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DRAFT AUDIOVISUAL MEDIA SERVICES DIRECTIVE

INITIAL EBU CONTRIBUTION TO THE FIRST READING

The EBU welcomes the Commission Proposal¹ to modernize the Television without Frontiers Directive and to extend it to cover all audiovisual media services, irrespective of the technology or distribution platform used. It also welcomes the proposed graduated approach, founded on the distinction between linear and non-linear services, which will make it possible, on the basis of clear criteria, to offer an appropriate response to questions raised by the development of new media.

The EBU wishes to contribute to the debate in first reading by outlining the main reasons why the general approach of extending the scope of the Directive is the right one.

At the same time, the EBU considers that the need exists to improve and amend certain provisions in the Commission Proposal which have been introduced to respond to new developments and challenges in the fields of jurisdiction, access to information and product placement.

As far as jurisdiction is concerned, problems related to audiovisual media services targeting another Member State need to be addressed more effectively. With regard to access to information, the proposed new clause on transfrontier news access is to be welcomed, but requires some clarification. Finally, product placement raises a number of specific issues which need to be clarified further before a European framework can be finalized.

Concerning other issues - not addressed in the present contribution - the EBU would refer back to its earlier position papers, and in particular its Position of 5 September 2005 on the Issues Papers for the Liverpool Audiovisual Conference.²

¹ Commission Proposal of 13 December 2005 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 (COM(2005) 646 final).

² Available at the EBU website www.ebu.ch under Position Papers.

What is at stake?

The EBU believes that the Commission Proposal for an Audiovisual Media Services Directive is an important and necessary step to prepare Europe for the widespread introduction of *digital television* and *interactive audiovisual services*.

EBU Member Organizations play a key role in the deployment of new audiovisual media services, both linear and non-linear, on various platforms, including digital terrestrial and satellite, cable, broadband (DSL), the Internet and mobile networks.

- The need for a European framework

The Television without Frontiers Directive, adopted in 1989, made a decisive and timely contribution to the development of a European audiovisual area, and notably in the field of satellite television. Similar action is needed again now, as Europe prepares for digital switch-over and for the mass distribution of audiovisual media services on-demand.

The regulatory approach in the Television without Frontiers Directive has greatly benefited broadcasters and consumers/citizens, as well as programme-makers. It has assisted the distribution of television services across frontiers (thanks to the country-of-origin principle and freedom of reception and retransmission) and it has helped to build consumer confidence and to create a level playing-field among broadcasters (through minimum harmonization of requirements for programme content, including commercial communications). It has also underpinned freedom of expression and information and has helped to develop the expression of cultural identities.

A similar regulatory approach will certainly also benefit the development of those new audiovisual media services which currently fall outside the scope of the Television without Frontiers Directive. The country-of-origin principle and its pre-requisite, harmonization, will offer *legal certainty* and facilitate *EU-wide distribution* of such services.

- Broadening the scope in response to digitization and convergence

The Commission proposal for an Audiovisual Media Services Directive is future-proof in the sense that it *covers all audiovisual media services which will become relevant for society in the foreseeable future*. It takes account of convergence and avoids the application of different rules, depending on which type of technology or network infrastructure or platform is used, or depending on who the service provider is (e.g. irrespective of whether its main activity is broadcasting, communications or publishing). What rightly matters is the *content of the service*,

its public availability and its purpose of informing, entertaining or educating. Consequently, activities whereby individuals share (e.g. through weblogs) user-created (video) content of a private character do not qualify as "audiovisual media services" and will therefore remain outside the scope of the future Directive.

- A graduated approach ensuring proportionality

The graduated approach of the draft Audiovisual Media Services Directive, which involves applying a set of essential requirements for all audiovisual services, combined with a second tier of more detailed rules for television, ensures that regulation is proportionate and adapted to the characteristics of linear and non-linear audiovisual services, now and in the foreseeable future.

The EBU supports the *distinction between linear and non-linear services* as a basis for a graduated, two-tier regulatory approach. The distinction between "linear" audiovisual services (broadcasting services) and "non-linear" audiovisual services (on-demand services) is likely to remain valid for the foreseeable future.³ Its interpretation may evolve over time, in line with the development of new technology. Perceived uncertainties over the distinction regarding, for example, music videos which are "pushed" by media service providers after a user has made his initial choice could be resolved through further fine-tuning of the definitions, and the EBU would certainly be willing to contribute its expertise to such work. On the other hand, there should be no doubt that real-time transmissions of sports or similar events fall within the definition of linear audiovisual services.

