

TENDER SPECIFICATIONS

**Study concerning Multi-territory licensing for the online distribution of audiovisual works
in the European Union**

SMART 2008/0002

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1 CONTEXT

The "i2010 – A European Information Society for growth and employment" initiative was launched by the Commission on 1 June 2005 as a framework for addressing the main challenges and developments in the information society and media sectors up to 2010. It sets as a first objective, the creation of a Single European Information Space, offering increased legal and economic certainty for rich and diverse content to develop and circulate in Europe. Ultimately, this will create a sound market basis for the European content sector to distribute its great variety of content on a European and global scale.

The spreading availability and take-up of broadband and the increasing possibility to access creative content and services everywhere and anytime, have brought about challenging new opportunities. For consumers, it means new ways to access, and even to influence, creative content available on global networks such as internet.

For producers and suppliers, it means the possibility to offer new services and content and to develop new markets. Moreover, by reducing the bottlenecks which traditionally characterise the physical distribution, it makes European audiovisual works more easily accessible outside their country of origin. In that way, the competitiveness of the audiovisual content industry in Europe will strongly depend on the use of these new technologies in the distribution stage.

The relevant issues can be best addressed at EU level as most of these new services are likely to benefit from the dual advantages of economics of scale and cultural diversity that the EU's internal market can provide. Therefore, the EU policies should aim at promoting fast and efficient implementation of new services and related business models for the creation and circulation of European content and knowledge.

For that purpose, the MEDIA 2007 programme includes innovative, targeted actions in the field of digitalisation. Among the new schemes, the "Support to Video on Demand and Digital Cinema Distribution" encourages the creation and exploitation of catalogues of European works to be distributed digitally across borders to a wider audience and/or to cinema exhibitors through advanced distribution services, integrating where necessary digital security systems in order to protect online content.

On 03/01/2008, the Commission adopted a [Communication on Creative Content Online](#) which launches further actions to support the development of innovative business models and the deployment of cross-border delivery of diverse online creative content services.

The development of "multi-territory licensing for creative content" is one of the four main, horizontal challenges, together with availability of creative content, interoperability and transparency of Digital Rights management systems (DRMs) and legal offers and piracy, that the Commission deems merit action at EU-level.

One of the major market changes brought about by convergence is the ability of content service providers to reach new audiences at European or even global level by making content available on new platforms not limited geographically by physical constraints. However, as a result of the commercial practices known as copyright territoriality, a content service provider has to enter into a large number of commercial negotiations in order to purchase the right to make content available in each Member State¹.

¹ In the music sector, in order to facilitate the introduction of a multi-territorial system of copyright licensing for online music services, the Commission issued a Recommendation on online management of music rights in

Therefore, in spite of the fact that the online environment allows content services to be made available across the internal market, the lack of licensing mechanisms or practices covering more than one Member State at a time makes it difficult for online service providers and users fully to benefit from the internal market potential. While it is first for right holders to appreciate the potential benefits of entering into license agreement in more than one country, there is a need better to understand the economic and cultural effects of the existing licensing mechanisms as regards the availability of audiovisual content throughout the Member States.

This analysis is complex because different regulation and practices apply to the various types of audiovisual content in each country and such practices are also different from Member State to Member State. Moreover, each national market in the EU is also characterized by individual features linked to cultural as well as economic elements. For example, the distribution chronology of cinematographic works depends on release windows that are specific to each country. Such windows have a double role. Firstly, they preserve an appropriate level of competition between the different distribution segments (cinema, video, vod, pay TV, free TV...), in accordance with their respective importance in terms of return on investment and cultural diversity. Secondly, they allow discriminating and progressively exploiting the consumers' preferences by targeting their willingness to pay in a decreasing order. The cinema release constitutes the first window of the distribution chronology in all countries. A successful performance of a work in cinema may have decisive impact on launching other types of exploitation because potential distributors may become more willing to take the financial risks of the other windows of exploitation. Given that the theatrical cinema release window varies from country to country, the availability of a cinematographic work on other supports such as VOD is also likely to be different from one country to another.

Some stakeholders argue that, in principle, there are no legal or administrative obstacles to the sale of rights in several countries bundled together (the so-called "multi-territory licensing") but that this business practice is not developed since there is not an established business model behind it (i.e. neither a single market for audiovisual content actually exist nor it could materialize because of the lack of the necessary homogeneity/uniformity of demand at European level). In all cases, licensing is generally a negotiation for which the scope (geographical, on modes and in time) of the requested exploitation and the price to be paid are the decisive criteria.

In most Member States legislative measures exist that, in a variety of ways, concentrate the copyright ownership of films and TV fiction with the producers who usually licence rights to distributors. These have a pivotal role in order to optimize the marketing of the audiovisual works to the benefit of all operators in the value chain. However, it has to be recalled that for older films the authors sometimes recover their rights on the expiry of the initial producing agreements.

In this context it has recently been highlighted as the overall revenues generated by the exploitation of audiovisual works, though they are concentrated in the first years from the release, can assure important additional returns via low level of yearly sales of a large number of

October 2005 (2005/737/EC). This Recommendation aims to facilitate the grant of multi-territory licences for online use of musical works by affirming the right of right holders to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right holder. The Commission has invited all interested stakeholders to submit views and comments on their initial experience with this Recommendation and, in general, on how the online music sector has developed since its adoption.

titles carried out for long periods after the first release (the so-called "Long tail" theory). Moreover, during this additional commercial life of an audiovisual works sales can easily take place at intra-Community level with consumers purchasing audiovisual works only available in other country than the Member State of residence. Unfortunately, this possibility, due to the limited availability of cross border on-line delivery services, only concerns the sale of audiovisual works on physical media (DVDs)

An additional issue may be holding back exploitation of audiovisual content on new digital platforms. Older contracts are frequently silent concerning the exploitation of rights on new media ('older' in the context of new media can be as short as a year).

