



EUROPEAN BROADCASTING UNION

UNION EUROPEENNE DE RADIO-TELEVISION

Legal Department

Département juridique

5.9.2005

DAJ

EBU Position on Issues Papers for the Liverpool Audiovisual Conference

RULES APPLICABLE TO AUDIOVISUAL CONTENT SERVICES

1. MATERIAL COMPETENCE/SCOPE: NEED FOR A CONSISTENT FRAMEWORK FOR TELEVISION AND NEW AUDIOVISUAL SERVICES

The EBU **supports the overall approach** taken by the Commission in its Issues Paper, which strives for a more consistent and technologically neutral regulatory framework for television broadcasting and new audiovisual services, an important objective already emphasized by the EBU in its 2003 Contribution to the review of the Television without Frontiers Directive.¹

We are convinced that it is possible to develop a regulatory framework for audiovisual services which is both coherent and balanced, and which achieves important public policy objectives without impeding the dynamic development of new audiovisual media, to which EBU Members are strongly committed.

Regarding the two major policy options outlined by the Commission, the EBU considers that **both options would bring about improvements compared to the current Directive. However, only the second option offers a genuinely suitable response to the situation created by the emergence of non-linear audiovisual services.** A comprehensive framework for any form of electronic delivery of audiovisual content would take account of digitization and convergence and the emergence of new platforms, and would have the advantage of being more consistent and future-proof. Naturally, the relationship with the e-Commerce Directive would need to be examined in more detail and clarified.

Increasingly, viewers receive audiovisual content on a wide range of digital platforms, whilst often unaware of, or indifferent to, the transmission technology used for the content's delivery. A comprehensive framework would thus ensure that whenever consumers accessed publicly available audiovisual content they could be confident that a certain minimum level of protection of public interest objectives existed. Such a framework would also address the need

¹ See, in particular, page 2 and pages 7-8 of the EBU's Contribution to the public consultation by the European Commission on the review of the Television without Frontiers Directive. The Contribution is available at the EBU website www.ebu.ch under "Position Papers".

for a level playing-field for all content providers. At the same time, it should be understood that any comprehensive framework must also take into account the need to foster a vibrant European audiovisual landscape, and not least in the new media. The EBU is therefore in favour of a balanced framework in line with the Lisbon Strategy. **A two-tier regulatory approach, as proposed by the Commission, is a good way forward in that it would tend to make non-linear services subject to obligations which are appropriate in terms of their characteristics and their level of development.**

It is expected that television services via new platforms and offers of audiovisual programmes on demand will develop rapidly over the coming years. It is crucial for these developments to take place within a clear regulatory framework which takes into account the specificity of audiovisual services.

Rules similar to those in the current Directive should be applied to all linear television services provided to the public by electronic networks, irrespective of the technology or distribution platform used. Non-linear audiovisual services have not achieved, to date, an impact on society comparable to that of linear services. Accordingly, it would be questionable for all the requirements for linear services to be extended to non-linear ones, in the absence, among other things, of the necessary flexibility. Nevertheless, we believe that to achieve a sufficient level of coherence between the regulation of linear and non-linear services the basic tier of **obligations for non-linear services must not *a priori* be limited to the five public policy objectives indicated in the Issues Paper** under 1.2 (for further details, see our comments on the other Issues Papers).

The **distinction between linear and non-linear services** is likely to remain valid for the foreseeable future. Nevertheless, it has to be anticipated that in the longer term the difference between the impact of linear and non-linear audiovisual services may decline owing to:

- increasing use of non-linear services, and
- more personalized use of linear services thanks to personal video recorders (PVRs).

In response to such developments, which may occur at different times in different countries, the Member States must retain the freedom to decide whether (and, if so, when) to introduce any additional regulatory requirements for non-linear services.

