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EBU Briefing Paper
on the draft Audiovisual Media Services Directive
after submission of the Amended Commission Proposal

Table of Contents

	page
1. Scope and graduated approach	2
1.1 There should be no exclusion of content aggregators/packagegers.....	3
1.2 There should be no sectoral exclusion of the press in electronic form.....	4
1.3 The future-proof character of the new Directive must not be undermined by any limitation to "TV-like" programmes or formats.....	4
1.4 Live transmissions of sports events and repetitive loops of programmes must continue to be qualified as linear audiovisual services.....	6
2. Co-regulation and self-regulation	7
3. Jurisdiction and country-of-origin principle	7
3.1 Protection of minors and prevention of incitement to hatred.....	7
3.2 Services targeting another Member State.....	8
4. Short reporting	9
4.1 Welcome clarification of the subsidiary nature of the news access regime.....	9
4.2 Further clarifications needed on the applicable law and access to the signal.....	10
5. European works and independent productions	10
5.1 Co-productions and non-national European works.....	11
5.2 Definition of independent producers.....	11
6. Product placement	12
6.1 The definition of product placement should be tightened.....	12
6.2 Mere production aid should be subject to lighter rules.....	14
6.3 Pragmatic solutions are needed for imported and/or acquired programmes outside the control of the media service provider.....	15
7. Independent regulatory authorities	16

1. SCOPE AND GRADUATED APPROACH

The EBU welcomes the broad consensus between the European Parliament, the Council and the European Commission on the extension of the scope of the Directive to all audiovisual media services, combined with a graduated regulatory approach.

EBU Position on the Amended Commission Proposal

The EBU *supports* in principle the following improvements to the definitions in the Amended Commission Proposal which take up (in full or in part) amendments by the European Parliament:

- the *amended definition of "audiovisual media service"* (Article 1, point (a)). The EBU strongly supports the Commission insofar as it has not taken up the more far-reaching proposal by the European Parliament for a general exclusion of the press in electronic form from this definition (see 1.2 below).
- the *new definition of "editorial responsibility"* (Article 1, point (kd)). However, comparing the definition proposed by the Commission with that by the Council (Presidency draft of 5 March 2007), the EBU supports the latter (Article 1, point (ab)) in so far as it uses the formulation "exercise of effective control". This is an improvement that should be retained as it facilitates application to both linear and non-linear services.
- the *amended definition of "media service provider"* (Article 1, point (b)). However, while fully agreeing that a provider which merely provides technical transmission services should not be qualified as a media service provider, we consider that such a clarification should be placed in a Recital (as in the Council's text) rather than in the definition itself. At any rate, we appreciate the fact that the Commission has not taken up the more far-reaching proposal by the European Parliament (Amendment 51) to exclude content aggregators and packagers (see 1.1 below).
- the *definition of "television broadcasting"* (Article 1, point (c)). The EBU also supports the Commission insofar as it has not taken up the more far-reaching proposal by the Parliament (Amendment 68) to add the criterion "chronological sequence of programmes" (see 1.4 below). On the other hand, the EBU would suggest replacing the criterion of simultaneous "viewing" by simultaneous "transmission" (or "reception"), which is more suitable to characterize television broadcasting in the digital age, when users will increasingly use personal video recorders.
- the *definition of "on-demand service"* (Article 1, point (e)). However, here again, the EBU would consider it more consistent to refer to the user choosing the moment of "transmission" rather than the moment of "viewing"; this would also better reflect the Parliament's proposal (Amendment 205: "where the user ... requests the transmission of a particular programme ... at a time of his choice").
- the *clarification with regard to services whose principal purpose is not the provision of audiovisual content* (Recital 14). The formulation proposed by the Parliament and taken over literally by the Commission clarifies, in an acceptable way, the situation with regard to games of chance, on-line games and search engines.

- *the clarification with regard to "mixed" and "hybrid" services* (Recital 14a). The EBU considers that this Recital, identical to Parliament's Amendment 20, contains indispensable clarifications for two cases:

- a) where the same programmes are offered to the public by the same media service provider in a linear and non-linear manner (e.g. by allowing on-demand viewing of programmes for a certain period after their linear transmission - "time-shifting") and/or
- b) where audiovisual media services are bundled together with services whose principal purpose is not the provision of audiovisual content (e.g. combining video-on-demand with music-on-demand); in this case it is necessary to ensure that the Directive applies to those separate parts of the service which fulfil all the criteria of an audiovisual media service.

