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**House of Lords Inquiry into the European Commission's proposal for a Directive amending Directive 89/552/EEC (Television without Frontiers)**

**Evidence submitted 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 (i.e. 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.

## **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<sup>1</sup>. Our arguments are set out more fully in the second section of our evidence.

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<sup>1</sup> For example The European Internet Service Providers Association, GSM Europe, European Telecommunications Network Operators, Bitcom (Germany).

17. In answer to the Committee's question are there advantages of regulating this area, we would respond that with respect to linear broadcast services<sup>2</sup> 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% rule and the 35 minute rule.
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

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<sup>2</sup> That is as we currently understand the broadcast TV definition, not the definition in the Directive

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% 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 (e.g. 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 (e.g. 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 – i.e. 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.
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<sup>3</sup>. It represents some of the strictest regulation in the content market (e.g. 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

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<sup>3</sup> 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](http://www.imcb.org.uk)

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% 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 content<sup>4</sup> 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 (e.g. 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.
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

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<sup>4</sup> The Internet Watch Foundation

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.