



EUROPEAN BROADCASTING UNION

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## Draft Audiovisual Media Services Directive

### EBU Proposal for amendments to the Commission proposal for revision of the Television without Frontiers Directive

#### Article 1 (a) - (e) - Scope and definitions

#### Definition of "audiovisual media service"

##### Article 1 (a)

(a) 'audiovisual media service' means a service as defined by Articles 49 and 50 of the Treaty the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council;

(a) 'audiovisual media service' means a service as defined by Articles 49 and 50 of the Treaty the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, ***and which is offered by a media service provider to the public*** by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council;

#### Justification:

Including a reference to the "media service provider" in this definition makes it clear that it is not just any provision of audiovisual content among members of the public which falls within the definition of "audiovisual media services", and thus within the scope of the Directive, but only those services for which a "media service provider" takes editorial responsibility (and not, for example, the sharing of user-generated content within limited virtual communities). The reference also ensures full coherence between the definitions of "audiovisual media service" and of "media service provider". However, what is meant in a "new media" environment by "editorial responsibility" needs to be further clarified in a recital (see proposed amendment to Recital 17). It is also proposed to delete the term "general" (before "public") in the English version ("grand" in the French version) so as to avoid the uncertainty which would be caused by changing the well-proven formulation in the current Directive, which simply uses the term "public".<sup>1</sup>

<sup>1</sup> This change would not affect, for example, the German version, where the Commission Proposal adheres to the current formulation: "Allgemeinheit".

## Amendments to Recitals 13 and 14

(13) The definition of audiovisual media services covers all audiovisual mass-media services, whether scheduled or on-demand. However, its scope is limited to services as defined by the Treaty and therefore covers any form of economic activity, including that of public service enterprises, but does not cover non-economic activities, such as purely private websites.

(13) The definition of audiovisual media services covers all audiovisual mass-media services, whether scheduled or on-demand. However, its scope is limited to services as defined by the Treaty and therefore covers any form of economic activity, including that of public service enterprises, but does not cover non-economic activities, such as purely private websites; ***the economic element must be of some significance to justify application of the Directive.***

### Justification:

The notion of "audiovisual media services" should apply only to services which are normally provided against remuneration; the fact that a website or videoblog contains information credits for, for example, the software used does not necessarily mean that it is to be qualified as an economic activity.

(14) The definition of audiovisual media services covers mass media in their function to inform, entertain and educate, but excludes any form of private correspondence, such as e-mails sent to a limited number of recipients. The definition also excludes all services not intended for the distribution of audiovisual content, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner; such as animated graphical elements, small advertising spots or information related to a product or non-audiovisual service.

(14) The definition of audiovisual media services covers mass media in their function to inform, entertain and educate, ***and in particular to contribute to public opinion forming***, but excludes any form of private correspondence, such as e-mails sent to a limited number of recipients. The definition also excludes all services not intended for the distribution of audiovisual content, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner; such as animated graphical elements, small advertising spots or information related to a product or non-audiovisual service.

### Justification:

In certain Member States the contribution to public opinion forming (in a broad sense) is used as a criterion to distinguish "media" services from other communications services.

## Definition of "media service provider"

### Article 1(b)

(b) 'media service provider' means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

Unchanged

### Amendment to Recital 17

(17) The notion of editorial responsibility is essential for defining the role of the media service provider and thereby for the definition of audiovisual media services. This Directive is without prejudice to the liability exemptions established in Directive 2000/31/EC.

(17) The notion of editorial responsibility is essential for defining the role of the media service provider and thereby for the definition of audiovisual media services. ***Editorial responsibility implies that the media service provider selects and organises the audiovisual content - either individual content items or a range of content - in a professional capacity. This excludes the sharing of user-generated content within limited virtual communities, as well as the activities of intermediary service providers which benefit from*** the liability exemptions established in Directive 2000/31/EC.

### Justification:

It needs to be clarified further in a Recital that the notion of "editorial responsibility" presupposes that the media service provider edits the audiovisual content - either individual content items or the selection of content - in a professional manner. This also allows for a clearer distinction between "media service providers" and "intermediary service providers", which benefit from liability exemptions under Article 12-15 of the e-Commerce Directive.

**Definition of "linear service"**

## Article 1(c)

(c) 'television broadcasting' or 'television broadcast' mean a linear audiovisual media service where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule;

(c) 'television broadcasting' or 'television broadcast' means *an* audiovisual media service *which is linear, that is to say* where a media service provider decides upon the moment in time when *an individual* programme is transmitted and establishes the programme schedule;

## Justification:

The rewording does not change the substance of the definition but makes it clearer that the terms television broadcasting/television broadcast and linear audiovisual media service are synonymous. (The replacement of the term "specific" by "individual" concerns the English version but not the French.)

**Definition of "non-linear service"**

## Article 1(e)

(e) 'non-linear service' means an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider;

(e) 'non-linear service' means an audiovisual media service where the *time of transmission of an individual programme is determined by* the user *who requests that programme from the selection* of content *offered* by the media service provider;

## Justification:

The purpose of the amendment is not to modify substantially the definition of "non-linear service" but to clarify it, putting the emphasis on the control by the user who makes a request for an individual content item and thus influences the time of its transmission.

**Article 2a (2) - Protection of minors**

(b) In paragraph 2 “Article 22a” is replaced by “Article 3e”.

(b) In paragraph 2 "*television broadcast*" is replaced by "*audiovisual media service*", "*broadcaster*" is replaced by "*media service provider*", and “Article 22a” is replaced by “Article *3d or 3e*”.

## Justification:

Application also with regard to non-linear audiovisual services of the (narrow) derogation from the country-of-origin principle in Article 2a (2) for the protection of minors serves both the public interest and the interests of the media service providers because

1. as a *lex specialis* such a provision would discard the much broader derogation from the country-of-origin principle in Article 3, paragraph 4 (a), (i) of the e-Commerce Directive;
2. it avoids a dangerous gap in the protection of minors which would arise if the national authorities could no longer avail themselves of Article 3, paragraph 4 (a), (i) of the e-Commerce Directive, without there being minimal safeguards in the Audiovisual Media Services Directive.

### **Article 3(3) - Co- and self-regulation**

Member States shall encourage co-regulatory regimes in the fields coordinated by this Directive. These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement.”

Unchanged

### **Amendment to Recital 25**

(25) In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union the Commission stressed that a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self regulation should be considered. For co-regulation and self-regulation, the “Interinstitutional Agreement on Better Law-making” provides agreed definitions, criteria and procedures. Experience showed that co- and self-regulation instruments implemented in accordance with different legal traditions of Member States can play an important role in delivering a high level of consumer protection.

(25) **(Two sentences deleted)** Experience *has shown* that co- and self-regulation instruments implemented in accordance with different legal traditions of Member States can play an important role in delivering a high level of protection *of the public. The pursuit of public interest objectives in the field of new audiovisual media services will be more effective if carried out with the active support of the service providers themselves. Member States may therefore make broader use of transparent and widely shared co-regulatory schemes, in particular for non-linear services.*

#### Justification:

The Interinstitutional Agreement concerns only cases of co-regulation at EU level, where the Community legislator itself entrusts third parties with co-regulatory tasks and the drawing-up of Community-wide standards; in the case of the Directive, co-regulation is mentioned only as a means for Member States to transpose the Directive at the national level. Moreover, the Interinstitutional Agreement contains restrictive criteria which are not fully appropriate for co-regulation in the audiovisual sector (in particular, the criterion that co- and self-regulation must not be used "where fundamental rights or important political options are at stake").

**Article 3 b - News access**

## Article 3 b

1. Member States shall ensure that, for the purposes of short news reports, broadcasters established in other Member States are not deprived of access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted by a broadcaster under their jurisdiction.

Unchanged\*

2. Short news reports may be chosen freely by the broadcasters from the transmitting broadcaster's signal with at least the identification of their source.

**Proposal for additional recital 27 a**

*"(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;"*

## Justification:

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.

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\* The EBU supports the introduction of European rules for transfrontier news access for broadcasters in the form of short extracts. 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.

**Article 4 - European works****Deletion of Recital 36**

"(36) When implementing the provisions of Article 4 of Directive 89/552/ECC as amended, Member States should make provision for broadcasters to include an adequate share of co-produced European works or of European works of non-domestic origin."

**Deleted**

Justification:

The current Directive does not contain any such obligation, and it would not be appropriate to introduce any quota for non-national European works.

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