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Subject:	Future European Audiovisual Policy in the framework of Digital Single Market: the functioning of the Audiovisual Media Services Directive in the context of the current geopolitical situation - <i>Policy debate</i> [Public debate pursuant to Article 8(2) CRP [proposed by the Presidency]]

Following consultation of the Audiovisual Working Party, the Presidency has drawn up the attached discussion paper as the basis for the policy debate at the EYCS Council meeting on 18-19 May 2015.

**Future European Audiovisual Policy in the framework of Digital Single Market:
The functioning of the Audiovisual Media Services Directive in the context of the current
geopolitical situation**

Presidency discussion paper

Background

1. The importance of the digital shift and its transformative effect on all kinds of human activity has been recognised at the highest political level in the EU, hence the need to elaborate a comprehensive strategy to reap the maximum benefit from these developments. Media convergence continues apace, bringing with it new opportunities for industry and consumers as well as new challenges for policy-makers and regulators.
2. The creation of digital single market has become one of the top priorities of the Commission. This is confirmed by the Digital Single Market Strategy for Europe, the adoption of which the Commission has announced for 6 May. As stated by the President of the Commission Jean-Claude Juncker, part of this new connected digital single market and its strategy is also a "successful European media and content industry". The digital environment should be consumer-friendly and based on principles such as "freedom of information, freedom and pluralism of the media, the openness of the internet and cultural and linguistic diversity", while at the same time ensuring public interest objectives of security and stability.
3. This means facilitating citizens' access to culturally rich and quality content, new and diverse services and providing growth opportunities to the industry by enabling the benefits of convergence of traditional and online media, and at the same time preventing the misuse of the freedoms guaranteed by European audiovisual market regulation, particularly the Audiovisual Media Services Directive (AVMSD)¹.

¹ Directive 2010/13/EU (OJ L 95, 15.4.2010, p. 1).

4. The Commission is currently engaged in a review (REFIT evaluation)² of the AVMSD which is to be completed by the end of 2015. During this exercise the effective functioning of the directive in a converged media landscape will be examined, including the challenges posed by the current geopolitical reality.

Context

5. Freedom of expression in Europe is in the spotlight. On the one hand it is under threat from those that would like to silence critical voices. This year alone we have witnessed in January the horrific murders at the French publication *Charlie Hebdo* and in April the cyber attack on the French public service television network *TV5 Monde* by individuals claiming to belong to Da'esh. On the other hand, freedom of expression is being exploited to spread hate speech and threaten national security and public order.
6. Freedom of expression is not absolute. It brings with it not only rights but also duties and responsibilities. International law prohibits war propaganda and incitement to hatred. States have the right to restrict the exercise of freedom of expression where this constitutes a threat to national security, territorial integrity or public order.³

² Commission communication on Regulatory Fitness and Performance Programme (REFIT), doc. 10648/14.

³ International Convention on Civil and Political Rights, Articles 19 and 20. European Convention on Human Rights, Article 10.

7. Ministers will recall the ruling of the French Conseil d'État in 2004 ordering the French-based Eutelsat Company to shut down the Hezbollah linked channel *Al-Manar*⁴ for broadcasting anti-Semitic content. There was also the case of *Roj TV*⁵, a Kurdish channel licensed in Denmark but targeting the Turkish and Kurd communities in Germany in which the European Court of Justice found that Member States are not precluded from adopting measures against a broadcaster established in another Member State, pursuant to a general law on the ground that the activities and objectives of that broadcaster run counter to the prohibition of the infringement of the principles of international understanding. In 2014 the Danish Supreme Court upheld a ruling to revoke the channel's licence on grounds that it is a mouthpiece of the Kurdistan Workers' Party (PKK), which is banned in Europe, the United States and Turkey.
8. Following Russia's aggression in Ukraine and its use of the media directly or indirectly owned by the government for the achievement of military and political goals, the EU is now faced with the reality whereby media are no longer there solely to inform, educate and entertain. They are also employed as tools for the achievement of political goals such as the weakening of European unity and social cohesion in the Member States through the manipulation of public opinion.
9. The European Parliament⁶ has strongly condemned Russia's aggressive and expansionist policy, seeing it as a potential threat to the EU itself. The (Foreign Affairs) Council also recognised the danger of the disinformation disseminated by Russia.⁷

⁴ Conseil d'Etat, ruling of 13 December 2004, N. 274757 (available only in French).

⁵ Judgment of the European Court of Justice of 22 September 2011 in joined cases C-244/10 and C-245/10.

⁶ EP resolution of 15 January 2015.

