RECOMMENDATIONS FOR THE IMPLEMENTATION OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

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Executive Summary

The implementation of the directive on Audiovisual Media Services in the Member States will enable national audiovisual laws to address the issues at stake in new services and new means of distribution. This adaptation should foster creativity and ensure the promotion of European works and their integrity.

Four aspects of the utmost importance are highlighted by FERA:

 ✓ Promotion of European works
The directive asks Member States to encourage the promotion of European works by on demand services. FERA recommends giving figures details when implementing the measures provided by the directive (financial contribution to the production and rights acquisition and prominence in the catalogue of programmes). In addition, FERA recommends implementing a third measure provided by recital 48: the attractive presentation of European works in electronic programme guides.

FERA considers the directive implementation as an opportunity to also revise the provisions regarding traditional broadcasters when these still allow them to disregard their obligation of broadcasting a majority of European works. In addition, the definition of European works should focus on creative works.

 ✓ Advertising breaks
FERA recommends that Member States do not lower advertising breaks frequency to 30 minutes but keep the existing rules for the cinematographic and audiovisual works (interval of at least 45 minutes when Member States allow advertising breaks in films). Member States who do not allow advertising breaks in films broadcasted on TV should keep this rule.

 ✓ Product placement
The directive gives Member States the possibility to decide not to allow product placement in their legislation. FERA recommends that product placement is prohibited or at least that its use be strictly controlled. Product placement should not prejudice the artistic freedom of authors and viewers must be given clear information on product placement, whatever the origin of the program.

 ✓ The monitoring of the application of the directive
FERA advocates a better control of the application of the directive, especially to monitor the contribution of the on-demand audiovisual media services to the financing of the audiovisual production. In addition, FERA urges a more thorough and structured enforcement of the new directive, at a national and European Commission level.
Adopted on December 13, 2005 by the European Commission, the proposal for a Directive on Audiovisual Media Services (AMS Directive) which adapts the “Television Without Frontiers” Directive (TVWF Directive) to new audiovisual media services, took less than 2 years of negotiation with the European Parliament and the Council to be finally adopted. Following the political agreement of the Council of Audiovisual Ministers on May 24, 2007 and the formal adoption of the Common Position of the Council on October 15, 2007, the European Parliament adopted the Common Position which has been negotiated with him beforehand on November 29. The new directive should come into force with its publication, by the end of 2007. Then, Member States will have 2 years to implement the directive into their national law.

The new Audiovisual Media Services Directive, as the TVWF Directive did, allows flexibility in the implementation by Member States. Article 3§1 states that Member States shall remain free to require media services providers under their jurisdiction to comply with more detailed or stricter rules in the areas covered by the directive.

Therefore, the implementation stage is very important as it gives the opportunity to strengthen some provisions on one hand and to reduce the negative impacts of some articles on the creation, promotion and on the integrity of European works on the other hand.

Five aspects of the directive are of the utmost importance for the European authors of the audiovisual sector:

- The extension of the directive’s scope to new audiovisual media services,
- The promotion of European works,
- Advertising breaks in audiovisual and cinematographic works,
- Product placement,
- The control of the directive’s enforcement.

I. **THE EXTENSION OF THE DIRECTIVE’S SCOPE TO NEW AUDIOVISUAL MEDIA SERVICES**

Article one of the directive gives the following definition of the audiovisual media service covered by the directive: “a service (…) which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate the general public, by electronic communications networks (…). Such an audiovisual media service is either a television broadcast or an on-demand audiovisual media service.”

An on-demand audiovisual media service is defined (point g) as an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.

Editorial responsibility means (point c) the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services.

Recitals 16, 18 and 21 of the directive indicate that the definition of an audiovisual media service does not cover: private websites, private correspondence, services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest, services whose audiovisual content is purely incidental, on-line games, search engines, electronic versions of newspapers and magazines. It must be mentioned that the directive does not include radio services neither (recital 22).
Therefore the directive covers all the audiovisual media services, whether they consist in traditional television broadcasting services (analog and digital, live streaming, webcasting and near-video-on-demand) or on-demand audiovisual media services such as video-on-demand. For linear services also offered in a non linear version by the same media service provider, the only directive’s requirements applicable are those required for the linear transmission.

Being included in the directive, on-demand services thus benefit from the freedom of establishment and the freedom of reception on the entire European territory taking into account the provisions which apply to all audiovisual media services and those specific to on-demand services.

