



Audiovisual Media Services Directive Position Paper

European Film Agency Directors

14th July 2016

The European Film Agency Directors (EFADs) welcomes the Commission's proposal to review the Audiovisual Media Services (AVMS) Directive. The EFADs supports the practical and pragmatic approach of the European Commission and its ambition to create a level playing field between new and existing players while maintaining the country of origin principle which has facilitated the cross-border provision of audiovisual services.

In addition, a large majority of the EFADs welcomes the flexibility granted to Member States to request financial contributions from online services established in other countries but targeting their national audience. We also support the introduction of catalogue quotas, prominence obligation for non-linear services, and stronger rules to protect minors online. We see these as positive first steps towards the creation of a fair level playing field between new online and existing players, the integration of online players into the European film value chain, and the promotion of cultural diversity in Europe. Making the AVMS Directive fit-for-purpose in the digital age is essential for the European film industry, citizens, and audiences.

Nevertheless, clarifications are necessary and the amendments to the Directive could go further. The EFADs therefore looks forward to working closely with the European Commission, Parliament and Council to address the areas below in order to nurture an environment that supports audiovisual and cinematographic creativity and the effective distribution of European works in Europe and worldwide.

Making the Directive fit-for-purpose in the digital age

- Online audiovisual media services are increasingly competing with traditional players. In 2014, on-demand film revenues witnessed year-on-year growth of 30 percent from 2013. However, this has been unable to compensate for the decline in other sectors such as the physical video market which is the most affected by the development of new forms of digital distribution. The sector experienced a 12 percent decline from 2013 to 2014 and a 33.5 percent decline over the last five years.¹
- Despite this competition, online audiovisual media services are currently subject to lighter rules than traditional services on the protection of minors and against hate speech. Moreover, the new digital distribution channels have not yet shown their full potential as investors in local and European audiovisual works through pre-buying rights nor will all of them necessarily be interested in playing a part in funding European film productions. The strategic challenge is to secure a stronger and more balanced economic commitment

¹ European Audiovisual Observatory. 2015. "Yearbook 2015 Key Trends" p.58 <http://shop.obs.coe.int/en/16-yearbook>

from all players in the value chain including newer online services and established players such as cinemas, distributors, public and private television.

- As a result, it is becoming more and more important to bring the AVMS Directive into the digital age to create a level playing field and to support cultural diversity in Europe. In Europe, a “level playing field” means an equal commitment from all market players to the creation, promotion and distribution of local and European content and respect for national rules and common European values on advertising and the protection of minors. A level playing field should mean that all operators have the ability to succeed in a market which is culturally, artistically and economically rich but also fragmented. Without support from new online players and without a level playing field, the production of European works will become more difficult and European citizens and audiences will have less access to Europe’s culturally diverse content.

The country of origin principle

- A large majority of the EFADs welcomes the decision to maintain the country of origin principle. The principle has been vital in facilitating the cross border provision and circulation of audiovisual programmes within the EU. Nevertheless, **flexibility is needed** so that the objective of creating a single market is balanced with the goals of establishing a fair level playing field and promoting Europe’s cultural diversity. The Directive should outline clear and flexible rules to ensure film agencies can continue to fulfil their important role of funding the development, production, and distribution of local and European content to the benefit of European citizens and audiences.
- A large majority of the EFADs therefore welcomes the changes to Article 13(2) which gives Member States the ability to request **financial contributions** from online audiovisual media services operating from another country and targeting their markets. This should apply to levies, taxes and to the investment obligations imposed on national operators whose objective is to promote the production of independent European audiovisual works. The growth of digital services has created unfair competition as these services can base themselves in an EU Member State with a lower fiscal and regulatory burden but target audiences in another EU Member State and benefit from their respective markets without investing in local and European creation. In 2013, 31 percent of video-on-demand services were available in an EU Member State but established in another EU country.² These online operators take profits from the targeted market without contributing to the local support policies in place and at the expense of the local operators who are subject to national contributions.
- At the moment financial contributions (i.e. levies, taxes and investment obligations) are in place in 11 countries: Belgium, Croatia, Czech Republic, Estonia, France, Germany, Italy, Poland, Portugal, Slovenia and Spain. On average the levies/taxes have a low rate, often 1-2 percent of revenues generated by the service, and in general they do not apply to small and medium-sized enterprises (SMEs). In the new proposal from the Commission, it should be noted that SMEs or special services are also exempt in Article 13(5). The application of the contributions will therefore only apply to big players which have significant revenues and are able to absorb these small amounts with very little impact.
- Moreover, in the new proposal, the introduction of contributions is voluntary and whilst some Member States have already put in place schemes, it is unlikely to lead to all 28 Member States introducing them. Nevertheless, it should be noted that taxation is a

² European Audiovisual Observatory. 2015. “Yearbook 2015 Key Trends” <http://shop.obs.coe.int/en/16-yearbook>

national competence and online audiovisual media services already have to comply with 28 different taxation regimes based on the country of destination. This demonstrates that they are able to operate perfectly well under these circumstances when providing their services across borders. Furthermore, if these services can manage to work in 28 different countries dealing with local promotion, language versions, different pricing, collecting subscriptions or advertising revenues then they will be able to manage the contributions in the countries the services are targeting.

