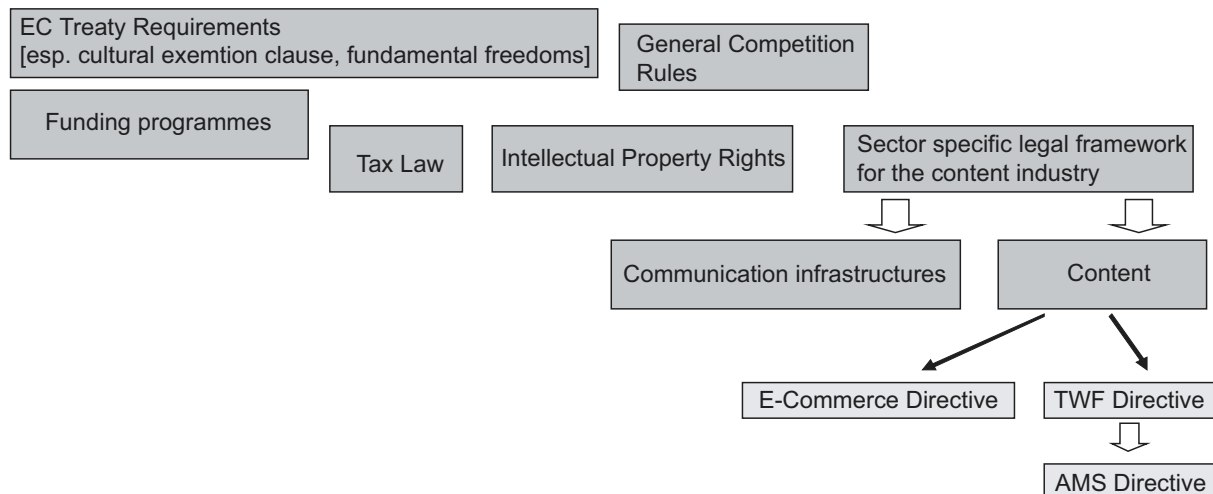
29 September 2006

**Memorandum by Prof Michael Holoubek, Institute for Austrian and European Public Law,
Vienna University of Economics and Business Administration**

To understand the relevance and impact of the proposal of the European Commission’s future “Audiovisual Media Services Directive” (AMS-Directive) in full, it’s necessary to look at the broader context of European audiovisual media regulation, the future AMS-Directive will be part of. The main purpose of this paper is, thus, to give a brief outline on the general system of European content regulation and to draw from this some conclusions regarding the scope, the basic features and regulatory approach of the AMS-Directive.

THE EC NETWORK REGULATION SYSTEM FOR AUDIOVISUAL MEDIA SERVICES

Audiovisual media services are in many respects subject to Community level policy-making. There are a number of interconnected regulation areas. Together they form a network of regulation systems that determines the framework under which the content industry has to act. This network system is built of firstly, numerous funding programmes established under the Community policies focusing on the content industry and in particular the audiovisual media industry (ie Media Plus and Media Training, Culture 2000–07, eContentplus etc). Secondly, the EC Treaty, and here especially the fundamental freedoms, the culture exemption clause [Article 87 (3) (d) EC] and the EC general competition rules, tax law measures, and the law of copyrights and related rights constitute in a horizontal way essential guidelines and rules for the sector. And finally, sector-specific provisions have been developed for the audiovisual media industry, (a) at the infrastructure level (with the 2002 regulatory package for the communication infrastructures) and (b) at the content level. Besides the AMS directive, which shall constitute in future a coherent regulatory framework for all audiovisual media services (currently the TWF directive covers only broadcast services in a narrow sense), the e-Commerce Directive, too, contains such content related sector-specific rules, namely for the so called information society services, the non linear audiovisual media services form a subcategory of.

The EC network regulation system for the audiovisual media services at a glance**REALISATION OF CULTURAL, DEMOCRATIC AND SOCIAL POLICY GOALS**

It is important to realise that within this network of regulations that determine the EC framework for the audiovisual media industry, apart from the funding programmes as soft law measures (ie subsidies) only the AMS-Directive as hard structure regulation formulates interventions in the audiovisual sector at EC level that also aim at the realisation of certain cultural, democratic and social policy goals in this area. By providing the necessity for standards with regard to the protection of minors, hate speech etc on Member State level and by providing minimum standards in the field of programming quotas, advertising etc it constitutes a special “economic-cultural” regulatory approach at European level for the audiovisual media services. In contrast, all the other above mentioned regulatory areas governing the audiovisual industry and in particular also the e-commerce Directive follow a purely “economic” regulatory approach; ie they focus on the establishment on an “economic” market model for the audiovisual media industry by providing only rules safeguarding functioning market structures in this industry sector. Objectives of a cultural, democratic or social nature are merely seen as external objectives left (via specific exceptions from the economic market structure regulation at EC level) to the discretion of the Member States.

EUROPEAN CULTURAL POLICY MODEL

The fact that Community law enables the Member States—via specific exceptions and authorizations—to lay down structural rules of a cultural and democratic policy nature, but fails to define them even in the form of minimum standards, has one consequence well-known from the application of the dogma of fundamental freedoms: due to the country-of-origin principle governing large parts of the EC market structure regulations, MS regulations motivated by cultural and other public interest objectives get under pressure by the economic principles of the single market. The consequence is that uncoordinated structural regulations on the part of Member States and the relevant political decisions typically finally either have no effect at all or become subject to such economic pressure that their special cultural or social regulatory approach loses its persuasiveness. From this it follows, if we assume that audiovisual media services shall not be regulated only by economic criteria, that structural regulatory interventions aimed at giving the market model a certain cultural, democratic and social policy dimension will have to be defined and coordinated at EC level. In particular under globalized competitive conditions, *de facto* only a European cultural policy model, but not isolated steps taken by individual Member States will stand a chance of success and assert itself in global competition.

“ECONOMIC-CULTURAL” REGULATORY APPROACH OF THE AMS-DIRECTIVE

Before this background we see all the more clearly the special importance that attaches to the Commission’s proposal for a revised TWF directive, according to which all audiovisual media services shall be subjected to a combined specific “economic-cultural” regulatory approach. First, it is capable at European level of asserting itself against other purely economic orientated regulatory approaches. Second, by defining criteria for an appropriate balance between economic and cultural aspects to be followed European-wide while leaving at the same time an adequate margin of appreciation to the Member States, it also provides the right basis, ie, the necessary back up provisions, on which Member States regulations motivated by cultural and other public

interest objectives in this sector can stand a chance against the economic principles pursued by European economic integration. To put it short, the specific regulatory approach of the future AMS-Directive ensures and allows for the effective realisation of cultural and other public interest objectives as with regard to audiovisual media services in Europe. By contrast, the other regulatory areas relevant for the audiovisual media services, especially also the e-commerce Directive only allow for regulatory interventions on economic grounds. Even if the audiovisual media services are currently excluded from the strict country-of-origin principle of the e-commerce Directive, without common coordinating guiding principles special MS regulations for audiovisual media services will not be able to assert themselves against the general economic principles of the e-Commerce Directive).

SCOPE OF THE AMS-DIRECTIVE

The question of the scope of the AMS-Directive and in particular the question, whether non linear audiovisual media services shall be included, is a crucial one, as this question in particular also determines whether the specific combined economic-cultural regulatory approach of the AMS-Directive or the purely economic approach of the e-Commerce Directive and the other regulatory areas applies to a service. Here again it has to be stressed that not including a service in the scope of the AMS-Directive does not mean that they are left unregulated at European level and thus fall in the exclusive competence of the Member States, but that they are subjected under the economic regulatory regime of the e-Commerce Directive and the other horizontal measures at EC level relevant for the audiovisual industry.

In light of these considerations the extension of the scope of the planned AMS-Directive to cover all audiovisual media services and thus to opt for a special cultural approach for all of these services has to be seen as an appropriate step. With this extension audiovisual media services that are currently excluded from the strict country-of-origin principle of the E-Commerce Directive, will be in future subjected to the country-of-origin principle of the AMS-Directive, which narrows the margin for Member States to intervene with transboundary services and thus have a deregulatory effect on this sector, guaranteeing the maintenance of the single market. At the same time the application of the country-of-origin principle of the AMS-Directive is backed up by arguments in favour of the promotion of democracy and cultural policy including the explicitly laid down authorization of Member States to provide for further measures in regard of media service providers subject to their jurisdiction, which in turn guarantees the Member States competences in this field. In this context it is also to stress that the current regulatory structure of the AMS-Directive to define as with regard to cultural matters the essential goals and guidelines but to leave the definition of the instruments by which these goals are to be achieved to the Member States is an appropriate one. For example, it's better to decide at Member States level whether a co-regulation system for, eg the protection of minors, shall be implemented than at EC level, as it very much depends on the specific national regulatory tradition whether such a system will work or not.

TECHNOLOGY-NEUTRAL FUNCTIONAL CRITERIA

For the lack of alternatives there are also good reasons to apply technology-neutral functional criteria that focus on the cultural and democratic importance of the audiovisual media services to define the scope of the directive and especially to draw the line between linear and non linear services. It fits the entire regulatory environment, because it harmonizes with the same functional, technology-neutral approach that is used regarding the European communications infrastructure regulation and it is in accordance with the principal task of the "ams directive" as the sector-specific European regulation at content level and its cultural and democratic market regulatory model. And backed up with a catalogue of examples of linear, respectively non linear services, which could be provided by soft law measures (eg, recommendations or guidelines by the Commission), the Member States' legislators, their courts and the European Court will be capable to deal with.

3 October 2006

Memorandum by the Institute of Professional Sport

INTRODUCTION

The IPS is the national association for the Professional Player associations in the UK and is pleased to respond to the House of Lords Select Committee Inquiry into Proposals by the European Commission (EC) for the Revision of the "Television Without Frontiers Directive." The EC propose that the scope of the directive be widened to cover new media services.