However, there is one point where the EBU does *not support* the new approach by the Commission. As regards the *new definition of "programme"* (Article 1, point (aa)), the EBU very much regrets that the Commission has not retained the proposal by the European Parliament (Amendment 77) but has followed the "general approach" of the Council. The requirement that, to come under the scope of the Directive, a programme must be *comparable in its form and content to television broadcasting*, creates legal uncertainty and undermines a future-proof delimitation of the scope (see 1.3 below).

1.1 There should be no exclusion of content aggregators/packageers

Where providers of communications network infrastructure or services extend their scope of activities and start to offer audiovisual media services to their customers, they naturally have to accept the additional responsibilities that accompany it.

To avoid any misunderstandings, the EBU has no problem with excluding from the scope of the Directive the mere technical transmission activities and the activities of intermediaries which benefit from the liability exemptions in Articles 12-15 of the e-Commerce Directive.

However, a provider which selects audiovisual content and offers a content package to the general public engages in an editorial activity and should therefore be regarded as a media service provider within the meaning of the Directive. Consequently, operators who "bundle" or "offer for sale packages" of audiovisual content must not be excluded. Such an exclusion would create an enormous loophole which would allow easy circumvention of the Directive. Even certain broadcasters could consider themselves content-aggregators in that sense, as they acquire programmes from rightowners, put them together and sell the package (or channel) to subscribers.

The only exclusion which might be acceptable concerns the mere bundling of audiovisual media services which are already under the editorial responsibility of a media service provider within the jurisdiction of a Member State. In other words, as in this case it can be ensured that the individual elements of the package are in conformity with the Directive, it may appear unnecessary to establish a second layer of responsibility for the content-aggregator for the overall package.

The Council (in its "general approach") and the Commission (in its original and amended proposals) only exclude mere transmission activities. This is also the case with most of the amendments adopted by the European Parliament, with the notable exception of Amendment 51 (Recital 35a), which would unreasonably exclude on a general basis "pure bundling" and "reselling" from the scope of the Directive. This would be inconsistent with the definitions proposed in Amendments 67 and 79 and also in direct contradiction with Amendment 26 (Recital 17a), which addresses the same issue.

1.2 There should be no sectoral exclusion of the press in electronic form

The EBU has no problem with excluding from the scope of the Directive electronic versions of newspapers and magazines, even if they contain moving images, as long as the audiovisual content is merely incidental. This is what the European Commission has also stated in its original and amended proposals (Recitals 14 and 15).

On the other hand, we are greatly concerned about amendments which would go further by, in particular, excluding, without further qualification, "the press in electronic form". As the term "press" is often used in a broad sense, including all forms of electronic media, such an exclusion would run the risk of completely undermining the extension of scope. Audiovisual media services, i.e. services which offer audiovisual programmes to the public by electronic means, should generally come within the scope of the new Directive; what should count is the content of the service and not whether a service is offered by a broadcaster or by another media company, or whether it is combined with a broader offer which also includes text and still pictures. Otherwise, the principle of technological neutrality and the related objective of creating a level regulatory playing-field for operators would not be attained, especially since on-line services by broadcasters and the press often contain the same kind of audiovisual programmes.

The EBU fears that the last part of the European Parliament's Amendment 66 on Article 1, point (a) to the definition of audiovisual media services, which excludes the "press in printed and electronic form", may give rise to ambiguities. Instead of tampering with the definition, it might be more appropriate to amend Recital 15, if necessary. As a compromise, it could be stipulated in Recital 15 that "the exclusion of services where audiovisual content is merely incidental to the service and not its principal purpose is particularly relevant for electronic versions of print formats".

1.3 The future-proof character of the new Directive must not be undermined by any limitation to "TV-like" programmes or formats

While it is true that the extension of the Directive targets non-linear services which fulfil a similar social, cultural or democratic function as television broadcasting and compete for the same audience, it would be inconsistent to limit the scope to services which look and feel like traditional television.

If the definition of "programme" were to cover only programmes in a traditional television format this would run counter to the very objective of the revision, i.e. the creation of a modern, future-proof regulatory framework for the audiovisual sector

where the functions of traditional television are gradually taken up by new audiovisual media. Accordingly, the notion of audiovisual media services should not be limited to services which provide audiovisual programmes in a form characteristic of traditional television broadcasting.