2. POSSIBLE INCLUSION OF RADIO

The EBU is convinced that the cultural, democratic and social specificity of audiovisual services and their importance for media pluralism and cultural diversity need to be respected with regard to the whole audiovisual sector, including radio and new media. Consequently, we are strongly against the inclusion of radio in a *horizontal* instrument such as the future Services Directive.² If a need is indeed felt to exist for an internal market instrument in the field of radio, the only appropriate response would be to include it in a *sectoral* Directive on audiovisual content services.

² See the EBU Position Paper on the Commission Proposal for a Directive on services in the internal market of 8 December 2004. Available at www.ebu.ch under "Position Papers".

If, therefore, the Commission envisages including radio in the scope of the future Directive, the EBU would expect it to be **subject only to basic tier obligations** which should, where necessary, be adapted to the characteristics of radio.

The EBU believes that such an approach could be developed further in line with the following principles:

- **respect for the distinctive nature of radio**, vis-à-vis both television and non-linear audiovisual services;
- **introduction of the country-of-origin principle within the coordinated areas** (with harmonized standards regarding the identification of advertising and its separation from editorial content, the qualitative rules on advertising, rules on sponsorship, the right of reply, protection of minors and human dignity);
- **respect for Member States' competences with regard to the protection and promotion of cultural diversity and media pluralism**. It would not make sense to introduce European quotas for radio, or to create for radio an equivalent to Chapter III of the current Directive; promoting the distribution and production of radio programmes, which is closely linked to linguistic policies, should be left to the Member States and excluded from the coordinated areas.

3. TERRITORIAL COMPETENCE/JURISDICTION AND RELATED ISSUES: THE NEED TO ADDRESS CONCERNS RELATED TO SERVICES TARGETING A PARTICULAR COUNTRY

The EBU considers that the concerns expressed by a number of Member States regarding services primarily targeting their own country but provided by broadcasters established in another Member State need to be addressed. Problems arise, in particular, as a result of non-respect of national rules which are stricter than European minimum standards (with regard to, for instance, advertising for alcohol) and from programme or advertising windows for a particular country.³

The EBU does not wish to create any doubts about the **country-of-origin principle**, which is crucial for broadcasters, but the EBU believes that it is perfectly possible to develop, for a limited number of cases, solutions which reconcile the functioning of the internal market and the free flow of information with **legitimate concerns related to public policy objectives such as pluralism and cultural diversity and the effectiveness of national legislation**.

Such solutions should follow on from the **principle of mutual loyalty** between Community institutions and Member States.⁴ In such a system the national measures should support the development of an internal market (and European audiovisual area), and the European measures should support the effective achievement of legitimate public policy objectives

³ In its 2003 Contribution on the review of the Television without Frontiers Directive (see footnote 1), the EBU drew particular attention to the need to find a solution in cases where advertising windows specifically intended for another country tap the advertising market in the receiving country to an extent which negatively affects media pluralism, and especially in the case of a small country or a limited linguistic area. See, in particular, pages 4, 33 and 38.

⁴ See Article 10 of the EC Treaty in its generally accepted (broader) interpretation.

pursued by national legislators. Article 3a of the current Directive is a striking example of how Community rules can support the effectiveness of national rules (in that case, the events listed by Member States which should be accessible to the entire national public on free television).

However, the EBU remains **sceptical regarding the two options mentioned by the Commission** in the Issues Paper, i.e. the codification of the case-law of the European Court of Justice and the extension of the Article 2a procedure. While codification of the case-law would not address all the situations mentioned above (but merely delocalizations with the *purpose* of evading legislation), the Article 2a procedure would run the risk of either not being effective or of creating obstacles to the retransmission of broadcasting services.