The key issue to-day is how to combine business strategies in the new on-line environment which has the potential to be EU-wide with effective business models developed up to now and generally restricted to individual member States. An example could be the development of a regulatory system supporting a new business model where right holders would be encouraged to grant, next to the main distribution licence(s), which would be reserved for the country(ies) of the producer(s) where cinema and other forms of distribution are generally pre-organised, a second multi-territory licence for on-line distribution bundling all the other EU countries for which, in general, no distribution agreements exist.

2 OBJECTIVES

2.1. General objectives

The general objective of the study is to carry out:

- (1) An analysis of the legal framework and the prevailing practices for the licensing of audiovisual works for online distribution in the Member States;
- (2) A detailed description of the structure (value chain, main operators, collecting societies, etc.) of the online distribution sector and the relevant market in the EU Member States;
- (3) An assessment of the present and future main challenges for the development of a multi-territory distribution business model in the different Member States and possibly the Union as a whole in the mid term (5/10 years);
- (4) The study shall analyse the economic (for the EU industry, the market and the different stakeholders in the single Member States) and cultural consequences (for consumers) that could be the results of the development of multi-territory distribution business models;
- (5) Finally, the study should describe the possible policy options aiming at fostering the development of multi-territory distribution mechanisms and business models for online distribution of audiovisual works, including an analysis of the possibility of developing a system where right holders would be encouraged to grant, next to the main licence, a second multi-territory licence.

2.2. Specific objectives

1) Legal aspects

This part of the study should deal with basically two sets of legal issues. Firstly, the study should identify the current legislation (civil law, administrative and fiscal laws, etc.) both at Member State and at EU level applicable to the trade of audiovisual online distribution rights. . Secondly,

it should analyse the most common commercial practices for the sale of online distribution rights for audiovisual works.

The two levels of legislation shall be analysed and classified according to the assessment that they: (a) support territorial licensing or limit the implementation of multi-territory licensing for the online distribution of audiovisual works, (b) could sustain the development of multi-territory licensing for the online distribution of audiovisual works or (c) have a neutral impact on the possible development of multi-territory licensing for the online distribution of audiovisual works.

2) Economic aspects

2 a) Analysis

The study shall carry out a concise, but complete, analysis (structure of the value chain, identification of stakeholders in the value chain (including collecting societies), business models (rental, sales, other) and overall availability of communication facilities of the industry structure as well as the market (size of the offer per business model, relevant volume of sales and turnover) for the online distribution of audiovisual works in the 27 Member States. The study shall specifically analyse for each Member State the intra-Community online trade of audiovisual works. These analysis shall be carried out taking into account the different origins of audiovisual works (EU, USA - including affiliated distribution companies based in the EU, others).

The analysis should be based on the economics of licensing and industrial organization theory, which has explored several issues related to licensing, while empirical analyses are rare. Moreover, in order to assess the potential development of intra-Community online trade of audiovisual works, the study will make reference to the actual intra-Community trade of DVDs sold on Internet as well as to the peer to peer Internet exchanges of audiovisual works.

The study should present and analyse a representative sample of audiovisual works being distributed on-line, which can demonstrate the economic aspects of the distribution of works in various channels. The study should explain why the selected examples can provide information which can be considered as representative for the functioning of the distribution channels.

2 b) Outlook

The study shall formulate forecasts (5/10 years) on the likely developments for the online distribution of audiovisual works in the 27 Member States taking into account at least two different macro-economic and communication facilities scenarios (rapid or slow development) and two legal and commercial practices environments (unchanged, inductive of multi-territory distribution business models).

Against such forecasts, the study shall analyse the economic (for the EU industry, the market and the different stakeholders in the single Member States) and cultural consequences (for consumers) and shall identify the main obstacles (related to the legal and economic aspects analysed above) for the development of multi-territory business models potentially viable in all, or most, of the 27 Member States.

3) Policy options

Taking into account the forecasts formulated and the challenges identified, the study shall elaborate possible measures (of economic and/or legal nature) that could effectively improve the multi-territory online distribution of audiovisual works. In particular, the study shall analyse the

measures able to foster the development of business models where, for instance, right holders would grant, next to the main licence, a second multi-territory licence or other business models to be identified in the course of the study.

4) Implications

The study shall deal with economic consequences that the implementation of the policy options elaborated under point 3) are likely to have on the present industry structures and markets as analysed under point 2 a); and in particular on the allocation of revenues among the different players in the value chain.

5) General questions

The study shall elaborate answers to common questions related to the audiovisual sector in general:

- On the basis of cost-benefit analysis, is it true that all right holders of audiovisual works can maximise their income by granting licences on a country-by-country basis? Under which licensing system (country by country, multi-territory, pan-European), will the profits of the different operators in the value chain be maximised. This analysis should include not only theoretical explanations and models but shall be based on a representative sampling of the distribution of a number of audiovisual works in various channels (physical distribution/peer-to-peer networks/online distribution) in the different EU Member States.

- What are the economic costs for consumers of a segmented market for audiovisual works?

- Would business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works?

6) Cultural aspects

The study shall provide a comprehensive analysis of the challenges to be addressed in order to improve citizen's faculty to access European audiovisual works across all Member States, in the online environment, thus enhancing cultural diversity.

Furthermore, the study shall analyse whether such improved access to European audiovisual works for citizens, could, in line with the aforementioned "Long tail" theory, enhance the access to Europe's audiovisual cultural heritage.

Additionally, the study shall provide an analysis of some stakeholders' assessment that the need for 'pan-European' or multi-territory online distribution of audiovisual works remains largely theoretical anyway, as cultural content markets are likely to remain mainly national because of cultural differences and practices.

