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## **Audiovisual services and GATS negotiations**

### **EBU contribution to the public consultation on requests for access to the EU market**

*In the EBU's view, it is essential to adhere to the negotiating mandate given by the Council in October 1999, which stresses the need to ensure "that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity". This mandate reflects the European view that the audiovisual media play a significant social, cultural and political role.*

*Accordingly, and in the absence of appropriate and internationally recognized safeguards, the EBU strongly advocates that*

- *no liberalization commitments on audiovisual services should be made throughout the current round of the GATS negotiations, and*
- *the relevant MFN exemptions should be maintained.*

*This should apply to audiovisual services in the broad sense, covering all sub-sectors. This is necessary in the interests of the coherence and effectiveness of audiovisual and cultural policies, and in view of the rapidly, and often unpredictably, changing nature of the sector.*

### **Introduction**

The EBU welcomes the consultation document drawn up by the European Commission (DG Trade),<sup>1</sup> which underscores the Commission's commitment to transparency and dialogue with civil society and industry regarding trade liberalization. As some of the Union's trading partners are requesting liberalization commitments in the audiovisual sector which would put at risk the European audiovisual model, and the underlying objectives of cultural diversity, media pluralism, citizen empowerment and social cohesion, the EBU believes that a broad public discussion of such requests is appropriate and, indeed, necessary.

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<sup>1</sup> "WTO members' requests to the EC and its Member States for improved market access for services" Consultation Document of 12 November 2002.

At the end of these consultations, we hope that the EU will be in a position to assert a clear negotiating position, without any ambiguities. Only in this way will the necessary political signal be given, not least in view of the negotiating pressures exerted by third countries on candidate countries and on other States which can legitimately aspire to EU membership. The EU will thereby be able to carry out its natural responsibilities in an enlarged Europe.

## **Main reasons for resisting liberalization requests on audiovisual services**

### **1. Specificity of audiovisual services**

Audiovisual services are special because of their cultural, political and social role and importance, and as essential factors for cultural diversity and media pluralism. This specificity is shared by virtually all audiovisual services, although the degree of cultural, political and social relevance may vary from one service to another (while some allow more scope for cultural creativity - e.g. cinema and music productions and certain radio/television programmes/channels - , others have a stronger impact on public opinion - e.g. information programmes/channels - or may be more relevant in social or educational terms).

This specificity is well recognized in Europe and is expressed in legal and political texts of the Council of Europe and the European Union, including the EC Treaty (Article 151, Protocol on public broadcasting), the Charter of Fundamental Rights, the Television without Frontiers Directive, etc. It has also been recognized at a worldwide level, in the Universal Declaration on Cultural Diversity, which stipulates that cultural goods and services are commodities of a unique kind "which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods".<sup>2</sup>

Imbalances in trade and dominance over markets in this sector therefore give rise to concerns which go far beyond economic considerations.

### **2. Imbalance in exchanges and dominance over markets: a danger for pluralism and cultural diversity**

In the present circumstances, and in the absence of appropriate safeguards, trade liberalization cannot be expected to contribute to cultural diversity and media pluralism. On the contrary, liberalization commitments, even if limited to guaranteeing the current *de facto* state of market openness, would rather exacerbate - or at least perpetuate - the existing imbalances of audiovisual and cultural exchanges. Moreover, the increase in scope for vertical or horizontal concentration would put media pluralism at risk.

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<sup>2</sup> Article 8 of Universal Declaration, adopted by the UNESCO General Conference on 2 November 2001

A few examples mentioned at a recent UNCTAD Conference<sup>3</sup> may help to illustrate these imbalances:

- The US feature film industry is in a dominant position globally (with US films holding market shares well above 50% in most markets worldwide and over 90% in their home market).
- The trade deficit in audiovisual services between the EU and the US rose continuously from 4.8 billion USD in 1995 to 8.2 billion USD in 2000, with a 14% increase from 1999 to 2000.<sup>4</sup> These figures also confirm that the European audiovisual market is *de facto* the most open market among developed countries.
- There is a dearth of film production in most developing countries. (According to estimates, in sub-Saharan Africa under 2% of the population saw an African film in 2000.)
- There is very strong concentration in the music industry, which might be a precursor for possible developments in other audiovisual and media sectors if markets were further liberalized. (More than 80% of the world market is controlled by the five leading music groups.)
- The Internet is dominated by US companies. (Currently the 13 biggest Internet access providers are from the US.)