In this context, it should be borne in mind that the mechanisms in the European Convention on Transfrontier Television, and in particular Articles 16 and 24a, which were designed to address similar concerns, have also failed to work satisfactorily. Consequently, in its contribution of May 2005 to the consultation by the Council of Europe on the scope and jurisdiction principles of the Convention, the EBU proposed the replacement of these rules by a new mechanism.⁵

In the EBU's view, such a **new mechanism** should also be developed at European Union level, limited to cases where a programme service, including a programme window or advertising window, is intended mainly or exclusively for the public in another Member State. In such cases it could be imagined that the Member State in which the broadcaster is established would be given the choice of either recognizing the jurisdiction of that other Member State (in conformity with European case-law on circumvention) or of taking appropriate measures to ensure that the service in question respects any stricter rules on programme content, including advertising, applicable to broadcasters in that other Member State and that it contributes proportionately to any audiovisual or cinematographic support scheme in that other Member State.

With regard to **non-linear audiovisual services**, the risk of delocalization naturally also exists, and probably even to a greater extent, owing to a smaller degree of European harmonization. Consequently, when establishment criteria are defined for non-linear services, care has to be taken to find criteria which are clear, stable and objective. This is also of great importance for the **subsidiary criteria for providers which are not established within the Community**. It would be incompatible with the objective of limiting circumvention of national laws if service providers established outside the Community could freely choose registration in any Member State (without any establishment there), thereby being able to choose the most favourable national law for them while gaining access to the benefits of the country-of-origin principle. The EBU believes that solutions which may work with regard to VAT cannot be transposed to regulatory questions, and all the more so in the audiovisual sector, where regulation touches upon highly sensitive issues relating to culture and media pluralism.

⁵ EBU comments of 11 May 2005 on the Council of Europe consultation on the European Convention on Transfrontier Television - scope and jurisdiction. Available at www.ebu.ch under "Position Papers".



5.9.2005
DAJ

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RIGHT TO INFORMATION AND SHORT EXTRACTS

1. EVENTS OF MAJOR IMPORTANCE

The EBU confirms its previously stated position that the current provision on the protection of "major events" should be maintained, and as far as possible improved.

In particular, the EBU would like to reiterate that Member States should be assisted more clearly when drafting national legislation on this matter, and preferably through **the provision of further "guiding principles"**.⁶ For example, the criteria used by the Contact Committee (and the Commission itself) to approve the national legislation in accordance with Article 3a of the Directive should be made publicly available. Other examples of such guiding principles are the following:

- It should be expressly clarified that it is possible for Member States to establish a "right of first refusal" by requiring that the rights to listed events are offered first to the qualifying broadcasters (i.e. national services which qualify to exercise the rights on an exclusive basis);
- It should be recommended to Member States that they adopt measures to ensure that the offer of rights is subject to reasonable conditions and a fair market price, e.g. via arbitration or mediation proceedings;
- It should also be recommended that Member States nominate an independent broadcasting authority to decide whether, under the circumstances of the case in question, a non-qualifying service would have legitimate reasons to exercise the rights on an exclusive basis;
- It would be preferable to clarify, for example in a recital, that any criteria for determining whether an event is of major importance for national society are a matter for sole decision by the Member States.

⁶ See the EBU Contribution of 2003 (footnote 1), pages 10-14.

2. SHORT REPORTING

The EBU welcomes the overall approach taken by the Commission in its Issues Paper.

Regarding the two options outlined by the Commission, the EBU considers that **the first option would not bring about any improvements compared to the current situation.**

In particular, the first option would be of no assistance to broadcasters seeking news material in (foreign) countries in which there is no specific short reporting regulation or self-regulatory code. Moreover, it is not indicated *to which specific conditions* such a possible non-discrimination rule would apply or whether there may be justified exceptions to such a rule, e.g. where a national regulation is based on a (non-harmonized) exception under copyright law.