Finally, the study shall provide an analysis of some stakeholders' assessment that removing any barriers to the multi-territory licensing will not advantage certain cultural expressions over other more vulnerable cultural expressions and the way to remedy such scenario.

3 DURATION

Duration of the tasks must not exceed 15 months and is subject to the provisions of Art. I.2.3 of the contract.

4 DELIVERABLES, MEETINGS AND TIMETABLE

4.1 Deliverables

The following deliverables in English are requested from the contractor:

Inception report, summarising the outcome of the inception meeting (see section 4.2 below) shall be submitted within two weeks after the meeting.

The **draft** of the **first interim report** shall be submitted within 5 months after the date of signature of the contract by the last contracting party. The report shall cover the legal and economic aspects as described under points 2.2.1, 2.2.2a and 2.2.2b (the latter for a first sample of 5 Member States) above. . It shall include all background papers and studies as well as a presentation. The **final first interim report** will take into account the outcome of the relevant interim report **meeting** (see section 4.2 below); it shall be submitted within 2 weeks after the meeting.

The first interim report shall also include:

- A detailed explanation of the methodology applied for the analysis and data collection;
- A description of the methodological problems which may arise in the course of the elaboration of the policy options and the evaluation of likely implications. These issues shall be dealt with in the second interim report.

The **draft** of the **second interim report** shall be submitted within 9 months after the date of signature of the contract by the last contracting party. The report shall cover the outlook analysis for all the Member States (point 2.2.2b) and policy options and their implications as described under points 2.2.3 and 2.2.4 above. It shall include all background papers and studies as well as a presentation. The **final second interim report** will take into account the outcome of the relevant interim report **meeting** (see section 4.2 below); it shall be submitted within 2 weeks after the meeting.

The second interim report shall also include at least the following

- A detailed explanation of the methodology applied for the elaboration of the policy options and the evaluation of their implications.
- A description of the methodological problems which may arise in the course of the analysis of the cultural aspects as described under point 2.2 above. These issues shall be dealt with in the final study report.

Study report

All reports shall be provided in 4 paper copies as well as in electronic versions (in MS-Word and in .pdf formats).

A **preliminary draft study report** shall be submitted within 12 months after the date of signature of the contract by the last contracting party. The report shall cover all the issues as described under point 2.2 above. The preliminary draft study report will take into account the outcome of the **preliminary draft study report meeting** (see section 4.2 below); it shall be submitted within 2 weeks after the meeting as **draft study report**.

The **draft study report** shall be presented to stakeholders during a **workshop** to be organised by the contractor and hosted by the European Commission.

The **final study report** shall be prepared taking into account comments presented during the workshop or submitted in writing in the following 2 weeks. The report shall be submitted within 15 months after the date of signature of the contract by the last contracting party.

The study reports (preliminary, draft and final) shall cover all the issues as described under point 2.2 above. If necessary for reasons of readability, parts of the first and second interim reports shall be included in the study reports as technical annexes.

The study reports shall include an executive summary, conclusions and policy options.

The final study report shall also be provided in 4 bound paper copies including annexes as well as in electronic versions (in MS-Word and pdf format). The final study report will be published by the Commission's services on the Commission website. The executive summary shall be in EN, FR and DE. A presentation set in EN suitable for the general public (in MS PowerPoint compatible form) shall also be delivered.

4.2 Meetings and workshop

Inception meeting

An inception meeting will be organised by the Commission's services at the Commission's premises in Brussels within 1 month after signature of the contract by the last contracting party. At the inception meeting the dimensions of the representative sample of audiovisual works being distributed on-line to be analysed (point 2.2.2a) and the choice of the Member States to be included in the panel for the analysis foreseen under point 2.2.2b as well as all aspects concerning the implementation of the study and, notably, the precise scheduling of all reports, meetings and the workshop shall be discussed by the parties. The contractor shall prepare the inception report on the basis of the outcome of the inception meeting.

Interim reports meeting

Two interim meetings during which the contractor will present the draft interim reports shall be held within two weeks after the delivery of the draft reports. They will be organised by the Commission's services at the Commission's premises in Brussels. The contractor will have to finalise the interim reports on the basis of the outcome of the meeting.

Study report meetings

Meeting

A preliminary draft study report meeting during which the contractor will present the preliminary draft study report will be held within two weeks after the delivery of the report. It will be organised by the Commission's services at the Commission's premises in Brussels. The contractor will have to finalise the draft study report to be presented at the workshop on the basis of the outcome of the meeting.

Workshop

The draft study report will be presented by the contractor to stakeholders during a one day workshop to be held within one month after the preliminary draft study report meeting. The contractor is expected to provide a senior member of staff having worked on the contract to deliver the presentation. The workshop will be held in Brussels in Commission premises with interpretation provided for by the Commission. All other organisation tasks and related expenses will be of the responsibility of the contractor. The Commission will provide a list of invitees, which should be completed by the contractor where appropriate. No reimbursement of expenses for invitees shall be foreseen.

4.3 Timetable

Month / Deliverables and Meetings	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Inception (kick-off) meeting	X														
Inception report		X													
Draft first Interim report					X										
First Interim report meeting					X										
First Interim report						X									
Draft second Interim report									X						
Second Interim report meeting									X						
Second Interim report										X					
Preliminary Draft Study report												X			
Preliminary Draft Study report meeting												X			
Draft Study report													X		
Workshop														X	
Final Study report															X

5 TERMS OF APPROVAL OF REPORTS

After reception of the interim and study reports (final versions) the Commission Services will have 30 calendar days in which:

- to approve it, with or without comments or reservations;
- to reject it and request a new report.

If the Commission does not react within this period, the reports shall be deemed to be approved.

