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## Issues Paper for the Liverpool Audiovisual Conference

### Rules applicable to Audiovisual Content Services

#### INTRODUCTION

The Commission Communication “i2010 – A European information society for growth and jobs”, adopted on 1 June 2005, recognises the necessity of an “integrated approach to information society and audiovisual media policies in the EU” as “communication networks, media, content, services and devices are undergoing digital convergence”. It stresses that increased legal and economic certainty will encourage new services and more content and announces that the Commission will propose by end 2005 a “revision of the Television without frontiers directive to modernise the rules on audiovisual media services.”

The scope of future regulation was an issue in the public consultation in 2003, and more recently with experts in three meetings of Focus Group 1 between September 2004 and February 2005. It also was discussed with the Member States in various Council meetings, in Contact Committee meetings as well as during the seminar under Luxemburg Presidency (30/31 May 2005)<sup>1</sup> and in bilateral contacts. Working documents for the Focus Groups were published on the Commission’s website.<sup>2</sup> In a report adopted in 2003, the European Parliament expressed its support for a revision of the scope of Directive 89/552/EEC (hereafter the TVWF Directive or the Directive), with the definition of audiovisual content to be expanded to take account of media convergence.<sup>3</sup>

This issues paper covers two main issues: material and territorial competence.

#### ISSUE 1: MATERIAL COMPETENCE:

##### 1.1. The notion of Audiovisual Content Services

From the outset the Commission Services identified two major policy options:

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<sup>1</sup> <http://www.tvsf.eu2005.lu>

<sup>2</sup> [http://europa.eu.int/comm/avpolicy/regul/focus\\_groups\\_en.htm](http://europa.eu.int/comm/avpolicy/regul/focus_groups_en.htm)

<sup>3</sup> See Perry Report, PE 312.581/DEF.

- a revision of the TVWF Directive including more flexibility in relation to advertising and an update of the definitions, to make sure that all services similar to television are covered by the revised directive.

- the establishment of a comprehensive framework for any form of electronic delivery of audiovisual content. The majority of experts consulted supported the more comprehensive approach with two different tiers of rules:

i) a basic tier of rules (covering protection of minors and human dignity, and similar principles of general interest) applying to all audiovisual content services and

ii) a subset of these services, **linear audiovisual services**, subject to rules derived from those in the TVWF Directive, but lighter and modernized.

Should this “two tiers” option be chosen, non-linear audiovisual services would cover on-demand services where users/ viewers are able to choose the content they wish at any time, e.g. video-on-demand, web based news services, etc., whatever the delivery platform.<sup>4</sup>

The notion of linear audiovisual services would only cover services that are scheduled, i.e. where there is a succession of programmes arranged throughout the day by the responsible editor and the viewer does not control the timing of the transmission. Thus, editorial responsibility would be part of the definition for the second tier. These services would include, for example, traditional television, web casting, streaming and near video-on-demand, whatever the delivery platform.

The elements for the definition of “audiovisual content services” could include:

- Services as defined by the treaty (Art 49 and 50),
- for the delivery of moving pictures with or without sound,
- to the general public,
- by electronic networks.

This definition would exclude by its reference to “services as defined by the Treaty” all forms of non-commercial or private mass communication. By its reference “to the general public” all forms of individual communication would be excluded.

The inclusion of radio services as “audiovisual content services” falling under the scope of the new directive is also an option that was discussed during the focus group meetings.

Commercial radios largely were against European regulation of radio, preferring purely national regulation. Satellite operators as well as other stakeholders in the audiovisual sector requested the inclusion of radio in an audiovisual content directive; radio then would be subject to basic tier obligations, which could be an adapted basic tier derived from the basic tier described above.

Most broadcasters – as defined by present regulation - were in favour of at least a technologically neutral definition of audiovisual services. Some Member States together

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<sup>4</sup> The definitions used here are of a different nature than the categories used as market definitions under EC competition rules.

with public service broadcasters already in the 2003 consultation demanded a European regulatory framework for any kind of audiovisual content notwithstanding the means of transportation. This request was continuously supported by the European Parliament.<sup>5</sup> Some of the new services providers expressed that it would be inappropriate to impose detailed television regulation on all audiovisual services, while acknowledging that benefiting of the country of origin principle would ensure more legal and hence economic certainty in their business model. There was very limited support for the idea to impose lighter obligations on smaller operators of linear services.