The EBU therefore expresses a **preference for the second option**, which offers greater clarity and more legal certainty to all (foreign) EU broadcasters. Admittedly, in view of the wide variety of events, parties and possible circumstances such a regulation for short reporting would be feasible only if **limited to the most basic conditions**, in line with the following:

- To create a one-stop-shop approach for all arrangements on television transmission rights to the same event and to provide for the smoother granting of transfrontier news access, the provision should guarantee access to the foreign signal covering the event **on a contractual basis** on fair terms;⁷
- If news access is available between broadcasters of the same Member State, **only the law, regulation or agreed industry practice of that Member State should apply**;
- The new provision would need to include a **minimum standard** for short reporting which is acceptable to all European broadcasters, while leaving national legislation free to provide for more favourable terms;
- Given that the main rationale of such a provision is to stimulate (fair) arrangements between broadcasters on access to their audiovisual signals covering the events, **the beneficiaries must be limited to (television) broadcasters only.**

⁷ In its 2003 Contribution (see footnote 1), pages 40-41, the EBU drew particular attention to the requirement that any such new provision should take today's practice, characterized by self-regulation through contractual relationships, as a starting-point, while also taking account of the risk of abuse through ambush reporting.



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CULTURAL DIVERSITY AND PROMOTION OF EUROPEAN AND INDEPENDENT AUDIOVISUAL PRODUCTION

By way of introduction, the EBU wishes to recall its commitment to promoting European works and independent productions and to developing the circulation of European works. It also supports the Commission's objectives on promoting cultural diversity in Europe.

The EBU and its Members welcome the outcome of the impact study, which has shown not only that the objectives of Articles 4 and 5 of the Directive have been achieved with respect to the programming of European works and independent productions but also that it has been possible to fulfil cultural objectives. The study also stressed in many respects that public service broadcasters had exceeded the obligations to a significant extent, and particularly regarding investment in independent production and the broadcasting of non-national European works. EBU Members will be continuing in this direction.

1. NON-LINEAR SERVICES

The EBU agrees with the Commission that non-linear services are likely to make increasing use of audiovisual content. However, the questions raised by the possible application to non-linear services of measures to promote European and independent audiovisual production illustrate the need for a graduated approach when dealing with such new services.

This approach could lead to solutions which take into account both the situation of non-linear services and the risk of distortion of competition between them and linear services. It would be unfair if support for European works had to be borne solely by so-called traditional broadcasting organizations.

It is important to monitor closely the development of these new services, so that their impact can be measured and the appropriate time for any regulatory action can be ascertained. In this context the idea of a review clause put forward by the Commission is an interesting approach.

Consequently, EBU Members **welcome further discussion** to identify the appropriate conditions for encouraging the development of European audiovisual content on all platforms and with due consideration of the above-mentioned concerns.

2. MONITORING THE APPLICATION OF ARTICLES 4 AND 5 IN MEMBER STATES

Generally speaking, EBU Members favour maintaining the monitoring system introduced by the existing Directive and do not consider it necessary to increase the measures for monitoring respect of Articles 4 and 5 of the Directive.

Nonetheless, most EBU Members would favour **a relaxation of the administrative controls** which are a burden not only on broadcasters but also on Member States and the Commission. An example would be to replace the reporting obligations with ex-post controls on a sample basis.

Such a modification **should not involve intervention by private companies external to the Commission**, such as producers' associations, which are mentioned by the Commission in its Issues Paper. Under that particular proposal, the producers would then seem to be simultaneously "the judges" and "the judged". The monitoring process in the Directive should be the responsibility of the national regulatory authorities and should be carried out, at the national level, by **a body which can offer every guarantee of objectivity and independence**.

3. ENCOURAGING THE PRODUCTION AND DISTRIBUTION OF EUROPEAN CO-PRODUCTIONS

EBU Members consider that it is not necessary to introduce regulatory measures in favour of exchanging and distributing European works.

Thus **sub-quotas for non-national** works would not be appropriate, as they would be liable to create editorial constraints and threaten programme independence.

In the view of EBU Members, **other means could achieve the objective** of stimulating exchanges and the circulation of European works. A key role of the EBU is to organize programme exchanges and co-productions among its Members, thereby making an active contribution to the circulation of audiovisual works in Europe. The EBU therefore favours measures which encourage the circulation of European works, e.g. voluntary measures of an incentive nature.