Naturally, either traditional television formats will need to be adapted for new audiovisual media services or new formats will need to be created. Limiting the scope of the new Directive to programme formats which already exist for traditional television, or which are at least suitable for traditional television, would do nothing but "freeze" the scope and prevent a dynamic interpretation which takes into account new developments.

The European Parliament has introduced the "TV-like" character in Amendment 18 on Recital 13, requiring that the content of audiovisual media services should be "suitable for television broadcasting". The "general approach" of the Council refers to the "TV-like" character in the definitions of programmes (whose form and content should be "comparable to" the form and content of television broadcasting) and of non-linear services (which, according to Recital 13a, should be "television-like", i.e. they should compete for the same audience as television broadcasts and the nature and the means of access to the service should lead the user reasonably to expect regulatory protection within the scope of the Directive). The EBU fears that this kind of criteria may give rise to different interpretations and create loopholes.

The Amended Commission Proposal takes up the definition of "programme" (Article 1, point (aa)) as proposed by the Council, with the sole difference that it does not include the Council's indicative list of programme genres in the definition itself but includes it only in Recital 13. However, it would be better to drop this list completely because it is neither necessary nor helpful; in its current form it may even give the impression that only certain traditional programme genres are covered and not others, such as news and information programmes or new participative programme formats.

Moreover, the reference to "*form and content*" in the Council and Commission versions raises difficulties, as the form (or format) of programmes naturally needs to be adapted to linear or non-linear distribution platforms; e.g. programmes designed for mobile television will clearly be much shorter in length ("clips"), perhaps even less than 60 seconds, and the accompanying advertising/sponsorship will naturally be different in form or style. In this regard, the Parliament version, which refers only to content, would seem preferable.

It is to be welcomed that Recital 13a of the Council version (not taken up in the Amended Commission Proposal) at least clarifies that the notion of programme should be interpreted in a dynamic way, taking into account developments in television broadcasting. However, this does not resolve all the ambiguities.

EBU Position on the Amended Commission Proposal

The EBU is not opposed to any reference to the "TV-like" character of new audiovisual media services, but *cannot accept the new definition of "programme"* (Article 1, point (aa)). Great care must be taken to ensure that the criteria used do not become an obstacle to a clear, consistent and future-proof delimitation of the scope.

In comparing the texts of the Commission, the Parliament and the Council, it is possible to identify three basic but relatively vague criteria which are used (in different formulations and contexts) to define or explain the "TV-like" character of new (non-linear) audiovisual media services:

1. whether the (form and) content is comparable to the (form and) content of television broadcasts
2. whether there is competition for the same audience as television broadcasts, and
3. whether users reasonably expect regulatory protection.

Regarding the first criterion, the EBU prefers the formulation "comparable to" (as in the Council's and Commission's text), as opposed to "suitable for" (as in Parliament's Amendment 18). On the other hand, the EBU prefers the Parliament's text insofar as it refers only to the "content" of programmes, and not also to their form or format, and does not contain any indicative list of programme genres. In contrast to the Amended Commission Proposal, the Parliament's text thus facilitates a dynamic interpretation.

The EBU also prefers the Parliament's text insofar as it uses the above criteria only in the non-operative part of the Directive, and not in the legal definitions, thus contributing to a better interpretation of the Directive without throwing up new questions.

1.4 Live transmissions of sports events and repetitive loops of programmes must continue to be qualified as linear audiovisual services

The European Parliament has fortunately not taken up proposals for amendments (in particular, from the Internal Market Committee) which would have stipulated that repetitive loops of content and the live streaming of an event (for example, a sports event) should not, in itself, constitute the provision of a *linear* audiovisual media service (but should, rather, be qualified as a *non-linear* service).

In practical terms, this would have meant that transmissions of (a series of) sports events would come under stricter rules (particularly regarding the insertion of advertising) when they are part of a television channel and under lighter rules when they are offered on their own (e.g. by a cable television operator or a sports federation). This differentiation would also apply to other programme categories, and particularly reality shows, where live streaming is provided over the Internet.

As live streaming can deliver an event to mass audiences simultaneously, even if peer-to-peer streaming technology is used, with the same features that characterize traditional television (immediacy, emotional intensity, potentially high impact on society, and no user control), the general application of the rules for linear services is fully justified.

Applying instead the lighter rules for non-linear services in certain cases would put broadcasters at a competitive disadvantage as regards the acquisition of sports rights.

