NATIONAL BROADCASTING COUNCIL OF POLAND

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MATERIAL AND TERRITORIAL COMPETENCE OF THE DIRECTIVE

1. Material Competence

New regulations in this area have become the reason to initiate work on a new directive which will result in the widest possible changes compared to the directive presently in effect.

Now that we see the emergence of new forms and ways of audiovisual content provision, it is of special importance to identify the material competence of the directive and to define its *ratio legis*, i.e., to substantiate the reasons why some forms of the audiovisual content distribution should be covered by regulation. It is therefore necessary to have legal certainty and to lay down the rules that will be comprehensible and convincing to the public and broadcasters/providers of audiovisual content.

The National Broadcasting Council (NBC) supports the basic premise that the new directive should include regulations that will be technologically neutral and will take into account media convergence, and that a complex and integrated approach to the Information Society and to audiovisual media services is necessary. It also supports – in principle – the adoption of two-tier regulation – for all audiovisual services and for linear audiovisual services.

The NBC sees no reason why the new directive should cover radio and is of the opinion that the proposed definition of audiovisual services which is to be included in the new directive rules this out. In the NBC's opinion, given that different provisions have been laid down for various types of TV broadcasters there is no reason why the latter should be further subdivided into high impact or low impact ones broadcasters (or the so-called primary and secondary channels).

It is also necessary to point out that the „Issues Paper" titled „Rules Applicable to Audiovisual Content Services" gives rise to many doubts because:

1. It defines the material competence of the new directive in an imprecise way, failing to provide legal certainty, especially where it does not provide a precise definition of non-linear audiovisual services which are to be regulated by the directive;
2. At the same time it does not offer *ratio legis* for coverage by regulations of all non-linear audiovisual services of non-media nature. It clearly emphasizes when referring to linear services they are to be media services (by referring to the schedule, the responsible editor, editorial accountability, etc.). This approach deserves support. What is missing, however, in the approach to nonlinear services is the definition of their nature and this is what gives rise to reservations that call for clarification.

1.1. Imprecise definition of material competence

The „Issues Paper" states that the regulation will cover „audiovisual content services", i.e.,:

- Services as defined by the treaty (Art. 49 and 50),

• for the delivery of moving pictures with or without sound,
• to the general public,
• distributed by electronic communications networks.

The „Issues Paper" explains additionally that the wording „Services as defined by the Treaty" excludes „non-commercial or private mass communication." Both elements of the foregoing explanation give rise to doubts.

The exclusion of „non-commercial mass communication" from the scope of the new Directive complies neither with the Treaty, nor reality. Art. 50 of the Treaty defines services as normally provided for remuneration, which means – contrary to what is stipulated in the „Issues Paper" – that it does not exclude the services rendered free at the point of reception, i.e., non-commercially. It is to be assumed the directive will regulate programme services broadcast by public, community or civic broadcasters whose operations are not financed by advertising or sponsorship, as well as audiovisual Internet-delivered services available free of charge. In many cases such services are noncommercial.

The notion of „private mass communication" is a contradiction of terms. Private communication cannot be mass communication and vice versa. It would be more appropriate to use „private communication".

If the foregoing reservations are not cleared out the proposed wording will be devoid of legal certainty. So it cannot be approved in its present shape.

1.2. Absence of the definition of nonlinear services.

The following examples of non-linear audiovisual services which are to be regulated by the new directive are offered in the Issues Paper: „video-on-demand, web based news services, etc., whatever the delivery platform." Again the explanation offered may give rise to various doubts. „Web based news services," though usually of multimedia nature, are based mainly on textual information. Will such news services will also be covered by the directive? This is why this notion calls for far-reaching precision – especially when it comes to Internet-delivered audiovisual content services.

While the technologically-neutral approach justifies covering all forms of television available on the Internet by the same scope of regulation as in the case of other distribution platforms (terrestrial, cable or satellite), the rationale for extending this regulatory framework also to Internet-delivered audiovisual services of non-media character is less clear. The „Issues Paper" does not rule it out and thus creates an impression that the new directive will cover all forms of audiovisual activity on the Internet. To rule that option out this ambiguity must be eliminated – which does not exclude the possibility of promoting self- or co-regulation of Internet service- and content-providers.

1.3 Provisions regarding audiovisual services

The „Issues Paper" puts forward a concept of two-tier regulation: of all audiovisual (media) services and of linear services. The NBC supports this approach (with the reservations expressed above), also as regards the the scope and forms of „basic rules" which are to cover all audiovisual services.

2. The territorial competence of the directive

2.1 Linear services

We support the proposals included in the „Issues Paper" concerning:

- The need for more precise definitions of of such terms as „a significant part of the workforce" and „editorial decisions";
- Change the order of additional criteria of jurisdiction determination (the order of Clause c and b is changed in art. 4).

