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EU Telecom Reform
EBU Briefing Paper after first reading in the European Parliament

1. Spectrum management

The EBU welcomes the Parliament's overall general approach, which corresponds to a large extent to the latest proposal by the Presidency.¹ In particular, the Parliament recognizes that radio frequencies are a public good which require the possibility for Member States to take into account public policy considerations in spectrum management decisions. The Presidency seems to follow a similar approach.

Service and technological neutrality (Article 9 Framework Directive)

The Parliament provides that spectrum allocation under the principle of service neutrality must be in accordance with ITU Radio Regulations and national allocation frequency plans. These are important changes which clarify the scope of service neutrality. In addition, the Parliament proposes to make broader the possibilities to limit the scope of the principles of service and technology neutrality in the interests of cultural and media policy objectives (in particular, Article 9(3) sub-paragraph 2, point (d) and Article 9(4) sub-paragraph 2, point (b) of the Framework Directive). A similar approach seems to be taken in the latest Presidency proposal. These changes represent significant improvements compared to the Commission proposals and are fully supported by the EBU.

Harmonization measures and spectrum trading (Article 9b Framework Directive)

In view of Member States' competence for cultural and media policies, the Commission should not impose spectrum trading with regard to frequencies used for broadcasting. The EBU thus strongly supports the exclusion contained in Article 9c point (a) of the latest Presidency proposal. However, should this proposal fail to be retained, the EBU would like to see a clarification in the text that national procedures (to which transfer is subject) may include a requirement to obtain the prior consent of a national regulatory authority or that the transfer should not result in a change in the services provided over

¹ Room Document 66/2008 of 18 September 2008.

the frequency. As a minimum, the amendment voted by the Parliament which requires spectrum trading to be in accordance with national frequency allocation plans should be preferred to the Presidency's latest proposal. A reference to national frequency allocation plans in Article 9b of the Framework Directive would also be consistent with a reference to the same plans in Article 9(3) and 9(4) of that Directive.

Individual rights of use (Article 5 Authorisation Directive)

The EBU welcomes the fact that both the Parliament and the Presidency confirm the possibility for Member States to grant individual rights of use (Article 5(1)). As regards the procedure for granting such rights for radio frequencies (Article 5(2)), the latest Presidency proposal simplifies the conditions under which an exception to the requirement of an open procedure can be available, which is clearly positive. The Parliament and the Presidency consider that there should be no rigid obligation for national regulatory authorities to review every five years individual rights of use granted for more than ten years (Article 5(2)(5)). This is a very important improvement which takes into account the fact that broadcasters need legal certainty and have to amortize investments over a period longer than five years. Compared to the Parliament's amendment, the Presidency latest proposal, however, introduces changes which are not in the interests of broadcasters (removal of the notice period when the individual right of use is changed to a general authorization) or not very useful for them (possibility for right-holders to request a review of their rights). The EBU would thus prefer the Parliament amendment.

2. Access to networks by operators - delivery of content services

The EBU appreciates the fact that the Telecom Reform leaves the current rules on access by operators to communications networks and services essentially intact, including the rules on access to facilities for digital TV (APIs and EPGs). These rules remain an essential asset of the European telecom framework.

Commission control over remedies (Art. 7 Framework Directive)

It is highly welcome that, according to the proposals by the Parliament and the Presidency, remedies taken by national regulatory authorities to ensure access will not be made subject to a possible veto by the European Commission. In comparing the Parliament's and Presidency's texts, the procedure put forward by the Presidency to ensure compatibility of national measures with the internal market seems preferable (Article 7(4)-(5) Framework Directive); it allows the European Commission to issue recommendations - but not binding decisions - in relation to draft measures.

Definition of "access" (Art. 2 Access Directive)

From the broadcasters' perspective, it is of great importance to avoid any ambiguity about the scope of the Access Directive and to make it clear that "access" in this context does not extend to access to content but covers only access to electronic communications networks and associated facilities (which follows from Article 1(1) Access Directive in connection with Article 1(1) and Article 2, points (a) and (e)

Framework Directive). As regards broadcasting and other content services, the Telecom Directives should only be concerned about aspects relating to their technical "delivery" (the conveyance of signals). We therefore support the clarification proposed by the European Parliament and the Presidency² for the definition of "access" (Article 2, Point (a) Access Directive), as it refers to the "delivery" of broadcast content services and information society services. In addition, it might be useful also to clarify that the services which must be made available to another undertaking only comprise *electronic communications* services and not also *broadcast content* services, in line with the provisions mentioned above.

