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## ETNO Reflection Document on the Audiovisual Media Services Directive proposal – Post European Parliament first reading and adoption of Council “general approach”

### Executive Summary

Following completion of the EP’s First Reading and adoption of a “General Approach” by the Council, ETNO believes that a number of issues still need be addressed in order to avoid unintended consequences and mitigate the harmful effects of the Directive’s extension to on-demand services. The definitions in Article 1 of the future Directive require particular attention. The Council also needs to defend the country-of-origin principle as defined in the E-Commerce Directive, and to take account of the impractical nature of EP proposals with regard to protection of minors, the right of reply, promotion of European productions and quantitative restrictions on advertising.

ETNO has always opposed extension of the Audiovisual Media Services Directive to non-linear services. The Association considers that consumer protection in this field can be ensured more effectively under existing legislative arrangements. We also believe that any attempt to regulate an industry that does not yet fully exist has large potential for unintended consequences – this risk outweighs any possible benefit with regard to cross-border provision of services.

Following completion of the European Parliament’s First Reading and the adoption of a “General Approach” by the Council, it is nevertheless clear that this view has not been universally accepted. Against this background, this position outlines those concerns which ETNO considers still worthwhile to highlight (all mentions of the “Council text” refer to the General Approach adopted on 13 November 2006).

- **Definition of “media service provider” and “editorial responsibility”** The wording of Article 1(b) of the Council text risks including network operators whose only role in the choice of content is the selection of linear channels to be included in a “bouquet” of services (i.e., a similar function to cable TV operators).

This problem is mitigated by the definition of “editorial responsibility” in Recital 16a of the same text. ETNO would therefore emphasise the importance of including this wording in the final Directive (the definition of editorial responsibility in the EP’s amendment No 25 is not similarly helpful). Additional assurance is provided by the EP’s amendment No 67 which supplements definition of media service provider as follows – *“It does not include natural or legal persons who merely transmit content for which the editorial responsibility lies with third parties”*

- **Definition of “on-demand service”** If the Directive has to be applied to thousands of future services which do not serve a mass audience, effective enforcement and consumer protection will be undermined. The Council text contains a number of new elements which will help to mitigate this problem – notably the addition of a “programme” definition, the revised version of Recital 13, and the reference to TV-like characteristics in Recital 13. It is important that these elements are retained in the final text of the Directive.
- **Definitions of “programme” and “audiovisual commercial communications”** ETNO’s concerns relate to the status of substantial, self-standing content items (say, 30 minutes long) which third parties pay to have included in on-demand catalogues in order to promote their products and services. Under the Council text’s definitions of “programme” and “audiovisual commercial communication”, there is a clear risk that such items will be classified as the former, and will therefore be prohibited by the Directive’s provisions on product placement and sponsorship. Such an outcome will threaten free or low-cost on-demand distribution of conventional programmes, and distort competition between broadcasters and on-demand providers since only the former may be able to pursue a viable advertising-funded business model. This outcome can be avoided by adoption of the EP definition of “audiovisual commercial communications” which avoids any cross-reference to “programmes”. A complete solution, and establishment of a logically coherent Directive also requires the addition of the following wording to the definition of “programme”: *“This definition does not cover audiovisual commercial communications as defined in Article 1(f)”*
- **Country of Origin** In the case of on-demand services, the Council text allows Member States to derogate from the country-of-origin principle under the same conditions that are defined in the E-Commerce Directive. ETNO cannot avoid noting that (a) this addition removes the central reason for the extension of the TVWF Directive to non-linear services and (b) rigorous application of Better Regulation principles should consequently lead the Commission to withdrawal its proposal. Recognising that such a development is nevertheless unlikely, the Association would simply underline the need to avoid any further erosion of the country of origin principle.

- **Protection of minors** The EP's Amendment No 100 requires Member States to encourage promotion of a Community wide-labelling, filtering system as a further measure to protect minors. ETNO considers such an exercise would be impracticable in the absence of a common understanding of what material is harmful to minors. Since filtering is generally provided by the access network provider, it is also inappropriate to address this issue in legislation which targets the activities of content providers. These questions should instead be dealt with on the basis of self-regulation at national level. This is the approach already foreseen in the Recommendation on Protection of Minors and Human Dignity adopted in December 2006.
- **Right of reply** EP amendments 55 and 136 seek to extend this right to on-demand services. The right of reply as established for linear audiovisual services is predicated on two assumptions: (a) an unfounded assertion in a television programme may be seen simultaneously by a significant part of the population and (b) transmission of a correction at an appropriate point in the schedule will ensure that it is seen by a significant part of the audience that were exposed to the original assertion. Manifestly, neither of these considerations applies in a non-linear context. For the victim of an unfounded assertion in a non-linear programme, prevention of the programme's future distribution will be a more important consideration, and the opportunity for doing this will depend partly on procedures which are currently being discussed separately in the debate on the draft Rome 2 Regulation. Accordingly, ETNO believes that the matter as a whole should be left for regulation at national level, as foreseen by the December 2006 Recommendation on Protection of Minors and Human Dignity.
- **Promotion of European productions** The EP's Opinion and the Council text list a number of ways in which non-linear operators might contribute to this objective. Both lists manifest a fundamental misunderstanding of the source of the problems faced by European content producers in the traditional broadcast environment. The "long-tail" effects already apparent in other areas of on-line media distribution demonstrate that European AV producers will not face similar problems in the future on-line environment where distribution bottlenecks no longer apply. The measures suggested by the Council and the EP all have the potential of slowing erosion of such bottleneck by obstructing the emergence of new service providers in some way<sup>1</sup>. In other words, the measures will be counterproductive, and reference to them should accordingly be removed from the text of the final Directive.

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<sup>1</sup> For example, some new providers may choose to build critical mass by concentrating on the most popular categories of content, before broadening their offering to include a wide range of niche material. Many firms offering DVD rental on the basis on internet ordering and postal delivery have developed in this way, giving their customers unprecedented access to European content. But a similar approach to electronic delivery would be blocked by the example measures listed by the EP and Council.

- **Quantitative Restrictions on Advertising** EP Amendment 134 seeks to restrict the duration of advertising to 20% of any given clock hour, and apparently applies to all audiovisual services. ETNO would simply underline the complete impracticability of implementing such a requirement in an on-demand environment where customers can pause content, and click between content windows at will.
- **Product placement and sponsorship** There is no rationale for extension of these provisions to non-linear services (such practices are widespread in the print media sector where consumers enjoy a similar degree of choice and control). Potential for unintended restrictions on development of new business models is also particularly acute in this area. Accordingly ETNO would underline the importance of restricting these provisions to *broadcast* services.
- **Co and Self-Regulation** ETNO strongly welcomes the intention of the both the Council and the EP to (a) remove reference to the definitions offered in the Interinstitutional Agreement on Better Lawmaking and (b) include references to self-regulation as an option for implementation of the Directive. The flexibility offered by this approach is particularly necessary in such a fast-moving market and will benefit both industry and consumers.