FINANCING COMMUNITY SPORT

Sport in the UK and Europe plays an important role in our society and gives a focus for civic and community activities as well as employment opportunities. Televised major sporting events provide access to millions of people world wide and in the UK a substantial proportion of the broadcast revenue from the collective sale of TV rights is invested back into grass roots development.⁴ This funding stream is endorsed by the Government which supports the work of sports charities such as the Golf, Cricket and Football Foundations that receive income via the sale of the sports TV rights. In turn the sports bodies are able to fund projects in the community. With any diminution of finances there is a likelihood of less investment in sporting opportunities and facilities.

It would be interesting to learn whether other national sporting bodies in Europe assist the funding of their community sport programmes through allocating a percentage of their TV revenues to community sport. Since 1997 with the adoption of the voluntary Code on Sports Broadcasting Rights the IPS understand that the UK sports bodies have led the way in this respect.

A reduction of such finances arising from a limitation on the exclusive nature of the sale of the sports rights would therefore be regretted. We are therefore opposed to the Commission proposals which we believe would create legal uncertainty for rights owners and licensees. Such legal uncertainty would threaten future investment in new media services and pose a danger to continued investment in sport across Europe. Furthermore, the proposals would lead to the creation of a secondary rights market for news, with news content no longer being made available free of charge in line with current practice. Instead news could become subject to market prices, which we do not believe to be in the interest of European citizens.

ADDITIONAL REGULATION

The IPS would fully support the views of the major spectator sports in UK and from Europe to news access and wholly endorses the right of the public to information. However the proposed Article 3b and accompanying Recitals (26 and 27) are unnecessary given the existing news access framework in the EU. They threaten to undermine the development of news media services and products as well as future investment into European sport. We would therefore recommend that Article 3b and accompanying recitals be deleted from the Directive, and that the existing copyright-based framework continue to provide the basis for effective news access to the public in the European Union.

VOLUNTARY CODE FOR NEWS ACCESS

The Independent Television Commission (ITC)⁵ expressed the view in its submission to the EC that it does not support that provision in the TWF Directive for news access to short extracts of events subject to exclusive rights. The ITC expressed the view that for or any secondary broadcaster to be entitled to provide a news report on a major event would undermine the value of the rights holder. In the UK there is a voluntary code by broadcasters' that governs use of short extracts taken from each others broadcasts for the purposes of news programmes. This appears to have worked well and does not require further legislation.

CONCLUSION

Further regulation⁶ would lead to significant regulation of the Internet and stifle the growth of competitiveness in the new media services as well as raising prices for consumers of national sports events. The IPS believes the self regulatory approach within the UK is in the best interests of Government policy and the sporting public.

Any restriction on the ability of rights holders to sell their sports TV rights could lead to such bodies relocating to non-EU locations and broadcasting their events back to the UK.

The recently launched Independent European Sports Review, that will result in a European Commission White paper for sport in 2007, has accepted the model of the collective selling of rights benefits broadcasters and spectators alike.⁷

The IPS would be pleased to be kept informed of any evidence to be given by sports bodies to the House of Lords Inquiry or indeed any final report it presents to the Government or the European Commission.

21 September 2006

⁴ CCPR Voluntary Code on Sports Broadcasting Rights.

⁵ ITC Response to the TWF Directive Review.

⁶ DCMS Minister Speech to the Foreign Policy Centre 26 January 2006.

⁷ Independent European Sports Review—P6.60 www.independentfootballreview.com

Memorandum by the Internet Watch Foundation (IWF)

The IWF was formed in 1996 following an agreement between the government, police and the internet service provider industry that a partnership approach was needed to tackle the distribution of child abuse images online.

Essentially the IWF is an independent self-regulatory organisation and the only non governmental body authorised to operate a “hotline” in the UK for the public and IT professionals to report their inadvertent exposure to illegal content on the Internet. We provide a universal “notice and take down” service to all content service providers in the UK so they can remove potentially illegal content from their servers and we work closely with law enforcement agencies at home and abroad to help them trace offenders who publish indecent images of children being abused online.

Our aim is to minimise the availability of potentially illegal internet content, specifically:

- child abuse images hosted anywhere in the world;
- criminally obscene content hosted in the UK; and
- criminally racist content hosted in the UK.

We work in partnership with UK Government Departments such as the Home Office and the Department of Trade and Industry to influence initiatives and programmes developed to combat online abuse. This dialogue goes beyond the UK and Europe, to ensure greater awareness of global issues and responsibilities.

We are funded by the EU, Internet Service Providers (ISPs), Mobile Network Operators, mobile manufacturers, Content Service Providers (CSPs), telecommunications and software companies, search providers and the financial sector.

As a result of these dynamic partnerships just 0.4 per cent of potentially illegal content is apparently hosted in the UK, down from 18 per cent in 1997.

As the number of people using the internet and the diversity of content available continues to grow, the mechanisms for dealing with illegal content must be better known and understood.

In partnership with many organisations, we strive to create continued awareness of the role and purpose of the IWF and aim to foster trust and reassurance in the internet for current and future users.

COMMENTS ON THE CONSULTATION DOCUMENT PROPOSALS

It is beyond the remit of the Internet Watch Foundation to comment on the specific topics addressed in the proposal.

We would however wish to draw attention to the IWF as an example of an industry funded model of self-regulation that has successfully removed specific types of illegal content from being hosted within the UK and limited access to such material when sourced from foreign jurisdictions.

The IWF receives no funding from the UK government and is fully supported by the UK internet industry. In the area of child abuse content hosted on the internet, the partnership with industry has helped to reduce the potentially illegal UK hosted content from 18 per cent in 1997, the first year IWF was operational, to 0.4 per cent in 2005. We believe that this represents a significant success for the self-regulatory model.

September 2006

Memorandum by Miniclip.com

EU REGULATION OF THE INTERNET WOULD BE DISASTROUS FOR THE EU AND ITS CITIZENS

EU regulation of the Internet would:

1. Cost the EU tremendous amounts of tax revenue over the years.
2. Dampen the EU economically.
3. Cost the EU the biggest and quickest opportunity it ever had to excel economically and socially. The upside (unregulated) is enormous in terms of jobs and taxes to be collected by the EU. The downside (regulated) of missing this great opportunity is equally as huge.
4. The EU would watch as the rest of the world surpasses it, economically, in new technology and social well-being.

5. The EU would watch it's most creative talent and most successful new business's (and tax base) leave to other countries.
6. The next Google would not come from the EU. The next big Internet companies will never be built in the EU and never pay EU taxes.

Old style Television regulations cannot be "extended" to new Internet technology

1. The Internet is not Television. The Internet is not run by a small number of companies like television.
2. The Internet has global reach unlike EU television. For example, Miniclip.com a UK company has more customers outside the EU than in it. It would be impossible for Miniclip.com and other EU websites to modify and supply regulated content to EU countries while supplying normal content to the rest of the world. The burden on all Internet companies and loss of jobs and tax revenue would be enormous.
3. It is impossible to enforce regulations on 100's of millions of content providers that range from companies, to individuals to non EU companies and individuals. In the future almost every Internet user will be a content provider and upload their own content.

The reasons of the proposed legislation of the Internet have already been met

Diversity

The Internet is already the most culturally diverse medium in the EU. It is impossible to impose diversity on something that is already diverse.

Advertising

Advertising on the Internet is self regulated. If users feel there is too much or inappropriate advertising on a website they notify the website to take down the advertising or simply go to another website.

Protection of Children

The Internet is already way ahead of Television in child protection technology. Website filtering software is currently available to parents and schools and is now being used. This is not true of Television (which is regulated) where parents do not have software to block inappropriate content from there children. Regulation of Television has failed to give Parents software to protect their children from inappropriate television programs.

November 2006

Memorandum of The Newspaper Society

1. The Newspaper Society (NS) represents the regional newspaper industry. In addition to the 83 per cent of the adult British population who read a regional newspaper, newspaper companies are also extending their audience reach across a range of websites and online services, broadcast channels and publications. The industry's development of these multi-media portfolios means that those readers are now able to obtain local news, information, entertainment and advertising from the regional press, in the way that suits their changing lifestyle, using their choice of the traditional and new media services available.
2. In addition to the industry's 1,300 core regional newspaper titles, the latest NS Annual Industry Survey has shown that the number of regional press websites increased from 509 in 2004 to 828 in 2005, the number of stand-alone magazines and niche publications grew from 400 to nearly 600 and the number of regional press owned radio stations grew from 20 to 28. Channel M is broadcast in Manchester. There were 16 launches of new regional newspaper titles. E-editions, websites, podcasts, mobile phones and related services allow people to access news and entertainment on the move, whilst blogging enables readers to get directly involved with their newspaper. The new media services encourage such interactivity. Audiovisual material generated by the newspapers' own journalists, readers, advertisers, news agencies and others are increasingly part of the media mix offered by newspaper websites and other new media services. Video streaming is used by an increasing number of publishers to provide news, sport and local information.

3. It is therefore very important that the European Commission's Television Without Frontiers/Audio-Visual Media Services Directive does nothing to discourage such industry online innovation, investment or revenue. The UK and European newspaper industries are also very sensitive to the broader dangers of the directive and have fundamental concerns about the extent to which the directive could introduce unnecessary and disproportionate restrictions upon freedom of expression and press freedom, in effect by extending broadcasting controls to other media. The NS supported the Government's stance on the Communications Act 2003 and its refusal to introduce special controls of any kind over Internet content, by co-regulatory or statutory means, or encourage anything other than voluntary self-regulation. It has supported the approach adopted to date in the UK Government's negotiations and submissions on the directive.

4. The Directive is also causing concern to press organisations across Europe and the European Newspaper Publishers Association (ENPA) is involved in detailed discussions with the European institutions.

5. Our answers to the questions most relevant to the industry are set out below.

In our current rapidly converging and evolving technological and market environment, is it appropriate to try to recast the regulatory framework?

What are the advantages and disadvantages of regulating this area? Are the regulatory costs proportionate to the benefits?

6. The Commission should not be bringing forward legislation that attempts to regulate a rapidly developing area. It should certainly not seek to extend restrictive broadcasting controls to the ever evolving online environment.