Where the Commission requests a new report because the one previously submitted has been rejected, this must be submitted 30 calendar days. The new report shall likewise be subject to the above provisions.

PART 2: ADMINISTRATIVE DETAILS

1 ELIGIBILITY REQUIREMENTS

All the **requirements** related to the **submission and opening of the tenders** are detailed in the invitation to tender (see sections 2, 4 and 8 of the invitation to tender):

- *Address and deadline for submission of the tender*
- *Presentation of the offer and Packaging*
- *Opening of the Tenders*

2 ADMINISTRATIVE REQUIREMENTS

A service provider may consider submitting a tender as a single entity or decide to collaborate with other service providers to present a bid: either by submitting a joint tender or through subcontracting. Tenders may also combine both approaches.

2.1 Different ways to submit a tender

Please pay attention to options 1 to 4 below, which describe the different ways of submitting a tender, and make sure that all the documents and evidences required with respect to YOUR tender are submitted.

Option 1: Submission by **one tenderer: Private / Public entity / Individual.**

Option 2: Submission by **partners** as defined under section 2.2 below.
One must be designated as **lead partner/contractor**.

Option 3: Submission by **one tenderer with subcontractors** as defined under section 2.2 below

Option 4: Submission by **partners** (one must be designated as lead partner/contractor) **with subcontractors** as defined under section 2.2 below

2.2 Joint Tenders and Subcontracting

2.2.1 Joint tenders

In case of a joint tender submitted by a group of tenderers, these latter will be regarded as **partners**. If awarded the contract, they will have an equal standing towards the contracting authority in the execution of the contract.

The partnership may take the form of:

a) a **new legal entity** which will sign the contract with the Commission in case of award

or

b) a group of partners not constituting a new legal entity, who via a **power of attorney (Annex 5)**, signed by an authorised representative of each partner, designate one of the partners as

lead partner, and mandate him as lead contractor to sign the contract with the Commission in case of award.

In both cases, all partners shall be considered as tenderers and shall **assume joint and several liability towards the European Commission for the performance of the contract.**

2.2.2 Subcontracting

Subcontracting is a situation where a contract is to be established between the Commission and a service provider and where this service provider, in order to carry out the contract, enters into legal commitments with other legal entities for performing part of the tasks foreseen in the contract.

The tenderer submitting the tender, if awarded the contract, shall become the sole contractor and shall assume **full liability toward the European Commission for the performance of the contract as a whole.** The other service providers will be regarded as subcontractors.

Subcontracting is subject to the provisions of Article II.13 of the model contract annexed to the invitation.

2.3 Identification of the tenderer – List of Forms & Evidences Required

Options 1/2/3/4: Documents to be provided by the single tenderer or lead partner:

- Annex 1: Administrative identification form (filled in and signed by an authorised representative)
- Annex 2: Legal Entities form² (filled in, signed by an authorised representative, and supported by relevant evidences according to the entity concerned, i.e. private/public/individual)
- Annex 3: Financial Identification form³ (filled in and signed by an authorised representative of the tenderer and his banker)
- Annex 4: Exclusion criteria form (filled in and signed by an authorised representative)
- Legible copy of the statutes of the company (for public/private entities)
- Legible copy of an official document indicating the name of the authorised representatives empowered to sign contracts on behalf of the tenderer.

Options 2 and 4: documents to be provided by each partner

- Annex 1: Administrative identification form (filled in and signed by an authorised representative)
- Annex 2: Legal Entities form⁴ (filled in, signed by an authorised representative, and supported by relevant evidences according to the entity concerned, i.e. private/public/individual)
- Annex 4: Exclusion criteria form (filled in and signed by an authorised representative)
- Annex 5: Power of attorney (filled in and signed by an authorised representative of each partner)
- Legible copy of the statutes of the company (for public/private entities)

² A standard template in each EU language is available at:
http://ec.europa.eu/budget/execution/legal_entities_en.htm

³ A standard template in each EU language is available at: http://ec.europa.eu/budget/execution/ftiers_en.htm

⁴ A standard template in each EU language is available at:
http://ec.europa.eu/budget/execution/legal_entities_en.htm

- Legible copy of an official document indicating the name of the authorised representatives empowered to sign contracts on behalf of the tenderer.

Options 3 and 4: Documents to be provided by each subcontractor (if the sub-contractor is an **individual external expert** not part of the tenderer's staff, he will have to provide only the letter of intent in Annex 6)

- Annex 1: Administrative identification form (filled in and signed by an authorised representative)
- Annex 4: Exclusion criteria form (filled in and signed by an authorised representative)
- Annex 6: Letter of intent from each subcontractor (signed by an authorised representative) or external expert to confirm their willingness and availability to perform the tasks.

3 SIGNATURE OF THE TENDER

The signature of the tenderer's authorised representative or representatives (preferably in blue ink) on the administrative identification form (**Annex 1**) will be considered as the signature of the tender, binding the single tenderer or the group of partners to the terms included in the tender.

4 LAYOUT OF THE TENDER

All tenders must be clear, complete and consistent with all the requirements laid down in the tendering documents and **presented in 3 sections** as follows:

4.1 Administrative section

The documentary evidence required in accordance with part 2 section 2, section 3, section 5.1.3 and section 5.2 of the Tender Specifications must be included in the administrative section of the tender. **Tenders not including the necessary evidence may be rejected.**

4.2 Technical section

This section must address all the requirements laid down in Part 1 - Technical description of the tender specifications. Information included here will be used to conduct the qualitative assessment of the tenders on the basis of the technical award criteria listed in section 5.3 below.

