



Regulatory Review

EUROPE'S BROADCAST RULE IN PLAY

By Gerry Oberst

We wrote in our September column about efforts in Europe to reshape media rules and the various ways these efforts could affect the



satellite industry. As we noted, the European Commission had released a series of issues papers on possible changes to the Television Without Frontiers legislative framework and invited comments.

Comments have come flooding into the Commission on many aspects of the proposals. As of mid-September, the Commission had published almost 200 separate submissions. These papers identify two main areas of contention that affect satellite operators and broadcasters.

One issue is whether to adjust the European "country of origin" principle for broadcast regulation. The principle allows only the country from where a program originates to apply media rules on content. The Commission floated a proposal to give countries of reception more leeway to apply their own regulatory notions. A second more overarching issue is whether to extend some form of broadcast content regulation to non-linear interactive services typically delivered over the Internet (but also over satellite platforms). Both topics remain controversial, with at least 100 of the published comments dealing with one or both of these issues.

To the satellite industry, the debate on country of origin is crucially important. Satellite services with broad coverage of Europe have thrived under the current system by being able to rely on being governed by a single set of rules. Satellite broadcasters have relied on this legal certainty to provide signals without having to adjust to every regulatory twist among the various countries of reception.

A handful of countries, mainly Poland, Ireland and Sweden, want a regulatory handle over broadcasts beamed into their borders. Ireland says that as much as 25 percent of advertising watched by Irish children is not subject to its own national code, even though those advertisements are targeted at the Irish market. Poland says broadcasters abuse the country's right to choose where to be located by transmitting programming inconsistent with regulations of the receiving country. Sweden wants to apply its own rules to advertising directed mainly at Swedish territory that advertises alcohol or is aimed at children.

Numerous commenting parties sought to counter these positions. For example, the largest multi-service cable operator in Europe, with interests similar to satellite broadcasters, argued that the country of origin principle is "fundamental to the coherent functioning of our business," and that deviation from the principle would be "catastrophic for our business interests," because operators would be faced with a different regulatory regime in each territory.

While the country of origin principle will receive plenty of attention, the second issue of whether to extend some form of broadcast content regulation to non-linear interactive services likely will become the main focus of the upcoming Commission proceeding. The Internet community and others came out swinging against the concept of applying some subset of media rules to non-linear audiovisual content.

As many parties noted, there already is a European Electronic Commerce directive for "information society services" that include audiovisual interactive material. A representative of Internet Service Providers referred to "widespread unrest" about possible application of broadcasting regulation to online distribution of audiovisual content and identified a "disconcerting" lack of any real justification for such an extension of the rule.

Some comments argued that instead of seeking to apply media rules to non-linear services, the Commission would better serve this sector by eliminating some existing media rules. Still others noted the distinction between linear and non-linear services does not match up with competition law principles.

The U.K. trade association for the information technology, telecommunications and electronic industries claims it is unlikely that there will be any content services classified as purely linear by 2010, and the sheer volume of so-called non-linear material would be impossible to regulate using current concepts. The association's comments maintain that the Commission's issues papers are not a suitable basis on which to draft new legislation and the entire process should be reopened.

Other trade associations and groups oppose in strong terms the very concept of applying essentially analog rules to the digital environment. Groups representing the telecommunications network operators and the electronics industry issued strong statements against this proposal, while the Satellite and Cable Broadcasters Group questioned the vague definition of non-linear services and urged the Commission to rely on self-regulation in this sector instead of a new regulatory overlay. A broadband operator noted diplomatically that much of the groundwork for the issues papers came from broadcasters and that perhaps it would be productive to obtain more input from wider value chains.

The satellite industry has been relatively quiet so far on this issue, tending to submit information in the background. We can expect the argument to get even louder, however, when the Commission publishes explicit proposals instead of issues papers. So far, we've seen only trial balloons. The real argument will start when the proposals are released. ♦

GERRY OBERST IS A PARTNER IN THE BRUSSELS OFFICE OF THE HOGAN & HARTSON LAW FIRM.