Accordingly, to avoid distortion of competition among different media service providers, and especially as regards the quantitative advertising restrictions, live transmissions of events (and in particular the streaming of sports events) and repetitive loops of content should continue to be qualified as a linear service.

The EBU welcomes the fact that the European Parliament, the Council and the Commission in its Amended Proposal have all refrained from taking up proposals which would contradict this result.

2. CO-REGULATION AND SELF-REGULATION

The EBU has always been supportive of co- and self-regulatory instruments in the audiovisual media sector. It has therefore welcomed the Commission Proposal in this respect, considering it promising to use co-regulation as a means of implementing the Directive with the requisite flexibility (see the Initial EBU Contribution of 3 April 2006 to the first reading).

Both the Council and the European Parliament have made proposals to strengthen and clarify the role of self- and co-regulation, but also to indicate their limitations, and particularly regarding the obligations of Member States on transposition. The EBU supported the thrust of these proposals but considered it preferable, for reasons of consistency, to use the formulation "self- *and* co-regulatory regimes" (instead of "and/or").

EBU Position on the Amended Commission Proposal

The EBU *supports* the Amended Commission Proposal as regards the definition of co-regulation (Article 1, point (kc)), the encouragement of self- and co-regulatory regimes at a national level (Article 3(7)) and the further clarifications on self- and co-regulation in Recital 25. However, the EBU proposes replacing, in Article 3(7), "and/or" by "and" in the formulation self- and co-regulatory regimes.

3. JURISDICTION AND COUNTRY-OF-ORIGIN PRINCIPLE

The EBU welcomes the extension of the country-of-origin principle to cover non-linear audiovisual media services in the future Directive.

3.1 Protection of minors and prevention of incitement to hatred

In cases of violations of the rules which protect minors and prohibit incitement to hatred, the European Parliament proposes application of the procedure already foreseen in Article 2a, to both linear and non-linear services, complemented by an urgency clause (paragraph 2a) for non-linear services, which is necessary for cases where violations are

ongoing (e.g. where incriminated content remains available on-demand). In contrast, the "general approach" of the Council deviates from the country-of-origin principle more than necessary by maintaining, as far as on-demand services are concerned, the derogations in Article 3(4), (5) and (6) of the e-Commerce Directive, despite the fact that the new Directive introduces for on-demand services harmonized rules on the protection of minors and incitement to hatred.

EBU Position on the Amended Commission Proposal

The EBU *supports* the Amended Commission Proposal, which follows the approach of the European Parliament and introduces an urgency clause for on-demand services in Article 2a, paragraph 3.

3.2 Services targeting another Member State

Regarding the problem of circumvention of stricter national rules by services intended exclusively or mainly for the public in another Member State, the EBU considers that the solution retained in Article 3(1a)-(1d) in the "general approach" of the Council goes in the right direction. It respects the country-of-origin principle while reconciling it with the freedom of Member States to adopt stricter or more detailed rules in areas harmonized by the Directive, improves cooperation among national regulatory authorities, and gives the European Commission an appropriate role to ensure the proper functioning of the internal market, in line with the EBU's proposals (see the Initial EBU Contribution of 3 April 2006 to the first reading, pages 6-8). The EBU shares the view that the anti-circumvention clause which was originally proposed by the European Commission was liable to be insufficient to address problems related to audiovisual media services, including advertising windows, targeting another Member State.

Whereas the report by the Committee on Culture and Education proposed a solution which was similar to the one in the "general approach" of the Council, the text adopted by the European Parliament in plenary falls short of the latter in several respects:

Firstly, the use in Amendments 221 on Article 3(1a) and 222 on Article 3(1b) of the criterion "abusive or fraudulent manner" or "abuse or fraudulent conduct" (similar to the Commission Proposal) does not provide for legal certainty, as the key question remains unanswered, i.e. in which cases circumvention of national rules is to be considered abusive. Under the "general approach" of the Council, the decisive element is the fact that a broadcaster provides a television broadcast which is *wholly or mostly directed towards the territory of another Member State*.

More seriously, Amendment 222 on Article 3(1b), which requires that the media service provider concerned "has established itself in the Member State having jurisdiction in order *solely* to avoid the stricter rules, in the fields coordinated by this Directive, to which it would be subject if it were established in the first Member State", would undermine the effectiveness of the whole mechanism. In particular the addition of "solely" would make it pointless as it will always be possible for broadcasters to invoke other reasons for their establishment decision.