## **1.2. Basic rules<sup>6</sup>**

There was a broad consensus in the focus groups' meetings that the basic tier of obligations, applicable to all audiovisual content services, if established, should safeguard the following public policy objectives:

- Protection of minors and human dignity
- Identification of commercial communications
- Minimum qualitative obligations regarding commercial communication
- Right of reply
- Basic identification / masthead requirements.

### **1.2.1. Protection of minors and human dignity**

The implementation of the TVWF Directive in the Member States shows that there are no European standards of public decency which would allow the terms “pornography” or “gratuitous violence” to be defined at European level. It therefore should be left to the Member States to define these notions.

Although the level of protection should be similar notwithstanding the linear or non linear character of the service, the means employed to protect minors and human dignity would vary according to the characteristics of the service.

### **1.2.2. Identification of commercial content**

Commercial communications in the e-commerce Directive are defined widely as any message intended to promote a product, a service, a brand, etc<sup>7</sup>. This definition covers any form of advertising or sponsorship where there is financial compensation. There appeared to be a consensus among experts consulted that commercial communications should be subject to the principle of identification. Drawing the consequence of the technological evolution in this fields, the application of this principle should cover split

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<sup>5</sup> See Perry Report, PE 312.581/DEF, Point 10. The European Parliament “Believes that the definition of audiovisual content must be expanded to take account of media convergence at the technical level; believes, further, that the principles underlying the Directive, and, indeed, those underlying the Community's audiovisual policy should be set down in a Content Framework Package of graduated levels of regulation, which would provide an overarching framework for the audiovisual sector”.

<sup>6</sup> The minimum obligations and their relation to second tier obligations will be discussed in detail in the respective issues papers.

<sup>7</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) Official Journal L 178, 7/07/2000 P.1 -16

screen, interactive advertising, product placement and future forms of commercial communications. The way used to identify commercial communications would be adapted to the characteristic of the communication. Surreptitious commercial communications should remain prohibited.

### **1.2.3. Qualitative rules regarding commercial communications**

Some qualitative rules, especially in relation to alcohol, tobacco and advertising targeted at minors were discussed during the focus groups' meetings. There was some consensus that current qualitative restrictions should be kept for linear services. Principles contained currently in Article 12 TVWF should be considered as remaining valid.

For non linear audiovisual services and interactive forms of commercial communications, an option would consist in allowing, under conditions, objective information on products currently covered in Article 14 TVWF.

### **1.2.4. Right of reply**

The objective of this provision would be to introduce measures in the domestic law or practice of the Member States in order to ensure the right of reply or equivalent remedies in relation to audiovisual content services, without prejudice to the possibility of adjusting its exercise to the particularities of each type of medium.

### **1.2.5. Basic identification / masthead requirements.**

Audiovisual content service providers could be obliged to ensure easily, directly and permanently accessible information on their identity, to allow parties concerned to exercise their rights. Recent cases show that this is not only relevant in relation to non-linear services, but also for "traditional" broadcasts.

**The discussions with experts were based on the following notions that were further developed during the whole consultation process:**

"audiovisual content service" means services as defined by Article 49 and 50 of the Treaty for the delivery of moving images with or without sound to the general public by electronic communications networks within the meaning of Article 2(a) of Framework Directive 2002/21/EC.
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"content service provider" means the natural or legal person who has editorial responsibility for the content of the audiovisual content service. [alternative: determines the manner in which audiovisual content is organized.]
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"linear service" means services where the content service provider decides upon the moment in time when a specific programme is offered and the composition of programme schedules.
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"broadcaster" means provider of linear audiovisual content services. Editorial responsibility includes the responsibility for the composition of schedules of programmes.
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## **ISSUE 2: TERRITORIAL COMPETENCE**

The country of origin principle is the core of the Television without Frontiers Directive. All broadcasters are regulated in at least one, but only one, Member State. Member States may not hinder broadcasts by broadcasters under another Member States jurisdiction. Member States are, however, free to take stricter measures than those laid down in the Directive for the broadcasters under their jurisdiction. The country of origin principle was considered as a necessary condition for the creation of internal market for television broadcasts and it has enabled the multiplication of audiovisual services in Europe.

