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Annex to the

**FIFTH REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN
PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND
THE COMMITTEE OF THE REGIONS**

on the application of Directive 89/552/EEC “Television without Frontiers”

{COM(2006) 49 final}

Annotations to point 1.1

In 2005, the Commission adopted the initiative “i2010 – A European Information Society for growth and employment”¹ to foster growth and jobs in the information society and media industries, in which it committed itself to create a consistent internal market framework for information society and media services by modernising the legal framework for audiovisual services, starting with a proposal for revising the “Television without Frontiers” Directive.

Annotations to point 1.2

A further indirect confirmation of the fragmentation of supply is provided by the volume of employment created by the audiovisual sector. The overall number of permanent jobs in the EU-25, after a period of sustained increase up to 2001, is stagnating below the level of 200 000 in 2003 (according to the latest data provided to the Commission by the European Audiovisual Observatory). Recent trends have highlighted the restructuring efforts that some major groups still have to undergo.

Annotations to point 3.1

The Court ruling in the “Mediakabel” case, delivered in June 2005, confirms that near-video-on-demand constitutes a broadcasting service in the sense of the Television without Frontiers Directive: this follows unambiguously from Annex V, point 3, subparagraph A, of Directive 98/34/EC (Electronic Commerce Directive), which states that television broadcasting services “including near-video-on-demand” are excluded from the definition of information society services. Not relevant in the Court’s view is the encoded or unencoded form of the transmissions, or the remuneration scheme used. An analysis of competing services is not relevant either, e.g. the substitutability of near-video-on-demand by video-on-demand (VOD), nor is the fact that some provisions of the Television without Frontiers Directive (such as the air-time requirements for European works) are less relevant to NVOD services.

Annotations to point 3.2

There are a series of practical criteria designed to determine which Member State has jurisdiction (head office, editorial decisions and significant part of the workforce). Besides these establishment criteria, additional criteria apply under Article 2(4) (use of a frequency, a satellite capacity or a satellite up-link) so that broadcasts broadcast by non-EU broadcasters and received in the EU fall under the jurisdiction of a Member State. Further, the Directive states that if jurisdiction cannot be established using the criteria set out in Article 2(3), the Member State of jurisdiction can be established on the basis of Articles 43 *et seq.* of the EC Treaty.

Where the legislation of the receiving Member States contains stricter or more detailed rules than the legislation of the country where the broadcaster is established, the rules of the country of reception cannot be applied to the programmes, even where such broadcasts are targeting specifically its market, unless a circumvention of the rules of the Treaty is established.²

In the judgment VT4 the Court held that, according to the Directive, a broadcaster falls within the jurisdiction of the Member State in which it is established, and, if it is established in more than one Member State, the competent Member State is the one in which the broadcaster has its centre of activity.³

In the case of “Extasi TV”, the service has been broadcast via satellite uplinking facilities situated in Spain, but the programming itself assembled and edited by Digital World Television (DWT), established in Italy.

The “Al Manar” television channel has belonged to Hezbollah culturally and politically from its inception. Al Manar’s satellite station transmits twenty-four hours a day, reaching not only the entire Arab world but also Europe and the rest of the globe. Al Manar has several times been accused of broadcasting programming that preaches hatred and violence. In December 2004, the US Department of State put Al-Manar on the Terrorist Exclusion List due to the channel's “incitement of terrorist activity”.

Eutelsat has been a French private company since 2 July 2001. Until then, the status of Eutelsat was that of an intergovernmental organisation, so it was not under the jurisdiction of any particular Member State.

The Dutch authorities had ordered a halt to the transmission of Al Manar via the NSS. On 21 March 2005, this channel disappeared from the NSS. The reason behind the Dutch decision was the fact that Al Manar did not have a Dutch licence.

The Spanish authorities banned the retransmission of Al Manar by Hispasat on Wednesday, 30 June 2005 (which effectively prevents its reception not only in the Iberian Peninsula but also in South America).

Annotations to point 3.4

The final report of the study on the impact of measures concerning the promotion of the distribution and production of TV programmes (Community and national), provided for under Article 25a of the Television without Frontiers Directive, was published in May 2005.⁴ The findings of the study are largely consistent with the results published in the Commission Communication on the application of Articles 4 and 5. The study confirms that there has been an increase in the scheduling of European works from approximately 50% in 1993 to 60% to 2002.

Annotations to point 3.5.2

In Case C-262/02, initiated by the Commission, the Court was asked to rule that French legislation was incompatible with the principle of freedom of services enshrined in the Treaty in view of the restrictions placed by the Evin law on the retransmission in France of foreign sports events.

Annotations to point 3.5.3

The Commission launched an open call for tender regarding a new framework contract for the surveillance/monitoring of the application of the rules in the Television without Frontiers Directive concerning television advertising, sponsorship and teleshopping in the Member States. The outcome of this procedure was the selection of the contractor S.A. Audimetrie, the contract being awarded on 16 December 2004.

Annotations to point 3.7.2

In March 2005, the presidents of the regulatory authorities were invited to a meeting chaired by Commissioner Reding. The main issue of concern was incitement to hatred in the programmes of channels originating outside the EU, such as Al Manar or Sahar 1. During this meeting, it was agreed that regulators needed to reinforce their cooperation especially on cases considered to be problematic. For this purpose, a number of concrete actions were agreed, for example the establishment of a contact point within each national authority, the establishment of a central database and the establishment of a restricted forum reserved for regulators.

Annotations to point 5.1

Substantial efforts have been made to meet European media standards in the Western Balkans and the process of reform is ongoing. Some countries in the region are in the process of aligning their legislations with the European Convention on Transfrontier Television of the Council of Europe or with the Directive itself.

Annotations to point 5.2

The Commission has made a proposal to strengthen the complementarity of the Directive with the European Convention on Transfrontier Television of the Council of Europe. In a letter to the Council of Europe (2005), the Commission stressed the achievements of the former in respect of public service broadcasting, the independence of regulatory authorities and media pluralism and invited the parties to the Convention to reflect on whether some of the Council of Europe's Recommendations in these areas could be transformed into binding obligations within the new/revised Convention under discussion.

¹ COM(2005) 229 final, 1.6.2005.

² In this respect, see recital 14 of the Directive and the case law: Case 33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging* (1974) ECR 1299 and Case C-23/93, *TV 10 SA v. Commissariaat voor de Media* (1994) ECR I-4795.

³ Case C-56/96, *VT4 v. Flemish Community of Belgium* (1997) ECR I-3143.

⁴ David Graham and Associates, available at http://europa.eu.int/comm/avpolicy/stat/studi_en.htm#3.