EBU Position on the Amended Commission Proposal

It is important to combine the country-of-origin principle with an effective mechanism to address circumvention problems caused by broadcasting services targeting another Member State.

While welcoming the fact that the Commission has improved the proposed mechanism in comparison to its original Proposal, the EBU *regrets* that the Commission has included, in Article 3(2)-(3), the European Parliament's Amendments 221 and 222 in full, thus deviating in some important respects from the "general approach" of the Council. In fact, certain points in the Parliament's Amendments 221 ("abusive or fraudulent manner") and 222 (in particular, the addition of "solely") weaken the new mechanism and run the risk of rendering it ineffective.

The EBU therefore *prefers the approach of the "general approach" of the Council*, which should nevertheless be *complemented by a Recital to identify economic and programme-related indicators for broadcasting services targeting another Member State, as proposed by the Parliament (Amendment 34)*. The EBU thus supports the Presidency draft (5 March 2007), which, in Recital 23a, takes up this Amendment, subject to a minor adaptation.

4. SHORT REPORTING

4.1 Welcome clarification of the subsidiary nature of the news access regime

Given that it is now expressly clarified in all texts that news access should, as a matter of principle, be sought first on the national level from the broadcaster having acquired exclusive broadcasting rights for that territory, the EBU can support the new approach of the Commission, the Council and the Parliament which requires all Member States to introduce a news access regime or, where such a right already exists, to apply the national regime also to foreign broadcasters.

The EBU also appreciates the fact that all texts leave it primarily to the Member States to define the modalities and conditions of the news access right. However, the European Parliament requires mandatory compensation for the "technical costs" (of granting access to the signal) for the rights-granting broadcaster. This may create a difficulty for countries whose broadcasters have established a reciprocal news exchange system based on free access. In particular, if such mandatory compensation is upheld, it should be clarified in a Recital that the compensation *must be related only to providing access to the signal and may not be based on the value of the acquired exclusive rights* of the signal-providing broadcaster, as this would be liable to undermine the news access right as a whole. The news access right aims to improve the conditions of access to information, which should not be obstructed by financial barriers. In the Amended Proposal adopted by the Commission on 29 March 2007, this compensation is no longer mandatory but (as in the Council's text) is left entirely to be defined by the Member States, which is indeed preferable.

EBU Position on the Amended Commission Proposal

The EBU welcomes the clarification of the subsidiarity of the transfrontier news access right, as well as the broad discretion given to Member States for the modalities and conditions of news access, including the issue of any compensation. However, if mandatory compensation is going to be introduced, it should be clarified in a Recital that such compensation must be related only to the cost of providing access to the signal and may not be based on the value of the acquired exclusive rights of the signal-providing broadcaster.

4.2 Further clarifications needed on the applicable law and access to the signal

The Presidency draft of 5 March 2007 introduces a rule on the *applicable law* being that of the Member State of the signal-supplying broadcaster. Whereas the EBU has no difficulties with the Council's approach *per se* on this point, the corresponding Recital of that text should be improved to avoid the impression that the signal-supplying broadcaster is, or should be, always the "host broadcaster", as this is not necessarily the case, especially for events taking place outside the EU. This can easily be achieved by deleting the word "initial" (in "supplying the initial signal") and the phrase "This is usually the Member State where the event takes place".

Moreover, the question of applicable law becomes an issue only in cases where a broadcaster needs to access the signal in another Member State. In this case it is for the Member State which has jurisdiction over the rightsholding broadcaster to ensure *access* to the signal for broadcasters from other Member States. However, the *use* of the extracts remains subject to the law of the Member State in which the broadcaster seeking access is established, in line with the country-of-origin principle.

Where the new Recital in the Commission's (and the Council's) text refers to the possibility of *access to the venue*, it should acknowledge that this particular right is of a much more limited nature than *access to the signal*, as it can be exercised only when the (physical and technical) facilities for short reporting are still available, and those broadcasters admitted by the event organizer on a contractual basis would normally have priority. Furthermore, extending this possibility also to *foreign* broadcasters would imply that for 90 seconds of footage a broadcaster could find it worthwhile to send a camera crew to another country. However, it is important that the foreign broadcaster who does not find that worthwhile cannot be forced to do so. It would thus be desirable to clarify (either in the text of the relevant paragraph or in a Recital) that at least in the cross-border context access to the signal should always remain possible.