The EBU therefore fully supports the proposed extension of the scope of the Directive. We believe that better regulation of the audiovisual sector means taking account of the new environment and introducing, in a technologically neutral way, certain rules common to all audiovisual media services. This comprehensive approach ensures that whenever consumers access publicly available audiovisual content they can be confident that there exists a certain minimum level of protection of public interest objectives, such as, in particular, the protection of minors and human dignity.

The new Audiovisual Media Services Directive will help to modernize audiovisual electronic media in Europe (based on digital technology and increased interactivity), stimulate the growth and diversity of creative industries across Europe and underpin European competitiveness. It will thus contribute to achieving the objectives of the Lisbon strategy and the i2010 initiative.

³ While the terminology (linear - non-linear) is new, the underlying concept is already well-proven as it builds on the current distinction between television broadcasting and information society services. In comparison, when the e-Commerce Directive was adopted, the term "information society services" was new and it was criticized for its vagueness, but that has not prevented the e-Commerce Directive from fulfilling its purpose.

The graduated approach in the proposed Directive is in line with the principle of proportionality and avoids the risk of over-regulating new services. The use of co-regulation as a means of implementing the Directive, with the requisite flexibility, is a promising concept, and one which needs to be developed further. It should not, however, lead to an erosion of the standards established in the Directive.

Why extension of the scope is needed

The European audiovisual model is based on the recognition of the double - cultural and economic - nature of audiovisual services. This means that, with regard to such services, cultural policies must not disregard the economic impact which they may have, and especially concerning the European internal market. On the other hand, internal market measures must also take cultural aspects into account.

This model has been supported by a broad political consensus in Europe, which has also allowed it to be reflected in amendments to the EC Treaty (particularly in Articles 151 and 133(6) and the Amsterdam Protocol on the system of public broadcasting in the Member States).

The same approach underlies the Television without Frontiers Directive, which *takes account of both the economic and the cultural dimensions* and carefully balances the interests in play. It combines internal market principles with certain requirements in the general interest, thereby creating a win-win situation for both culture and commerce.

The specificity of audiovisual services is related to the importance of audiovisual media for society, democracy and culture; recognition of this lies at the heart of the Television without Frontiers Directive and of the Commission proposal for the extension of the scope (see Recital 3 of the proposed Directive). Thanks to digitization and convergence, non-linear audiovisual services are gaining in importance and are progressively *involved in the same functions as traditional broadcasting*.

It is also important to maintain *consistency* between the internal market and the external trade policy. If non-linear audiovisual services were not covered by the future Directive, it would be difficult to argue that they should be covered by the audiovisual "carve-out" under GATS and thus not be the object of future commitments on trade liberalization.

So far, no credible alternative has been presented to the Commission's proposal to extend the scope of the Directive:

- Status quo

In view of new technological and market developments, it is simply not possible to preserve the Television without Frontiers Directive as it is, with its current limited scope. This would be incompatible with the principle of technological and platform neutrality and would also create distortions between different providers of audiovisual services.

- No instrument

Nor is it possible simply to abolish the Directive, unless the wish is to put at risk the progress made on achieving a European audiovisual area and to break up the consensus on the European audiovisual model. A completely unregulated European audiovisual market would be incompatible with the objective of maintaining and promoting Europe's cultural diversity, and would run the risk of creating harmful fragmentation.

- Services Directive

The audiovisual media have a key role in the formation of European cultural identities and public opinion. The European framework for audiovisual services thus needs to take account of such factors as cultural diversity and media pluralism, which require particular measures and respect for each national situation. Such aspects cannot be treated in a horizontal Directive on services in the internal market,⁴ a view fully shared by the European Parliament in first reading. Legislation which is specific to the audiovisual media is therefore necessary, given their importance for society, democracy and culture.

- e-Commerce Directive

Some have argued that the e-Commerce Directive (Directive 2000/31/EC) is sufficient to establish an internal market for on-demand audiovisual media services. In so doing, they overlook the fact that that Directive does not deal at all with content aspects⁵ and that it allows for many exceptions to the country-of-origin principle.⁶ It thus cannot provide legal certainty and resolve problems arising from varying audiovisual regulations in the Member States.