⁷ Council conclusions on Ukraine of 29 January 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/01/council-conclusions-ukraine/>

10. The European Council has stressed the need to challenge Russia's ongoing disinformation campaigns and invited the High Representative to prepare an action plan on strategic communication.⁸

The AVMS Directive, free transmission and the question of jurisdiction

11. The preamble to the AVMSD states clearly that “the country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market” (recital 33). Put simply, it means that each provider of audiovisual media services comes under the jurisdiction of one and only one EU Member State. This is to ensure the free flow of information and audiovisual programmes in the internal market and the legal certainty needed for service providers to be able to develop new business models for cross-border services.
12. The Directive lays down a minimum set of rules and it is up to Member States to adopt stricter national rules if they so desire. However, they can only be applied to providers in their jurisdiction. In exceptional cases, under specific conditions and following a specific procedure,⁹ Member States may provisionally suspend the retransmission of televised broadcasts coming from another Member State if they “manifestly, seriously and gravely” infringe the rules on the protection of minors and incitement to hatred.

⁸ European Council conclusions on 20 March 2015, EUCO 11/15.

⁹ Article 3(2) of the AVMSD.

The challenges

13. Without a doubt, the country of origin principle has greatly encouraged the freedom of transmission of audiovisual media services across borders with some 9,000 channels registered in the Member States and almost 2,000 channels targeting states other than those in which they are established¹⁰. This has clearly contributed to increased media pluralism and more choice for consumers. However, the implementation of the Directive has, on occasion, raised certain issues.
14. The change of the Union's security environment has brought two aspects of the Directive into sharper focus: firstly, the issue of jurisdiction in the case of services of non-EU origin licensed in one Member State yet targeting the audience of another Member State and secondly, the procedure to be followed by Member States when they are the target of unacceptable content coming from other Member States.
15. The procedure foreseen in the Directive does not allow for quick reaction in emergency situations in the case of television broadcasting and can take up to two months. The situation is different for on-demand services where an "emergency procedure" is foreseen and there are broader grounds for receiving States to take action, for example, public policy, the protection of public security, including the safeguarding of national security and defence. The Council conclusions adopted in November 2014¹¹ also addressed the phenomenon of graduated regulation and invited the Commission to assess whether the current regulatory distinction between on-demand and linear audiovisual media services was still appropriate in the digital era.

¹⁰ European Audiovisual Observatory. *2014 Yearbook*. p.125

¹¹ Council conclusions on European Audiovisual Policy in the Digital Era (OJ C 433, 3.12.2014, p. 2).

16. There are cases where third country channels are licensed in a Member State to an entity that is not a media service provider according to the AVMSD i.e. it neither exercises effective control over the content of these channels nor is it engaged in any transmission activity; it is in effect a “letter-box” company. Proper implementation of the AVMSD by all Member States is essential to ensure that only media service providers genuinely established in the EU in accordance with EU law benefit from the freedom to provide services in the single market.
17. The AVMSD presupposes that broadcast content is already in compliance with the regulations of the licensing State and should not have to be subjected to further checks. It follows, therefore, that the regulatory authority of the originating Member State is responsible for ensuring and, if necessary, monitoring¹² the compliance of the content of all the channels in its jurisdiction with national laws and the AVMSD, whatever the language. However, this may not always be practically possible.
18. The situation is made more complicated when national sensitivities are concerned and where the cultural and historical context may not be fully understood by the State having jurisdiction. It has been suggested that in the present geopolitical context (and not only), broadcast content should be analysed from the perspective of the receiving State as well as that of the Member State having jurisdiction. In such cases it seems obvious that close and effective cooperation between the relevant regulatory authorities is of paramount importance.

¹² Monitoring in this context is the analysis of content already transmitted and is not to be confused with censorship or prior restraint, which is the prohibition of content yet to be disseminated. Content monitoring is necessary to ensure compliance with, for example, the rules on advertising, protection of minors, European works quota etc.

Ministerial debate

19. Member States have expressed their support and interest in discussing important and specific aspects of the AVMSD that have an impact on the development of the Digital Single Market. The Presidency believes that it is important to discuss at a political level the functioning of the Directive in the context of current geopolitical challenges that touch upon freedom of expression and the public interest objectives of security and stability.
20. This debate is particularly important as it is for the ministers responsible for audiovisual policies in their respective Member States to set the main guidelines for future European audiovisual regulatory policy.
21. The Presidency considers a policy debate at the Council is timely and will provide valuable input to the ongoing REFIT evaluation. Bearing in mind the issues outlined above, Ministers will be kindly invited to respond to the following question:

In the context of the Audiovisual Media Services Directive, how can we balance freedom of expression with the public interest objectives of security and stability, while at the same time maintaining a culturally diverse and high quality European audiovisual landscape?

22. Furthermore, given the announced launch of a Digital Single Market Strategy for Europe by the Commission, Ministers are also welcome, should they so wish, to address the following question:

What steps should be taken to ensure that culturally diverse and high quality audiovisual content is supported in the implementation of the Digital Single Market Strategy?

In their interventions, Ministers should be guided by the questions set out above and will be encouraged to intervene freely, without scripted interventions, by asking questions, commenting and providing concrete proposals for future action. There will be one table round covering both questions.

In order to give all Ministers an opportunity to contribute, interventions will be restricted to three minutes maximum.