EBU Position on the Amended Commission Proposal

Concerning the discretion for Member States to provide access to the venue instead of to the broadcast signal, a clarification should be added that (at least for foreign broadcasters) access to the venue cannot simply replace access to the signal since otherwise the new rules would lose their practicability.

5. EUROPEAN WORKS AND INDEPENDENT PRODUCTIONS

The EBU appreciates the fact that, as far as linear services are concerned, the rules of the current Directive on the promotion of European works and independent productions have essentially been maintained unchanged.

5.1 *Co-productions and non-national European works*

As an exception to this general approach, the European Commission had proposed an amendment to the Preamble (Recital 36) which gives the impression that the Directive requires Member States to introduce quotas for European co-productions and non-national European works, which the EBU would strongly oppose (see the Initial EBU Contribution of 3 April 2006 to the first reading).

The EBU therefore welcomes the Amendment 52 on Recital 36 by the European Parliament, which avoids such an interpretation and clarifies that it is only a matter of *encouraging* broadcasters to broadcast an adequate share of co-produced European works and of European works of non-domestic origin.

EBU Position on the Amended Commission Proposal

The EBU *regrets* that the European Commission has adhered to its original proposal and has not accepted, as a compromise, appropriate measures of encouragement as proposed in Amendment 52 (Recital 36). In contrast, the EBU supports the approach by the Council, as the Presidency draft (5 March 2007) contains a formulation in Recital 36 which is very similar to the one proposed by the European Parliament.

5.2 *Definition of independent producers*

In contrast to the European Commission proposal, which did not touch the status quo with regard to the definition of independent producers, the European Parliament approved an amendment which would require Member States, when defining independent producers, to "take appropriate account" of three criteria, including the "ownership of secondary rights" (Amendment 137 on Article 6(1), point (d)).

The current Directive already allows individual Member States to use, among other criteria, the retention of rights as a criterion for considering their independence from broadcasters.¹ However, there is no justification for interfering with the contractual distribution of rights between broadcasters and producers without a proper assessment of each market and the (various) ways in which these rights are allocated between the contract partners. If the amendment by the European Parliament meant that Member States were generally *obliged* to use the criterion of "ownership of secondary rights", the EBU would be strongly opposed to this.

¹ See Recital 31 of Directive 97/36/EC in connection with Recital 23 of the original Directive 89/552/EEC.

Firstly, there is not necessarily a link between a producer's independence and his holding of rights in productions. Secondly, 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. However, for certain productions, depending on the market, language, format or programme genre, it might simply be impossible to find other sources of financing. Rights should follow risks. Amortization of the production costs is possible only through multiple exploitations, and broadcasters must also respond to the audiences' demands for time- and place-shifting use of their programmes. This means that the "secondary" rights of yesterday are essential rights today. Consequently, depriving broadcasters of the secondary exploitation rights would mean not only preventing them from amortizing their investment and thereby prompting them to reduce the level of their financial contribution to the production, but also hindering them in fulfilling the needs of their audiences. (For more details, see EBU Position of 5 September 2005 on Issues Papers for the Liverpool Audiovisual Conference - Cultural diversity and promotion of European and independent audiovisual production.)

The EBU is therefore opposed to the amendment to Article 6(1) proposed by the European Parliament and prefers the current situation, where it is for each Member State to define independent producers, taking into account the economic context of the country and the structure of its audiovisual market. In its Amended Proposal, the Commission has partially included the Parliament's Amendment, as a new paragraph in Article 1, but without explicitly referring to secondary rights.

EBU Position on the Amended Commission Proposal

While the EBU *appreciates* the fact that the Amended Commission Proposal has not taken up the controversial criterion of "ownership of secondary rights" from Parliament's Amendment 137, it still *fails to see a need or justification for adding a clause on the definition of "independent producer" in the Directive*. Moreover, the proposed criterion "proprietary rights of the production firm" may be interpreted as including secondary rights. Accordingly, the EBU prefers the status quo, as in the Council's text.

6. PRODUCT PLACEMENT

While firmly supporting the principle of separation of advertising from editorial content, the EBU welcomes the objective of creating a clear, transparent and stringent framework for product placement. Such a framework should be based on the principles of (a) protection of editorial integrity and independence, (b) prohibition of undue prominence and (c) transparency for viewers, and should take into account the differences which exist between various forms of product placement and production aid (see the Initial EBU Contribution of 3 April 2006 to the first reading).