### **3. Liberalization would run the risk of reinforcing the oligopolistic market structure and imbalance of exchanges**

Economically speaking, the audiovisual markets of all countries do not offer producers, broadcasters and distributors the same capacity for development. Brazil has raised this issue in its negotiation proposal, drawing attention to the oligopolistic structure of the market and the significant risks of distortion among the producing States.<sup>5</sup> States whose domestic market is sufficiently broad to recover most of the production costs can export their audiovisual productions to foreign markets at a low price, to the detriment of home productions, which are excluded from the distribution circuit.

Brazil has suggested a debate on the preparation of appropriate trade defence mechanisms for the audiovisual sector, such as specific anti-dumping disciplines. However, this approach is too narrow and does not take sufficient account of the cultural dimension. Above all, such a mechanism is difficult to introduce; Brazil has not submitted any concrete proposals on how such a mechanism would work, given the large range of factors which determine prices for audiovisual products in different markets.

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<sup>3</sup> Expert meeting on audiovisual services: Improving participation of developing countries. Geneva, 13-15 November 2002. The report of the expert meeting (TD/B/COM.1/56) and the note by the secretariat which served as the principal working document (TD/B/COM.1/EM.20/2) are available at the UNCTAD website in various languages. See

<http://www.unctad.org/Templates/meeting.asp?intItemID=2012&lang=1&m=4299&info=doc>

<sup>4</sup> Estimates of the European Audiovisual Observatory, Press Release of 9 April 2002. It may be wondered how large the deficit might have grown without the European quota system.

<sup>5</sup> See S/CSS/W/99 of 9 July 2001 p.3. The MFN exemption taken by the EU regarding redressive duties against unfair pricing practices by distributors of audiovisual works can be seen as a unilateral answer to the same problem.

#### 4. The flexibility of the GATS - no solution in itself

The US and others have referred to the in-built flexibility of the GATS, which allows Member States to limit or "tailor" their liberalization commitments so as to accommodate public concerns for the preservation and promotion of cultural values and identity.<sup>6</sup> However, apart from the "inflexibility" of commitments (which in practice are almost irreversible) there are a number of reasons why this approach is flawed:

- Owing to the lack of multinationally-agreed standards on cultural and audiovisual policies it would be extremely difficult (and risky) to formulate such "limited" commitments (with the likelihood of trade panels interpreting, and defining the limits of, any limitations).
- The principle of "progressive liberalization" in GATS Article XIX would put any limitations to commitments at risk of being squeezed out during the next round of negotiations.
- Given that future horizontal disciplines (on subsidies, domestic regulation, etc.) apply to all "committed" sectors, they would also apply to audiovisual services once commitments have been made. Exceptions would need to be negotiated in each individual case. (Although the US suggests developing an understanding on subsidies which recognizes "the use of carefully circumscribed subsidies for specifically defined purposes", this remains a vague, narrow offer.<sup>7</sup>)

For further details, see the EBU Comments on US negotiating proposals of December 2000.<sup>8</sup>

#### 5. Trade rules inappropriate for distinguishing between justified and unjustified audiovisual/cultural policy measures

With the instruments and criteria currently used in the multilateral trade system it would simply be impossible to operate a clear distinction between

- audiovisual policy measures which are legitimate to protect and promote cultural diversity, and
- measures which are simply protectionist.

As it is the objective of audiovisual policy measures to give citizens access to content that is relevant for their daily life and close to their preoccupations and their cultural and social background, there is naturally a certain degree of national, regional or cultural "preference". However, the right of GATS Member States "to regulate" (as recognized in the Preamble of

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<sup>6</sup> See S/CSS/W/21 of 18 December 2000 p. 2

<sup>7</sup> *Ibid.* p. 3

<sup>8</sup> "Audiovisual services and GATS. EBU Comments on US negotiating proposals of December 2000" of 12 April 2001. Available at the EBU website [www.ebu.ch](http://www.ebu.ch) under "Position papers"

the GATS Agreement) does not give them the right "to protect"; it is thus not a sufficient legal basis for audiovisual or cultural policy measures. Moreover, there can be no complete separation between cultural and economic policy objectives, as the achievement of cultural policy goals often depends on the existence of an economically viable domestic production base ("cultural industries"). Last but not least, in the absence of a common framework covering both cultural and trade aspects, it would not be possible to apply the proportionality principle in a way which could ensure appropriate and predictable results. Consequently, if liberalization commitments were made, audiovisual or cultural policy measures would be put under the sword of Damocles in the form of review by trade dispute panels.

## 6. Need to be prepared for future developments

The audiovisual sector is undergoing unprecedented technological and market changes, and there is huge uncertainty about future developments, in particular regarding new (digital and interactive) audiovisual services and their economic, societal and cultural impact. To remain effective, audiovisual and cultural policies need to be adapted accordingly; existing measures may need to be extended, or if they become obsolete new measures may need to be invented. The acceptance, under the GATS, of the mere right to maintain existing measures, or to adopt safeguards with regard to traditional services only (such as cinema, radio and television), would completely fail to conserve the necessary scope for future policy measures.

