

Draft Directive "Audiovisual Media Services"

(amending Directive 89/552/EEC "Television without frontiers").

EUROKINEMA Position Paper

EUROKINEMA, an association of film and television producers, wishes to make the following observations.

I. EXTENSION OF THE SCOPE OF THE DIRECTIVE TO NEW AUDIOVISUAL MEDIA

The innovative element in the revision of the "Television Without Frontiers" directive consists of extending the scope of the directive, which was previously confined to traditional audiovisual services (linear services), to non-linear audiovisual services. These consist mainly of services provided on the Internet via broadband or ADSL and via mobile telephony. So, whatever the technology of the distribution/broadcasting platform used, audiovisual content services will be subject, in theory, to a common regulatory framework.

It should be pointed out that among the non-linear audiovisual services, video-on-demand constitutes a service which is developing particularly fast at present, and which represents a vehicle for distribution of films and audiovisual works made available to the public based on their own choice.

Here is the definition of non-linear services (Article 1, point e):

'non-linear service' means an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider.

Eurocinema approves this definition, which seems coherent, but wishes to analyse in greater detail the implications of new economic and cultural consumption models which comprise video on demand.

II. PROMOTION OF EUROPEAN WORKS AND INDEPENDENT PRODUCTION ON ONLINE SERVICES

The promotion of cultural diversity is a principle of general interest (Article 151 of the Treaty) and must constitute one of the key features of common rules both for linear and non-linear services.

Chapter III of the current TWF directive (particularly Articles 4, 5 and 7) relating to the promotion of distribution and production of television programmes encourages television stations to broadcast a majority of European programming and a minimum number of European works originating from independent producers, as well as respecting the periods before they can be broadcast as agreed with the rights holders for cinematographic works; it meets the **political objective of promotion of cultural diversity on a European scale.**

Online services (for the film industry and audiovisual programmes essentially via video on demand) will constitute a new means of access to the audience for film and audiovisual creation and production. This new means of exploitation will supplement and complement the existing means of exploitation (cinemas, pay-TV and unencrypted TV, video/DVD) and constitute a new **decisive market opportunity** for the economy of audiovisual programmes. It could constitute a means of access to European films and programmes, where we know that distribution is limited at present, both in cinemas and on television. Non-national European films represent fewer than 10% of European films market.

However, we note that video-on-demand services have been developing at an astonishing rate in recent months. Generated by telecoms operators, Internet access providers or broadcasters, the offering of online audiovisual programming (mainly films) is growing fast, showing that films form a key component of these platforms.

However, the NPA¹ study on the development of video on demand in 10 countries of the European Union, carried out at the request of European associations in the film and audiovisual sector, shows that the **characteristics of the films on offer are very unequal** depending on the member state concerned.

This study shows that American films currently represent up to 90% of the offering of VOD on some platforms, national content between 1% and 70%, and non-national European films between 5% and 25% of the total.

This means, on the majority of platforms and whichever countries are concerned, that the national or non-national European content forms a **minority** of the output.

So we can fear to see a new medium (VOD) develop in European without any real attractiveness for European film or audiovisual content, at least in the majority of Member States.

Unless there is regulation of the emerging video-on-demand market, there is a risk that two scenarios may occur:

- European films and audiovisual works will be unable to have a presence that is significant and at the appropriate time in this new market;
- the emergence of national models, with possible successes in certain countries, but confirming the absence of offerings of European films in many others, reifying another facet of the **digital divide**.

The window of video-on-demand, which will have been left vacant by European films, will be occupied by American films, thus consolidating the virtual monopoly approach of the American conglomerates on the European market.

The negative effects of such a scenario for European operators (telecoms, platforms, service publishers) engaging in film-on-demand services are easy to predict:

- these businesses will be faced with a virtual monopoly of American films when purchasing rights (with the effect of a bidding war for access to American catalogues, which is already the case – in part – for pay-TV) ;

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- Negative impact on cultural diversity (since European programmes will not be available when this new distribution window opens) as well as on European economic growth and creativity.

To return to the European Parliament's concerns about pluralism of content, it will be necessary to provide for a framework of **European measures aimed at promotion of European content** in non-linear services (video-on-demand) within the revised Television Without Frontiers directive.

Therefore, the **existing provisions of the directive should be reinforced** with regard to the promotion of European works on online services.

Currently, the promotion of European works is covered by two references:

- Whereas clause 35 stipulates that online services '*should ... promote the production and distribution of European works and thus actively contribute to the promotion of cultural diversity*'.
- Article 3f, paragraph 1, stipulates that '*Member States shall ensure that media services providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works within the meaning of Article 6*'.

We consider that this clause should be re-written in a much more voluntarist way. Three separate provisions should be incorporated:

1. contribution by VOD service operators to the creation of European content;
2. enhancing European content;
3. access to European content.

1. Contribution to production of European content

We should point out that in Europe, the technique of **prefinancing** film and audiovisual production is a structural necessity. In the absence of sufficient equity from producers facing considerable production costs, prefinancing constitutes one of the keys to programme making, as well as access to these programmes because without pre-financing, there would be no programmes.

In the context of this directive, arrangements for investment by non-linear content (video-on-demand) businesses should be envisaged, for the benefit of film and audiovisual production, based on the model for obligations imposed on broadcasters to invest in film production².

Investment by video-on-demand operators should be seen as **prefinancing** of programmes (films and television programmes). Under no circumstances could it be construed as a 'taxation' mechanism penalising online operators.

Telecoms operators, who are currently spending large amounts on sports rights to provide content for their online distribution, should be familiarised and made aware about this approach.

This measure could be imposed on providers of non-linear audiovisual services gradually, so as not to impair the development of an emerging market.

² In this regard, see the full report on the broadcasters' obligations to invest in film production. European Audiovisual Observatory, Council of Europe, February 2006.

2. Enhancing European content

Film catalogues available on non-linear audiovisual content services should contain a reasonable proportion of European audiovisual content and ensure the promotion and visibility of this offering to the audience. This is a provision relating to the exposure of work, so as to guarantee genuine availability in the catalogues of European content (offering policy).

3. Access to European content

In the context of non-linear services, the freedom of access to programmes is granted to the audience, who decide the moment in time and the type of programme that they want to watch. In the longer term, electronic programme guides will form an indispensable tool in programme selection.

The NPA study tends to show the paramount role of EPGs (electronic programme guides): *'They are important marketing tools: it is from these indispensable gateways that users access all programming of works'*.

As the EPGs represent the gateway to the content, it is clear that they will become a tool for marketing and access to the content. In this context, it must be foreseen that access to European content should be maintained.

Following the Canadian example, one could consider, if necessary, that electronic programme guides would grant preference to access to European video-on-demand services so as to give preferential access to European content (access policy).

This option should be written into the directive so as to give Member States the freedom to intervene in the arrangements for the implementation of EPGs.

Therefore, Article 3 f) should be supplemented in the following way:

- **Article 3, f) 1**
[Member States shall ensure.....within the meaning of Article 6]

"The promotion of non-linear services can be carried out according to the following arrangements: minimum investments in European works proportional to turnover, minimum proportion of European works within video on demand catalogues, and attractive exposure of European works in electronic programme guides".

Moreover, the arrangements for monitoring of measures taken by the Member States by way of promotion of content on online services need to be improved.

- **Article 3, f) 4** states that the Commission shall submit a report on the application of paragraph 1, taking account of the market and technological developments. The wording **"and the objective of cultural diversity"** should be added to this paragraph, and a time interval between submissions of this report should be proposed (every two years). The monitoring carried out by the Member States should be reinforced by means of an **independent study**.

*"The Commission shall, on the basis of the information provided by Member States and **an independent study**, report to the European Parliament and the Council every two years on the application of paragraph 1, taking into account the market and technological developments **and the objective of culturally diversity"***

This report should, if appropriate, enable the Commission to propose improvements to Article 3, f) 1.

Finally, this provision relating to the promotion of European online content should be reviewed after a period of five years:

▪ **Article 3, f) 5:**

"No later than the end of the fifth year from the adoption of this directive, the Commission shall, if appropriate, put forward proposals for amending Article 3,f),1 taking account of market and technological developments and cultural diversity".

III. TERRITORIAL JURISDICTION

The current directive organises the freedom of reception of linear audiovisual services (traditional broadcasting).

Based on the country of origin principle applied to audiovisual services (a State authorises an audiovisual service, which then benefits from freedom of reception throughout the European internal market), this provision has led to many disputes (particularly conflicts of jurisdiction between Member States which has led several Member States to claim their own jurisdiction over a broadcaster, which was subject to dual regulation).

These disputes led the Commission, during the revision of the Television Without Frontiers directive, to propose a series of criteria – Article 2, paragraph 3 a), b) and c) – aimed at clarifying the jurisdiction of the State over the broadcaster.

These criteria enabled conflicts over dual or triple jurisdiction to be avoided. However, major problems remain, relating to the fact that some linear audiovisual services choose to establish themselves outside the country under whose jurisdiction they should normally fall.

The directive grants freedom of establishment and freedom of service provision by direct application of the Treaty of Rome. However, freedom of establishment in a Member State cannot have the effect of removing from the jurisdiction of the Member State a broadcaster which *"directs all or most of its activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the organization had it been established on the territory of the first Member State"* (whereas clause 14, TWF Directive 97/36/EC).

In reality, the current criteria adopted by Article 2, paragraphs 3 a), b) and c), while they enabled conflicts of jurisdiction to be clarified, do not enable Member States to uphold their jurisdiction in the event of 'circumvention'. Circumvention by the broadcaster is usually motivated by a concern to evade the national system regulating linear media, which provides for stricter or more detailed rules under the option offered to Member States by Article 3.1 of the TWF directive.

A large number of countries, under Article 3.1 of the TWF directive, have developed more voluntarist measures, in the form of broadcasting quotas, investment obligations and the advertising rules.

Out of a concern to evade these more restrictive measures, some broadcaster or audiovisual services are using free establishment in another Member State to circumvent these constraints. Such practices lead to real disorganisation in the national scene, and genuine

distortions of competition, to the detriment of broadcasters subject to stricter or more detailed rules.

Therefore, circumvention of jurisdiction should be ruled out completely.

In recognition of this problem raised by many Member States, the proposal for a directive inserts a new paragraph 7 in Article 2, g):

'A Member State may, in order to prevent abuse or fraudulent conduct, adopt appropriate measures against a media service provider established in another Member State that directs all or most of its activity to the territory of the first Member State. This shall be proven on a case by case basis by the first Member State'.

However, it is almost certain that the criteria currently adopted for identification of the country of jurisdiction are inadequate : a primary and a secondary criterion should be added to the list of criteria currently formulated in Article 2, paragraph 3.

The primary criterion should be that of the **resources generated** by the media service (linear or non-linear) (the resources generated consisting of advertising revenue and/or subscriptions). This criterion should appear as the first point in the list of criteria for determining jurisdiction, so as to give priority to an economically objective criterion. A secondary criterion could be the language in which the service is provided.

The choice of an economic criterion (revenue from media services) and a cultural criterion (language) as a secondary criterion should enable jurisdiction criterion to be clarified, and put an end to the circumvention currently observed.

Such criteria should be adopted for all media services, whether linear or not.

▪ **Article 2, paragraph 3, a) new**

"The television broadcaster, the audiovisual service in question, the provision of the online or offline service generates the majority of advertising or subscription revenue in that Member State"

Article 2, paragraph 7 should also be clarified to take account of the considerations set out below:

*"A Member State may, in order to prevent or **put an end to** abuse or fraudulent conduct, adopt appropriate measures against a media service provider established in another Member State that directs all or most of its activity to the territory of the first Member State. This shall be proven on a case by case basis by the first Member State, **relying on indicators such as, the origin of the advertising revenue and/or subscriptions, the main language of the programme, the existence of programmes or marketing communication aimed specifically at the audience in the Member State of reception.**"*

IV. BROADCASTING OF EUROPEAN CO-PRODUCTIONS AND NON-NATIONAL EUROPEAN WORKS

Our Association supports the insertion of a whereas clause 36 aimed at the member states providing that television broadcasters should include in their programming an appropriate proportion of European coproductions and European works originating in another country.

Contrary to the assertions made by the European Broadcasting Union (EBU), which represents public broadcasters, this measure cannot be considered as a mandatory quotas; however, it does aim to develop a legal practice already introduced in some Member States. It should be subject to monitoring.

Draft directive "Audiovisual Media Services"
Eurocinema position

Proposal for amendments

▪ **Article 2, paragraph 3, a) new**

"The television broadcaster, the audiovisual service in question, the provision of the online or offline service generates the majority of advertising or subscription revenue in that Member State"

▪ **Article 2, paragraph 7**

*"A Member State may, in order to prevent or **put an end to** abuse or fraudulent conduct, adopt appropriate measures against a media service provider established in another Member State that directs all or most of its activity to the territory of the first Member State. This shall be proven on a case by case basis by the first Member State, **relying on indicators such as, the origin of the advertising revenue and/or subscriptions, the main language of the programme, the existence of programmes or marketing communication aimed specifically at the audience in the Member State of reception.**"*

▪ **Article 3, f) 1**

"The promotion of non-linear services can be carried out according to the following arrangements: minimum investments in European works proportional to turnover, minimum proportion of European works within video on demand catalogues, and attractive exposure of European works in electronic programme guides"

▪ **Article 3, f) 4**

*"The Commission shall, on the basis of the information provided by Member States and **an independent study**, report to the European Parliament and the Council every two years on the application of paragraph 1, taking into account the market and technological developments **and the objective of cultural diversity**"*

▪ **Article 3, f) 5:**

"No later than the end of the fifth year from the adoption of this directive, the Commission shall, if appropriate, put forward proposals for amending Article 3,f),1 taking account of market and technological developments and cultural diversity"