In this connection, the EBU recalls the **existence of European support programmes** whose scope is still limited and could usefully be extended, and **not least through greater accessibility to broadcasters**. The EBU draws attention to the existence of regional funds to assist foreign distribution, such as those in the Nordic countries. One way forward could be the creation of a European fund which would, *inter alia*, cover the additional costs related to the circulation of non-national European works.

Moreover, it is very likely that the development of digital technology, resulting, in particular, in a large number of new (digital) channels, will make it easier for such works to be circulated.

4. THE CONCEPT OF INDEPENDENT PRODUCER

The great diversity in the various national situations makes it very difficult to attempt to harmonize the concept of independent producer. Assessing the independence of a producer depends to a large extent on **the economic context of each country and the structure of its audiovisual market**. The concept of independent producer is not applied identically in the national legislation of, for example, large and small countries. In small countries with a small audiovisual market most producers are linked in some way to the broadcasters for which they produce. Consequently, the greatest flexibility is required in any attempt to specify the concept of independent producer. It would be incompatible with this to harmonize at the European level general rules suitable for only certain types of audiovisual markets.

Possession of secondary exploitation rights must not become a mandatory condition for independent producers to be regarded as "independent of broadcasters" within the meaning of the Directive. There is not necessarily a link between a producer's independence and his holding of rights in productions.

It would be unfair and **contrary to economic logic** for broadcasters who assume a large proportion of, or even almost all, the costs and risks of a production to be deprived of essential exploitation rights to the audiovisual work. Rights should follow risks. Amortization of the production costs is possible only through multiple secondary exploitations. Depriving broadcasters of the secondary exploitation rights would mean preventing them from amortizing their investment and therefore prompting them to reduce the level of their financial contribution to the production.

The Commission states that the "unbundling" of rights would ensure that "sleeping" rights are put on the market. EBU Members do not accept this view. Firstly, it assumes the existence of "sleeping" rights, which has not been demonstrated. Secondly, it is based on outmoded concerns about the circulation of works. Although the market situation in the past may have given cause for such concerns, in today's context of technological evolution and an exponential increase in the different ways works can be transmitted broadcasters are well placed in both structural and economic terms to ensure that audiovisual works receive appropriate circulation.

The retention of secondary rights by producers which is imposed on broadcasters is **akin to a subsidy** by the latter to the former. Although it is accepted in certain countries that broadcasters contribute to a general support fund for the audiovisual industry, it would not be healthy for part of broadcasters' budgets to be allocated direct to increasing the income of independent producers. Adopting such an approach at the European level would run the risk of masking, and propping up, the real inadequacies and weaknesses of independent production.

Finally, the retention of secondary rights by producers is likely **to have a range of effects, according to the national markets**, not only on competition but also on the content of works. It could, for instance, encourage independent producers to concentrate increasingly on lucrative formats, which is not the intention of the Directive with regard to cultural diversity. That is why, in any case, and not least because of the uncertainty which the Graham report itself reflects, there should be **no interference with the distribution of rights between broadcasters and producers without a prior impact assessment in each Member State.**



5.9.2005
DAJ

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COMMERCIAL COMMUNICATIONS

As a general observation, the EBU would stress its support for a coherent regulatory framework for all forms of commercial communications and for both linear and non-linear audiovisual services. Where justified, this implies a graduated approach. The separation of advertising and editorial content should be a guiding principle, and a key requirement is the protection of editorial independence and of the integrity of audiovisual programmes and broadcast signals.

1. QUALITATIVE RULES (ON PROTECTION OF MINORS, OF HUMAN DIGNITY AND OF PUBLIC HEALTH)

The EBU **fully agrees with the approach outlined in the Issues Paper**, i.e. to maintain the qualitative rules of the Directive and **to extend them** - with appropriate implementation arrangements (see point 6 below) - **to all audiovisual commercial communications**, whether linear or non-linear. For the protection of minors it is particularly important to extend to non-linear services the current rules on advertising directed at minors and the restrictions on tobacco and alcohol advertising.