The problem of the territorial scope of the Directive has long given rise to controversies, as evidenced by the „Statement" adopted in May 2004 by a number of Member States (Austria, Belgium, the Czech Republic, Estonia, Holland, Ireland, Lithuania, Latvia, Poland, Slovenia and Sweden) which called for a discussion on the provisions of the directive in this regard and invited the European Commission to propose appropriate solutions in the process of its revision.

It is possible to enumerate several reasons why the Member States are dissatisfied with the present status quo in the area of transfrontier television as governed by the present directive:

1. Foreign programs include contents that do not comply with the regulations of the receiving country (under Art. 3 of the Directive a Member State may introduce more specific or stricter regulations in the areas covered by the provisions of the Directive with regard to broadcasters covered by the jurisdiction of that Member State, but possible constraints as to the contents or advertising cannot be enforced in the case of transfrontier programme services). This phenomenon may be labeled as the abuse of the freedom to choose the "country of establishment" for the purpose of circumventing the regulations of the country to which the programme service is directed.
2. Small states claim that their economic interests are jeopardized by advertising addressed to their markets which is included in foreign programme services, or in the so-called advertising windows;
3. A broadcaster of a programme service addressed to a country is granted a license in one country in order to avoid the regulations covering the country to which its program is aired;
4. It happens that it is not possible to determine the jurisdiction under which a broadcaster operates.

Issues 1-3 are of key significance in terms of the ability of Member States to conduct their own audiovisual policy and of maintaining an equilibrium between national and Community audiovisual policy. As shown by recent of developments, a growing number of states are of the opinion that this balance has been tipped to the detriment of national policy.

The rule that a broadcaster is under the jurisdiction of the country of establishment is one of the basic provisions of the directive and should not be changed. However, it should be examined whether to provide the new directive with methods allowing to seek solutions of the problems mentioned above.

As for issue 1 (more detailed and stricter national regulations) it is possible to make use of a mechanism already laid down by art. 3a of the Directive for national lists of major events: a Member State submits its regulations to a competent authority for examination and once they are found to comply with the Community standards, they become binding on

broadcasters established in other states that air either all or most of their program to that country.

With regard to issue 2, it is necessary to ensure that the advertising addressed exclusively or mainly to one Member State complies with the regulations of that state, should they be different than the Community ones. The arguments that the advertising market may be destabilized and that the interests of local broadcasters may be threatened when most of advertising proceeds go to foreign broadcasters call for further and more in depth discussion on possible new regulations to be included in the directive.

As regards issue 3, it will advisable to supplement the directive with the provisions reflecting the rulings of the European Court of Justice whereby a Member State is allowed to cover broadcasters established in another country by its jurisdiction once their programs are exclusively aired to its territory, or if a broadcaster was established in another country only with a view to circumventing the jurisdiction of the state to which its program is broadcast. At the same time art. 2a should be revised to include the right of a member State to take measures against a broadcaster abusing the freedom to choose the „country of establishment," if it does not submit to its jurisdiction.

Moreover, it seems to be appropriate to extend the scope of the Directive's Chapter VIa by adding provisions laying down a procedure for direct cooperation among Member States to ensure that the directive is implemented. It is necessary to seek ways of preventing this phenomenon – e.g. via cooperation between regulatory authorities of the transmitting and receiving country. The aim of this cooperation could be to shape the license that a broadcaster is granted in the country of establishment in such way – to follow in the footsteps of the ruling issued in the *Van Binsbergen and TV 10 S.A. vs. Commissariaat voor de Media* cases by the ECJ - that in key matters (e.g., the protection of economic interests or minors and human dignity) a broadcaster is not exempted from the observance of the regulations by which it would be governed, should it be established in the country to which its programs are broadcast. The licensing authority of one country would thus be provided with information about an applicant that wants to broadcast to another country and potentially allow it to establish that the broadcaster tries to circumvent the regulations by which it would be governed, if it were established in the country to which it wants to direct its programme service.

The formula of such a cooperation should be well devised and laid down in the directive. Information exchange and cooperation among governments and regulatory authorities could solve many jurisdiction-related problems. Theoretically they are possible today but their sanctioning by the directive would help with their development.

2.2 Non-linear services

It is hard to discuss the jurisdiction over non-linear audiovisual services in the absence of their precise definition (see 1.2). As regards the non-linear audiovisual services available on the Internet, the NBC believes that the directive should only cover media services, while other services should be subject to self or co-regulation with the involvement of service and content providers, which could be encouraged by the directive. It is also possible to adopt an extended version of the Recommendation proposed by the European Parliament and the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry

As for the Internet-delivered non-linear media services , the 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 lays down numerous useful instruments regulating such services. It is also possible to apply the

solutions laid down in the Council Directive 2002/38/EC of December 3, 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.