6.1 The definition of product placement should be tightened

To be workable, the definition of product placement should not go as far as covering all products which are featured, "normally" in return for payment or for similar consideration, contrary to the Proposal by the European Commission. The word "normally" should be removed, also in the interests of legal certainty for broadcasters and to ensure coherence of the definitions of "television advertising" and "product placement".

The formulation "with or without payment or similar consideration to the media service provider" in the definition proposed by the European Parliament in Amendment 75 seems to go in a different direction; however, it may be wondered whether the purpose of the Amendment is really to get rid of the requirement that product placement must be carried out in return for payment or for a similar consideration and not, rather, to clarify that it does not matter whether the payment or similar consideration is made to the media service provider or a third party such as the producer.²

Another question is whether mere "production aid" (also referred to as "product references") should be covered by the definition of product placement.

Interestingly, Amendment 75 also excludes at least certain forms of production aid (or production props) from the definition of product placement (including prizes and merchandising products). It would indeed be preferable to make a clear distinction, already in the terminology and definitions, between "product placement" on the one hand and mere "production aid/props" on the other (see also Amendment 76), even if it makes sense to apply the content rules to both forms, for example, as regards the prohibition of undue prominence and of placement of tobacco products.

EBU Position on the Amended Commission Proposal

The EBU *regrets* the fact that the Commission, in its Amended Proposal, has not taken up proposals from the European Parliament and the Council for a better definition of product placement (and production aid) but adheres to its original definition. This very broad definition causes a number of problems:

Firstly, the fact that the definition does not require payment or similar consideration to be made to the media service provider (but also apparently covers payments/considerations to any producer, organizer, actor or other participant, in a production or performance) leads to an application of the new rules also in cases where the media service provider does not know about product placement. However, where media service providers have not been informed and cannot reasonably be aware of product placement, they should not be held responsible for it.

² In view of the recognition "It is a characteristic of product placement that it is carried out in return for payment or for similar consideration" in the official justification for Amendment [75].

Secondly, by including mere production aid in the definition of product placement, there is a risk that this will confuse viewers, who in many countries have become acquainted with the distinction between the two forms; moreover, it would not be appropriate to apply all the rules to both of them (see 6.2 below).

Thirdly, without any possibility for derogation as regards imported and/or acquired programmes, there is a risk that it may no longer be possible for media service providers to show certain programmes, even if they are of great interest to the public (see 6.3 below).

Regarding the definition, the EBU considers that, as an absolute minimum, the tightening of the definition in the Council draft should be retained, i.e. the deletion of "normally" before "in return for payment or for similar consideration". Moreover, the distinction between genuine product placement (against remuneration) and mere "production aid" (or "production props") needs to be made clearer.

6.2 Mere production aid should be subject to lighter rules

The European Parliament and the Council have adopted a new approach consisting of distinguishing between outright product placement, which is banned except for certain programme categories (particularly fiction and drama, unless they are addressed to children), and material production aid, which is admissible in all programme categories. The EBU fully supports this new approach, which to some extent has also been taken up in the Amended Commission Proposal.

Although not going as far as the European Parliament, in the second indent of Article 3i, paragraph 2, the Commission indirectly recognizes production aid as a specific sub-category and authorizes it in all programme categories, unless Member States decide otherwise. However, in contrast to the Parliament text, the Amended Commission Proposal unfortunately applies exactly the same identification requirements to mere production aid as to genuine product placement.

There is a legitimate interest on the part of viewers to be informed about production aid of significant value, and the EBU agrees that information thereon should be provided. On the other hand, the presence of mere production aid should not make it necessary to warn viewers about product placement at the start and the end of the programme, and when the programme resumes after an advertising break, as would be required under the Amended Commission Proposal.

Consequently, the identification rules should be alleviated for mere production aid, in line with the Parliament's Amendment 227 on Article 3ha(2), which leaves Member States a wide margin as regards information for viewers on production aid.

The result of applying the same requirements as for genuine product placement would be worse if the general identification requirements were reinforced, in line with the Parliament's proposal, e.g. by requiring a reminder every 20 minutes or the addition of a symbol on the television picture. The EBU appreciates the fact that the Amended Commission Proposal does not take up such proposals.

