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The case for a fair, ambitious and future proof level playing field regarding the promotion of European Works in the Audiovisual Media Services Directive

Why Member States should be free to apply financial contributions to linear services targeting their territory

Busting the myths

As the European Parliament, the Council and the European Commission are intensifying their discussions on the Audiovisual Media Services Directive (AVMSD), the European Film Agency Directors (EFADs), would like to stress their support for a fair, ambitious and future proof level playing field regarding the promotion of European Works. It is vital to foster the creation, production, promotion, distribution, and exhibition of European audiovisual and cinematographic works so that Europe can continue to be a driver for the creation and production of European works that convey the diversity of European identities.

In our view, allowing Member States to apply financial contributions to linear services targeting their territory is necessary to ensure that these services contribute to local creation, that film agencies can continue to meet their public interest mission of promoting cultural diversity, and that Video on Demand (VoD) services and broadcasters operate under the same rules.

That is why **we support the Council's approach to the current negotiations regarding Article 13 and take this opportunity to rebut certain myths around that extension. Contrary to certain statements, this extension will actually promote a fair level playing field and lead to more investments in local European Works.**

The current situation

In 2016, almost as many TV channels (31%) as on demand services (34%) established in the EU were specifically targeting foreign markets [1]. These players are currently not subject to levies and investment obligations in the countries they are targeting but are competing with local players. This is the case in various territories and leads to unfair "forum shopping" practices, in particular for small and medium size services (subject to the financial contribution) that have to compete with bigger services established outside their territories (not subject to the contribution).

Myth 1): The extension to linear services will undermine the Country of Origin (CoO) principle and lead to less competition.

Reality: The application of the CoO will remain for all matters except for financial contribution. Indeed, the Country of Origin Principle will continue to apply, notably to retransmissions of audiovisual media services from other Member States, the protection of minors and consumers, commercial communications, the independence of regulatory bodies, the inclusion of people with disabilities and news coverage.

Myth 2): The application of the principle of the Country of Destination will lead to impose mandatory financial obligations for broadcasters across Europe.

Reality: Member States are and will remain free to put in place levies, taxes or investments obligations on linear services. This limited derogation from the CoO principle applying to financial contributions would simply ensure a fair competition and a fair level playing field with VOD services and between all broadcasters targeting the same territory.

The derogation to the CoO will not require countries with levies and or obligations investments to change anything nor require countries without those obligations to put them in place. Preventing Member States to allow financial contributions on cross border operators would run against both the principle of subsidiarity and the independence of Member States regarding the financing of works and the preservation of cultural diversity, as stated in recital 19 of the current AVMS Directive. Otherwise the current situation would encourage broadcasters to establish themselves in territories where there is no financial contribution and specifically target territories where such a contribution exists. This is particularly the case where there is an adjacent territory with the same language and close historical ties. This not only does not contribute to the production sector of the smaller country but also competes in an unfair way against the smaller local broadcasters. The result damages cultural diversity since the broadcasters in the larger territories do not usually undertake production in the smaller territories. **By putting local broadcasters in an unfair competitive advantage, this situation leads to concentration in a few countries (see below) and less investment in local European works in smaller Member States.**

Moreover, the European Commission has stated in its decision on the amendment to the aid scheme FFG that an interpretation of the AVMS Directive "*which would require a Member State to exempt VoD providers specifically targeting its audience but being established in another Member State from a contribution to the promotion of European works would discriminate against providers established in the former Member State which are subjected to a tax, while they are competing on the same market*." **The same reasoning should also apply to linear services specifically targeting another territory.**

Myth 3): The extension will cover a wide range of broadcasters, be particularly detrimental to small linear services and lead to less investment in European works.

Reality: The text provides for an exemption for small services that can also be applied to linear services. The extension would only target in a limited manner certain big global broadcasters' services specifically targeting foreign markets. Applying financial contributions to those services will essentially lead to a virtuous circle of more investments in local European works for European audiences.

Non linear services with low turnover or a low audience are already exempted from the requirements in Article 13, paragraphs 1 and 2. In addition, while we very much recognize that broadcasters invest heavily in European works more than on-demand services, the wide majority of those investments focuses on local works for national markets. In contrast, the extension foreseen in Article 13.2 only covers certain big linear services targeting foreign markets, where the investments in European works, especially in small markets, are not important.

Moreover, a recent European Audiovisual Observatory publication has shown that the market power of those services is significant and leads to a concentration in a few countries[1]. As a result, allowing financial contributions to those services with a big market

[1]The market power of foreign services specifically targeting a national market can be significant: In seven European countries (5 EU Members comprising Hungary, the Netherlands, Sweden, the French Community of Belgium and Denmark, plus the French-speaking part of Switzerland and Norway) the cumulated audience market share for targeted TV services was greater than 20% of the overall audience market share ii) around three quarters of all linear and on-demand media services established in the EU that are targeting foreign

power will essentially lead to a virtuous circle of more investments in local European works in small Member States**.**

<u>Myth 4): The extension might lead to onerous levies and double payments. Linear services will not benefit from the funds.</u>

Reality: The Directive provides for an anti-double imposition mechanism. All broadcasters subject to the financial contributions will be able to benefit from the funds.

Current practices show that financial contributions are not onerous. The levies' rates for Video on Demand services are very low, between 1% and 2.5% of the relevant turnover. The negative effects claimed by certain big broadcasters specifically targeting other territories would therefore actually be marginal. All other broadcasters, including small and local broadcasters that do not have the resources to target another territory would not be covered by the extension but will benefit from it.

Moreover, **there cannot be a double payment** since Article 13, paragraph 2 (and recital 24) specifically provides that *"if the Member State where the provider is established imposes a financial contribution, it shall take into account any financial contributions imposed by targeted Member States".*

In line with the principle of non-discrimination, all broadcasters subject to the financial contributions will be able to benefit from the funds, with a positive effect for investments in European works in the short, medium and long term.

<u>Myth 5): The determination of the advertising revenues in the targeted country is too complex.</u>

Reality: The determination of the advertising revenues in the country of destination is not more complicated than for VoD operators or in the country of origin of the broadcaster.

Several Member States already implement the financial levies from the linear advertising based services in their national funding schemes. In that context, we also note that certain non-linear services are also based on an advertising model, very much like the linear

markets were in 2016 concentrated in just three countries. [European Audiovisual Observatory study: Focus on services targeting other countries, 2017.]()

advertising based services. Indeed, the EC refers in its own proposal to **"***indicators such as advertisement or other promotions specifically aiming at customers in its territory (….) when assessing on a case-by-case basis whether an on-demand audiovisual media service established in another Member State is targeting audiences in its territory".* **Member States and relevant national regulatory authorities will therefore be able to determine the financial contribution due to linear services specifically targeting the market of another country.** More generally, the alleged complexity of the advertising system (which is anyway less relevant for Pay-TV services) should not be used an excuse to prevent Member States to apply the financial contributions to linear services targeting their territory.

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