2. IDENTIFICATION OF COMMERCIAL COMMUNICATIONS AND SEPARATION FROM EDITORIAL CONTENT

The **separation principle** is an important safeguard against editorial content being mixed up with advertising and is of great importance **for all media sectors**. Any relaxation of this principle would change viewers' experience of the audiovisual media and undermine the media's credibility. The EBU is therefore **opposed to attempts to remove the separation principle** from the Directive and to replace it by a mere transparency requirement.

On the other hand, the relationship between the various rules in the Directive (with regard to separation, identification and surreptitious advertising) is not always clear and could be rationalized by integrating the current threefold protection into **one basic principle which should apply to all audiovisual communications**. Where justified, this basic principle could then be complemented by special rules regarding, for example, product placement (see below).

3. AUTHORIZATION OF PRODUCT PLACEMENT?

In view of the dynamic evolution of product placement in the United States, the widespread legal uncertainty regarding the practice in Europe, and different interpretations of the current rules in the Directive, there is an **obvious need for clarification**. Such clarification would also help remove obstacles to European co-productions and programme exchanges.

Transparency requirements ensuring information for viewers are important but insufficient. It is essential for the discussion on product placement to take account of the interests of viewers and consumers, respect for the quality of works and the creative process and, not least, the role of the audiovisual media - and particularly their authenticity, objectivity and journalistic quality. Product placement must be subject to **clearly and strictly defined requirements and limits**. These should include the following points:

- Product placement should be **restricted to certain categories of programmes** (in particular, television drama or similar programmes so as to create a level playing-field with cinematographic works) or at least - inversely - should be excluded from certain programme categories (for example, news and current affairs programmes, documentaries, religious programmes and programmes for children).
- **No undue prominence** must be given to products, **no specific promotional references** must be made, and the **editorial content must not be influenced by commercial interests**.
- Viewers should be **warned**, in a clearly visible and effective way, of the presence of product placement.
- As long as there are quantitative limits on traditional advertising spots it would be logical also to have **quantitative limits** on product placement (e.g. regarding the number of placements per hour or per day, with quantitative tracking tools already being developed by industry), since otherwise there would be regulatory distortion to the detriment of forms of advertising which are more in line with the separation principle.

The EBU wishes to warn against the assumption that further relaxation of the rules governing product placement would strengthen the competitiveness of the European audiovisual industry and make up for a likely decline in income from traditional advertising spots as a result of new technology which allows viewers to skip advertising (PVRs). Rather than creating a new revenue stream for broadcasters and producers, such a regulatory change could simply prompt advertisers to re-shuffle existing budgets in favour of product placement; this would certainly benefit various agents and intermediaries. However, it would **not strengthen budgets available for audiovisual productions since it would also create or amplify losses for other forms of television advertising or sponsorship**.

The EBU believes that no major regulatory changes should be made as long as there are no robust data on the impact which liberalization of product placement would have not only on the advertising market but also on the audiovisual offer and viewer satisfaction. For example, liberalization of product placement could distort investment and schedules in favour of formats and genres which are the most conducive to product placement (entertainment and format shows). It is also uncertain how European viewers would react if their favourite programmes were inundated with product placement. For advertisers and broadcasters the liberalization of product placement could easily result in a lose-lose situation rather than a win-win situation.

4. QUANTITATIVE RULES (HOURLY AND DAILY ADVERTISING LIMITS AND INSERTION RULES)

EBU Members see **some scope for relaxation** of the current rules - for example, regarding the current double (daily and hourly) limits on the quantity of advertising and the restrictions on isolated spots - but they stress the need for careful impact assessment (also regarding the impact on programme formats,⁸ on scheduling and on viewing behaviour).

