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Comments by EBU on the public consultation on the Review of the PSI Directive

From the outset, the EBU stresses that it shares the Commission's goal of completing a single European information space which will encourage an open, competitive internal market for the information and media society. The dissemination of content held by public service bodies contributes to the creation of such a market.

However, the case of public service broadcasters is fundamentally different from that of the public service bodies which fall within the scope of the current PSI Directive, and subjecting them to the provisions of the PSI Directive would not be appropriate.

The EBU's comments therefore focus on point ii) of the consultation and answer questions 3 and 4, which address the issue of the scope of the Directive.

The EC Commission's rationale for considering an extension of the scope of the PSI Directive to public service broadcasters seems to be that "[...] *public service broadcasters hold amongst their collections a considerable amount of valuable material*" and "*these institutions have a mandate in the wide dissemination and preservation of their content to realise various social (cultural/educational) and economic goals, and are also interested in the potential commercial and non commercial re-use of this material*".

Whereas the PSI Directive aims to encourage access to documents held by public service bodies, public service broadcasters already have as part of their public service remit the task of ensuring that citizens have the widest possible access to a broad range of content. Regardless of the information that public service broadcasters gather and irrespective of the programmes they produce, commission, acquire or preserve in their archives, the objective is to make them available to the public. Dissemination to the public benefits from technological progress and is no longer limited to traditional (linear) radio and television services but also includes websites and non-linear audiovisual media services (see, for example, the Council of Europe Recommendation (2007)³ on the remit of public service media in the information society of 31 January 2007).

The remit of all public service broadcasters is thus to disseminate information to the public. Under the Amsterdam Protocol on the system of public broadcasting in the Member States, it is for each Member States to confer, define and organize the public service remit. Setting out in the PSI Directive the conditions under which public service broadcasters have to give access to their content would therefore overlap and interfere with the definition of the public service remit, which falls within the exclusive competence of the Member States. It is also for Member States to organize the commercial exploitation of the remit, within the framework of European competition rules, including the rules on State aid.

Another reason why the inclusion of public service broadcasters in the PSI Directive would not have the intended effect relates to the central issue of intellectual property rights with regard to broadcast material. Firstly, the current Directive recognizes that the obligations which it imposes apply only insofar as they are compatible with the provisions of international agreements on the protection of intellectual property rights. Thus the PSI Directive cannot - and should not - affect the lawful exercise by broadcasters of their intellectual property rights.

Secondly, the PSI Directive excludes from its scope documents for which third parties hold intellectual property rights. This provision would substantially reduce the quantity of documents which broadcasters could make accessible for the re-use intended by the PSI Directive. Requiring broadcasters to make available materials on which third parties hold rights would raise serious difficulties in view of the complexity of copyright clearance. For instance, the commercial re-use of archived materials requires the prior agreement of a large number of persons who have creatively contributed to such materials.¹ Extending the scope of the PSI Directive would not resolve those copyright difficulties for public service broadcasters, but would, rather, exacerbate them.

We believe that before another layer of European regulation is envisaged for public service broadcasters, it is necessary to examine carefully the justification and proportionality of such a measure and its compatibility with the exclusive competences of the Member States.

¹ On this issue see, for example, the EBU's comments on the Commission staff working document, annexed to the Communication of 30 September 2005 on "i2010 Digital Libraries" (http://www.ebu.ch/CMSimages/en/leg_pp_digitallibraries_170106_tcm6-45055.pdf).