7. The NS considers that the scope of the Directive should be confined to television broadcasting services and its scope should not be extended to other new media services. As the UK Government has argued, the inclusion of so-called non-linear services is potentially costly and erroneous. Unnecessary regulation of new media services might hinder their growth and development, reducing investment in the services and the economic growth that they might yield.

8. EU intervention and harmonisation are unnecessary. Regional and local newspapers are firmly based in their local communities. Their print and online content is aimed at that local audience and readers. Few print newspapers are intended to circulate across national frontiers, although online services are obviously globally accessible. Newspaper companies which have diversified into local radio, local television and new media have not encountered any of the regulatory problems by which the Commission seeks to justify its proposals.

9. The regional newspaper industry would bear all the burdens and costs of any increased regulation required by implementation of the Directive. Regional newspaper companies are used to different legal and self-regulatory regimes applying to different media content. The Directive would not simplify the regulation of audiovisual content but complicate it. It might well impose stricter content controls over material generated and published by regional media companies and increase newspaper companies' liability. This would not benefit the consumer, who is already adequately protected by UK law and the company would not derive any of the suggested benefits—local newspaper companies are not seeking to export their services overseas or to expand any overseas audience. They would not be able to re-locate to non-EU locations.

Defining the nature of the regulated services: is there agreement on the commission's proposal to distinguish between linear and non-linear audiovisual media services?

10. The scope of the Commission's proposal should be confined to broadcasting services alone and therefore the definitions require amendment to achieve this.

11. The definitions proposed by the Commission which determine the ambit of the Directive could catch a very wide range of services, far beyond anything that mirrors traditional broadcasting services, without sufficient justification for new restrictions upon the content of such services over and above existing UK law. The definitions are also uncertain in ambit.

12. The newspaper industry has welcomed the Commission's assurances of its intention that newspaper websites, even if they contain some audiovisual material, should be excluded from the scope of the Directive. The industry would obviously prefer the restriction of scope of the Directive to broadcasting, but if this is not possible, there must be an effective exemption. Inclusion of an effective exemption for newspapers' online publications including audiovisual material would still be of prime importance, even if the Directive's scope was ultimately narrowed to television like services provided over the Internet.

Jurisdiction and Country of Origin—does the Proposal go far enough in facilitating the free movement of broadcasting services?

13. This question relates specifically to broadcasting services. However, for avoidance of doubt, to date the regional newspaper industry has strongly advocated the adoption or retention of the country of origin principle in proposed EU legislation which might affect the newspaper industry, for the purpose of resolving any questions as to which national law might govern any cross-border transactions or any content accessible across borders, insofar as the EU has jurisdiction over such issues. The newspaper industry therefore has no objection to the retention of the country of origin principle in the Directive. Conversely, the regional newspaper industry does not consider the existence of the country of origin principle any incentive for extension of the scope of the Directive beyond broadcasting. Competition is fierce for readers, audience, users and advertisers and certainly is not limited by any lack of harmonisation.

Regulatory Approach—What role should industry self-regulation play in the new regulatory framework?

14. The additional regulation proposed by the Directive is unnecessary, given the e-commerce Directive and operation of UK national law. The industry is particularly concerned that no new unnecessary controls are imposed upon freedom of expression and press freedom. There is no need for statutory or co-regulatory broadcast content controls to be extended to Internet content and new media services. Civil and criminal law of the UK already govern online content. If any industry voluntarily chooses to adopt stricter rules, then that should be a voluntary matter for the industry concerned without EU or member state intervention.

15. The draft text does not recognise the UK system of voluntary self regulation by the industry, completely independent of any statutory regulation or statutory co-regulatory framework. It is therefore very important that amendments are made to the draft proposal, so that if there really is justification for any control over content, genuine industry self regulation, without state or statutory involvement, would be sufficient.

Protection of Minors and Protection of Human Dignity—what controls should be imposed on non-linear services in respect of illegal and harmful material, such as the granting of a “right to reply”?

16. The UK’s existing criminal and civil law, derived from EU legislation, UK statute or the common law developed by the courts, supplemented where appropriate by self-regulation, already provide adequate protection.

17. Introduction of new legislative controls, simply because material might be accessible to the young, would unduly and unnecessarily restrict the publication and dissemination of news and other content primarily intended to be read or viewed by an older, predominantly adult audience.

18. In the UK, criminal and civil law already tightly controls internet content. This legal regime is supplemented by voluntary controls over non-broadcast advertising content and voluntary self-regulatory editorial controls over print and online versions of newspaper titles, in addition to newspapers’ individual readership protection policies and editorial controls.

19. The directive would require the extension of UK law in certain areas with detriment to freedom of expression. UK law already outlaws incitement to racial hatred, incitement to religious hatred, incitement to violence and discrimination on a number of grounds. However, any further extension of incitement to hatred offences could produce a chilling effect upon the media, even though the media’s objective is not the provocation of hatred. Interest groups might well seek to exploit such controls to prevent unwelcome media investigation, media reporting and the publication of news, information, comment, opinion and entertainment. This can restrict the media’s legitimate role, including its prompting of public examination and public debate. The intense debate on the new UK offences of incitement to religious hatred highlighted such problems. The adequacy of the defences in that legislation, intended to address some of the freedom of expression problems—including media concerns about factual documentaries and investigations—are as yet untested.

20. Anti-discrimination controls could also result in huge interference with a wide range of editorial content, including news, current affairs, documentary, drama, opinion, comment, reviews and entertainment. The industry opposes any interference with editorial discretion and any attempt to introduce taste and decency or other controls over editorial content, over and above the current requirements of UK law.

21. The EU Directive could require new, wider and very uncertain restrictions on freedom of expression, over both editorial and advertising content, without any demonstration of the necessity for such controls or explanation of any specific problems that it is attempting to address. If any new controls over content were actually necessary in any of the areas specified by the directive, these would be better addressed by voluntary industry self-regulation which can quickly and flexibly deal with any particular problem if it really does merit additional measures. The Directive and suggested amendments do not yet allow any possibility of true voluntary self-regulation, as opposed to co-regulation or statutory controls.

Right of Reply

22. There is neither need nor justification for any extension of a right of reply to online or other services beyond the requirements of the current UK broadcasting regime.

23. The regional newspaper industry would oppose any proposal for extension of right of reply to online audiovisual media or any other online or new media and printed media services, because of the threat to freedom of expression and the intense practical difficulties that this presents for newspaper and new media content.

24. The introduction of a general statutory right of reply for audiovisual or other material could create acute editorial, legal and administrative problems in practice: particularly where a right of reply could be claimed for fact, opinion or comment, irrespective of whether any offending statement is actually inaccurate and defamatory of any individual complainant; if the right could be claimed by anyone, whether an individual or group, irrespective of whether they were the actual subject of the words complained about or not; if ever proliferating right of reply claims and chains of claims could develop, with replies to replies being demanded; as legal problems proliferated due to problems in distinguishing whether the right applied, compliance difficulties and increased exposure to legal liability, not least for third party content.

25. The media could be discouraged from reporting controversial issues or even from publishing fair and accurate reports of courts, tribunals, inquiries, councils, findings of disciplinary bodies and other bodies, and the wide range of matters that would otherwise benefit from common law and statutory privilege under the defamation laws.

26. Press coverage and stimulation of debate, discussion, comment and opinion on issues of local, national and international interest could diminish and become very restricted if statutory right of reply were accorded to expressions of opinion.

27. If right of reply were only accorded to factual matters, then the media would still face burdensome legal challenge on the categorisation of the material in order to assert the right or claim remedies for its denial.

28. Editorial control becomes impossible if a right of reply is open to a wide range of complainants. Individuals, political parties, organisations, pressure groups and other groups might all try to claim right of reply in respect of just one item, or one report of a meeting or court hearing, let alone a whole website or other publication or other service which will have carried a wide range of facts, views, opinions, comments on an equally vast and diverse range of issues in its various sections of news, sport, entertainment, comment. The nature of new media services exacerbates these problems if right of reply applied to any news publications, groups, chat rooms, internet community notice boards and discussion forums, SMS services and other mobile messaging services that included text and audiovisual material. These provide a vast forum for individuals, virtually independent of editorial control, to express a vast range of facts and opinions using a vast range of services. All this could then be complicated still further by ever lengthening chains of complaints from an ever increasing number of complainants whether individuals, third parties or representative organisations.

29. A right of reply regime applicable to such services would create intense difficulties for those responsible for compliance and enforcement.

30. At the extremes, there is a real danger that any right of reply regime can lead to a judge or regulatory authority dictating the home pages and content pages of online services. This would be a wholly unacceptable encroachment upon press freedom.

31. The industry also considers that there is no need for the imposition of such controls.

32. The online environment already enables an aggrieved individual to produce an effective, immediate, independent and wide publication of any response to any publication that might fall within the Directive.

33. In addition, under UK law, (statute and common law) the defamation law already requires the publication of requested statements in contradiction or explanation for the purposes of certain statutory defences and other defences effectively require inquiries to be made, allegations put and the replies taken into account. Self-regulation can also provide effective mechanisms. For example, the newspaper industry's self-regulatory code

upheld by the Press Complaints Commission which binds both printed and online versions of publications already requires the correction of inaccuracy, mis-leading statement or distortion and a fair opportunity for reply to inaccuracies must be given if reasonably called for. In any event, editors have always been prepared to publish corrections, a follow up story, letter or comment piece or other article as appropriate.

29 September 2006

Memorandum by PPL and VPL

EXECUTIVE SUMMARY

PPL and VPL⁸ welcome this consultation by the House of Lords. The European Commission's proposed revision of the TV Without Frontiers Directive would, if implemented, have a negative impact on the music industry and the wider creative economy.

The online market for music, and music video in particular, is growing fast under the auspices of existing legislation, principally the E-Commerce Directive⁹ and the Copyright Directives.¹⁰ There are still issues around illegal content, particularly copyright infringing material, but these are best handled by adapting existing legislation which is designed for the online world, rather than trying to translate a regulatory structure which has been built around spectrum scarcity. We have two specific proposals to address these conflicting legislative approaches.

