



**Organization for Security and Co-operation in Europe  
The Representative on Freedom of the Media  
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Position Paper on  
'non-linear audiovisual media services'  
as established in the Proposal of the European Commission for an Audiovisual  
Media Services Directive (AVMS) and the  
Draft Report of the Committee on Culture and Education of the European  
Parliament (CULT)  
4 October 2006

***Background***

On 13 December 2005 the European Commission communicated a proposal for an Audiovisual Media Services Directive (AVMS)<sup>1</sup> to the European Parliament (EP). It is meant to replace the Television without Frontiers Directive (TVWF) from 1989 (last revised 1997).

The proposed AVMS is establishing regulation for two types of audiovisual media services: 'linear' and 'non-linear'.

Linear services are traditional TV broadcasts. Non-linear services include 'on demand' services and commercial audiovisual contents, including those on the Internet.

The regulation for 'linear' services would be similar to those which TVWF already imposes on TV services, but simplified.

'Non-linear' services would be subject to a lower degree of regulation, although a number of provisions would be the same for both services. Still, they would have to be identifiable and traceable, and be subject to controls on offensive content, incitement, advertising and product placement, and they would have to promote access to European works.

Another EU Directive, the e-Commerce Directive<sup>2</sup>, explicitly states in no. 18 that "[...] television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided by request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; [...]"

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<sup>1</sup> COM(2005) 6464 final, 13 December 2005 <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0646en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0646en01.pdf)>

<sup>2</sup> Directive 2000/31/EC

The e-Commerce Directive allows for derogations from the 'country of origin principle'. The Commission sees this right as an obstacle for a single European market for information society services and in its proposal for the AVMS does not allow for any derogations from the 'country of origin principle' for 'non-linear' services; derogations from this principle will remain possible for 'linear services', however.

On 1 August 2006 the rapporteur on the directive, MEP Ruth Hieronymi, presented a draft report of the Committee on Culture and Education of the European Parliament (CULT)<sup>3</sup>. The Committee discussed the draft on 28 August 2006; it is scheduled for adoption by the Committee for 23 October 2006.

As opposed to the proposal of the Commission, the CULT draft report proposes to enable member states to derogate from the 'country of origin' principle also for 'non-linear' services<sup>4</sup> similar to the tested procedures of the e-commerce directive<sup>5</sup>.

This draft report also introduces the right of reply for 'non-linear' services, which is seen as a particularly appropriate legal remedy in the online environment<sup>6</sup>.

### *The Position of the OSCE Representative on Freedom of the Media*

1) The Representative on Freedom of the Media (RFOM) welcomes the move to modernise the Television without Frontiers directive by the AVMS.

2) The 'country of origin' principle is a concept that the Representative is actively promoting within the OSCE region. The Representative regrets that this principle is no longer reflected for 'non-linear audiovisual media services' in the proposed CULT draft report on the AVMS. Implementing this principle without exception, however, would be a step forward for the free flow of ideas and information within the EU.

The right to derogate from the 'country of origin' principle proposed in the draft CULT report contradicts this important principle. Facilitating the free movement of audiovisual media services, including 'non-linear' services within the EU internal market through the application of the country of establishment principle, as promoted by the Commission<sup>7</sup>, should be the objective of the new AVMS.

3) Filtering or blocking of content across borders, as proposed in the draft CULT report, is the least favourable solution in terms of freedom of the media, especially for a borderless infrastructure like the Internet.

4) The concept of 'non-linear audiovisual media services' - newly established by the Commission's proposal – remains very vague. To the present day, despite the ongoing discussion

and despite the draft CULT report, it is still not entirely clear what 'non-linear audiovisual media services' will comprise.

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<sup>3</sup> 2005/0260(COD) provisional, 1 August 2006

<[http://ec.europa.eu/information\\_society/doc/library/hieronymi.pdf](http://ec.europa.eu/information_society/doc/library/hieronymi.pdf)>

<sup>4</sup> Ibid. amendment 44, art. 1, para. 4, letter b

<sup>5</sup> Ibid. Explanatory Statement.

<sup>6</sup> Ibid. amendment 27, recital 38 A (new); amendment 70, art. 1, para. 17 A (new)

<sup>7</sup> Commissioner Viviane Reding, Speech/06/352, 7 June 2006

<<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/352>>

While some actors argue it will only affect 'TV-like' online services, such as video-on-demand or IPTV, others warn that it will also regulate online video gaming, hosting of videos, weblogs or websites with advertisement banners, mobile services and other services of the information society and might hinder development and growth in this sector and stifle the free flow of information.

5) It is worthwhile stressing that the rapid development of the Internet was mainly due to the absence of content regulation. The huge amount of valuable information and resources the Internet offers would not have been possible had it been regulated by States and governments to the same degree as traditional media.

As there is no scarcity of frequency, and considering the pluralistic nature of the Internet and the possibility to publish content easily, there is no justification for content regulation, as formerly applied to the traditional broadcast media with their limited bandwidth. Users of non-linear content actively and consciously choose what to consume from a broad range of content options. Considering this broad range of possibilities, as in the print press in many countries, there is no need for the same degree of content regulation as in traditional TV.

It should be borne in mind that regulation should be limited to an unavoidable minimum. Otherwise there is the risk that – even with good intentions – it goes too far and stifles the free flow of information.

'Non-linear' audiovisual media services according to the proposal will be regulated to a lower degree than 'linear' services. The 'basic tier' of regulation for 'non-linear' services, however, already contains a number of provisions that are the same for 'linear' and 'non-linear' services.

Given the open and pluralistic character of modern information and communication technologies, the users' choice, and the 'pull' character of on-demand-services, it seems doubtful that such broad content regulation is necessary in addition to the already existing general criminal law provisions, e.g. on hate speech.

### ***Conclusions***

- 1) The 'country of origin' principle is not only important for a single European market but also favourable for the free flow of information. Derogation from this principle would impede on freedom of expression in global information and communication infrastructures, such as the Internet.
- 2) A clear and narrowly defined consensus should be reached on which media types qualify as 'non-linear audiovisual media services' in the scope of the proposal. It should clearly be restricted to 'TV-like' services. This should be clarified and communicated by the Commission, and the Parliament should have a valid and reliable basis for the discussion of the proposal.
- 3) The basic tier of regulation for 'non-linear audiovisual media services' should be limited to the absolute necessary minimum. Existing legislation, like the e-commerce directive, already covers services of the information society. After the removal of the right to derogate from the 'country of origin' principle, this would be a sufficient framework for online and on-demand services.