The political freedom and flexibility necessary to shape future developments would be lost once liberalization commitments had been made - especially if they were conceived in the form of a "standstill", as apparently requested by the US. Such commitments would also prejudice the outcome of the European debate on the future of the Television without Frontiers Directive, and a more horizontal approach to audiovisual regulation.

Future developments may also raise questions regarding the classification of new services.<sup>9</sup> It will therefore be crucial - if and wherever liberalization commitments are made with regard to service sectors such as computer and related services, telecommunications services, or entertainment services, which may be seen as overlapping with future audiovisual services - for a clear distinction to be made in the schedule to prevent any "liberalization overspill" on audiovisual services. With regard to the three service sectors mentioned above, the following distinctions would seem helpful:

- between computer software (falling within "computer or related services") and interactive audiovisual content "software",<sup>10</sup>
- between transmission services (falling within "telecommunications services") and audiovisual content services, and
- between live performances (falling within "entertainment services") and (live or deferred) audiovisual coverage of such performances.

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<sup>9</sup> See also EBU Comments of 12 April 2001 (Footnote 8).

<sup>10</sup> All electronically-delivered content should be classified as services (GATS) and not goods (GATT).

## **7. Avoidance of narrow or rigid frameworks**

If new measures could be introduced only if they had already been foreseen and listed at the time a WTO Member made a liberalization commitment - and it is difficult to see how the US request for an "open and predictable environment" could be fulfilled otherwise - the room for manoeuvre with regard to audiovisual policy would be severely restricted. A serious threat would result from future horizontal disciplines, e.g. on subsidies or on domestic regulations, if they were to cover the audiovisual sector. Such restrictions could mean the end of any serious audiovisual and cultural policy at the regional or national level. They would also effectively block the way to a future international Convention on cultural diversity.

Some of the liberalization requests received would not only erode policy-makers' choice in the future but would also threaten the basic pillars on which the European audiovisual model is based today. These include co-production agreements with other countries (which are dependent on an MFN exemption), support schemes for audiovisual production and distribution (which would be incompatible with national treatment commitments), and requirements/quotas for European content (which would be incompatible with market access commitments and are also dependent on an MFN exemption since "European" refers to a Europe that is broader than the EU). Not even the public service broadcasting systems would be safe, as - contrary to what is often said - they are not securely covered by the exception in GATS Article I.3 (since public broadcasting services are normally provided independently from the government and in competition with commercial broadcasting services<sup>11</sup>).

## **8. Expectations for an international instrument on cultural diversity**

A Convention on cultural diversity could help to clarify the legitimacy of cultural and audiovisual policy measures at the national or regional level. It could also develop instruments to increase the diversity of origins of audiovisual products and to improve the conditions for audiovisual production and distribution in developing countries and in smaller cultural and linguistic regions, - by, for example, stimulating co-productions and fostering two-way exchanges. To quote from the Universal Declaration on Cultural Diversity (Article 10): "In the face of current imbalances in flows and exchanges of cultural goods and services at the global level, it is necessary to reinforce international cooperation and solidarity aimed at enabling all countries, especially developing countries and countries in transition, to establish cultural industries that are viable and competitive at national and international level."

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<sup>11</sup> See the definition of "services supplied in the exercise of governmental authority" under (c).

## **9. Building bridges between culture and trade**

No solution for a multilateral approach to trade in audiovisual services can be found without genuine dialogue between culture and trade experts. Such discussions would be greatly facilitated and likely to be more balanced if there were internationally-agreed standards for audiovisual and cultural policy; an international Convention on cultural diversity could contribute to this. A multilateral "cultural pillar", set apart from the existing "trade pillar" - the multilateral WTO Agreements - should help to build bridges between culture and trade and bring about such dialogue.

Blueprints for such a bridge-building exercise have been, or are being, developed in other areas, e.g. between trade and intellectual property rights, between trade and labour standards, and between trade and the protection of the environment. Such efforts are fully in line with the concept of sustainable development, which requires, in the interests of future generations, a more coherent and balanced approach between economic aspects on the one hand and social, ecological, cultural etc. aspects on the other. Cultural diversity is to be seen as essential for sustainable development.<sup>12</sup>

### **Conclusion**

In the light of the foregoing, it is important that

- no liberalization commitments on audiovisual services should be made throughout the current round of the GATS negotiations, and
- the relevant MFN exemptions should be maintained.

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<sup>12</sup> See Article 11 of the Universal Declaration on Cultural Diversity and Article 1.3 of the Council of Europe Declaration on Cultural Diversity