EBU Position on the Amended Commission Proposal

The EBU *supports* the new approach in the Amended Commission Proposal insofar as it makes a distinction between outright product placement (against remuneration) and mere production aid (or production props) and makes production aid admissible in all programme categories.

However, to take full account of the differences between the two forms, it is also *necessary to alleviate the identification requirements for mere production aid*. The EBU regrets the fact that in this respect the Amended Commission Proposal has not taken up the proposal by the European Parliament, which offers the necessary flexibility. ("In cases of production aid the viewer shall be informed of the use of any such aid by appropriate means.")

Moreover, the EBU considers that production aid should be recognized as a distinct sub-category, with a proper definition and without opening the door to circumvention of the stricter rules on real product placement.

6.3 Pragmatic solutions are needed for imported and/or acquired programmes outside the control of the media service provider

Obliging media service providers to identify product placement can work only if it is ensured, through the Directive, that media service providers are themselves kept informed (by producers and/or vendors) about the presence of product placement in programmes. Licensing agreements should be required to give media service providers control over product placement, if any, as regards both the principle and the modalities. On the other hand, where broadcasters do not know about the presence of product placement, or have no means of knowing, they should not be held responsible for it.

Both the European Parliament and the Council have proposed not to apply the new rules on product placement to programmes produced before a date which corresponds to the transposition deadline of the new Directive, and the European Commission has also included such a "sunrise clause" in its Amended Proposal (Article 3i, paragraph 5). This certainly helps to resolve many cases for broadcasters.

The "general approach" of the Council also foresees the possibility for Member States to waive the requirement to inform viewers with regard to programmes where the payment or similar consideration has been made to the producer or another third party and not to the broadcaster or media service provider itself. This has now also been taken over in the Draft Amended Commission Proposal (Article 3i, paragraph 3, last sentence).

However, in practice it is not just the identification requirement which poses a problem when product placement lies outside the control of the media service provider, and it is not even the most serious one. Even if a media service provider has no means of preventing product placement, he may still be able to warn the public that the programme may contain product placement. But what can he do if product placement is

(or may be) present in programmes which fall within a category outside the positive list? Or if a programme from outside Europe falls within a listed category but does not respect the Directive's restrictions on promotional references or undue prominence? Would this mean that if a media service provider cannot prevent or remove the product placement in question he cannot show the programme, even if it is of great interest to the public? This may concern, for example, broadcasts of cultural events, and particularly where transmitted live, or mixed-genre programmes (infotainment, etc.).

EBU Position on the Amended Commission Proposal

First of all, media service providers should be empowered, through explicit arrangements with rightsholders, to exercise effective control over product placement.

For past audiovisual productions, and for imported and/or acquired (new) productions if they are outside the control of the media service provider, the EBU sees the need for pragmatic solutions.

The EBU therefore *supports* the Amended Commission Proposal insofar as it exempts past productions (Article 3i, paragraph 5) and provides for the possibility of derogations from the identification requirement in cases where the payment or similar consideration for the product placement has not been paid to the media service provider (Article 3i, paragraph 3, last sentence). However, *the scope for derogations in case of imported and/or acquired programmes is still too narrow* and needs to be extended beyond the identification requirement and, in particular, as regards the presence of product placement in programme categories outside the positive list.

If not amended, the new European rules on product placement could become a serious obstacle to the free flow of information and cultural exchanges worldwide. Member States need increased scope for derogations in the interests of the public's access to information.

7. INDEPENDENT REGULATORY AUTHORITIES

The EBU supports the Commission proposal to introduce a new Article 23b on independent media authorities, as such authorities (or bodies) are an essential element of free and pluralistic audiovisual media systems (see the Initial EBU Contribution of 3 April 2006 to the first reading). The European Parliament has proposed amendments which would further improve the effectiveness of the clause and, in particular, the guarantee of independence. The Amended Commission Proposal partly takes up these proposals (in Recital 9 and Article 23b).

While understanding the need to keep Community rules sufficiently flexible to accommodate the various national structures, the EBU regrets that the "general approach" by the Council makes no reference to the *independence* of the media authorities but deals only with *cooperation* among the national authorities.

EBU Position on the Amended Commission Proposal

The EBU *supports* the Draft Amended Commission Proposal, which clearly specifies that Member States must establish national regulatory bodies and institutions, guarantee their independence, and ensure that they exercise their powers impartially and transparently. Independent regulatory authorities are an important factor in safeguarding freedom and pluralism of the media.