4.3 Financial section

The price quoted must fulfil the following requirements:

- A **total** fixed price (in the form of an all-inclusive amount) expressed **in Euro** must be included in the tender.
- The price quoted must **be firm and not subject to revision.**
- Under Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (OJ L 152 of 13 July 1967, the Communities are exempt from all charges, taxes and dues. Such charges may not therefore be included in the calculation of the price quoted. **The VAT amount must be indicated separately.** VAT exemption is granted to the Commission by the governments of the Member States, either through refunds upon presentation of documentary evidence or by direct exemption.

- The price quoted shall be subject to the terms set in Article I.3 of the model contract attached.
- The price must fall within the scope of these tender specifications and be broken down into unit prices and quantities per each of the following categories:

(a) Professional fees. The daily fee and total number of man/days for each category of staff working on the contract must be specified.

(b) Travel and subsistence expenses. In the event of travel being necessary to carry out the duties specified in the tender, travel and subsistence expenses shall be paid as indicated in the tender.

(c) Other expenses (outsourced services or supplies for which invoices can be produced, e.g. translation expenses, printing expenses, website development, etc.). As indicated in the tender

The part that the tenderer intends to subcontract shall be precisely indicated and detailed.

The total price quoted cannot exceed 500 000 euros. Tenders with a higher total price will be rejected.

The financial section must be submitted in a separate envelope, upon which shall be written the reference of the call for tender as indicated in the invitation, and with the clear mention “Financial section”

5 EVALUATION OF TENDERS

The evaluation of tenders will be done in accordance with the following subsequent steps:

- The Commission verifies that the **tenderer** is not in one of the situations covered by the exclusion criteria (first step, see section 5.1 below)
- The Commission verifies that the **tenderer** has the appropriate capacities to perform the contract on the basis of the selection criteria (second step, see section 5.2 below)
- The Commission assesses the **tender** on the basis of the award criteria (third step, see section 5.3 below).

5.1 Exclusion Criteria

5.1.1. Pursuant to Article 45(2) of Council Directive 2004/18/EC and to Article 93(1) of the Financial Regulation, the Commission will exclude tenderers from participation in the procurement procedure if:

- (a) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- (b) they have been convicted of an offence concerning their professional conduct by a judgement which has the force of res judicata;

- (c) they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify;
- (d) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority or those of the country where the contract is to be performed;
- (e) they have been the subject of a judgement which has the force of res judicata for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;
- (f) they are currently subject to an administrative penalty referred to in Article 96(1) of the Financial Regulation.

Points (a) to (d) of the first subparagraph shall not apply in the case of purchase of supplies on particularly advantageous terms from either a supplier which is definitively winding up its business activities, or from the receivers or liquidators of a bankruptcy, through an arrangement with creditors, or through a similar procedure under national law.

For the purpose of the correct application of the above paragraph, the candidate or tenderer, whenever requested by the contracting authority, must:

- (a) where the candidate or tenderer is a legal entity, provide information on the ownership or on the management, control and power of representation of the legal entity,
- (b) where subcontracting is envisaged, certify that the subcontractor is not in one of the situations referred to in paragraph 1 of Article 93 of the Financial Regulation.

5.1.2. Pursuant to Article 45(2) of Council Directive 2004/18/EC and Article 94 of the Financial Regulation, a contract shall not be awarded to candidates or tenderers who, during the procurement procedure for this contract:

- (a) are subject to a conflict of interest;
- (b) are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the procurement procedure or fail to supply this information;
- (c) find themselves in one of the situations of exclusion, referred to in Article 93(1) of the Financial Regulation, for this procurement procedure.

5.1.3. Tenderers – including sub-contractors if any - shall provide a declaration on their honour (Annex 4), duly signed and dated, stating that they are not in one of the situations referred to in Article 93(1) or 94 of the Financial Regulation. The tenderers must undertake to inform the Commission, without delay, of any changes with regard to these situations after the date of submission of the tender.

5.1.4. In addition, for contracts of a value higher than EUR 133.000, ONLY the tenderer to whom the contract is to be awarded shall confirm the declaration by providing, within a time-limit defined by the contracting authority and preceding the signature of the contract, the following evidences (if the tender is proposed by partners, these evidences must be submitted by each partner):

- 1) The contracting authority shall accept as satisfactory evidence that the candidate or tenderer to whom the contract is to be awarded is not in one of the situations described in point (a), (b) or (e) of Article 93(1) of the Financial Regulation, a recent extract from the judicial record or, failing that, an equivalent document, **issued less than 12 months before the date of the letter informing of the contract award** by a judicial or administrative authority in the country of origin or provenance showing that those requirements are satisfied. The contracting authority shall accept, as satisfactory evidence that the candidate or tenderer is not in the situation described in point (d) of Article 93(1) of the Financial Regulation, a

certificate by the competent authority of the State concerned, **issued less than 12 months before the date of the letter informing of the contract award.**

- 2) Where the document or certificate referred to in the first subparagraph is not issued in the country concerned and for the other cases of exclusion referred to in Article 93(1) of the Financial Regulation, it may be replaced by a sworn or, failing that, a solemn statement made by the interested party before a judicial or administrative authority, a notary or a qualified professional body in his country of origin or provenance.

Depending on the national legislation of the country in which the tenderer is established, the documents referred to in paragraphs 1) and 2) shall relate to legal persons and/or natural persons including, where considered necessary by the contracting authority, company directors or any person with powers of representation, decision-making or control in relation to the candidate or tenderer.

In case of doubt on the declaration on the honour provided by the subcontractor(s) in accordance with the indications of point 5.1.3 above, the contracting authority shall request the evidence referred to in points 1) and 2) above from the subcontractor(s).

