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From:	General Secretariat of the Council
To:	Delegations
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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes - Exchange of views on key issues

Delegations will find in the Annex a paper drawn up by the Presidency to guide discussions on the above mentioned proposal at the meeting of the Working Party on Intellectual Property (Copyright) on 2 March.

This document presents a number of issues that have been raised by delegations at the Council Working Party of 30 November. During this meeting, the delegations raised various issues linked to the proposal and to the Impact Assessment accompanying the proposal. The Presidency would like to discuss in more detail at the next Council Working Party a number of specific issues outlined in this paper.

1. ONLINE TRANSMISSIONS OF BROADCASTING ORGANISATIONS

a. "Ancillary online services" (recitals 8, 11 and Article 1(a))

The definition provided in the proposed Regulation covers the broadcasters' online services which have a clear and subordinate relationship to the broadcast and which consist in the provision of radio or TV programmes simultaneously with or for a defined period of time after their broadcast (online live TV/radio, catch-up services along with ancillary materials). Certain delegations have expressed concerns on the difficulty to draw a clear line between catch-up services and video-on-demand (VoD) services, which are not covered by the proposed definition. Some delegations have expressed concern on the scope of the country-country-of-origin principle and clarity on contractual freedom.

- Which criteria could be used to clarify the distinction between the services covered by the proposed Regulation and the services not covered, including VoD services, and make it future-proof? Should a differentiation be made to better distinctly define “Video on Demand” & “Catch-up TV”?

- In the delegations' view, is the scope of application of the country of origin as proposed by the Commission appropriate? Would it allow addressing the difficulties described in the Impact Assessment related to the transaction costs for the clearance of rights for broadcasters' online transmissions?
- Do delegations consider that there is sufficient clarity on the principle of “contractual freedom” in the proposal?

b. Notion of "principal establishment" of a broadcasting organisation (Article 2(1))

Under the country of origin principle proposed in the draft Regulation, the copyright relevant acts for the provision of ancillary online services take place solely in the Member State where the broadcasting organisation has its principal establishment. Certain delegations asked for clarifying the notion of "principal establishment". The risk of forum shopping was raised by a few delegations.

- Considering the experience from the Satellite and Cable Directive, is there any realistic risk of forum shopping?
- Are there any doubts as to the meaning of "principal establishment"? Note that the term is used also in Article 1(2)(d)(ii) of the Satellite and Cable Directive.

c. Clarification on fixing the amount of the payment for the rights subject to the country of origin (Recital 10 and Article 2(2))

The proposed Regulation provides that, under the application of the country of origin principle, the licence fees paid by broadcasters to right holders take account of all aspects of the ancillary online services, considering notably the features of the service, the audience and the language version. The Satellite and Cable Directive includes a similar provision (recital 17). Certain delegations have raised questions on the practical application of this provision.

- What are the concerns regarding the practical application of this provision?

2. RETRANSMISSIONS OF TV AND RADIO PROGRAMMES BY MEANS OTHER THAN CABLE

a. Interaction between the new rules and the national rules implemented pursuant to the Satellite and Cable Directive

Several delegations raised questions on the relationship between the rules proposed in the Regulation for retransmissions by means other than cable and existing national rules, notably those extending the provisions of the Satellite and Cable Directive to other retransmission technologies than cable.

- Could delegations give examples of the potential practical problems that could be created by such overlaps?

b. Definition of retransmission (recital 12 and Article 1(b))

The proposed Regulation extends the rules on mandatory collective management provided in the Satellite and Cable Directive to retransmissions of radio and TV programmes provided by means other than cable, but on equivalent closed networks. Certain delegations asked why retransmission services provided on the open internet (OTT services) are excluded from the scope of the proposed Regulation.

- Is the definition of “retransmissions” sufficiently clear in terms of services which are covered??
- Are there any substantial differences between OTT retransmissions and retransmissions included in the scope of application of the Commission's proposal?
- In particular, are there any specific risks for right holders regarding OTT retransmissions? If so, could such risks be addressed and in what way?

c. Exercise of the rights in retransmissions through mandatory collective management (Article 3) – choice of the collective management organisation

The proposal sets out the rules applying to the mandatory collective management, specifying that right holders are free to choose the CMO which will be mandated to manage their rights (in line with Article 5 of the Collective Rights Management Directive). Certain delegations had questions on specific situations not covered in the proposed Regulation, i.e. what if there is no CMO managing retransmission rights in a particular Member State, and how the system would work if a right holder chose to exercise his rights through a CMO located in another MS.

- Are there any doubts regarding the application of Article 5 of the Collective Rights Management Directive to the situations covered by the proposed Regulation?
- What practical difficulties do delegations foresee regarding the application of the proposed rules?
- What lessons can be learnt from the experience with the similar rules applying to cable retransmission? In particular, how could potential practical difficulties be addressed in practice?

d. Good faith negotiation between retransmission services and broadcasting organisations (in relation to Article 4)

In the draft Regulation, the rights held by broadcasting organisations are not subject to mandatory collective management (Article 4), and retransmission services negotiate directly with broadcasting organisations. In order to ensure good faith negotiations, it was suggested to introduce a provision similar to Article 12(1) of the Satellite and Cable Directive on prevention of the abuse of negotiating positions.

- From the delegations' experience, is there a possible problem concerning licensing retransmission rights to broadcasting organisations?
- If so, would an obligation to ensure good faith negotiations be an appropriate solution?

e. Article 3(5) – Legal presumption permitted

As explained by the Commission at the last meeting, this article has been included in the proposal as it was deemed important by some Member States during the negotiations of the Satellite and Cable Directive.

- Could the delegations confirm and explain the relevance of this article for their national systems (taking into account the experiences based on the Satellite and Cable Directive)?

f. Direct injection

Some delegations inquired on transmissions using direct injection technique (following the SBS/SABAM judgment of the CJEU). In this judgment, the Court analysed the technique of direct injection that is used by broadcasters in some Member States to inject the programme-carrying signals into the network of the distributor without being accessible to the public at this stage. The Court concluded that the broadcaster's transmission to the distributor did not reach a public and that therefore the former did not communicate to the public. It is the distributor's intervention that allows the signals to reach its subscribers, according to the Court.

- What is the experience of the delegations with the direct injection technique?
 - Are there links with the proposed Regulation?
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