The establishment criteria in Article 2 of the Television without Frontiers Directive are designed to determine which Member State has jurisdiction (head office, editorial decisions, and significant part of the work force). In addition, the Television without Frontiers Directive includes subsidiary criteria which are to be applied if a broadcaster is not established in one of the EU Countries.

During the consultation, which includes the consultation process in 2003, discussions in the Focus Group, bilateral debates as well as discussion with the Member States in formal and informal Council meetings, Contact committee meetings, the seminar under Luxemburg presidency (30/31 May 2005), and the High level meeting of Regulatory Authorities in the field of broadcasting (17 March 2005), the following problems were discussed:

- Possibilities to improve the criteria of Article 2 of the TVWF Directive in order to guarantee an effective and correct implementation of the directive;
- Solutions how to treat the circumvention problem while respecting the country of origin principle.
- Answers to the question which establishment criteria and which supplementary subsidiary criteria should be envisaged to transpose the principles of Art 2(4) TVWF for non-linear audiovisual content services provided that minimum standards of the future directive should be applied to services available in the EU.

### **2.1. PROVISIONS WITH RESPECT TO LINEAR AUDIOVISUAL SERVICES**

#### **2.1.1. Determination of jurisdiction and circumvention measures against broadcasters in case of evading legislation**

On the basis of the case law of the European Court of Justice, the focus groups' meetings and the Member States explored several possible solutions with a view to improving the existing rules and guaranteeing an effective and correct implementation of the Directive while taking account of the problems raised by several Member States.

A first set of options concerns the establishment criteria of Article 2 of the directive. The question was, whether these criteria should be clarified? Different problems with respect to the determination of the competent Member State, including problems related to supposed circumvention of the legislation of the receiving Member State, are partially due to differing interpretations of the criteria, used in Article 2 Paragraph 3, such as the term "a significant part of the workforce involved in the pursuit of the television broadcasting activity" or the term "editorial decisions". Within the different discussions positions were mixed whether clarification of these criteria could help to reduce the risk of abuse and circumvention.

Regarding the application of horizontal legislation and circumvention measures against broadcasters in case of evading legislation, the following options were discussed:

- No change of the existing rules;
- The codification of the case law of the European Court of Justice<sup>8</sup>;
- The extension of the Article 2a procedure to cover other considerations of overriding public interest than those included at present (serious harm to minors).

Industry representatives and experts consulted insisted on the importance of maintaining an effective country of origin principle as the “*conditio sine qua non*” of the Directive while a number of Member States were concerned about finding solutions to their problems concerning broadcasters established in another Member States but targeting their market<sup>9</sup>.

With respect to concrete solutions, there was a trend in recent consultation meetings towards supporting the idea of extending Article 2a of the Directive. Another issue discussed was the question whether the criterion of language of a programme could be a suitable criterion for the Member States in the analysis to assess whether a broadcast is directed at a specific Member State. A number of Member States stated that this would not solve the existing problems and especially industry representatives were very reluctant to support the use of “the language of a programme” as a suitable criterion to assessing territorial competence.

### **2.1.2. Review of the subsidiary criteria in order to improve the effective application of the directive for broadcasts coming from outside the European Union**

Besides the establishment criteria the Television without Frontiers Directive includes addition criteria which apply if a broadcaster is not established in one of the EU Countries. Member States shall ensure these broadcasters comply with the rules if

- they use a frequency granted by that Member State,
- they use a satellite capacity appertaining to that Member State or
- they use a satellite up-link situated in that Member State.

In the light of the recent experience with incitement to hatred in broadcasts coming from outside the EU and more precisely the “Al Manar” and “Sahar 1”<sup>10</sup> cases the Commission Services suggested a reversal of the existing order of the technical criteria in Article 2 paragraph 4 TVWF: to place the use of uplink before satellite capacity.

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<sup>8</sup> European Court of Justice case law according to which a Member State can apply its rules to broadcasts by a broadcaster established in another Member State if: 1. The broadcasts in question are directed at the first Member State and 2. If the choice of the establishment was made with the sole purpose of evading the legislation of the first Member State Case C-23/93 TV 10 SA v. Commissariaat voor de Media, paragraph 21. This case law is recalled in recital 14 of the Television without Frontiers Directive

<sup>9</sup> Several Member States prepared a statement regarding the process of the revision of the “Television without Frontiers” Directive on the agenda for the Education, Youth and Culture Council meeting on 23 and 24 May 2004. In this statement Member States referred to urge the Commission to identify ways in which the legitimate concerns voiced can be addressed. “It is clear that the Member States do not believe that the Directive as it is currently structured meets their concerns.”