5.1.5. Administrative and financial penalties

1. **By returning the form in Annex 4 duly signed and dated**, tenderers confirm that they have been notified of the following points: Each institution has a central database containing information on tenderers who have been in one of the situations described under 5.1.1 and 5.1.2 above. The sole purpose of this database is to ensure, in compliance with Community rules on the processing of personal data, that the above-mentioned cases of exclusion are applied correctly. Each institution has access to the databases of the other institutions.
2. In accordance with Article 96 of the Financial Regulation the contracting authority may impose administrative or financial penalties on the following:
 - (a) candidates or tenderers in the cases referred to in point (b) of Article 94 of the Financial Regulation;
 - (b) contractors who have been declared to be in serious breach of their obligations under contracts covered by the budget.

In all cases, however, the contracting authority must first give the person concerned an opportunity to present his observations.

3. The penalties referred to in paragraph 2 shall be proportionate to the importance of the contract and the seriousness of the misconduct, and may consist in:
 - (a) exclusion of the candidate or tenderer or contractor from the contracts and grants financed by the Community budget for a maximum period of ten years; and/or
 - (b) the payment of financial penalties by the candidate or tenderer or contractor up to the value of the contract in question.
4. In accordance with Article 133 of the Regulation laying down the rules for the implementation of the Financial Regulation, the cases referred to in point e) of 5.1.1. above shall be the following:
 - (a) cases of fraud as referred to in Article 1 of the Convention on the protection of the European Communities' financial interests drawn up by Council Act of 26 July 1995 (OJ C 316, 27.11.1995, p. 48);

- (b) cases of corruption as referred to in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, drawn up by the Council Act of 26 May 1997 (OJ C 195, 25.6.1997, p. 1);
- (c) cases of involvement in a criminal organisation, as defined in Article 2(1) of Joint Action 98/733/JHA of the Council (OJ L 351, 29.12.1998, p. 1);
- (d) cases of money laundering as defined in Article 1 of Council Directive 91/308/EEC (OJ L 166 of 28 June 1991, p. 77).

5. Pursuant to article 133a of the Regulation laying down the rules for the implementation of the Financial Regulation, in order to determine duration of exclusion and to ensure compliance with the principle of proportionality, the institution responsible shall take into account in particular the seriousness of the facts, including their impact on the Communities' financial interests and image and the time which has elapsed, the duration and recurrence of the offence, the intention or degree of negligence of the entity concerned and the measures taken by the entity concerned to remedy the situation.

When determining the period of exclusion, the institution responsible shall give the candidate or tenderer concerned the opportunity to express their views.

Where the duration of the period of exclusion is determined, in accordance with the applicable law, by the authorities or bodies referred to in Article 95(2) of the Financial Regulation, the Commission shall apply this duration up to the maximum duration laid down in Article 93(3) of the Financial Regulation.

6. The period referred to in Article 93(3) of the Financial Regulation is set at a maximum of five years, calculated from the following dates:
- (a) from the date of the judgment having the force of *res judicata* in the cases referred to in points (b) and (e) of Article 93(1) of the Financial Regulation;
 - (b) from the date on which the infringement is committed or, in the case of continuing or repeated infringements, the date on which the infringement ceases, in the cases referred to in Article 93(1)(c) of the Financial Regulation.

That period of exclusion may be extended to ten years in the event of a repeated offence within five years of the date referred to in points (a) and (b), subject to paragraph 5.

7. Candidates and tenderers shall be excluded from a procurement and grant procedure as long as they are in one of the situations referred to in points (a) and (d) of Article 93(1) of the Financial Regulation.
8. Pursuant to article 134b of the Regulation laying down the rules for the implementation of the Financial Regulation, without prejudice to the application of penalties laid down in the contract, candidates or tenderers and contractors who have made false declarations, have made substantial errors or committed irregularities or fraud, or have been found in serious breach of their contractual obligations may be excluded from all contracts and grants financed by the Community budget for a maximum of five years from the date on which the infringement is established as confirmed following an adversarial procedure with the contractor.

That period may be extended to ten years in the event of a repeated offence within five years of the date referred to in the first subparagraph.

9. Tenderers or candidates who have made false declarations, have committed substantial errors, irregularities or fraud, may also be subject to financial penalties representing 2% to 10% of the total estimated value of the contract being awarded.

Contractors who have been found in serious breach of their contractual obligations may be subject to financial penalties representing 2% to 10% of the total value of the contract in question.

That rate may be increased to 4% to 20% in the event of a repeat infringement within five years of the date referred to in the first subparagraph of paragraph 8.

The institution shall determine the administrative or financial penalties taking into account in particular the elements referred to in Article 133a(1) of the Regulation laying down the rules for the implementation of the Financial Regulation.

5.2 Selection criteria

The following selection criteria will be used to select the tenderers. If the tender is submitted by partners (as defined under section 2.2 above) these selection criteria must be fulfilled by each partner.

Documentary evidence of the tenderers' claims in respect of the selection criteria is required as indicated below. The tender should also include any other document that the tenderer(s) wish(es) to include by way of clarification.

5.2.1 Professional information

Criterion:	Enrolment in one of the professional or trade registers in the country of establishment
Documentary evidence:	Declaration or certificate of enrolment in one of the professional or trade registers in the country of establishment

5.2.2 Financial and economic capacity

Criterion:	Sufficient financial and economic standing for carrying out the study.
Documentary evidence:	Annual income statements and balance sheets or extracts there from for the last 3 financial years Statement of overall turnover and turnover from contracts for studies in the field of audiovisual and ICT services and Intellectual Property Rights (IPRs) in the last three financial years.

If, for some exceptional reason which the Commission considers justified, a tenderer is unable to provide one or other of the above documents, he or she may prove his or her economic and financial capacity by any other document which the Commission considers appropriate. In any case, the Commission must at least be notified of the exceptional reason and its justification in the tender. The Commission reserves the right to request any other document enabling it to verify the tenderer's economic and financial capacity.