- *Scope.* We support a variant of Option 3, whereby the Directive retains its existing scope, ie the established definition of broadcasting, but the regulatory conditions are updated to reflect the broadcasting environment as it is now.
- *Copyright.* We propose that a clause is added to the TV Without Frontiers directive making a clear derogation for copyright in order to avoid forum shopping.

A. BACKGROUND

1. It is important to understand the context of the proposed TV Without Frontiers Directive and, in particular, the extension of scope. Europe is moving towards an economy driven by value in intangible assets. The UK creative industries already represent 8 per cent of Gross Value Added¹¹ and the creative economy is growing twice the rate of the rest of the economy. Even manufacturing in the UK is increasingly IP-based.

2. Music has been at the forefront of the digital explosion. Music, albeit largely illegal file-sharing, has driven the demand for internet connectivity and latterly broadband. Legitimate online music services were launched in Europe in 2004. In the UK, the growth was so dramatic that within 18 months, download sales exceeded sales of physical singles. As bandwidth capacity expanded to cater for full track audio-visual downloading and streaming on demand, music video services were launched—in 2005 on mobile (by three and others), and later in 2005 on PC/portable devices (by iTunes and others). Initial growth has been similarly dramatic and most industry executives predict that online revenues will represent over 25 per cent of total music revenues within the next three or four years.

3. This growth has been underpinned by existing legislation drafted for the online environment, most notably the E-Commerce Directive and the Copyright Directive.

B. OPTIONS AND SCOPE

(a) *In our current rapidly converging and evolving technological and market environment, is it appropriate to try to recast the regulatory framework?*

(b) *What are the advantages and disadvantages of regulating this area? Are the regulatory costs proportionate to the benefits?*

⁸ PPL and VPL are the UK collecting societies licensing on behalf of 40,000 performers, 3,000 record companies and 1,000 music video producers. See Appendix A.

⁹ EU Directive 2000/31/EC *Directive on Electronic Commerce*, 2000.

¹⁰ EU Directive 2001/29/EC *Copyright in the Information Society*, 2001.

¹¹ *The Contribution of Copyright and Related Rights to the European Economy*, Turku School of Economics and Administration, 2003. http://ec.europa.eu/internal_market/copyright/docs/studies/etd2002b53001e34_en.pdf

4. There are similarities between online and offline and, in principle, laws which apply offline should apply online as well. However, the broadcasting environment is very specific, as is the regulatory environment which has grown around it. The regulation of broadcasting and the application of law to online services must be approached differently because of two critical factors. They are ubiquity and global service.
5. Offline, spectrum is a scarce commodity. It is controlled by governments and is licensed to broadcasters on specific terms. Those terms are easily enforced through the granting of spectrum, without which the broadcaster could not operate. Online, there is no such scarcity. Bandwidth is available to anyone with the means of paying for it. It is not controlled by governments. Therefore, that regulatory mechanism which allows such detailed scrutiny of broadcasters no longer applies. Online, delivery systems are ubiquitous; off line broadcasting is controlled by governments.
6. Similarly, offline broadcast services are largely contained within one territory. Broadcasters wishing to enter another territory must obtain spectrum (with conditions attached). Online, however, a service can be located anywhere in the world, it can move at will and it can target any number of other territories, within or outside Europe. If the supply-side conditions imposed on European-based operators are too onerous, they will simply move their operations overseas.
7. Thus, while the same basic laws (decency, protection of minors, copyright) should apply, the regulatory approach will need to be different as between offline broadcasting and online delivery. The TV Without Frontiers Directive is well suited to the offline world and has helped broadcasters operate services in different territories within Europe. However, translating that supply-side regulatory approach to the online world is fundamentally flawed. Governments do not have the regulatory levers (such as allocation of spectrum) to be able to control services in the same way and their powers in relation to services emanating from outside European boundaries are very different.
8. This fundamental flaw shows itself in many of the debates around the Commission's proposal for the revised TV Without Frontiers Directive. Many of the issues which the revised Directive purports to address are already subject to European legislation, taking on board the different approach to regulation demanded of the online world. The E-Commerce Directive, for example, deals with country of origin for a wide range of information services online. Whilst there remain problems, not least the continuing proliferation of illegal copyright-infringing material, these should be dealt with by revising the E-Commerce Directive (in particular, the liability provisions) rather than superimposing new legislation based on a spectrum licensing regulatory system.
9. Another consequence concerns the definition of broadcasting. This term has become well established within European and national legislation. The received definition is now the basis for many other pieces of legislation which would be fundamentally changed by any change in the definition of broadcast. For example, many continental European legislatures make a distinction between broadcasts and webcasts for the purposes of copyright. A change in the definition of broadcast would have a consequent detrimental change in the copyright and underlying rights granted to record companies and performers. The definition of broadcast should therefore remain as it is currently understood, thus recognising the distinction for these purposes between the online and offline worlds.
10. For these reasons—regulatory mechanisms for broadcasting versus online, the established legislation for online services and the established definition of broadcast—we have backed the UK industry consortium resisting the expansion of scope. We support a variant of Option 3, whereby the Directive retains its existing scope, ie the established definition of broadcasting, but the regulatory conditions are updated to reflect the broadcasting environment as it is now.

C. COUNTRY OF ORIGIN, PLACE OF ESTABLISHMENT, JURISDICTION, AND DEROGATION

Does the Proposal go far enough in facilitating the free movement of broadcasting services?

11. PPL and VPL have been consistently supportive of the country of origin principle to enable businesses based in one territory to operate freely in other European territories. In the Services Directive, for example, PPL and VPL resisted an amendment which would have excluded collecting society services from the remit of the directive. Our view is that a collecting society based in one territory should be able to operate in other European territories. This is already current practice as record companies and performers throughout Europe have appointed PPL to license their repertoire and collect their royalties on their behalf.
12. There is an important caveat to the country of origin principle. It should not apply to commercial terms, such as copyright licences. The value of a copyright and its use in a particular context relates to that market and it is the local market valuation that should apply. This principle, tariff of destination, derives from the

rights granted in the Copyright Directive and is enshrined in the DG Competition decision¹² on simulcasting. It recognises the fact that local market conditions should determine the value of a copyright. It also protects against copyright havens (outside Europe) and forum shopping.

13. There is unfortunately direct evidence of forum shopping when the country of origin principle was misapplied in the Cable and Satellite Directive.¹³ When satellite operators were able to locate their uplink anywhere in Europe and obtain a copyright licence in that territory, it was not clear that the licence should be valued on the basis of tariff of destination. Consequently, some background music operators moved their uplink specifically to take advantage of a cheaper copyright licence. Their customers and their main operations were located in the UK but they shopped round other European territories before deciding to locate the uplink (and purportedly their operational base) to Holland. Despite the apparent relocation, their customers and operations remained principally in the UK.

14. As we have seen from the Cable & Satellite Directive, rules on place of establishment are hard to enforce, particularly if there is an economic incentive to be economic with the truth. As outlined above, businesses should not be able to exploit place of establishment and the country of origin principle for forum shopping.

15. In order to avoid this forum shopping, we propose that a clause is added to the TV Without Frontiers directive making a clear derogation for copyright. This will also remove one area of conflict between the proposed directive and existing legislation, in this case the Copyright Directive.

APPENDIX A

Briefing note on PPL and VPL

PPL FACTS AND FIGURES

- Licenses on behalf of 3,000 record companies and 40,000 performers.
- Licenses 200 TV channels and 300 radio stations broadcasting recorded music, as well as over 200,000 pubs, nightclubs, restaurants, shops and other places playing recorded music in public.
- Has negotiated bilateral agreements with 20 other collecting societies to collect overseas airplay royalties.
- Collected £86.5 million in airplay royalties for performers and record companies in 2005.
- Distributes revenue using a comprehensive track-based system—analysing over 17 million uses of recorded music reported by TV and radio stations, background music suppliers and venues playing recorded music in public. All track plays are matched to PPL's repertoire database CatCo, containing information on seven million tracks.
- Distributes to all the performers—featured artists, session musicians and backing vocalists—as well as the record companies that create the sound recordings that are played.
- Is the largest performer/producer licensing society in the world.

PPL RECENT ACHIEVEMENTS

- In 2005, achieved a 5.4 per cent growth in net revenue for the rightholders.
- In the last five years, has increased net revenue by nearly 40 per cent, generating an additional £20 million payable to record companies and performers, and almost halved the cost/revenue ratio.
- In 2005, PPL's CatCo was selected as the database underpinning the official combined download and singles chart.
- Signed the IFPI Simulcast Agreement in 2002 and the Webcast Agreement in 2003 paving the way for multi-territorial licences.

PPL AND PERFORMERS

- In 2001, set up the Performers Forum with AURA, Equity, MPG, MU and PAMRA.
- Located several thousand artists due royalties as a result of the joint Royalties Reunited campaign.

¹² Commission Decision of 8.10.2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014—IFPI “Simulcasting”) <http://europa.eu.int/comm/competition/antitrust/cases/decisions/38014/en.pdf>

¹³ Council Directive 93/83/EEC, *Cable & Satellite Directive*, 1993.

- In 2003, signed two Memorandums of Understanding laying down the principles for closer cooperation and collection of overseas airplay royalties.
- In 2006, obtained clearance from the OFT to merge performer operations and amended PPL's Articles of Association to create a new structure for PPL, integrating collection and distribution of UK and overseas royalties for all performers. The new structure provides four Performer Director positions and creates a Performer Board to oversee performer business.

VPL FACTS AND FIGURES

- Represents 1,000 music video producers.
- Licenses 60 TV channels broadcasting music videos, including 25 specialist music channels.
- Licenses around 2,000 pubs, nightclubs and other places playing music videos in public.
- Collected £12.8 million in airplay royalties for music video producers in 2005.
- Analyses usage information from TV stations and background music services for distribution to rightholders.
- Offers a sourcing service, Music Mall, for back catalogue video clips and other footage.
- Is the largest music video collecting society in the world.

VPL RECENT ACHIEVEMENTS

- Recently concluded a licence with MTV on behalf of independent companies throughout Europe.
- In 2003, integrated management operations with PPL resulting in cost efficiencies to rightholders.
- Concluded licence arrangements for new video on demand services, such as Home Choice, NTL and Telewest, and the new store forward and narrowcast services.
- Announced a video digitisation project to provide online delivery of music videos to users.