As regards the **insertion rules**, it would be possible to envisage relaxation concerning, for example, the insertion of advertising during certain sports events. Nonetheless, EBU Members strongly believe that - whatever the scope for simplification or liberalization may be - there is a need **to maintain the special protection for certain audiovisual works** (in particular, cinematographic films) and of **certain programme categories** (news and current affairs programmes, documentaries, religious programmes and children's programmes).

Moreover, **this special protection should be extended to non-linear services**, since the interruption by advertising of, for example, a cinematographic film or children's programme has a comparable effect regardless of whether the film or programme is part of a broadcaster's schedule or whether it is provided on individual demand. The EBU therefore **disagrees** with the statement in the Issues Paper that "these provisions (i.e. on the insertion of advertising) are evidently linked to the linear nature of the programmes". In fact, most of the rules on advertising insertion concern not the insertion of advertising within the broadcaster's schedule but the insertion within individual programmes; accordingly, only a slight adaptation of the rules is necessary to apply them to video-on-demand services.

⁸ There is a risk that programmes will increasingly be designed in formats allowing frequent interruption by advertising - to the detriment of other formats and of essential editorial, artistic and other considerations which determine the quality of audiovisual works.

5. SPONSORED CONTENT

The EBU **agrees** with the proposal that the **basic principles** for television sponsorship - in particular regarding the identification of the sponsor and the rule that the content of sponsored programmes may in no circumstances be influenced by the sponsor - should **apply to all sponsored audiovisual content** (i.e. to both linear and non-linear services).

6. APPLICATION OF RULES (SELF-REGULATION AND CO-REGULATION)

Already in its 2003 Contribution (to the review of the Directive)⁹ the EBU recognized **co-regulation as a promising concept** but also indicated that more detailed study was required as different interpretations and definitions existed and it was not clear how it could work in a transfrontier context. The EBU therefore welcomes the fact that the Commission has undertaken such work and looks forward to further discussions on the basis of the forthcoming study.

⁹ See in particular page 9 and pages 30-32 of the EBU's Contribution to the public consultation by the European Commission on the review of the Television without Frontiers Directive. The Contribution is available at the EBU website www.ebu.ch under "Position Papers".



5.9.2005

DAJ

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RIGHT OF REPLY**

The rules in the Directive regarding the protection of minors in the media, the ban on incitement to hatred, and the right of reply are all linked to the protection of human dignity, which is recognized as a general principle of Community law.¹⁰ EBU Members therefore wish to recall the importance they attach to these matters.

1. PROTECTION OF MINORS**1.1 Linear services**

The EBU is in favour of the Commission's proposal to **maintain the provisions in Article 22, which appear sufficient to ensure the protection of minors with respect to linear audiovisual services.**

The EBU would recall that the protection of minors is not only a responsibility for broadcasters but is an issue of society which concerns all parties, including the public authorities and broadcasters but also parents and schools. Consequently, the protection of minors **must remain a shared responsibility** if the desired results are to be achieved.

In its 2003 Contribution, the EBU expressed reservations about the terms of Article 22(3), which requires that programmes that may be harmful to minors should have an acoustic warning, or be identified by a visual symbol *throughout their duration*, and the EBU suggested that other tools, such as programme guides and teletext, should also be considered.

Moreover, as has already been stated on a number of occasions, broadcasters are not opposed to more detailed study of the implementation of a common rating system for content if it is carried out with due regard for the cultural differences and characteristics of each national rating system. Where appropriate, such a system should be based on symbols or pictograms standardized at the European level.

¹⁰ Decision of the European Court of Justice (C-377/98) of 9 October 2001 and Article 1 of the Charter of Fundamental Rights of the European Union.

In any case, EBU Members **continue to favour a co-regulatory approach**, of the kind which has prompted a number of national systems for protecting minors and has frequently demonstrated its effectiveness.

1.2. Non-linear services

EBU Members **support the Commission's suggestion to extend to non-linear services, on a binding basis, the provisions in Article 22**. This does indeed seem a necessary solution in the light of the exponential development of on-line services and the dangers faced by minors as a result.