5.2.3 Technical background

Criterion:	List of contracts in the field of audiovisual and ICT services and IPRs performed in the past three years, or currently being performed, with their respective values.
Documentary	List of contracts in the field of audiovisual and ICT services and IPRs performed

evidence:	in the past three years, or currently being performed, with their respective values.
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Criterion:	Experience, technical knowledge of the proposed teams in the legal and economic areas related to audiovisual and ICT services and IPRs.
Documentary evidence:	Concise but informative curricula vitae of teams members, demonstrating professional experience in the fields of audiovisual and ICT services and IPRs of at least three years

Criterion:	Management capability
Documentary evidence:	List of contracts of a value of at least 300 000 euros performed by the tenderer and other applicants, including subcontractors, if any, in the last three years with indication whether the tasks were carried out as main contractor, within a consortium or with sub-contractors.

Criterion:	Technical capacity of the tenderer and other applicants, including subcontractors, if any, to carry out the tasks in each Member State
Documentary evidence:	Detailed description of the operational structures of the tenderer and other applicants, including subcontractors, if any, in each Member State or equivalent centralised structures.

5.3 Award criteria

5.3.1 Technical award criteria

The tenders will be qualitatively assessed on the basis of the technical award criteria and respective scores listed below:

Technical award criterion	Maximum score/weighting	Threshold
1. Understanding of the tasks required in relation to the tender <ul style="list-style-type: none"> • Clear understanding of the "Context" and "Objectives" of the study. The tenderer should provide detailed explanations of the issues at stake. 	30	15
2. Technical quality of the tender <ul style="list-style-type: none"> • Suitability of the proposed methodology to provide an exhaustive analysis of the regulatory and legal/contractual environment concerning on-line distribution of audiovisual works in the Member States of the Union • Suitability of the proposed methodology to provide an 	60	30

<p>exhaustive analysis of the economic aspects as indicated under point 2.2.2.a of Part 1 of these Tender Specifications. The tenderer should provide details of the sources for economic data to be utilised in the study.</p> <ul style="list-style-type: none"> • Suitability of the proposed methodology to elaborate forecasts, policy options and analysis of implications as indicated under points 2.2.2.b, 2.2.3. and 2.2.4. of Part 1 of these Tender Specifications. • Suitability of the proposed methodology to provide the analysis of the cultural aspects as indicated under point 2.2.6 of Part 1 of these Tender Specifications <p>(All the above sub-criteria are of equal relative importance)</p>		
<p>3. Management</p> <ul style="list-style-type: none"> • Quality of Work plan and organisation of the work • Suitable time scale and allocation of human and budgetary resources. <p>(All the above sub-criteria are of equal relative importance)</p>	10	5
TOTAL	100	60

Minimum score per criterion (threshold):

Tenders scoring less than 50% of the maximum score for any technical award criterion will be considered of insufficient quality and rejected.

Minimum total score (threshold):

Tenders with a total score of less than 60 points at the end of the evaluation process will be considered of insufficient quality and rejected.

5.3.2 Price

The price quoted must comply with the requirements laid down in Part 2 - section 4.3 above.

6 AWARD OF THE CONTRACT

The Contract shall be awarded to the tender offering the best value for money, which will be the one with the best quality/price ratio, taking into account the award criteria listed in section 5.3. The qualitative score obtained for the technical award criteria will be divided by the total price of the tender.

7 PAYMENT AND STANDARD CONTRACT

- Payments under the contract shall be made in accordance with articles I.4 and II.4 of the model contract attached.

- Depending on the financial solidity of the tenderer, payment of the pre-financing may be made conditional upon the furnishing by the Contractor of a financial guarantee.
- In any case, a financial guarantee shall be required for the payment of pre-financing exceeding EUR 150.000. The guarantee shall be supplied by a bank or an authorised financial institution. The guarantee shall be denominated in Euro. The guarantee shall be released as and when the pre-financing is deducted from interim payments or payments of balances to the contractor in accordance with the terms of the contract.

8 VALIDITY OF THE TENDER

Period of validity of the tender shall be nine months from the closing date for submission of the tender given above.

9 ADDITIONAL PROVISIONS

- Changes to tenders will be accepted only if they are received on or before the final date set for the receipt of tenders.
- Expenses incurred in respect of the preparation and presentation of tenders cannot be refunded.
- No information of any kind will be given on the state of progress with regard to the evaluation of tenders.
- All documents submitted by tenderers will become property of the Commission and will be regarded as confidential.

10 LIQUIDATED DAMAGES: SEE ARTICLE II.16 OF THE MODEL CONTRACT

11 NO OBLIGATION TO AWARD THE CONTRACT

Initiation of a tendering procedure imposes no obligation on the Commission to award the contract. Should the invitation to tender cover several items or lots, the Commission reserves the right to award a contract for only some of them. The Commission shall not be liable for any compensation with respect to tenderers whose tenders have not been accepted. Nor shall it be so liable if it decides not to award the contract.

12 RESULTS

The results of the service must be forwarded to the Commission of the European Communities in Brussels. **The copyright will belong to the Commission;** the Commission will in particular have the right to publish the results.

13 DISCLAIMER

The following sentence is to be prominently displayed on the cover of each working paper and the final report of the study. The disclaimer should also be incorporated into the introduction of each working paper and final report.

The opinions expressed in this study are those of the authors and do not necessarily reflect the views of the European Commission.

PART 3: ANNEXES

ANNEX 1: ADMINISTRATIVE IDENTIFICATION FORM

<u>TENDERER'S ID</u>	
Name	
Legal form	
Date of registration	
Country of registration	
Registration number	
VAT number	
Address of registered office	
Contact address (if different)	
URL	
<u>AUTHORISED REPRESENTATIVE(S)⁵</u>	
<u>CONTACT PERSON</u>	
Name	
Forename	
Position	
Telephone	
Fax	
Email	
<u>DECLARATION BY THE AUTHORISED REPRESENTATIVE(S):</u> I, the undersigned, certify that the information given in this tender is correct and that the tender is valid.	