October 2006

Memorandum by RNIB and RNID

Television plays a vital role in the cultural landscape of modern society.

Access to television and other audiovisual services is as important to disabled people as it is to non-disabled people. RNIB research has shown for instance that 96 per cent of blind and partially sighted people want to watch TV.

However, many of the one in seven adults in Europe with a hearing loss and 30 million with serious sight loss are being denied proper access to TV because of low levels of access services, such as subtitling, audio description, audio subtitling and sign language. This problem is now compounded by the fact that navigation around digital TV sets takes place through on-screen "electronic programme guides". These are visually based and inaccessible to blind people.

RNIB and RNID have therefore been closely following the progress of the TVWF revision for a number of years. We feel it is important we respond to the Sub-Committee's enquiry to ensure that it is briefed about our concerns regarding the directive.

We have structured our response below in line with the questions in the Sub-Committee's call for evidence. We have answered only those questions which fall within our remit.

3(a) In our current rapidly converging and evolving technological and market environment, is it appropriate to try to recast the regulatory framework?

Yes—some revision is clearly necessary. Since the TVWF directive was originally introduced, we have seen developments such as Digital TV, IPTV, mobile TV and so on. These technical developments and the EU's moves to create an internal market have changed the audiovisual services market significantly.

In any case, it appears certain given the level of political backing in the EU Member States that the directive will be revised. Almost all EU Member States support this. It is perhaps time now to move away from questioning the very idea of the revision of the directive, as some stakeholders continue to do, and to look at how to ensure the best possible outcome from its almost inevitable revision.

3(b) *What are the advantages and disadvantages of regulating this area? Are the regulatory costs proportionate to the benefits?*

We have followed with interest the debate in the UK and elsewhere about the advantages and disadvantages of regulating this area. We recognise that this is a complex and tricky issue. It is beyond our remit to comment on all of the questions this debate gives rise to.

Our particular concern is that the current TVWF directive omits an important public policy concern, namely access to audiovisual services for disabled people. In this particular area, the advantage of regulation would be to improve access to the millions of blind, partially sighted, deaf and hard of hearing people who currently find it difficult to watch TV.

The benefit of this to disabled people cannot be calculated in financial terms. It is impossible therefore to provide a scientific cost-benefit analysis for the regulation of accessibility. However, it is important to understand that ensuring access to audiovisual services for the widest number of people will assist the proper functioning of the internal market by increasing the number of customers the market enjoys.

Some examples of cost:

New technology is constantly bringing down the cost of providing subtitling. The Dutch subtitling campaign SOAP! point out that the cost of subtitling in Holland constitutes less than 1 per cent of programme budgets. In the UK, channels are required to provide access services if they are able to afford the assessed cost of up to 1 per cent of their revenue. This currently applies to 76 channels in the UK.

The access services industry is also flourishing in countries where they are provided. One industry source has informally estimated that the UK market is worth £40 million while another has put the figure at closer to £50 million.

4(b) *Does the Proposal contain measures that will effectively protect public interest objectives?*

The current proposal lacks measures to protect a key public interest objective, namely access to audiovisual services by disabled people.

This is something that the European Parliament and disability organisations have been calling for since 2003. Prior to the publication of the proposal to revise the TVWF Directive, the European Parliament twice called for the directive to include accessibility for disabled people (Perry Report 2003 and Weber report in 2005).

Independent user research conducted for OFCOM earlier this year shows that the demand for access services such as audio description and subtitling is very significant in the UK.

(Television access services review, see <http://www.ofcom.org.uk/consult/condocs/accessservs/summary/>)

The review found that 7.5 million people said that they had used subtitles to watch television, of whom about 6 million did not have a hearing impairment. Results from the case studies found that those who had used audio description regarded it as very helpful in understanding programmes better, and that a significant proportion of respondents who had not used audio description were keen to try it.

Europe-wide research carried out in 2005–06 by the European Blind Union into disabled people's access to television demonstrated that the demand for more accessible TV is high across the EU, but that supply is pitifully low. The report can be found at the following link: <http://www.euroblind.org/fichiersGB/TV-survey.htm>

It should be noted that Article 26 of the Charter of Fundamental Rights of the European Union “recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupation integration and participation in the life in the community.” TV access services are just such a measure.

Likewise, the European Commission's 2005 eaccessibility Communication (COM(2005) 425) stresses the need to make digital television accessible to disabled people.

For such charters and communications to be meaningful, the needs and rights they identify must be supported by EU governments, incorporated into EU legislation and converted into action. In the case of audiovisual services, this of course means the TVWF directive.

5. *The third group of questions focus on specific topics addressed in the Proposal.*

These are:

Defining the nature of the regulated services—Is there agreement on the Commission’s proposal to distinguish between linear and non-linear audiovisual media services?

No, this is clearly still a bone of contention at the time of writing. RNIB and RNID believe that in relation to our specific call for access for disabled people to be written into the directive, there is a need to ensure that this covers both “linear” and “non-linear” services.

In a few years time it is likely that relatively few people will be watching TV in a “linear” fashion. Many will be using video on demand or internet-based audiovisual services, which could easily be considered “non-linear”. The huge choice and flexibility of these services will no doubt attract many viewers.

Disabled viewers will naturally want to benefit from these services too.

However, if the revised directive only covered the accessibility of traditional, “linear” services for disabled people, we would find that the directive would still not ensure disabled peoples’ access to TV via these new platforms. (As mentioned earlier, without accessibility legislation, the market is unlikely to provide accessible audiovisual content and services.)

Regulatory approach—What role should industry self-regulation play in the new regulatory framework?

We have worked with industry to endeavour to ensure the accessibility of its products and services for disabled people. We note that industry strongly advocates self-regulation as a means to ensure accessibility of TV for disabled people, among other objectives. However, in this field, the record of self-regulation is poor. Self-regulation has not provided a solution for blind or deaf people wishing to have audio described, subtitled or signed television programmes, for instance. The only EU state with any significant level of audio description is currently the UK. (At around 8 per cent of programmes.) It is not by chance that the UK is also the only EU Member State which has a legal requirement for this service.

ABOUT RNIB AND RNID

RNIB (Royal National Institute of the Blind) campaigns for a world where people who are blind or partially sighted enjoy the same rights, responsibilities, opportunities and quality of life as people who are sighted. Promoting social inclusion and challenging discrimination is one of the key areas we focus on. We empower people who are blind or partially sighted in the UK, help remove the barriers they face and help to prevent blindness.

RNID (Royal National Institute for Deaf people) is the UK’s largest charity representing the needs of its 35,000 members and supporters and the broader community of nine million deaf and hard of hearing people in the UK. RNID’s vision is to ensure that deafness and hearing loss are not barriers to opportunity and fulfillment. We do this by raising awareness of deafness and hearing loss, by providing services, through social, medical and technological research and development and by campaigning for better legislation and practice.

Letter and memorandum from the Satellite and Cable Broadcasters’ Group

The Satellite and Cable Broadcasters’ group (SCBG) would like to take the opportunity to send you a short submission on the revision of the Television Without Frontiers Directive. For your information this paper has also been sent to DCMS, DTI, Ofcom and the Select Committee for Culture, Media and Sport in order to inform all the key UK decision-makers about our views.

SCBG’s main concern in the revision process is maintaining the fundamentally important Country of Origin principle that is the cornerstone of European broadcasting and has allowed many of our members to deliver a plurality of services across Europe.

Although the European Commission and the UK Government have lent their support to this important principle, we see that there are many threats to it as several Member States are seeking to change the rules of jurisdiction, which would in practice lead to Ofcom having to apply broadcasting regulation of other EU member States, which would lead to enormous complications for our members, but also for the regulator.

We therefore urge the UK Government to take an even stronger stance in the fight for this principle and not only focus on the issue of scope, but also proactively work with other supportive Member States to maintain status quo or suggest a workable solution.

On commercial communications, we believe that product placement must be allowed and we do not believe that excluding particular genres from it is going to be very effective.

For the news companies in our membership we strongly emphasise the need to abolish the 35-minute rule proposed by the Commission, but also fight the suggested 30-minute rule that would change the current advertising practice of rolling news that has worked very well and would result in significant reductions in investment and revenues of these channels.

These points are elaborated in detail in the attached paper and we would welcome the opportunity to discuss them further with you.

The SCBG is the trade association for independent satellite and cable programme providers. Its members are responsible for over 100 channels in the UK and in addition broadcast many more services from the UK to continental Europe and beyond. Many member companies are pan-European broadcasters, producing and commissioning content for different national markets.

SCBG channels provide consumers with programmes and services across a wide range of genres and audiences, including entertainment, factual, educational, history, music, nature, art and science. They make and show programmes for children and young people, and for ethnic minorities in their own languages. Together they have a combined audience share approaching 20 per cent of all UK television viewing.

Satellite and cable broadcasters operate in an extremely competitive and volatile environment, without privileged access to scarce Government-controlled spectrum or to the must-carry status afforded to terrestrial networks. They are therefore unable to attract mass advertising revenues, and do not benefit from public funding.

Satellite and cable broadcasting has been the fastest growing sector in the UK television industry, now employing over 6,000 people in the UK with revenues of nearly £5 billion.

NB This submission represents the views of all SCBG members with the exception of Kanal 5 who, while agreeing with a substantial part of the document, have made their alternative views known to the UK Government directly.

INTRODUCTION

The Satellite and Cable Broadcaster's Group (SCBG) welcomes this opportunity to submit our views on the revision of the Television Without Frontiers Directive. We hope that this revision will lead to a regulatory framework that is fit for the future digital market. Current legislation is already cumbersome and inefficient in the analogue world, and needs to be reduced, not increased, in a new digital environment where consumers and viewers have increased choice and power over their media consumption. Self- and co-regulatory measures have proven to be successful in achieving deregulation and we hope that they will play an important role in the future of European media regulation.

One of our main concerns in the revision process is maintaining the fundamentally important Country of Origin principle that is the corner stone of European broadcasting and has allowed cross-border services to flourish. We are disappointed that the UK Government to this date has preferred to focus on the issue of the future scope of the regulation, rather than supporting this principle, which is so vital for many broadcasters under its regime.

COUNTRY OF ORIGIN

1. *Impact on the UK satellite and cable sector*

The Government has already made clear its view that the proposed new Audio-Visual Media Services Directive would have adverse impact on present and potential non-linear services, including non-linear services operated by UK television channels. However, it has not recognised sufficiently the effect of the proposed directive on those UK companies that already operate pan-European television businesses.

The Satellite and Cable Broadcasters Group represents the principal UK television companies operating such businesses. Its members offer television channels in many EU States, usually in the language of those states and often including programmes produced in the country of reception. All these companies are established in the UK, and are regulated in the UK by Ofcom, under the *Television Without Frontiers* Directive (89/552/EC; 97/36/EC).

SCBG member companies already provide television and other audio-visual services in more than 100 million homes across Europe, and broadcast in more than 20 European languages. Further new channel launches are in progress or planned.

The UK's business success in this field has been enabled entirely by the provisions of the TVWF Directive, and in particular by its application of the fundamental Country of Origin principle. UK is the acknowledged leader in pan-European satellite and cable services, with a number of major UK companies providing high-quality broadcasting throughout the EU. Inward investment, employment and revenues in this sector have grown steadily in the last decade, and will continue to do so provided the basic principles of the present Directive are maintained—ensuring that regulation remains based on the country of origin, not on the country of reception.

1.1 Threats to the Country of Origin principle

The Commission's present proposals seek to maintain the Country of Origin principle. But we are aware of significant threats, which would undermine its operation in practice:

- A number of Member States are seeking to change the rules of jurisdiction in a way, which would effectively bring regulation into the country of reception. The proposals of this group, as expressed in the 26 June Working Paper for the “Ministerial round table on problems resulting from relocation and audience targeting” are designed to weaken Country of Origin regulations by introducing a comprehensive range of exceptions including national regulation on “morals, cultural diversity, media pluralism, social cohesion, advertising and production”.
- The Commission's own proposed amendments to Article 2 (new paragraphs 7, 8, 9 and 10), under which a Member State may take action against a media service provider established in another Member State, may unintentionally provide a new route for complainant countries to evade the Country of Origin principle. Although intended constructively, in order to codify existing case law in the new Directive, the inclusion of these paragraphs has led to further suggested amendments which if accepted would de-stabilise the CoO principle. The term “abuse and fraudulent conduct” introduced by the Commission has already proved open to a variety of definitions in the hands of those who would prefer to weaken CoO.
- The UK Government's negative stance in relation to the proposed enlarged scope of the Directive has been taken in some quarters to mean that it is prepared, in return for restrictions on scope, to compromise on the Country of Origin rules.

1.2 Damage to the UK creative economy

If the Country of Origin principle is undermined in practice by any of these means, the satellite and cable sector of the UK creative economy will be damaged substantially. By definition, most cable and satellite channels are in niche markets and face tough financial conditions. Scope economies provide an underpinning on our pan-EU and multi-territory channel. Absent a robust CoO policy countries in many of the receiving countries will be denied the rich choice and diversity of service that TVWF has enabled. Companies will not be prepared to run or launch channels if they are subject to varying regulations dependent on their country of reception, nor if the regulatory environment is rendered uncertain by new provisions for complaint by receiving States. The technical complexity of preparing alternative versions of programming for countries under the same satellite footprint would deter businesses from investing in new channels or continuing the operation of existing ones.

Companies would inevitably reduce operations, investment and employment in the UK, and ultimately would face a decision whether to establish themselves elsewhere, outside the UK and probably outside the European Union.

2. *Proposals for UK Government policy*

2.1 Retention of present Country of Origin regulation

In its responses so far, both to the Commission's proposals and to potential amendments, the Government's entire emphasis has been on the risks inherent in extending the scope of the Directive. In our view, this emphasis has been misplaced. We believe that, while the UK should continue to resist comprehensive enlargement of scope, it should give equal weight to maintaining the Country of Origin regulations intact by supporting retention of the relevant sections of the present TVWF Directive, unaltered and without addition.

In this respect it is essential to distinguish between support of the Country of Origin *principle* and its future operation *in practice*. Maintaining the principle while facilitating increased exceptions to it is not acceptable, if UK pan-European businesses are to be protected.

2.2 No change to rules of establishment and jurisdiction

Therefore the UK Government should not readily agree any changes to the rules on establishment or jurisdiction, nor support any amendments, which give credence to the belief that national regulation should over-ride EU regulation. Nor should the Government support new criteria for determining the place of establishment of an audio-visual media service, regardless of whether such criteria are based on economic or employment assessments. These criteria are unlikely to be viable, but none should in any case be acceptable since they are in practice erosions of the Country of Origin principle.

2.3 Support for Finnish Presidency positions

While our clear preference is for the status quo to be maintained, we recommend that the Government should consider supporting—with some clarification—the positions and drafting put forward by the Finnish Presidency in relation to establishment and jurisdiction (Chapter II Article 2 paragraphs 3 to 8).

The Presidency text acknowledges the concerns of some Member States in relation to trans-frontier media services, but avoids the extreme remedies put forward by those States seeking to break the Country of Origin regulations. The Finnish draft also removes from the Commission's proposals the term "abuse and fraudulent conduct", whose lack of precise definition would leave Member States too much room to question all activities by broadcasters offering services to other Member States.

However, an important clarifying amendment needs to be made to the Finnish text:

At Chapter II Article 2 paragraph 7, the reference to a media service provider "*which has established itself in a second Member State in order to avoid the sector-specific rules which would be applicable if it were established in the first Member State*" needs the addition of the word "only" before "in order to avoid". Any media service provider established in the UK and offering services to another country may in some respects thereby avoid the sector-specific rules of the receiving country. But that is an inevitable consequence of the Country of Origin principle, and is not the only or principal reason why companies have chosen the UK to establish themselves. Unless it can be shown that avoidance is the only or principal factor in the choice of establishment, the provisions of paragraph 7 should not apply.

2.4 Scope extension gives CoO wider UK importance

Since some extension of the scope of the Directive beyond linear services now seems likely, it is important to recognise that Country of Origin regulations will embrace many more UK businesses other than those presently affected. All new media companies, including major UK companies, may find their operations embraced wholly or partially within the enlarged scope of the new directive. They and the Government should therefore be concerned strongly to ensure that, in that event, they are not restricted in their activities nor deterred from investing by changes to Country of Origin regulation.

2.5 Avoidance of pejorative language

It would also be helpful if the Government were to abandon its use of such pejorative terms as "targeting" or "jurisdiction shopping" in its descriptions of channels and services created in the UK for reception in other Member States. Such channels and services are providing EU consumers with choices they are free to make, and represent the working of common market principles in their purest form. No official UK document or representation should, even unwittingly, characterise these present or potential services as hostile acts against the culture or economy of another Member State.

COMMERCIAL COMMUNICATION

3. *Product placement*

Product placement is becoming increasingly important to the economies of media service providers and independent producers. The Commission's proposals to liberalise it, and the many amendments put forward to date, restrict unnecessarily the categories of programme in which product placement may be allowed.

We support its exclusion from news programmes and from other programmes reporting on matters of current social, political or economic interest. However, we see no reason to exclude it from fiction programmes or from the "factual entertainment" programmes, which many UK broadcasters provide for European audiences. The proposed exclusion of "documentary" programmes is too broad a category, and should be deleted or qualified.

The UK Government should support the relaxation of EU rules in order to allow product placement in *all* programmes where (a) it is not surreptitious, (b) it does not affect, or might be assumed by consumers to affect, editorial integrity—for example in news and current affairs programmes—and (c) it does not receive undue prominence. Ideally, national regulatory authorities should be given freedom to liberalise product placement within this basic tier of regulation.

We believe that the restrictions on product placement should not extend to prizes given out in programmes and should only extend to programmes commissioned or produced by a media service provider.

We think it unlikely that Ofcom would wish to apply restrictions to product placement that go beyond those contained in any new Directive. To do so would be entirely impractical, since pan-European broadcasters and programme-makers would have to produce re-versioned programmes for the UK, thus denying them the economic benefits of product placement. In practice, product placement would go elsewhere into media not faced by these unequal restrictions.

When it comes to identification of product placement the rules should in our view mirror those currently applied on sponsorship, which have worked very effectively in the UK under Ofcom's control.

4. *The 35-minute rule*

There is no support for the proposed new 35-minute rule on advertising breaks in news programming, or indeed any amendment to shorten it to 30 minutes. We therefore recommend that the UK Government should reject any such amendments.

Nevertheless, the exclusions that presently apply in practice should be maintained, notably in respect of specialised news and current affairs channels.

Any change to the present model would result in a significant reduction in investment and revenues and present business models would no longer be viable. The news genre channels have been at the forefront of the pan-European broadcasting initiative and their investment and skill has contributed significantly to the creation of the “Television Without Frontiers” society. This would be jeopardised by any further restriction on advertising.

Also in relation to the proposed “35” or “30” minute rule, if it is to remain, then “films made for television” should be deleted. We believe that the policy objective should be to encourage investment in such programming by media service providers and not discourage it.

Although the proposals by the Commission to liberalise the advertising rules are welcome, we would recommend that isolated spots be allowed in all programmes (subject to specific rules for certain programme genre such as news or children's programmes if this is deemed necessary). Advertising will remain a fundamental economic driver for the television industry but as is now becoming increasingly apparent, television attractiveness to advertisers is reducing due to the coalescing of a range of hitherto disparate factors (such as the growing importance of the internet for key advertising demographics such as 18–35 year olds).

CONCLUSIONS

The Satellite and Cable Broadcasters group represents UK stakeholders whose businesses have been built on the foundations of the present TVWF directive, and who have an intimate commercial interest in the outcome of the proposed revisions. We therefore hope that the UK Government will give its strong support to our views in relation to Country of Origin, and also:

- Commit to self-regulation and co-regulation.
- Support inter-state issues to be settled by enhanced contact between regulators.
- Argue for maximum liberalisation and equality in advertising rules, including admission of product placement in all programme categories other than news, current affairs and children's programmes.
- Support the removal of the newly proposed “35 minute rule” on advertising breaks in news programming.
- Resist new regulatory burdens that would deter investment in new technologies.

Memorandum by the Voice of the Listener & Viewer

PROPOSED EXTENDED SCOPE OF THE DIRECTIVE

1. Broadly speaking, VLV welcomes the Commission's proposal to extend the scope of the Television without Frontiers Directive to all Audiovisual Media Services. In our view, the Draft Directive has sought to establish a middle way between the relatively tight controls traditionally imposed on television broadcasting services, and the tenets of free speech, which are underpinned by the European Convention on Human Rights. The following points are worthy of note.

- The Commission's definition of an audiovisual media service requires any such service to fulfil the following conditions. These are that the service:
 - (a) should be any service as defined by articles 49 and 50 of the (European) Treaty;
 - (b) It's principal purpose is the provision of moving images, with or without sound;
 - (c) which are designed to inform, entertain or educate the general public;
 - (d) by means of an electronic communications network.
- Moreover, recitals 13 to 15 of the Draft Directive (which, for some unknown reason the UK Government did not circulate as part of its consultation process) specifically exclude the following:
 - (a) non-economic activities, such as purely private websites;
 - (b) any form of private correspondence, such as e-mails sent to a limited number of recipients;
 - (c) services where the inclusion of audiovisual content is merely incidental to the service and not its principal purpose, such as websites that contain audiovisual elements only in an ancillary manner;
 - (d) animated graphical elements, small advertising spots, or information related to a product or non-audiovisual service; and
 - (e) electronic versions of newspapers and magazines.

2. VLV is sure that these uncertainties could be avoided by some redrafting. For the avoidance of doubt therefore, and in order to protect non-commercial free speech on the Internet, VLV proposes that the content of recitals 13 to 15 should be added to the definition of an audiovisual media service in Article 1(a) of the Draft Directive.

3. Moreover, given the Decision of the European Court of Justice in the *Mediakabel BV* judgement, and taking account of the minimal obligations which will be placed upon providers of non-linear audiovisual media services, VLV considers that it is proper to include within the purview of the new directive the categories of audiovisual media services which the UK Government has identified in paragraph 2.15 of its Partial Regulatory Impact Assessment.

4. VLV also welcomes the new definition of television broadcasting in the Draft Directive, which again in line with the decision of the European Court of Justice in the *Mediakabel BV* judgement, covers all types of transmission platform for a television service.

5. VLV is especially pleased to observe that the proposed distinction between a linear and a non-linear service makes sense from a consumer's perspective. As defined in article 1(e) of the Draft Directive (which follows the *Mediakabel BV* judgement of the European Court of Justice), a non-linear service means an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of content provided by the media service provider.

KEY OBLIGATIONS TO BE IMPOSED ON PROVIDERS OF NON-LINEAR AUDIOVISUAL MEDIA SERVICES

6. Broadly speaking, VLV considers that the obligations proposed for providers of non-linear audiovisual services are "fit for purpose" for the development of a European Information Society. They fall into four main categories which are designed either to:

- (a) Prevent the deliberate deception of the consumer (article 3g(a) which prohibits surreptitious audiovisual commercial communication, article 3g(b) which prohibits subliminal techniques, and article 3h(4) which prohibits the use of sponsorship or product placement in news and current affairs programmes, and of product placement in children's or documentary programmes);
- (b) Require the consumer to be informed about the provenance of a particular service or category of programme, (article 3c on the origin of the audiovisual media service, article 3g(a) on the presence

of an audiovisual commercial communication, and article 3h(c) on the presence of a sponsorship agreement); or

- (c) Prohibit the audiovisual commercial promotion of goods or services deemed to be injurious to public health (articles 3g(d), 3g(3), 3h(2), 3h(3) on the promotion of tobacco products, medicines on prescription and alcoholic beverages, and article 3g(c) on the encouragement of socially or environmentally destructive behaviour)
- (d) Prohibit the abuse of free speech in line with the restrictions permitted by article 10 of the European Convention on Human Rights.(article 3d on the protection of minors, article 3e on incitement to hatred)

Given the histrionic claims of some sections of the audiovisual media communications industry about the draconian nature of these proposed restrictions it is worth examining the European Commission's proposed restrictions in more detail.

7. Preventing the deliberate deception of the consumer

The proposed definition of surreptitious advertising in article 1(h) of the Draft AVMS Directive, which is the same as that used in article 1(d) the TV Without Frontiers Directive, is extremely tightly drawn. It requires that any such representation is both "intended by the broadcaster to serve advertising" and might "mislead the public as to its nature". This definition has allowed independent producers of television programmes in the European Union to finance their productions by the use of surreptitious advertising, which has, in turn, led EU Member States such as Austria and Spain to allow product placement in these categories of television programmes. This means that although product placement is currently forbidden on UK television services, the UK authorities, such as Ofcom, have been unable to prevent product placement in programmes originating from other EU Member States. Moreover, although article 3g (a) of the Draft Directive prohibits surreptitious audiovisual commercial communication, the definition of surreptitious advertising in draft article 1(h) still requires that the broadcaster (and not the provider of an audiovisual media service) the representation of to serve advertising.

VLV would therefore like to see the definition of surreptitious advertising (a) to be widened to include all providers of an audiovisual media service; and (b) to make the sole criterion was that of misleading the public as to the nature of the representation.

8. Requiring the consumer to be informed about the provenance of a particular service or category of programme

The draft directive, like the TV without Frontiers Directive, is based on the country of origin principle. This means that there are now 25 EU Member States which can authorise a television broadcast or an audiovisual media service, and this number will increase as the EU is enlarged, and in addition, the provisions of the Directive extend to other countries in the European Economic Area. It is therefore imperative that the consumer is properly informed in which Member State, and by which national regulatory authority, a given audiovisual media service has been licensed. There are four reasons for this.

- First, the consumer can immediately raise with the appropriate authority any concerns about an alleged infringement of the directive;
- Second, the proposed requirement to inform the consumer about the presence of product placement in an audiovisual media service, compensates all viewers in the EU, but especially those in the UK, in regard to the shortcomings in the definition of "surreptitious advertising" which we noted in paragraph 7 (above);
- Third, the definition of a "commercial communication" in article 2(f) of the e-Commerce Directive (eCD), , since it exempts "any communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner" from the obligation to provide consumers with the information set out in article 6 eCD, and thus permit the reintroduction of surreptitious advertising, and unannounced product placement into non-linear audiovisual media services;
- Fourth, any viewer of a non-domestic television broadcast must be able to exercise a right of reply, or equivalent remedy, under the provisions of article 23 of the Directive. However, the conditions for exercising a right of reply vary widely between different EU Member States, and despite the requirement in article 23(3)—which was introduced in 1997—for Member States to ensure that a sufficient time span was allowed to exercise a right of reply, virtually nothing has been done to ensure

that viewers do indeed have sufficient time to exercise that aspect of the directive in relation to transfrontier television broadcasts.

- Moreover, although the Draft Directive does require providers of audiovisual media services to provide recipients of the service with information about the provenance of the service (article 3c), and about the existence of a sponsorship agreement or the presence of product placement (article 3h(c)), the draft text contains no guidance to member states about either the placing or the prominence of these pieces of information.

VLV considers that, while continuing to support the country of origin principle, the European Union should take steps to harmonise the manner in which these categories of information are presented to consumers. To this end, together with its colleagues in the European Alliance of Listeners and Viewers Associations (EURALVA), it is proposing that the national regulatory authorities of all Member States should be instructed to make arrangements to harmonise the manner in which this information is presented, across all EU Member States.

This could either be done by amending the constitution and membership of the Contact Committee established by article 23 of the Directive, or by establishing a separate committee of national regulatory authorities.

In addition, VLV would oppose any moves by the UK Government to rely exclusively on the provisions of the e-Commerce directive to regulate non-linear audiovisual media services.

9. Prohibit the audiovisual commercial promotion of goods or services deemed to be injurious to public health

In the opinion of VLV, the prohibition on television of advertisements, and the sponsorship of programmes, which promote tobacco products and medicines on prescription have worked well and have now been accepted by most consumers and viewers. The same applies to the irresponsible promotion to young people of the benefits of drinking alcoholic beverages. Moreover, the qualitative prohibitions on television advertising and tele-shopping in article 12 of the Television without Frontiers Directive have also worked well. It therefore seems perfectly sensible to extend all these same prohibitions to audiovisual commercial communications and audiovisual media services in articles 3g and 3h of the Draft Directive. This will not only establish a level playing field between television broadcasters and providers of non-linear audiovisual media, but it will also ensure continuity of regulatory provision, given that, as noted in recital 35 of the draft text, non-linear audiovisual media services have the potential to partially replace linear services.

VLV therefore supports the continuance and extension of the qualitative prohibitions to both linear and non-linear audiovisual media communication.

10. Prohibit the abuse of free speech in line with the restrictions permitted by article 10 of the European Convention on Human Rights.

Article 3e of the Draft Directive prohibits any incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Some interest groups, such as the Audiovisual Stakeholders (an industrial lobby group which does not include any consumers) have argued that these prohibitions will have a chilling effect on free speech, since they are not [yet] specifically banned in UK law. Moreover, it will be recalled that article 10(2) of the European Convention only permits the restriction of free speech provided that those restrictions are (a) prescribed in law, (b) necessary in a democratic society, and (c) and are enacted [among other things], for reasons of public safety, the prevention of disorder, and the protection of the reputation or the rights of others.

In the opinion of VLV, the prohibitions on incitement to hatred which are proposed by the European Commission, are indeed necessary in a democratic European society which is increasingly marked by the global ebb and flow of different races, ethnic minorities, people with varying religious beliefs, and attitudes towards age, gender and sexual orientation. Moreover, such a ban would not merely proscribe in law any incitements to hatred in audiovisual media services which threatened the reputation and the rights of other groups in a society, it would also be likely to ensure public safety and prevent public disorder.