- At the same time, the EFADs welcomes the provision aimed at avoiding double imposition. If an operator has already paid a levy on the basis of the revenues generated in the targeted country, this should be taken into account by the country of origin if it already has a levy system in place.
- Whilst these contributions are small, within the Member States they are a vital lifeline for local audiovisual industries and for the flowering of local and European culture. The money generated by financial contributions in the form of levies and taxes feeds into the film agencies' budgets which allow them to support a wide range of activities such as film education, the production of local and European content, and distribution in theatres or online.
- A small derogation from the country of origin principle is therefore necessary to meet the Directive's objectives of supporting and strengthening cultural diversity to the benefit of European citizens and audiences. It is essential that online services provide a stronger economic commitment to the development of local and European content.
- A large majority of the EFADs also regrets the decision not to give Member States the ability to apply the rules of the Directive to audiovisual **services located outside of the EU** but which target European audiences and whose presence in the EU is significant in terms of market share/turnover. According to the European Audiovisual Observatory, 207 audiovisual services in May 2013 were recorded as established in the United States and explicitly targeting one or more European markets.³ A provision should be introduced which grants Member States the discretion, within certain determined parameters, to insist that the country of origin of such non-EU services is determined as the Member State which they are targeting.

European quotas and prominence

- The EFADs supports the introduction of obligations on on-demand services to devote a **minimum of 20 percent of their catalogues** to European works and to give these works **more prominence** in Article 13(1). The quota should apply mainly to recent and independent European works – although 'classic' and archive works should also be recognised – and reflect the fact that the actual market share of European works in the respective Member State might be higher. Quotas and prominence are necessary to guarantee that Europe's cultural diversity flourishes and to ensure digital players are integrated into the value chain and contribute to the strengthening of the European film economy. At the moment, whilst there is a lack of precise data to assess the situation, the EFADs believes that the catalogues offered by online audiovisual media services often contain too few European works which are not sufficiently visible to consumers. To ensure Article 13(1) is enforceable, online services should face legal consequences if they do not meet these obligations.

³ European Audiovisual Observatory, May 2013. "Press Release – More than 3,000 on-demand services in Europe"
<http://www.obs.coe.int/en/-/more-than-3-000-on-demand-services...>

- We encourage policymakers to include a more **concrete definition of “prominence”** in the Directive to ensure its effective application. Prominence can take various forms and if there is no one size fits all approach, the Directive should recognise the best practices in place such as in Belgium. Prominence could include the appearance of European works on the welcome page, a special European works section, promotion and marketing activities, editorialised content and special campaigns. The focus should be on creating “smart editions” of online film catalogues which give European works preferential treatment and high visibility. This requires setting up an active strategy rather than relying on automatic methods of display.⁴
- We also encourage the adoption of a **clearer definition of “European works”** in Article 1(n). The definition should specify that only European “quality” programming such as feature films, documentaries and television series would fall under the obligations in Article 13.
- The revision of the Directive should not only focus on new players but also address the existing rules for broadcasters. Whilst the quotas for broadcasters have worked well for national European works, we recommend the inclusion of an effective incentive for broadcasters and online platforms alike to promote more **European non-national works** and **works of independent producers**. This incentive should encourage these operators to take up a “diversity” of audiovisual content which will ensure the circulation of works across borders from all languages and European cultures to the benefit of European citizens and audiences.

Film education and literacy

- The EFADs considers that ambitious actions at national and European level in the area of film education and literacy (cultural, critical and creative) are crucial. Film develops human identities, cultural affiliation and understanding, and therefore providing information, raising awareness and creating appetite for European works (especially among children and young people – our future audiences) is paramount. Film education and literacy are an integral part of the effort to build a safe but innovative digital environment which empowers European citizens through critical engagement with audiovisual content.
- We therefore **strongly regret the decision to remove Article 33** which requires Member States to report every three years on the application of the Directive, which includes media literacy. We would like to see this decision reversed. Film literacy is a cornerstone of media literacy and it is important that it has a specific place in this Directive and in the EU’s overall objective to create a Digital Single Market. It is imperative that it does not become diluted in general policies on media literacy.

The protection of minors

- The EFADs welcomes the additions made to Article 28 which extends the measures on the protection of minors and against incitement of violence or hatred to new digital players such as **video-sharing platforms**. These platforms are increasingly competing with traditional players.
- At the same time it is important to ensure Member States still have the flexibility to shape rules on the protection of minors. Member States should retain the ability to establish

⁴ An example of a “smart edition” of an online film catalogue can be found on the VoD platform Filmin in Spain: <https://www.filmin.es/>

regulation and co-regulation, and undertake soft law to raise awareness and create empowerment. For example, it should be left to the Member States to determine **film classifications and accompanying information**. Determining what is harmful is often linked to the specific cultural values of each Member State such as parental responsibility and upbringing. We therefore welcome Articles 6(a) and 12 which maintain the Member States' independence to set such classifications and information for linear and non-linear services whilst at the same time encouraging them to protect minors from harmful content.

Transparency

- The EFADs encourages the European institutions to go further and **introduce a transparency obligation on online services** in the Directive to make data available on film and television series' performance, sales and audiences. Moreover, we recommend **improving the transparency obligations on broadcasters**. Broadcasters will often make data on the share of European works available but not the share of investment or the air-time of a specific genre or film. A stronger role for audiovisual regulators could include a responsibility to ensure this data is transmitted.
- Transparency of data is essential for the development of new business models, research and innovation. The data needed is not personal data but big data which is crucial for the entire ecosystem including the audiovisual, advertising and e-commerce markets. It also guarantees the successful implementation of Article 13(2). It is essential for economic growth, jobs and the creation of a Digital Single Market.

About EFADs

The association of the European Film Agency Directors (EFADs) brings together the Directors of European Film Agencies in 31 countries in Europe (EU, Iceland, Norway and Switzerland). We represent government or government associated public bodies, in charge of national funding for the audiovisual sector and with the responsibility to advise or regulate on all aspects of national and European audiovisual policies. In total, the EFADs members and their governments fund around three billion Euros every year through subsidies and tax reliefs with a view to fostering the creation, production, promotion, distribution, and exhibition of European audiovisual and cinematographic works.

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