<sup>10</sup> See IP: 05/325 and Memo 05/98

The responsibility could be divided more equitably between operators involved and consequently between Member States. Indeed, most of the third country programmes use satellite capacities provided either by Eutelsat or by Astra. In addition, the satellite operator barely has direct contractual links with the broadcasters. They have contracts with the uplink-operators (teleport) and these operators have direct contracts with the broadcasters.

The regulatory authorities in the field of broadcasting, Member States as well as the different stakeholders agree largely with the proposal to reverse the order of the subsidiary criteria.

Furthermore, some Regulatory Authorities in the field of broadcasting as well as some experts proposed to take account of the technical developments by including “multiplex” as a new criterion. Multiplexing is a technical operation whereby signals coming from different sources and intended to be transmitted by satellite are aggregated together. This can be done at different stages by different companies in different countries<sup>11</sup>. Some industry representatives, especially satellite operators, questioned the proposal to introduce “multiplexer” as a new criteria: according to them multiplexing very often does not have a clearly defined or single location. Additionally a multiplex operator can, but does not have to, have direct contractual links with the content provider. Therefore for them it is questionable whether a new criterion “multiplexer” would refer to the adequate operators involved.

## **2.2 PROVISIONS FOR NON-LINEAR AUDIOVISUAL SERVICES**

### **2.2.1. Possible criteria for determination of the jurisdiction**

Should the scope of the new directive covers audiovisual content services, the question of the jurisdiction would be raised as for non-linear audiovisual content services. Possible criteria to determine the jurisdiction could be:

- The place where the editorial decisions concerning non-linear services are taken.
- The place where the content service provider is established. The general establishment criteria of the e-commerce directive could be applied.

### **2.2.2. Implementation where there is no establishment**

As explained in above the Television without Frontiers Directive includes subsidiary criteria which apply if a broadcaster is not established within the EU. Provided that some minimum standards should be applicable for all non linear services, the question is how to apply these minimum standards in case of no establishment of a non-linear service provider: which subsidiary criteria would have to be put in place?

One possibility discussed in the different groups could be to set up a specific registration-procedure, similar to the procedure established by the VAT Directive<sup>12</sup>. According to this new procedure any audiovisual services provider not established within the EU could opt for registration in one Member State. This operator would have to comply with any relevant existing provisions in that Member State. As a result of the registration for the

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<sup>11</sup> Multiplexing can be done to increase efficiency or to optimise the utilisation of transponder capacity or can even be done after uplink on the satellite so that signals are aggregated to be delivered as a single service to the customer on earth.

<sup>12</sup> Council Directive 2002/38/EC, of 7 May 2002, amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services; Official Journal L 128 of 15.05.2002.

content service provider this system would open up a possibility to benefit from the country of origin without being obliged to have the establishment within the EU<sup>13</sup>.

If, on the contrary, a non established service provider did not choose the possibility to register in a Member State, any of the countries where the service was available would be entitled to regulate, thus subjecting the operation to multiple regulation.

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The Directorate-General Information Society and Media of the European Commission invites you to make observations to this issues paper by 5 September 2005. Please submit your comments in a generally readable electronic format. All submissions will be published on the Commission's website if not requested otherwise. If you would like your contribution to be treated confidentially, please indicate this at the top of the first page of your submission. Should you want to add a cover letter please do so in a separate document. In case your comments exceeds four pages please start your submission with an **executive summary**. All submissions should be mailed to the functional mailbox of the Audiovisual Policy Unit of the Directorate-General for Information Society and Media: [avpolicy@cec.eu.int](mailto:avpolicy@cec.eu.int).

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<sup>13</sup> This approach would be compatible with the electronic commerce directive, which establishes the country of origin principle for service providers established in the European Union (Article 3). Furthermore this would be compatible with Art 12(3) of the electronic commerce directive, which provides the possibility for a court or administrative authority of requiring the service provider to terminate or prevent an infringement.