Place and date:

Name (in capital letters) and signature:

⁵ Please include the names of the legal representative(s) whose contract signature is required in accordance with the statutes of the organisation and the official document to be provided under section 2.3

ANNEX 2: LEGAL ENTITIES FORM

As required in PART II under section 2.3 of the tender specifications.

A standard template in each EU language is available at:

http://ec.europa.eu/budget/execution/legal_entities_en.htm

ANNEX 3: BANK IDENTIFICATION FORM

As required in PART II under section 2.3 of the tender specifications

A standard template in each EU language is available at:

http://ec.europa.eu/budget/execution/ftiers_en.htm

ANNEX 4: EXCLUSION CRITERIA FORM

**STUDY CONCERNING MULTI-TERRITORY LICENSING OF AUDIOVISUAL
WORKS IN THE EUROPEAN UNION, SMART 2008/0002**

The undersigned (authorised representative of the tenderer):

.....

Name of the company/organisation:

Legal address:

Registration number:

VAT Number:

Declares on his honour that the company or organisation that he represents:

- is not bankrupt or being wound up, is not having its affairs administered by the courts, has not entered into an arrangement with creditors, has not suspended business activities, is not the subject of proceedings concerning those matters, and is not in any analogous situation arising from a similar procedure provided for in national legislation or regulations;

- has not been convicted of an offence concerning professional conduct by a judgment which has the force of res judicata;

- has not been guilty of grave professional misconduct proven by any means which the contracting authorities can justify;

- has fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which it is established or with those of the country of the contracting authority or those of the country where the contract is to be performed;

- has not been the subject of a judgement which has the force of res judicata for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;

- is not currently subject to an administrative penalty referred to in Article 96(1) of the Financial Regulation.

In addition, the undersigned declares on his honour:

- that on the date of submission of the tender, the company or organisation he represents and the staff proposed for this tender are not subject to a conflict of interests in the context of this invitation to tender; he undertakes to inform the Commission without delay of any change in this situation which might occur after the date of submission of the tender;

- that the information provided to the Commission within the context of this invitation to tender is accurate, truthful and complete.

By signing this form, the undersigned acknowledges that he is aware of the administrative and financial penalties described under 5.1.5 of the specifications.

Place and date:

Name (in capital letters) and signature:

ANNEX 5: POWER OF ATTORNEY

MANDATING ONE OF THE PARTNERS IN A JOINT TENDER AS LEAD PARTNER
AND LEAD CONTRACTOR
(to be filled in and signed by each of the partners in a joint tender)

The undersigned:

– Signatory (Name, Function, Company, Registered address, VAT Number)

having the legal capacity required to act on behalf of his/her company,

HEREBY AGREES TO THE FOLLOWING:

- 1) To submit a tender as a partner in the group of partners constituted by **Company 1, Company 2, Company N**, and led by **Company X**, in accordance with the conditions specified in the tender specifications and the terms specified in the tender to which this power of attorney is attached.
- 2) If the European Commission awards the Contract to the group of partners constituted by **Company 1, Company 2, Company N**, and led by **Company X** on the basis of the joint tender to which this power of attorney is attached, all the partners shall be co-signatories of the Contract in accordance with the following conditions:
 - (a) All partners shall be jointly and severally liable towards the European Commission for the performance of the Contract.
 - (b) All partners shall comply with the terms and conditions of the Contract and ensure the proper delivery of their respective share of the services and/or supplies subject to the Contract.
- 1) Payments by the European Commission related to the services and/or supplies subject to the Contract shall be made through the lead partner's bank account: **[Provide details on bank, address, account number]**.
- 2) The partners grant to the lead partner all the necessary powers to act on their behalf in the submission of the tender and conclusion of the Contract, including:
 - (a) The lead partner shall submit the tender on behalf of the group of partners.
 - (b) The lead partner shall sign any contractual documents — including the Contract, and Amendments thereto — and issue any invoices related to the Services on behalf of the group of partners.
 - (c) The lead partner shall act as a single contact point with the European Commission in the delivery of the services and/or supplies subject to the Contract. It shall co-ordinate the delivery of the services and/or supplies by the group of partners to the European Commission, and shall see to a proper administration of the Contract.

Any modification to the present power of attorney shall be subject to the European Commission's express approval. This power of attorney shall expire when all the contractual obligations of the group of partners towards the European Commission for the delivery of the services and/or supplies subject to the Contract have ceased to exist. The parties cannot terminate it before that date without the Commission's consent.

Signed in on **[dd/mm/yyyy]**

Place and date:

Name (in capital letters), function, company and signature:

ANNEX 6: LETTER OF INTENT FOR SUB-CONTRACTORS AND EXTERNAL EXPERTS

**Study concerning Multi-territory licensing of audiovisual works in the European Union
SMART 2008/0002**

The undersigned:

Name of the company/organisation:

Address:

Option 1: Company/Organisation

Declares hereby that, in case the contract is awarded to [name of the tenderer], the company/organisation that he/she represents, intends to collaborate in the execution of the tasks subject to this call for tender, in accordance with the tender specifications and the tender to which the present form is annexed, and is available to carry out its part of the tasks during the period foreseen for the execution of the contract.

Option 2: External individual expert

Declares hereby that, in case the contract is awarded to [name of the tenderer], he/she intends to collaborate in an individual capacity as an external expert in the execution of the tasks subject to this call for tender, in accordance with the tender specifications and the tender to which the present form is annexed, and is available to carry out its part of the tasks during the period foreseen for the execution of the contract.

Place and date:

Name (in capital letters) and signature: