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Dear Natasha

**Proposal by the European Commission for the Revision of the “Television without Frontiers” Directive (Directive 89/552/EC, as amended, “TVwF”) – to be renamed Audio Media Service Directive (“AMSD”)
Response on behalf of SMG Television**

This short submission is on behalf of the television division of SMG plc (“SMG”). SMG owns the two regional Channel 3 licensees branded as “stv” and broadcast throughout central and north Scotland, as well as two production companies SMG Productions and Ginger Productions (together the “SMG Production Companies”). The SMG Production Companies make programmes for UK network broadcasters (ITV, Channel 4, Five and BBC, and also for UK digital broadcasters).

Introduction

SMG has had the opportunity to review and comment on the *proposed* joint submission of ITV, Channel 4 and Five. We support that submission, particularly where it calls for flexibility over advertising rules, and facilitation of product placement. Here we take the opportunity to make certain reinforcing points on the scope and content of the proposed revisions. In addition, we raise our concerns around ambiguity over the defined term “broadcaster” (as revised) which, in our view, impacts adversely on the objective of the Directive to promote diversity of supply.

Scope

There has already been much debate and dissent over the proposed extension of scope into “non-linear” platforms. SMG supports and highlights the European Court of Justice Case (Mediakabel BV) (as has the DCMS in its UK Government Briefing Note to the European Parliament) – the manner in which the images are transmitted should not be the determining factor in assessing what constitutes a television broadcasting service.

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Under the guise of drawing a more coherent distinction, the AMSD drafters have introduced concepts (of linear and non linear) which are already outdated, given the pace of technological change. Regulation surely has to be applied to the product rather than the means of delivery. There seems no convincing reason to justify harmonising regulation where core societal values are concerned (protection of minors; prevention of incitement to racial hatred), and yet continue to justify **different** regulation (around advertising rules) when dealing with comparable content, for example, the transmission of live sport to the public – whether by “linear” or “non linear” means.

Content is king, and commercial broadcasters are in the business of creating product which will draw audiences and attract advertisers. They too must be allowed to innovate and cannot be subjected to unfair discrimination. AMSD risks consigning commercial broadcasters to a non-convergent world.

Moreover, it is important to highlight that extension of scope will mean significant increased regulatory costs which will fall upon the commercial broadcasters, as well as requiring an extended statutory remit for national regulators.

Definition of “broadcaster” and objective of promoting diversity of supply

Absent the 1989 Directive, broadcasters would have been in a position of monopoly in relation to the output from their channels. TVwF addressed this market failure by imposing obligations upon broadcasters to commission a certain proportion of their output from producers independent of them. Vertical integration coupled with market power would not promote diversity of supply. Regulation was required to address market failure. A “burden” was to be assumed by broadcasters (subjected as they were to an independent quota), but they were left with the ability to commission the balance in-house.

The real issue is – who is the broadcaster to be subjected to this burden, yet allowed to reap the benefit (of vertical integration)?

It is the person with scheduling and commissioning power – as recognised in the TVwF:-

“broadcaster – means the natural or legal person who has editorial responsibility for the composition of schedules of television programmes (...) and who transmits them or has them transmitted by third parties”.

The proposed amendment to the definition would capture as broadcaster any person with a licence – whether or not they had commissioning power. Surely that is not the intention? If it is, it risks undermining the effectiveness of the Directive as regards the objective to create plurality of supply.

The drafting has to change, and it has to be more closely aligned to the definition of “television broadcasting” which includes both the reference to “media service provider” and to “linear audiovisual media service”. Failure to expressly include these references in the definition of “broadcaster” will lead to ambiguity, and the key

twin elements of control of choice over content, and scheduling power will be absent. Those elements are key to the activity and role of "broadcaster":

Proposed Text by European Commission	SMG Amendment
Article 1 – Definitions	
<p>"broadcaster" means provider of linear audiovisual media services.</p> <p>"media service provider" means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organized.</p>	<p>"broadcaster" means a media service provider of a linear audiovisual media service that decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule.</p>

I trust these are helpful comments for consideration by DCMS in the process of updating the regulation and ensuring it has value and robustness to support and promote the broadcasting industry in this period of rapid technological change, business consolidation and media convergence.

I would welcome any opportunity to discuss these issues further.

Yours sincerely



David Archer
Acting Chief Executive
SMG Television