Tasks of NRAs and dispute resolution mechanism (Arts. 8 and 20 Framework Directive)

In line with the approach developed for the definition of "access", we believe that the references to "access to content" in Article 8(2), point (b) of the Framework Directive (in the Parliament's version), and to "content providers" in Article 20(1) of the Framework Directive (in the Presidency's version), are too broad and should be replaced by formulations which make it clear that the Telecom Directives do not deal with content services as such but only with their delivery. Regarding the definition of the tasks of national regulatory authorities (Article 8(2), point (b) Framework Directive), we support the formulation proposed by the Presidency,³ which refers to the "delivery" of broadcast content services and information society services. A similar formulation should also be used in Article 20(1) of the Framework Directive, which foresees binding dispute resolution between undertakings in connection with obligations arising under the Telecom Directives: such mechanisms should cover "undertakings delivering broadcast content services and information society services" rather than "undertakings providing content" (the formulation used in the Presidency text).

3. Access by end-users - must-carry rules and net neutrality principles

Extension of scope of must carry (Article 31 Universal Service Directive)

The European Parliament, in first reading, followed the EBU's proposal and voted, by a large majority, for an Amendment extending the (potential) scope of must-carry rules to all audiovisual media services, including non-linear ones. The Committee of the Regions did the same in its opinion on the Telecom Reform Package. Finally, the French Presidency⁴ has included the extension to non-linear services in its compromise proposal. Nevertheless, there seem to be ongoing discussions in the Council on this matter.

The reason for any hesitations may be that the "open" Internet, where media services are provided/controlled by the media service providers themselves, can play an important role in the distribution of non-linear audiovisual media services to the public, and that the application of "must-carry" rules would probably make no sense in this respect. However, an increasing number of "closed" networks (e.g. IPTV services) are also

² Presidency proposal of 17 October 2008.

³ Presidency proposal of 18 September 2008.

⁴ Presidency proposal of 14 October 2008.

developing - beyond traditional cable television networks - where all media services (whether linear or non-linear) are provided/controlled by the service/network operator; such networks may in the future gain a significant, or even dominant, role for the distribution of audiovisual content. The application of must-carry rules to such closed networks, for both linear and non-linear services, may therefore become an appropriate instrument to safeguard media pluralism and cultural diversity, and to fill a widening gap in the protection of users' and citizens' rights.

It may be recalled that extending the scope of Article 31 would not *require*, but would simply *authorize*, Member States to apply must-carry rules to non-linear audiovisual media services, provided that the other criteria in the Article are fulfilled. This would avoid a situation where Member States are prevented under Community law from modernizing their rules when a pressing need arises.

Apart from the extension to audiovisual media services, it is also essential to clarify that must-carry rules can cover complementary services, providing, in particular, text-based information. These are (implicitly) covered by the current Article 31. However, the Commission Proposal would reduce the scope to "accessibility" services (i.e. services for disabled users) and would thus exclude from must-carry status any special services aimed at other specific groups within society, such as a subtitling service for linguistic minorities, as well as complementary services which are aimed at the public as a whole, such as radiotext, teletext, and programme information.

Complementarity of must-carry rules and net neutrality principles (Art. 8 Framework Directive, Art. 22 Universal Service Directive)

Must-carry rules (for closed networks) and net neutrality principles (to underpin the open architecture of the Internet) are complementary instruments to protect users' and citizens' rights (see the following table). Under no circumstances can the (very cautious) steps taken by the Commission, Parliament and Presidency in favour of net neutrality, which support the ability of end-users to access and distribute any (lawful) content and use applications and services of their choice, serve as a substitute for must-carry rules (see Article 8(4) point (g) of the Framework Directive and Art. 20(5) and Art. 22(3) of the Universal Service Directive).

	Networks concerned	Services concerned	
		Linear	Non-linear
Must-carry rules	Cable television networks (CATV)	YES →	
	Other (closed*) networks	YES** →	
Net neutrality principles	Open* Internet	YES	YES

* Closed = Media services are provided/controlled by the *service/network operator*
 Open = Media services are provided/controlled by the *media service providers* themselves

** If a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts.
