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Publishers
Council

**POSITION OF THE EUROPEAN PUBLISHERS COUNCIL ON
THE REVISION OF THE BROADCASTING DIRECTIVE AND
PROPOSALS FOR A NEW AUDIOVISUAL MEDIA SERVICES DIRECTIVE
JUNE 2006**

Part 1 – Introduction and Summary

The European Publishers Council is a high level group of 30 Chairmen and Chief Executives of Europe's leading media corporations whose interests span newspapers, magazines, periodicals, books and journals, online database and internet publishing and, in many cases our members have significant interests in private commercial television and radio. A list of our members is attached.

The proposals from the European Commission for a new Audiovisual Media Services Directive present us with a comprehensive set of regulations affecting editorial, programme and advertising content which will touch the very core of our businesses.

This position paper sets our views, analyses the impact of the new rules on our businesses and presents MEPs with suggested amendments - designed to minimise the impact of the new Directive on new media services which, unlike television services, are not currently licensed, including those offered by the press online and via mobile.

In summary:

- The **proposals to modernise and liberalise advertising rules**, based on country of origin control, including the introduction of regulated product placement, for licensed broadcast services throughout the European Union, are to be welcomed as a contribution to the better regulation and improved competitiveness of Europe's broadcasters.
- We question the validity and practicality of the **proposals to extend the scope** of the existing Broadcasting Directive to cover also *non-licensed* new media services. In our view these are disproportionate and contrary to constitutional protections of the freedom of expression. We also believe they will be unenforceable.
- **Freedom of Expression:** The Commission has properly recognised the need to exempt the press from their new Directive, together with those services whose principal purpose is not the provision of audiovisual content. The proposed method for doing so however is inadequate and will not stand the test of time or of technological progress. Detailed, statutory content regulation for editorial and advertising content in article 3 if applied to the new services including the press online will undermine existing self-regulatory mechanisms, the constitutional protection of freedom of expression and fail the test of best practice principles laid

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out in the EU Commission's Better Regulation initiative.

- The **competitiveness of an emerging sector** will be undermined by the burden of comprehensive content regulations.
- **Online publishing** comprises text-based editorial, still photographs and increasingly video clips some of which are on-demand, either subscription based and/or supported by advertising which itself is sometimes audiovisual in nature demonstrates the difficulties for both publishers and regulators to distinguish between what is non-linear or linear. Furthermore, if a live feed is available, e.g. of a sporting or similarly popular event, this could be deemed "multicast" and fall within regulations for linear services. It is essential that the press online remains free of the comprehensive statutory content regulation foreseen in the Audiovisual Media Services Directive which if left unchanged would have a chilling effect on the freedom of expression throughout the European Union (see analysis of the content rules in part 3).
- **Legal Certainty:** The proposed extension of scope undermines the legal certainty under which new services, including the press online, are currently flourishing.
- **European information society services do not operate in a legal vacuum.** These services, including the press online, are already subject to the EU Directives on E-Commerce, Unfair Commercial Practices and Data Protection as well as the general law and self-regulatory codes pro practice covering both editorial and advertising content. It would be both disproportionate and against principles of subsidiarity to subject these services to additional regulatory burden.
- **Enforceability:** Firstly, as the internet is a global medium, it seems inappropriate to impose regulatory burdens on content providers established inside the territories of the European Union when the citizens of the same geographic area are also consumers of equivalent, similar content services from throughout the world. Secondly, it is important to remember that the reason why Governments are able to enforce the content rules in the existing Broadcasting Directive is because television services are licensed activities.

Summary of recommendations

- ⇒ The Broadcasting Directive should be amended to liberalise the television (linear) advertising provisions but without extending the scope to cover so-called 'non-linear' services, as outlined in Option 3 of the Commission's Impact Assessment.
- ⇒ The press should clearly and explicitly be excluded from the scope of the Directive in all circumstances. This principle is important in order that the press - in print or online, can continue to uphold fundamental rights such as freedom of expression and guarantee an independent press free from government interference. This can be achieved by specific wording in the general articles, as well as is currently the case, in the Recitals.
- ⇒ The inevitable result of the 'blanket' approach taken by the Directive is an argument as to where the boundary should lie between 'light touch' and over-regulation of the new media sector. A better approach is to use the proposal to amend and clarify any shortcomings of the current Broadcasting Directive in terms of linear services, leaving non-linear to existing EU laws, the general law and self-regulation.

⇒ The Directive needs to recognise the respective roles of existing regulation, co-regulation and self-regulation in order to best protect consumers and to promote a healthy audiovisual industry in Europe as part of the i2010 and Lisbon agendas.

Part 2 – More detailed comments

1. In the context of the i2010 programme and Lisbon agenda, designed to promote growth and competitiveness, the European Publishers Council supports the review and eventual liberalisation of the regulatory framework for broadcasting ‘linear’ services, as outlined in Option 3 of the Commission’s Impact Assessment.
2. We strongly support the Commission in its decision to maintain the country of origin principle to enable the free-flow of television services throughout the European Union and oppose any moves to allow new derogations from this principle.
3. We support the introduction of a news access right for short reports. This is essential for freedom of information and freedom of expression.
4. EPC supports all the reductions of the restrictions on advertising time and the introduction of regulated product placement within television programmes and films as a legitimate means of commercial communication within the boundaries proposed by the 2004 Interpretative Communication. Identification of this form, as of any other form of commercial communication, should be clearly identifiable as such to the viewer at the beginning and/or at the end of the programme to ensure editorial integrity.
5. The same applies to sponsorship of television programme content as already foreseen in the Interpretative Communication where not only the name of the sponsor, but also a verbal or visual reference to products and services should be made in a manner clearly understood by the viewer.
6. Unfortunately, in its current form, we foresee that the draft AMS Directive, which sets out to extend the scope of the existing Broadcasting Directive to new, non-licensed, non-linear services will undermine the growth and global competitiveness of Europe’s media sector, contrary to the aims of i2010 and the Lisbon agenda.
7. Although we support deregulation of the existing Broadcasting Directive, and recommend that definitions of ‘TV-like’ services be updated to include services that are identical in nature to traditional scheduled broadcast services, but delivered over different platforms, we continue to oppose the extension of scope to “non-linear” services.
8. The proposed extension undermines the legal certainty and freedom of expression under which new services currently operate, provided by the eCommerce Directive, the Unfair Commercial Practices Directive, the general law and self-regulatory codes of practice in the field of both editorial and advertising content.
9. Of course the European Publishers Council welcomes the Commission’s proper recognition of the need to exempt the press from this Directive, and those services whose principal purpose is not the provision of audiovisual content, including the press online, but the decision by the Commission to set out detailed statutory content regulation for editorial and advertising content will undermine existing self-regulatory

mechanisms, the constitutional protection of freedom of expression and fail the test of best practice principles laid out in the Commission's Better Regulation initiative.

10. Non linear services should not be subject to content regulation via the proposed Audiovisual Media Services Directive. Instead Member States, under principles of subsidiarity, proportionality and better regulation, should be left to ensure that, in conjunction with the general law and existing European Directives, self-regulatory codes and effective systems of self-regulation should apply to 'non-linear' services, including the written press in print and online.
11. The internet and online publishing in particular does not operate in a legal vacuum. The online environment is subject to the general law (i.e. what is illegal offline is illegal online) and, in many cases, for example advertising and editorial content, also subject to self-regulatory codes of practice and ethics.
12. We would draw your attention to the work of the European Advertising Standards Alliance (EASA), of which the European Publishers Council is a member, with regard to the operation of self-regulation of advertising and to the many national systems of press self-regulation which have already adapted to online publication. Proper recognition of the role of self-regulation in delivering effective consumer protection should be made within the articles of the Directive.
13. The distinctions between linear and non-linear will shortly become meaningless and therefore impossible to apply in future under the proposed definitions with any the necessary legal certainty which operators require.
14. Online publishing, which includes both text-based editorial, photographs and increasingly full-motion audiovisual clips, some of which is "on demand", either subscription based and/or supported by advertising, could be both linear and non-linear and certainly often containing audiovisual content. Furthermore, if a live feed is available, e.g. of sporting or similarly popular events, it could become "multicast" and thereby classified as linear.
15. As the internet is a global medium it seems inappropriate to impose regulatory burdens on content providers established inside the territories of the European Union when the citizens of the same geographic area are consumers of equivalent and similar content services from throughout the world.

Part 3 – Analysis of the impact of the new content rules for editorial and advertising content

The new Directive would impose a comprehensive set of statutory regulations in three important areas covering editorial and programme content, advertising and content production.