⁴ See also the EBU Position Paper of 8 December 2004 on the Commission Proposal for a Directive on services in the internal market, available on the EBU website www.ebu.ch under "Position Papers".

⁵ See also the culture clause in Article 1(6).

⁶ See Article 3(3)-(5).

In reality, the e-Commerce Directive and the future Audiovisual Media Services Directive have different purposes⁷ and will therefore be not mutually exclusive but *complementary*. They deal with different matters and where, exceptionally, they overlap (to a very limited extent, with regard to commercial communications⁸), the more detailed rules of the Audiovisual Media Services Directive (for example, on the identification of advertising, sponsorship and product placement) will prevail. On the other hand, with respect to all the other areas not coordinated by the Audiovisual Media Services Directive (such as the liability of intermediary service providers), the rules of the e-Commerce Directive will continue to apply.⁹

Only through a special internal market Directive on audiovisual media services is it possible to achieve a European audiovisual area and to ensure the proper functioning of an internal market for audiovisual services.

It is a key advantage of the current Television without Frontiers Directive and of the proposed Audiovisual Media Services Directive that they balance internal market and cultural policy objectives and thus create a bridge between culture and commerce, something which other instruments (such as the e-Commerce Directive or a future Services Directive) are unable to do.

Other challenges which need to be addressed by the new Directive

While the extension of the scope is certainly the most important and urgent response to new challenges, the Commission Proposal also tackles three other matters where complex regulatory questions have arisen, and on which the EBU wishes to provide more detailed comments: services targeting a particular country, news access by broadcasters, and product placement.

1. How to deal with audiovisual services targeting a particular country

The *country-of-origin principle* is one of the cornerstones of the Television without Frontiers Directive, and the EBU believes that this should remain the case with the new Audiovisual Media Services Directive.

⁷ See the judgment of the European Court of Justice of 2 June 2005 in Case C-89/04 (Mediakabel), paragraph 19, with regard to the relationship between the Television without Frontiers Directive and the e-Commerce Directive.

⁸ Article 6(a) of the e-Commerce Directive requires commercial communications which are part of an information society service to be "clearly identifiable as such".

⁹ Recitals 2, 10 and 17 of the draft Audiovisual Media Services Directive address the relationship with the e-Commerce Directive.

However, the EBU considers it necessary to find an appropriate solution for cases where an audiovisual media service, or advertising window, is intended exclusively or mainly for the public in another Member State and is commercialized there.¹⁰

The European Court of Justice, in a ruling in October 1994, stated that a broadcaster which is established in one Member State but directs its activities wholly or principally towards the territory of another Member State may be regarded by the latter as a domestic broadcaster if the place of establishment was chosen in order to avoid the legal system of that State. The Court thus accepts such intervention by the receiving Member State as necessary for the proper functioning of its legislation, which aims to ensure the pluralist content of programmes.¹¹

The European Commission is proposing an anti-circumvention clause (see Article 2(7)-(10)), which, on the one hand, is founded on case-law of the European Court of Justice allowing Member States to take steps to prevent abuse of freedoms guaranteed by the Treaty and, on the other hand, establishes *ex ante* control by the Commission on measures taken by the targeted Member State. However, such an approach, which focuses on the choice of establishment by an operator and addresses only "abuse or fraudulent conduct", falls short of meeting the concerns which have been expressed by a significant number of Member States. These concerns, which are also shared by many EBU Members, and particularly those from smaller countries, relate mainly to safeguarding *cultural diversity* and *media pluralism*.

Various possibilities may be envisaged, depending on whether the competence to take appropriate action is given to the State whose public is targeted or to the State where the audiovisual media service provider is established, or is exercised on the basis of cooperation between both Member States.

One possible solution might be to require operators, with regard to any service targeting exclusively or mainly a particular Member State, to respect any stricter rules on programme content, including advertising, applicable in that Member State.¹² Provision should be made for cooperation among Member States and an appropriate role for the European Commission to ensure the proper functioning of the internal market. The solution should, in any case, ensure the effectiveness of the measures taken by the targeted State to safeguard media pluralism and cultural diversity in that State.