Provisions applicable to all audiovisual media services (chapter IIa):

- Permanent access to general information on the media service provider’s identity for the recipients of the service (art.3a),
- Prohibition of incitement to hatred based on race, sex, religion or nationality (art.3b),
- Gradual accessibility of the services to people with a visual or hearing disability (art.3c),
- Respect of the “release windows” periods for cinematographic works (art.3d),
- General rules regarding advertising: recognition, respect of human dignity, non discrimination, prohibition of commercial communications for tobacco, minors protection regarding alcohol, prohibition of commercial communications for medicinal products and medical treatment available on prescription only, code of conduct regarding children’s commercial communications, rules on sponsoring (art.3e and f),
- Rules on product placement (art 3g)

The following provisions apply to on-demand services only (chapter IIb):

- protection of minors (art. 3h)
- promotion of European works (art. 3i)

II. PROMOTION OF EUROPEAN WORKS

The Audiovisual Media Services Directive maintains the obligations of the traditional services in relation to the promotion of European works (art. 4 and 5 of the TVWF Directive) and in addition, provides for new provisions related to the promotion of European works by on-demand services.

1. Concrete measures for the promotion of European works by on-demand audiovisual media services

The European Commission’s original proposal for the revision of the directive dated December 2005 only provided for a principle of promotion of European works by new media services, but did not indicate any concrete measure to be implemented to pursue this objective. The European Parliament and the Council amendments took into account the recommendations of European professional organisations and the article 3i now reads as follow:

“1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European
works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service."

The directive highlights two kinds of measures to be adopted for the promotion of European works by on-demand audiovisual media services:

- the financial contribution to the production and rights acquisition of European works,
- the share and/or prominence of European works in the catalogue of programmes offered by the services.

Recital 48 which notes that on-demand audiovisual media services “should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity” proposes a third measure of support for European works: the attractive presentation of European works in electronic programme guides.

As underlined in the studies on VOD performed in 2006 and 2007¹, the visibility of European works in electronic programme guides should not be neglected since users access to programmes by these portals. Therefore, the inclusion of a provision relating to these very important tools in national law will strengthen actions promoting investment and access to European works.

The directive does not provide figures neither for the financial contribution, nor for the share and/or prominence of European works in the catalogues. Member States should nevertheless include such recommendations in their national law by providing figures to be met at a minimum. Recital 48 mentions in particular “a minimum share of European works in video-on-demand catalogues”. It is up to the Member States to determine this share and the level of the financial contribution.

The financial contribution of on-demand services could consist in the obligation to invest a share of the turnover of the service concerned in the production and rights acquisition of European works (the investment rate could increase according to the turnover) and/or by contributing to the national film and audiovisual production fund, following the existing obligations of broadcasters in a number of European countries. Alternatively or simultaneously, catalogues should contain an important proportion of European works.

Detailed indications, including figures if possible, will be necessary to make these obligations concrete and allow a follow-up at the European level.

2. Traditional television broadcasting services

This revision of the TVWF Directive did not allow any strengthening of the broadcasters’ obligations related to the promotion of European works. Nevertheless, at the implementation stage, Member States remain free to strengthen articles 4 and 5 which provide that broadcasters reserve a majority proportion of their transmission time to European works, in particular with the view of taking into account a new recital 50. FERA would like to remind its previous proposals on this subject matter.

a) A more precise definition of “European works”

Articles 4 and 5 give a very wide definition of the types of programmes which can be included in the European works’ quotas. All programs are considered except news, sports events, games, advertising, teletext services and teleshopping. Mainstream programmes (stage-set and variety programmes) are also taken into account whereas they do not have the features of a work, in

¹ NPA Conseil Study of May 2006 « The development of VOD in Europe » and NPA Conseil and the European Audiovisual Observatory study of May 2007 “VOD in Europe”.
particular the feature of being able to be seen several times and therefore, to circulate and to be broadcasted more than once.

The purpose of the quotas of articles 4 and 5, it is to say the promotion of the European creation and the circulation of European works, must not be hidden by the importance given to mainstream programmes or events related programmes in broadcasters’ programming. Therefore, quotas should be only applicable to creative works (cinematographic films, TV dramas, documentaries, animation works), either by limiting the type of programmes computing for the European works’ quotas (positive definition restricted to creative works), either by creating an important sub-quota dedicated to creative works.

In addition, a new recital 50 of the AMS Directive provides that “When implementing the provisions of Article 4 of Directive 89/552/EEC, Member States should encourage broadcasters to include an adequate share of co-produced European works or of European works of non-domestic origin.”

The implementation of article 4 in the Member States had mainly stimulated the national audiovisual production and its broadcasting so far. It is only if the market is too small to provide for enough production that broadcasters buy foreign programmes. This limited impact to national programmes is not adequate with regards to the role of television broadcasting in the development of the European identity. Article 4 shall encourage the circulation of European works and offer to the audience programmes from other Member States.