Given the "ordre public" issues involved, it is of prime importance that the approach to such new services should not merely be voluntary or comprise only encouragement measures or recommendations.

It might also be worthwhile to introduce positive measures, such as **the implementation of a labelling system** identifying on-line content which is particularly suitable for minors.

2. INCITEMENT TO HATRED

The EBU is particularly committed to the protection of human dignity and the fight against all infringements thereof, and particularly acts of incitement to hatred. Consequently, EBU Members **support the Commission's proposal to extend the provisions of Articles 22a of the Directive to the entirety of non-linear audiovisual services**.

3. RIGHT OF REPLY

The EBU supports **maintaining the status quo as per Article 23 of the Directive with respect to linear audiovisual services**, as proposed by the Commission.

It favours **the extension of these rules to non-linear services**, subject to adapting the provisions to the technical and editorial characteristics of these new services. In this connection, the Council of Europe Recommendation 2004 (16) of 15 December 2004 on the right of reply in the new media environment is an appropriate basis for work.

Such harmonization would be a response to the need for coherent regulation of all audiovisual services distributed to the public.



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MEDIA PLURALISM

The EBU welcomes the Commission's discussion on media pluralism. It shares the Commission's view regarding the **crucial importance of media pluralism for the democratic process in the Member States as well as in the European Union** and for freedom of expression. Media pluralism and freedom of expression are recognized as EU principles protected by Article 11 of the Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights.

The EBU also shares the Commission's view that various instruments and measures exist whereby media pluralism can be promoted, notable examples being public service broadcasting, anti-media concentration rules, support measures within the MEDIA Programme, rules of conduct on professionalism in journalism, and competition law. The EBU welcomes the Commission's **recognition of the importance and special role played by public service broadcasting in safeguarding pluralism at the national as well as the European level.**

To ensure that this important role is maintained in the digital age, the EBU asks the Commission **to take full account of the principle of media pluralism** when applying competition law and State aid law, as well as any other European legislation related to the media sector. Such an approach would also be in line with the **Member States' competences** for regulating media pluralism issues, as stressed by the Issues Paper.

As the Commission itself recognizes, strict application of competition law is not sufficient to safeguard media pluralism. In the field of **anti-trust and mergers**, media pluralism considerations should be invoked in a transparent manner in cases of **transnational** media concentration (e.g. when a large media network strongly present in one or more European countries enters the market of another Member State).

With regard to the **application of State aid law** this would include taking full account of the Amsterdam Protocol on public broadcasting, thereby respecting **the legitimacy of new media services offered by public service broadcasters as defined by the Member States.**

In the context of the **regulatory framework for electronic communications networks and services** media pluralism is acknowledged to be a main principle requiring respect. The Commission thus needs to take full account of the principle of media pluralism when interpreting and applying the electronic communications framework and to respect Member States' competences for taking appropriate regulatory steps, with regard to, for example, must carry as well as electronic programme guides (EPGs).

The EBU shares the Commission's view that media pluralism is a common value of the European Union and the Member States. Within their respective competences the European Union and the Member States should cooperate in this field in accordance with the principle of mutual support and recognition. Given the direct link which exists between media pluralism and cultural diversity the EBU welcomes the Commission's support for the inclusion of media pluralism issues in the draft UNESCO Convention on cultural diversity.¹¹

The EBU agrees with the Commission that the report prepared by the EIM contains a number of important proposals which should be considered by the European Union, subject to its limited competences as recognized by the Commission itself. Establishing a **European Observatory focusing on media markets and concentration**, with the provision of a database of information on EU Member States, should be a useful means of ensuring that the necessary information is available when media pluralism considerations are applied. However, for such an institution to work successfully it might be necessary, as a complementary measure, to ensure that Member States make the requisite data available.

¹¹ See also the EBU Position Paper on Draft UNESCO Convention on cultural diversity, available at the EBU website www.ebu.ch under "Position Papers".