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Draft directive on "Audiovisual Media Services" Opening remarks by the International Federation of Actors (FIA)

The International Federation of Actors (FIA) believes that the draft European directive on services and audiovisual media, put forward by the Commission on 13 December 2005, is inadequate.

It also notes that the political debate tends to focus exclusively on product placement, which certainly raises important issues but cannot replace an in-depth discussion on the obligations that should apply to all new on-demand content distributors.

The Television Without Frontiers directive established a true internal market for television broadcasting in the European Union, granting any lawful operator the possibility to transmit its signal – and the content it carries – beyond its national borders. The country of origin principle, restricted by clear-cut limitations in favour of the country of reception, allowed national operators to increase their audiences exponentially and gain a considerable economic benefit. Nowadays, all European citizens find it normal to receive the TV broadcasts of their countries of origin while abroad.

In exchange, the directive established certain obligations aiming at safeguarding quality content, mirroring the various European national identities and preserving the cultures of this new geopolitical entity. Furthermore, the directive provided specific ground rules for advertising, in order to protect the consumers' legitimate interests and to safeguard the integrity of broadcast works.

Today, this appears to be largely challenged. We believe that the Commission's proposal dangerously favours the big telecommunications companies and lacks objectivity. We are deeply concerned by this regulation, which doesn't seem to take the soaring levels of on-demand content distribution on non-linear networks much into account – which might soon jeopardise the EU audiovisual support mechanisms.

FIA represents performers' unions in Argentina Australia Austria Belarus Belgium Bhutan Brazil Bulgaria Burkina Faso Cameroon Canada Chile Colombia Congo (DR) Croatia Cuba Cyprus Czech Republic Denmark Ecuador Estonia Finland France Georgia Germany Ghana Greece Hong Kong Hungary Iceland India Ireland Israel Italy Japan Kazakhstan Kenya Korea Kyrgyzstan Latvia Luxembourg Madagascar Mexico Moldova Morocco Namibia Netherlands New Zealand Nigeria Norway Panama Pakistan Paraguay Peru Poland Portugal Romania Russia Slovakia Slovenia South Africa Spain Sweden Switzerland Turkey Ukraine United Kingdom United States of America Uruguay Venezuela Zambia Zimbabwe

The new services and audiovisual media environment is rapidly rising. Technological convergence, the spectacular evolution of media and new communication platforms open new perspectives to big telecommunication companies. Non-linear services, allowing users to pull content and shape their own programming, is now becoming the principal vector of audiovisual content within the European Union. Whereas telecommunication companies acrimoniously compete with one another for audiovisual programming and offer a plethora of new interactive channels to European viewers, it is of prime importance to extend to these new "actors" a regulation that does not only grant them the benefits of the country of origin principle, but also impose on them minimum provisions supporting the production and distribution of European audiovisual works. Unless this is accepted, the new directive on "audiovisual media services" will not be in the position to encourage the emergence of a true single market for new audiovisual media, while protecting and promoting cultural diversity in the 25 European member states.

1. Promoting the distribution and production of television programmes

The current directive states that (linear) television broadcasters shall allocate the main proportion of their broadcasting time to European works. It also states that they shall allocate at least 10% of their air time or, alternatively, of their programming budget, to European works by independent producers.

While it acknowledges that non-linear audiovisual media services "*could partially replace*" linear services, the Commission still doesn't deem necessary to submit them to obligations similar to those set up for traditional linear services. It indeed considers that non-linear (on-demand) services are not likely to replace the latter fully.

In our opinion, this is a wrong starting point. Indeed, the issue is not knowing to which extent these new services will or will not replace the linear ones, but rather understanding what role they will play in the broadcast of audiovisual content and how they would also contribute to the safeguarding and promoting of cultural diversity with the EU.

In its 35th recital, the draft directive only indicates that non-linear audiovisual media services "*should, where practical, promote the production and distribution of European works*", which is unfortunately only a noble assertion on principle, but devoid of any real teeth.

The directive proposal also urges the member States – under its general principles (!) – to ensure that "*media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works*". This provision is very disappointing. Indeed, this is only a general principle that furthermore:

- a. does not explicitly mention non-linear media services;
- b. remains extremely vague and, in addition, makes no reference to independent production;
- c. is totally omitted in chapter 3 of the directive - concerning the promotion of TV programmes distribution and production – which moreover is not even slightly amended by the draft directive.

We fear that the absence of clear and enforceable provisions aimed at non-linear services might weaken in the mid-term the current European audiovisual production and distribution support mechanisms to. Indeed, "traditional" TV channels would soon claim their "discrimination" compared with their direct competitors, namely the providers of non-linear audiovisual services, and plead for a suppression of all quotas.

It is indeed possible to submit non-linear audiovisual service providers to – original and perfectly suited obligations in favour of audiovisual production and distribution, and to order, for instance, that:

- a. a percentage of the turnover made by non-linear audiovisual media service providers be used to support independent European production;
- b. a minimum proportion of works made available to the public by non-linear audiovisual media service providers be devoted to European works, according to the directive's definition ;
- c. the European works made available to the public by non-linear audiovisual media service providers be visible and easily accessible by all users in the EU.

However, these provisions will obviously only have a real impact if the new directive provides for adequate mechanisms against any fraudulent relocation of on-demand audiovisual media service providers. FIA therefore welcomes with great interest the anti-circumvention provision proposed by the European Commission, limiting the range of the country of principle origin in case of abuse. This procedure, based on a jurisprudence by the Court of Justice, should also make it possible to sanction any attempt by on-demand audiovisual media service providers to circumvent their obligation to support the production and broadcast of European audiovisual works.

As far as the articles 4 and 5 of the current TVWF directive are concerned, FIA deplores the fact that the draft directive on “audiovisual media services” has not rectified some shortcomings in the original text and, in particular, has not re-defined the notion of “European work” in order to exclude talk shows and “reality-TV” shows, enabling some private channels to fulfil their broadcasting quotas easily and at a lesser costs, while broadcasting “prime time” inexpensive works bought from third countries.

2. Advertising regulations

FIA deplores the draft directive's attempt to soften the current advertising regulations. In particular, FIA rejects the possibility to interrupt the broadcast of TV films and cinematographic works with adverts once every 35 minutes, even if the hourly limit of 20% advertising volume per broadcasting hour is maintained.

The Commission has not provided substantial evidence of the profits brought about by a reduction from 45 to 35 minutes, whereas this new measure is likely to affect performers' rights and in particular, their moral rights with regard to their work. We hold this measure as unnecessary, especially in view of the additional measures envisaged by the draft directive to soften advertising regulations, which provide for a sufficient compensation for the decline in advertising income – i.e. the abolition of the daily 3-hour-advertising limit; the abolition of the 20 minutes gap between advertising breaks in a given broadcast; the recognition of product placement as a possible new source of advertising income.

FIA also considers that the new directive should clearly limit advertising breaks – and their regulation – to commercial audiovisual channels. Certain public channels nowadays introduce advertising breaks within their broadcast – which clashes with their remit, lessens the value of their programmes and inflicts an unjustified discomfort on users, who already pay yearly TV-licence fees to finance public television.

3. Product placement

As it currently stands, the TVWF directive doesn't allow a broadcaster in the EU to place products in the audiovisual programmes/contents it is responsible for. On the other hand, nothing prevents it from transmitting programmes with product placements, when these contents – be they audiovisual or cinematographic works –

do not involve its responsibility – i.e. they were purchased from third parties, who directly benefited from the placement. In this perspective, it would seem useful to remove a difference in treatment that currently discriminates against European broadcasters – limiting their access to a potential financial source. Furthermore, product placement might not only represent a source of financial income, but also be necessary in order to “relate” an audiovisual or cinematographic work more solidly to the real world.

FIA nevertheless considers that the new directive should clearly separate product placement (which the Commission wishes to authorise) from the (forbidden) surreptitious advertising. In its initial draft, the Commission’s proposal doesn’t differentiate enough between them both. It is fundamental, in this respect, that users be in a position to identify clearly the advertising nature of products/services they are shown within programmes. This should be done in the most suitable way for both users and broadcasters, while respecting the work’s integrity.

FIA believes that further thinking is necessary before the most appropriate solution is found. It would also be important to consider whether similar identification rules should apply to all, i.e. when product placement directly benefits a European broadcaster or a third party.

From the outset, FIA appreciates certain provisions in the Commission’s draft proposal, in particular:

1. the ban on product placement in children programmes, as well as in the news and in political information programmes - though, as far as the first case is concerned, it is difficult to see how children can be protected when they view other programmes, such as sports broadcasts;
2. the exclusion of product placement for certain goods or services , whose advertising is forbidden or limited by EU legislation , such as tobacco;
3. the exclusion of “product integration” or the explicit promotion of goods or services – which comes closer to a traditional advertising spot – though we would like the boundary between product placement and product integration to be made much more explicit.

Moreover, FIA considers that:

1. product placement should only be authorised for commercial broadcasters, with the exclusion of public broadcasters;
2. product placement should only be authorised for products and/or services that are inherently linked to the content being transmitted. Furthermore, all undue prominence should be forbidden;
3. the performers’ contractual freedom – as much as editorial integrity and freedom – should be guaranteed, allowing them to deny their consent to the placement if they so wish. This may, for instance, be due to the exclusivity ties of previous possible advertising engagements - or simply to personal reasons, as the artist does not wish to see his/her image associated with a particular product and/or service;
4. the same regulation regarding the product placement should be applied to all audiovisual services, whether they are linear or on-demand.