VLV therefore considers that these prohibitions on free speech in audiovisual media services are both timely and proportionate.

THE PLACE OF ESTABLISHMENT OF AUDIOVISUAL MEDIA SERVICES

11. The Draft Directive extends the rules of establishment which have traditionally applied to television broadcasting services to all audiovisual media services, with the exception that in determining the appropriate jurisdiction for non-EU media service providers, the Member State with the satellite uplink now takes precedence over the Member State which has the satellite capacity.

VLV supports these changes.

DEROGATION FROM THE COUNTRY OF ORIGIN PRINCIPLE

12. Under Article 2a of the Draft Directive a Member State may only derogate from the Directive (ie block an audiovisual media service from another EU Member State) if it manifestly, seriously and gravely infringes article 22 (the protection of minors) and/or article 3e (incitement to hatred). The former is an area where the UK has traditionally exercised this power in relation to pornographic television broadcasts, and it could be appropriate to exercise the latter in relation to broadcasts from another EU Member State which might incite public disorder.

VLV therefore continues to support these provisions, although it also recognises that in exercising the latter power, it may be necessary for the UK to demonstrate in law that the exercise of its power to restrict the rights of UK citizens to receive information and ideas from an audiovisual media service based abroad are indeed necessary in a democratic society.

13. The “Audiovisual Stakeholders” claim that non-linear audiovisual media services are information society services that are covered by the e-Commerce Directive (eCD), and therefore fall outside the scope of the new Draft Directive. Moreover, the audiovisual stakeholders claim that “[T]he fact that Member States can derogate from eCD has been cited as a justification for extending the TVwF Directive.” At this point in time, VLV has been unable to obtain any firm clarification from either Ofcom or from UK civil servants, about the future range and extent of the future overlap between the two directives. At this stage therefore, VLV will only consider the implications for consumers of audiovisual media services of the freedom of the UK to derogate from the two directives, although we would also welcome further investigation into this aspect by the House Lords.

14. The first point to emphasise is that the freedom to derogate is a *de facto* contradiction to the country of origin principle on which both directives are based. In our view therefore, it should be used as sparingly as possible. It would be quite wrong to deny UK users of audiovisual media services the right to use an audiovisual media service that has been approved by another EU Member State. It would also contravene the fundamental principle of free trade between EU Member States.

15. The second aspect of derogation is that the power to derogate in the Draft Audiovisual Media Services Directive is tightly limited. [see paragraph. 12 (above)]. However, the e-Commerce Directive offers a Member State a range of several reasons for derogation, including the curious phrase “the protection of consumers, including investors”. [eCD, article 3(4)(i)] VLV has failed to discover in what ways investors can be classified as consumers of the services in which they invest.

16. The third aspect of derogation is related to the freedom of a Member State, including the UK to delegate its derogated powers to a co-regulatory or a self-regulatory body. The Inter-institutional agreement on better law-making, which was agreed between the European Parliament, the Council of the European Union and the Commission of the European Communities in December 2003, lays down guidelines for the introduction of co-regulation and self-regulation. Crucially, the Inter-institutional agreement envisages the introduction of co-regulation on a national basis (articles 18–21), but limits the introduction of self-regulation to self-regulation at a European level (articles 22–23). However, the UK audiovisual stakeholders claim that self-regulation “would be the most effective way to patrol so-called “non-linear” services.” Their argument is that “alternative regulatory mechanisms are more effective in monitoring the fast-moving and disparate “non-linear” industry than state regulation at a European level.” [<http://www.audiovisualstakeholders.org>] Unfortunately, this self-justificatory phrase elides both self-regulation with co-regulation, and state regulation with European level regulation. It fails to recognise the difference between the minimum provisions specified in the draft directive, and the manner in which they are implemented by individual Member States, it also flies in the face of the careful distinctions which were drawn in the European Inter-institutional Agreement between co-regulation and self-regulation. It ignores the fact that EU Member States are allowed to introduce domestic regulations which are more strict than those required in the Draft Directive. It also ignores the fact that properly constituted co-regulatory arrangements can respond just as quickly as self-regulatory mechanisms in the fast-moving and disparate “non-linear” industry.

17. Worse, from the consumer's perspective, if every Member State is empowered to derogate its non-linear audiovisual media services from the eCD and then to delegate them to a domestic self-regulatory mechanism, will be the failure of the European Union to establish any semblance of common European standards in matters of public policy, in any of the following areas—the protection of minors and the fight against any incitement to hatred on the grounds of race, sex, religion or nationality, violations of human dignity concerning individual persons, or the protection of public health.

VLV considers that the requirement in the European Inter-institutional agreement for audiovisual stakeholders to establish self-regulatory arrangements at the European level remains a powerful incentive for those stakeholders to harmonise their self-regulatory arrangements across the whole of the European Union, and it therefore welcomes the preliminary discussions designed to achieve this aim which have already been taking place under the leadership of the European Commission.

GENERAL REQUIREMENTS ON ALL AVMS PROVIDERS

18. VLV supports the requirements in article 3d to ensure that providers of audiovisual media services do not make their services available in such a way that might seriously impair the physical, mental or moral development of minors.

19. VLV supports the proposal in article 3c to introduce a requirement for every media service provider to provide basic identification requirements and contact details.

20. VLV also supports the proposal to prohibit the incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

21. VLV also supports the proposal to extend the right of reply provision to all linear services.

22. Moreover, VLV would like to see the right of reply provision extended to a range of non-linear services. From a user's perspective, the exercise of a right of reply empowers the user by enabling her/him to have access to both sides of an accusation about the behaviour or the views of an individual. It is not merely an excuse for an aggrieved person to rebut an accusation. This will be especially important on the so-called social networking services, such as YouTube and MySpace. If used well, these services can enable similarly inclined people to find one another, but if used malignly, they can enable an unscrupulous minority to edit and manipulate audiovisual media material for political propaganda purposes in order to create a mob of partially-informed users. The most obvious example has been the preparation by terrorists of the pre-suicide video for subsequent release. But the potential political abuse of non-linear audiovisual media material has also reached the USA. In the recent primary elections for the American senate, Senator Joseph Lieberman lost the primary election partly because the aides of his political opponent used the Internet to spread repeatedly brief audiovisual clips of Lieberman's gaffes. There is no way of stopping the distribution of audiovisual clips of politically embarrassing moments, particularly on amateur blogs which are anyway excluded from the purview of the draft directive. However, VLV considers that it would strengthen the democratic electoral and political process if the right to reply, or its equivalent, which is allowed on all linear services, were extended, albeit in a modified form, to all licensed non-linear services.

PRODUCT PLACEMENT

23. Although product placement is currently banned in the UK, the prohibition on surreptitious advertising in the current TVwF Directive has not prevented some EU Member States such as Austria and Spain from allowing product placement within their TV services. The proposed changes in the new draft directive would remedy this confusion by permitting properly regulated product placement. However, these changes would not require the UK, which currently bans product placement, to allow its introduction into UK services, since an individual Member State would still be allowed to introduce regulations that are stricter than those which are set down in the directive.

24. VLV broadly supports the proposed limits on product placement in the directive, namely that:

- There shall be no product placement in news or current affairs programmes, or in audiovisual media services from children and documentaries;
- Neither the scheduling, nor the editorial content of the programme may be influenced in a manner that affects the editorial independence of the media service provider, nor may it directly encourages purchases; and
- Viewers must be clearly informed about the presence of product placement.

- However, VLV considers that the UK Government should pay closer attention to the last point. Firstly, even though the UK government's Issue Grid claims that viewers must be clearly informed "at the beginning, during and/or at the end of the programme", the text of the draft directive actually says that programmes containing product placement "must be identified at the start of the programme in order to avoid any confusion on the part of the viewer." The difference is that the formulation in the UK Government's Issue Grid allows the programme maker to choose where and when to inform the viewer, whereas the Commission's formulation requires the notification to be placed at the start of the programme. VLV prefers the formulation of the EU Commission in the Draft Directive.
- Indeed, VLV would go further and require the viewer to be clearly informed at the beginning, during, and the end of the programme.
- Moreover, VLV supports the proposal put forward by the European Alliance of Listeners and Viewers Associations, for the information about the presence of product placement in a programme to be presented in a standard form in each Member State. This would ensure that UK viewers were properly and clearly informed about the presence of product placement, in an identical manner, regardless of the EU Member State in which the audiovisual media service was licensed. The details could be agreed by a Committee of National Regulatory Authorities, such as that proposed in paragraph 8 (above).

LISTED EVENTS AND SHORT REPORTS

25. VLV considers that the provision in article 3a for a Member State to draw up a list of major events which members of the public must be allowed to see on free-to-air television has worked well and should be retained.

26. VLV considers that the UK should support the introduction on linear services of a right of access to short news reports of events of high public interest. This right already exists in UK law, but by including it in the new EU Directive it would enable UK broadcasters—and thus all UK viewers—to have access to short reports of such events in all the other Member States of the EU and the European Economic Area.

VLV therefore supports both of these proposals.

CONCLUSION

27. In general, VLV supports most of the proposals in the Draft Directive on Audiovisual Media Services. It considers that all of the duties which will be imposed on non-linear services are reasonable and not unduly burdensome. In general the burdens imposed on linear services such as television broadcasting have been relaxed.

28. VLV also recognises that non-linear audiovisual services are developing in a rapid and fast changing manner, but even so it considers that arrangements for co-regulation, as envisaged in the EU's Inter-institutional Agreement, will be able to ensure that the UK is able to guarantee a speedy and flexible regulatory response to a fast-changing audiovisual media world.

29. In addition, VLV supports the proposal from the European Alliance of Listeners and Viewers Associations proposing that National Regulatory Authorities should be charged with the responsibility of harmonising the manner in which the regulatory authorities in each EU Member State require users of audiovisual media services and viewers of television broadcasting services to be informed about the country of origin of the service, the existence of product placement, and the manner in which to exercise a right of reply to a transfrontier audiovisual media service.

30. Finally, VLV considers that in order to ensure that UK citizens can keep themselves properly informed, the right of reply—or fair treatment—should be extended to all non-linear audiovisual media services.

2 October 2006