During former consultations organized by the European Commission on the revision of the TVWF Directive, FERA proposed the introduction of a sub quota for European non national works. In the same spirit, recital 50 asks Member States to ensure that European works of non-domestic origin and European co-productions be adequately included in the relevant broadcasted programmes under article 4.

b) The abusive use of the expression “where practicable”

The words “where practicable” used in articles 4 and 5, reduce the impact of the broadcasting obligations of European works and the use of independent productions by limiting them to obligations of best efforts and not of results. Broadcasters can therefore take advantage of this flexibility in order to avoid respecting these obligations. The study realised by David Graham and Associates in 2005\(^2\) showed that the implementation of this expression into the legislation of several European countries was very often used to avoid the enforcement of the European works broadcasting quotas.

However, these obligations for the European works broadcasting exists since 1989, so broadcasters had enough time to make the necessary arrangements in order to progressively respect them. This expression is now superfluous and only serves broadcasters who want to avoid the obligations on a long-term basis.

Therefore, instead of using the expression “where practicable” which gives the broadcasters the opportunity to avoid the obligations without any control, it would be better to provide in national law strictly defined and temporary cases of exoneration whose long-term purpose would still be the respect of the broadcasting of a majority proportion of European works.

\(^2\) Study commissioned by the European Commission and covering for the 1994-2002 period, the fifteen former UE Member States as well as those of the European Economic Area (Island, Liechtenstein, Norway).
III. ADVERTISING BREAKS IN CINEMATOGRAPHIC AND AUDIOVISUAL WORKS

The revision of provisions on advertising breaks was achieved in order to satisfy the requests of advertisers and broadcasters, but prejudices audiovisual and cinematographic works and their authors.

Whereas the TVWF Directive provided for different advertising break frequencies according to the type of programmes, thus giving a special status to audiovisual and cinematographic works which could be interrupted no more than every 45 minutes, the new directive on audiovisual media services just provides for a unique rule for several types of programmes (cinematographic and audiovisual works, news and programmes for children) which can be interrupted every 30 minutes. The only programmes to remain totally protected from advertising breaks are religious services. Series, serials and documentaries still fall out of any protection against advertising breaks.

During the discussion in the European Parliament, FERA expressed its opposition to the 30 minutes rule and advocated for keeping the 45 minutes provision, mentioning again the need for protection of the work’s integrity. The Culture committee of the European Parliament had followed this recommendation but with only a bare majority of one the 30 minutes rule had been adopted in plenary session of the European Parliament on December 13, 2006.

In accordance with article 3 of the directive, Member States are advised not to follow this new provision of article 11§2 and to maintain the 45 minutes rule or the complete prohibition of advertising breaks in films as it exists in several Member States.

Moreover, if advertising breaks in cinematographic and audiovisual works are authorized, it is necessary to ensure that a provision aiming at the protection of the integrity of works and rights of holders’ rights is implemented in national law. Article 11§1, partly from the original directive, provides that “Member States shall ensure, where television advertising or teleshopping is inserted during programmes, that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme, and the rights of the right holders are not prejudiced.”

If advertising breaks in cinematographic and audiovisual works are authorized, the implementation of this provision will give the opportunity to mention that the freedom given to broadcasters to insert advertising breaks does not mean any authorization regarding authors’ moral right. Therefore, the broadcaster is required to obtain this authorization by contracting with the authors, whether at the production or broadcasting stage.

IV. PRODUCT PLACEMENT

The issue of product placement’s European regulation has been widely debated. Whereas product placement has been already used in some European feature films (though in a more limited way than in American films), it was not the case in audiovisual works produced for television, mainly because of advertising breaks during the broadcasting.

The European Commission proposed to authorise product placement in cinematographic and audiovisual works in order to end up legal uncertainty and to open a new source of funding for producers. Nevertheless, placement product could be dangerous as it could prejudice artistic freedom as well as the independence of the authors who could be obliged to change their work in order to ensure the promotion of a product which contributes to the financing of the production.

3 Confere in particular FERA’s position paper of July 2006 and press release following the first reading vote in the European Parliament in December 2006.
This drift does exist, in Unites States especially, and therefore calls for a strict legal framework of placement product's use.

The new Audiovisual Media Services Directive provides for the following definition of product placement: “any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration” (art. 1m).

Article 3g of the directive prohibits product placement in principle (§1), but later on (§2) authorises its use in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes or in cases where there is no payment, unless a Member State decides otherwise. Therefore, at the implementation stage, a Member State remains free to prohibit product placement in cinematographic works, films and series made for audiovisual media services. A prohibition should be expressly provided for, otherwise product placement will be authorised according to the conditions provided for in article 3g§2.

If product placement is authorised, such conditions should be fully enforced at the implementation stage.

1. Protection of the artistic freedom of authors

Four requirements, which shall at least all be met, are provided by the directive and give a framework to the use of product placement:

(a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
(b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
(c) they shall not give undue prominence to the product in question;
(d) viewers shall be clearly informed of the existence of product placement.

Unfortunately, there is no guarantee regarding the artistic freedom of the authors and the respect of the integrity of the works. Member States choosing not to prohibit product placement in cinematographic works, films and series, should add to these requirements that product placement is not to prejudice artistic freedom of authors.

2. Viewers’ information

The European Parliament has considered viewers’ information as an important condition of the use of product placement. It gave rise to a debate regarding the pernicious effect of informing the viewer too often during the programme (the EP wanted that the viewer be informed every 20 minutes), which could be considered as an additional form of advertising of the product or service and therefore could have damaged further the integrity of the work.

Eventually, the fourth requirement (Art. 3g§2d) provides that: “Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.”

Unfortunately, an exception to this information provision was introduced for the programmes which have neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider. Therefore, instead of giving time to producers in order to integrate information on product placement in the programmes produced from the enter into force of the directive, the directive provides for a long-term exception for programmes neither produced
nor commissioned by the media service provider itself or company affiliated to the media services provider. This exception, if implemented, would weaken significantly the impact of the information provision.

Therefore, Member States are advised to implement the viewer’s information obligation regarding product placement without the exception for programmes neither produced nor commissioned by the media service provider itself or company affiliated to the media services provider. Instead, a temporary derogation could be introduced in order to give time to producers to adapt and respect this requirement, bearing in mind that paragraph 4 of article 3g already provides that product placement provisions shall apply only to programmes produced after 4 years from the date of the entry into force of the directive.

V. THE MONITORING OF THE APPLICATION OF THE DIRECTIVE

The control of the directive’s application both by national authorities and by the European Commission is of the utmost importance: this control will allow an assessment on the directive enforcement within the 27 Member States and will suggest orientation for changes (if needed) in order to adapt to the audiovisual media services evolution.

Article 26 provides that the European Commission shall submit to the European Parliament and the Council a report on the application of the directive and, if necessary, make further proposals to adapt it no later than 4 years from the date of entry into force of the directive and every 3 years thereafter (every 2 years in the TVWF Directive).

In addition, article 3i on the promotion of European works by on-demand audiovisual media services provides that Member States shall report to the Commission no later than 4 years from the date of entry into force of the directive and every 4 years thereafter on the implementation of the provisions. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and the Council on the application of the article, taking into account the market and technological developments and the objective of cultural diversity.

Recital 48 specifies that: "Within the framework of the reports set out under this Directive Member States should also take into account notably the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services, and in the actual consumption of European works offered by such services."

These requirements add on the reports on the application of articles 4 and 5 which Member States shall provide to the Commission every 2 years and which are gathered by the Commission and transmitted to the European Parliament and the Council.

Reports on the application of the provisions of the directive, conducted on a regular basis by the European Commission and established on the basis of information communicated by Member States, should be confirmed by independent studies in order to give them more accuracy.

In addition, FERA believes that it is of the utmost importance to strengthen the quality and accuracy of the evaluations realised by Member States. In order to achieve this purpose, Member States should provide in their legislation for:

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4 Monitoring means used by Member States are very different from one country to another. The control is realised either by the independent regulation authority, either by the competent Ministry. Elements are sometimes missing in the reports transmitted by Member States but the Commission does not have the power to force them to transmit complete ones.
- An obligation of cooperation and transparency which should be met by media services providers. To be efficient, this obligation should go with penalties in infringement cases⁵.

- A strengthened monitoring of the enforcement of the obligations of the directive, especially those aiming at promoting European works. In addition, responsible national authorities should be given the power to punish⁶.

**Financing and development of audiovisual works**

FERA welcomes recital 48 which specifies that the reports made by the Member States and a fortiori the independent study provided for in article 3i should take into account the financial contribution by on-demand audiovisual media services to the production of European works because it is essential to monitor the link between the new audiovisual media services and the financing and development of audiovisual works.

Terrestrial broadcasters currently play a fundamental role in the development and production of European audiovisual works. If this link between distribution and development/financing is not maintained in the new online distribution network, advertising will become the main means of financing content, with inevitable negative consequences for cultural diversity and creative integrity of the works.

**Conclusion**

All these recommendations are related to issues of common interest for film directors in EU Member States. When implementing the directive, Member States remain free to include further issues in which directors may also be interested in.

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⁵ Penalties’ enforcement is needed in order to change the media providers’ impunity feeling, widely spread in Europe.
⁶ For example, in Ireland, the competent national authorities do not have this kind of power.