¹⁰ See the EBU Position of 5 September 2005 on the Issues Papers for the Liverpool Audiovisual Conference, pages 3-4.

¹¹ See the judgment of the European Court of Justice of 5 October 1994, Case C-23/93 TV10.

¹² See the EBU proposal in its comments of 11 May 2005 on the Council of Europe's consultations on the European Convention on Transfrontier Television, pages 3-4. The document is available at the EBU's website (www.ebu.ch) under Position Papers.

The EBU considers that the proposed anti-circumvention clause is liable to be insufficient to address problems related to audiovisual media services, including advertising windows, targeting another Member State. Although, for the time being, problems occur mainly in a limited number of Member States (especially smaller ones), it is in the general interest to find a solution now, since otherwise it may not be possible to safeguard Europe's cultural diversity in the longer term.

2. How to safeguard cultural diversity, media pluralism and access to information

In the EBU's view it is important to recognize that respecting and promoting cultural diversity and media pluralism and the public's access to information are important public policy objectives.

- Diversity, pluralism and independence

The EBU appreciates the fact that the Commission is maintaining unchanged, as far as linear services are concerned, the rules of the current Directive on the *promotion of European works and independent productions* (Articles 4 and 5). This approach should also be followed in the proposed Preamble, which should not modify the interpretation of the current rules. Accordingly, Recital 36, which gives the impression that the Directive requires Member States to introduce quotas for *non-national European works*, should be deleted or amended. It is for the Member States to decide whether to take measures encouraging the broadcasting of European works of non-domestic origin.¹³

The proposed new rules on *independent regulatory authorities* (Article 23b) are welcome, as they can help to underpin the independence and pluralism of the audiovisual media. At the same time, the rules need to be kept sufficiently flexible to accommodate the various national structures which exist regarding, for example, independent bodies supervising public service broadcasters.

- Access to information: listed events, news access

The EBU welcomes the fact that the Commission proposes to maintain the clause on *listed events* (Article 3a). This provision guarantees the effectiveness of national systems which ensure that events of major importance to society are accessible to the entire public, live on free television.

¹³ For further details regarding the EBU position on this and related matters, see its comments of 5 September 2005 on the Issues Paper for the Liverpool Audiovisual Conference "Cultural diversity and promotion of European and independent audiovisual production", available at the EBU website www.ebu.ch under Position Papers.

The EBU welcomes the Commission's proposal for a news access clause (Article 3b). As does the provision on listed events, this clause serves freedom of information and the interest of viewers in having access to a wide range of quality content.

Complementary European rules are needed in this field. National news access systems do not always cater for broadcasters from other Member States and, more importantly, they may work only where another broadcaster in the same country has acquired transmission rights (which may not always be the case in, for example, smaller countries or countries with limited audiovisual output).

The EBU therefore supports the introduction of *European rules for transfrontier news access for broadcasters* in the form of short extracts. (See the EBU Position of 5 September 2005 on the Issues Papers for the Liverpool Audiovisual Conference, pages 5-6.) However, care must be taken not to undermine existing national systems on news access, which are mostly based on the principle of reciprocity among broadcasters. For that reason, this right of short extracts should not be extended to news agencies.

Accordingly, to prevent circumvention of national systems of news access among broadcasters, it is necessary to stipulate clearly the subsidiary character of the right to transfrontier news access, which should be available only in cases where news access cannot be obtained from another broadcaster within the same Member State.

The EBU proposes the following amendment to the Preamble to clarify the scope of Article 3b (new Recital):

“(27a) The right to transfrontier news access should apply only where it is necessary; accordingly, if another broadcaster in the same Member State has acquired exclusive rights to the event in question, access must be sought from that broadcaster;”

3. A new European framework for product placement?

The EBU supports the principle of separation of advertising from editorial content. Although more thought needs to be given to how product placement can be reconciled with this principle, the objective of creating a clear and transparent framework for product placement is to be welcomed. The EBU wishes to contribute to the discussion by drawing attention to certain difficulties and shortcomings in the current Proposal.

- How to define product placement

As there is currently no common understanding in Europe of what "product placement" is, it is necessary to define carefully any form of product placement which is intended to be covered by the proposed framework: only those cases where it is the broadcaster that receives payment or similar consideration, or also those where it is the producer or another third party (cases which are generally outside the control of the broadcaster)? If not all forms of product placement are covered: how is it possible to avoid distortion of competition and incorrect perceptions by the public if, for example, product placement needs to be identified only in European films, although it is much more widespread in films imported from the US? Is the free provision of a product which is needed in an audiovisual production (including the prize in a quiz show) already product placement?

- How to protect editorial integrity and independence

The protection of editorial integrity and independence must be an absolute priority, and broadcasters which choose to use this source of revenue will naturally have to take effective organizational and other precautions. The guiding line should always be whether there exists an *editorial justification* for showing a particular product, and any *undue prominence* should be avoided.

- How to differentiate between programme genres

The European Commission has recognized in its proposal that there are programme genres (such as news, current affairs and children's programmes) in which product placement raises more concerns than in others (such as fiction and sport). However, young people watch not only children's programmes but also music and other genres. Moreover, the public at large should be entitled to trust the objectivity not only of news and current affairs programmes but also of the advice provided in health, consumer and other "service" programmes. Differentiation may also be needed between different forms of product placement.¹⁴

- How to restrict the placement of alcoholic and medicinal products

Whereas the Proposal prohibits placement of any tobacco products, it does not contain specific restrictions on the placement of alcoholic beverages or medicinal products. This must raise concerns in terms of public health policy and carries with it the risk that restrictions which exist for television advertising for the same product categories could be circumvented by means of product placement.

¹⁴ Particularly regarding sponsored prizes and production aid.

- How to ensure transparency

While there can be no disagreement on the objective of ensuring transparency for viewers, the proposed requirement that programmes containing product placement must be "appropriately identified at the start of the programme" needs further consideration, so as to enable the most effective form of identification to be implemented. Any solution will need to take account of differences which exist in this respect between sponsorship and product placement.¹⁵ What is the right place for such an identification? And what should be its content?¹⁶

It is obvious that requiring broadcasters to identify all "product sponsors" in advance of each programme would not only create practical difficulties (for example, with regard to acquired programmes, and in particular foreign ones, where the broadcaster has no control or knowledge) but would even have the perverse effect of offering free commercial air-time to "product sponsors". This would cause discomfort for viewers and undermine the broadcasters' ability to raise revenue from television sponsorship.

The regulatory framework on product placement proposed by the Commission does not, as it stands, provide for a satisfactory solution. Before a decision is taken on a new framework, a better understanding is required of the impact of product placement, particularly with regard to the competitiveness of the European audiovisual industry and broadcasters' overall revenue.

Summary of the EBU Position on the Commission Proposal

The EBU welcomes and supports the Commission Proposal with respect to:

- The broadening of the scope, based on the notion of "audiovisual media services" and combined with a graduated regulatory approach.
- The distinction, in principle, between linear and non-linear services.
- The technological neutrality of the definitions and their flexibility to take into account new developments.

¹⁵ As far as television sponsorship is concerned, sponsorship credits are, economically speaking, the consideration which broadcasters offer in return for the sponsor's financial contribution to the programme. With regard to product placement, the situation is different: in many cases the visibility is ensured sufficiently through the insertion of the product in the programme itself, and it would be detrimental to the broadcaster if it had to offer credits (and thus free air-time) to "product sponsors" (especially if it is not the broadcaster itself that receives any payment or similar consideration).

¹⁶ Would a simple standard warning that the programme "contains product placement" be sufficient? Or that it "may contain product placement" in cases where the broadcaster has no control? What kind of further information should be made available, wherever possible, to interested viewers who wish to make their own judgment as to whether the editorial content can be trusted?

- The definition (for the purposes of the Directive) of television broadcasting as any linear audiovisual media service.
- The application of basic requirements to both linear and non-linear services.
- The extension of the country-of-origin principle to non-linear services within the coordinated areas.

On the other hand, there are certain areas where the EBU sees a need to amend and improve the Commission Proposal:

- Jurisdiction: more effective measures are needed to address problems related to audiovisual media services, including advertising windows, targeting another Member State.
 - Access to information: rules on transfrontier news access (short reports) are welcome, but it needs to be clarified that they do not allow circumvention of national news access systems.
 - Product placement: a number of issues need further consideration.
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