According to our interpretation, the extent of the new rules which will apply to all audiovisual media services, i.e. linear and non-linear is as follows:

1. The "content" rules for audiovisual media services (and commercial communications in the case of 3e):

“Article 3d

Member States shall take appropriate measures to ensure that audiovisual media services under their jurisdiction are not made available in such a way that might seriously **impair the physical, mental or moral development of minors.**”

“Article 3e

Member States shall ensure by appropriate means that audiovisual media services **and audiovisual commercial communications** provided by providers under their jurisdiction do not contain any **incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**”

- ⇒ *This constitutes a very broad set of content obligations – applying to both editorial and advertising content which we believe will hamper the growth of new media services and fall foul, in the case of the press, of constitutional rights in terms of freedom of expression.*
- ⇒ *Rules already exist to prohibit such content on the internet. New rules in this area are at best unnecessary and at worst create new levels of regulatory burden inappropriate for a developing sector.*
- ⇒ *We recommend that these rules should apply only to linear services.*

2. Rules on advertising content

*That is, rules for audiovisual **commercial communications** which accompany audiovisual media services across linear and non-linear platforms, **in addition to the provision in article 3e above.***

“Article 3g

Member States shall ensure that **audiovisual commercial communications** provided by providers under their jurisdiction comply with the following requirements:

- (a) audiovisual commercial communications must be clearly identifiable as such. Surreptitious audiovisual commercial communication shall be prohibited;
- (b) audiovisual commercial communications must not use subliminal techniques;
- (c) audiovisual commercial communications must not:
 - (i) include any discrimination on grounds of race, sex, or nationality;
 - (ii) be offensive to religious or political beliefs;
 - (iii) encourage behaviour prejudicial to health or to safety;
 - (iv) encourage behaviour prejudicial to the protection of the environment.
- (d) all forms of audiovisual commercial communications and teleshopping for cigarettes and other tobacco products shall be prohibited;
- (e) audiovisual commercial communications for alcoholic beverages must not be aimed at minors and may not encourage immoderate consumption of such beverages;

(f) audiovisual commercial communications must not cause moral or physical detriment to minors. Therefore they shall not directly exhort minors to buy a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.”

⇒ *This level of statutory interference is unacceptable as it leaves no room for self-regulation and could interfere with or at least unbalance existing self-regulatory codes and practices. We also question whether this makes sense in the internet world where forms of contextual advertising operate successfully which might fall foul of these rules. Also under paragraph c this may give rise to detailed rules outlawing certain kinds of food and toy (under f), or products which are deemed not to be environmentally friendly and so on.*

⇒ *We recommend that these rules should apply only to linear services.*

3. Extension of the "quota" rules to new services

“Article 3f

1. Member States shall ensure that **media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works within the meaning of Article 6.**”

⇒ *This is rather surprising and almost certainly impossible to comply with for most internet services as well as for many existing television thematic channels.*

⇒ *We recommend that these rules should apply only to linear services.*

Part 4 - Proposed amendments to the text

As you can see from our analysis in Part 3 above, there is a need to amend the proposal to minimise the impact of the new Directive on non-licensed new media services, including those offered by the press online and via mobile, and to recognise the role of self-regulation.

If left un-amended, the detailed, statutory content regulation for editorial and advertising content found in article 3, when applied to the new services including the press online, will undermine the constitutional protection of freedom of expression and fail the test of best practice principles laid out in the EU Commission’s Better Regulation initiative.

13 – Definition of linear audiovisual media services

Proposed AVMS Text	Amendment
The definition of audiovisual media services covers all audiovisual mass-media services, whether scheduled or on-demand. However, its scope is limited to services as defined by the Treaty and therefore covers any form of economic activity, including that of public service enterprises, but does not cover non-economic activities, such as purely private websites.	<u>The definition of linear audiovisual media services covers mass media in their function to inform, entertain and educate, where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule. This covers any form of economic activity, including that of public service enterprises.</u>



	<p><u>This definition does not cover non-economic activities, such as user-generated content, private websites, any form of private correspondence, such as e-mails.</u></p> <p><u>The definition also excludes all services not intended for the distribution of linear audiovisual content, i.e. where any linear audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner; such as animated graphical elements, small advertising spots or information related to a product or non-audiovisual service.</u></p> <p><u>Nor does this definition cover non-linear services, which includes streamed, looped and downloadable content, or information society services as defined in Article 1 of Directive 98/34/EC. It also does not cover services which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.</u></p>
<p>Justification</p>	
<p>The definition of broadcasting needs to be amended to include services that are the same in nature to traditional scheduled broadcast services, but delivered by different platforms. The term 'linear audiovisual media services' is suggested to cover these services.</p> <p>It is not necessary to extend scope to cover so-called 'non-linear' services, even if in a graduated way. Public policy objectives are important in relation to these services, but extending scope is not the most effective way of achieving those objectives.</p> <p>General law and self-regulatory approaches are already operating successfully in relation to non-linear services, to protect minors and prevent incitement to hatred, among other objectives. Self-regulation offers the ability to react quickly and flexibly to a fast moving market. Further initiatives are being explored at national level. However, self-regulation has been excluded from the draft Directive text and the consumer protection offered by already existing and planned initiatives services will therefore be undermined.</p> <p>The extension of the Directive to non-linear services poses several significant problems:</p> <ul style="list-style-type: none">• It severely undermines the legal certainty derived from existing legislation, in particular the eCommerce Directive (eCD), which has provided the strong legal framework on which growth and investment in the new media sector has been built over the last five years. Such legal uncertainty will drive innovation and investment outside the EU and undermine i2010 and Lisbon agenda objectives.• It attempts to impose an additional layer of regulation on a newly emerging sector whose parameters, characteristics and players are yet to be set. This means that definitions are broad and vague, and that implementation could be unworkable. It may not therefore be possible for regulators to fulfil the promise of consumer protection that is made in the Directive.• It addresses a market that is global in nature and so there is no need to promote single European market objectives. <p>In line with the Commission's Better Regulation policy, we therefore suggest that the Directive revises the definition of 'broadcasting' to apply to 'linear audiovisual media services' in line with technological neutrality. 'non-linear audiovisual media services' should continue to be covered by the eCommerce Directive as 'information society services' and self-regulation should be encouraged as the most effective means by which to deliver public policy objectives.</p>	

Article 2 (1- 5) – ‘Television broadcasts’ etc replaced with ‘audiovisual media services’ etc

Proposed AVMS Text	Amendment
New paragraph 7	<p>“7. This Directive does not apply to services where linear audiovisual content is merely incidental to the service and not its principal purpose.”</p> <p>“8. This Directive excludes electronic newspapers, periodicals, magazines, journals, or any service, the principal purpose of which is the provision of news.”</p>
Justification	
<p>In the case of new paragraph 7, this gives legal effect to Recital 14 to ensure that services not intended for the distribution of audiovisual content as its principal purpose are excluded.</p> <p>In the case of new paragraph 8, this gives legal effect to Recitals 9 and 15 in line with fundamental rights and constitutional rules relating to freedom of the press and freedom of expression in the media.</p> <p>In the case of paragraphs 7 and 8, excluded services from this Directive will be covered by the main body of European legislation applicable to information society services including inter alia EC Directives on E-Commerce, Unfair Commercial Practices, Data Protection and Data Protection in Electronic Services and Distance Selling. These excluded services are also subject to the general laws of the Member States including those on defamation, obscenity, and advertising as well as self-regulatory codes of practice.</p>	

Article 3 (3) – Co-regulatory schemes

Proposed AVMS Text	Amendment
Member States shall encourage co-regulatory regimes in the fields coordinated by this Directive. These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement.”	Member States shall encourage self- and/or co-regulatory regimes in the fields coordinated by this Directive. These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement.”
Justification	
<p>The omission of ‘self-regulation’ from the draft Directive text rules out an effective regulatory approach to the communications industry.</p> <p>Self-regulatory bodies have been functioning as an effective and integral element of the regulatory ecology across the EU communications industry for well over a decade. These models work because they can directly and promptly respond to the industry to which they relate, and because their members have a market incentive to ensure that the services that they provide are in conformity with social standards and public policy.</p> <p>Self-regulatory schemes are already operating across the EU to effectively address public policy concerns in a number of the areas that are covered in the proposed AMS Directive, including protection of minors and human dignity. However, by removing references to self-regulation, the proposed Directive will undermine and potentially render less effective existing self-regulatory codes, as well as those that may develop in coming years in response to emerging media. Without the flexibility and the sense of industry responsibility that self-regulation affords, there is concern that statutory regulation will unenforceable and may not therefore be able to provide the public with the same levels of protection that they are currently enjoying.</p> <p>There is also concern that imposing statutory regulation would discourage companies, particularly in emerging markets, from engaging in self-regulation at a time when there is significant interest in creating a flexible and self-regulating market. It is important not to devalue or underestimate the desire of industry members to behave in a responsible way towards their customer base, especially when effective regulation of this fast-moving industry relies heavily on their co-operation.</p>	

The EPC is signatory to the Audiovisual Stakeholders Group position paper and full set of amendments, together with organisations from across the telecoms, new media, broadcasting, technology, advertising sectors. For the paper, amendments and list of signatures please visit www.audiovisualstakeholders.org

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