

Proposal for a Directive amending the Audiovisual Media Services Directive 2010/13/EU

**SAA comments
September 2016**

Executive summary

Scope

- SAA welcomes the Commission's proposal to cover video-sharing platform services for some requirements.
- SAA supports the European Parliament (EP) co-rapporteurs' proposal to extend this inclusion to further requirements, in particular regarding advertising, sponsorship and product placement principles.
- SAA however questions the need for a definition of user-generated videos which might create confusion.

Promotion of European works

- SAA welcomes the new requirements of Art 13 for a catalogue obligation of European works, prominence of European works and the possibility for Member States to impose financial contributions on on-demand services, even when established in another Member State but targeting their audience. These requirements should however be strengthened to deliver meaningful results. SAA proposes:
 - a catalogue obligation of 30% as a minimum, raised to 40% after three years of implementation,
 - an indication of what prominence is,
 - a mandatory requirement for financial contributions,
 - and efficient implementation, by requesting ERGA drafts implementation guidelines.

Commercial communications

- Among the numerous proposals to relax advertising rules, SAA opposes the possibility of interrupting films every 20 minutes instead of every 30 minutes.

About SAA

Founded in 2010, the Society of Audiovisual Authors (SAA) is the association of European collective management organisations representing audiovisual authors. Its 29 members in 22 countries manage rights for over 120,000 film, television and multimedia European screenwriters and directors.

The organisation's objectives are:

- to defend and strengthen the economic and moral rights of audiovisual authors;
- to secure fair remuneration for audiovisual authors for every use of their works;
- to develop, promote and facilitate the management of rights by member societies.

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Introduction

The European audiovisual media landscape has evolved since the last revision of the Directive in 2007. Media convergence is changing the way the audience accesses audiovisual works via video-on-demand platforms, catch-up services, video-sharing platforms and social media growing in importance, challenging the effectiveness of existing legislation mainly focused on traditional broadcasting. The overall European policy objectives remain relevant, including in the online environment, but the tools to achieve them need to evolve. This revision is therefore an opportunity to better include new audiovisual media services, and harmonise and reinforce provisions, notably on the promotion of European works, that have proven insufficient.

SAA welcomes most of the European Commission's proposals to revise the AVMS Directive. However, the following points need to be considered and the proposal amended accordingly.

Scope

The scope of the AVMS Directive, both material and geographical, and its interaction with other Directives (e.g. the IPR Enforcement, Copyright and e-Commerce Directives) is a key challenge.

Material scope

The major change proposed by the Commission is the inclusion of video-sharing platform services (for limited requirements on protection of minors and protection against violence and hatred) through the new concept of "organisational responsibility".

The proposal for a revised AVMS Directive defines a video-sharing platform service as a service consisting of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility but organises the stored content, including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing.

The proposed Directive takes great care to preserve the intermediary liability of the e-Commerce Directive (Art 28a starts with "without prejudice to Articles 14 and 15 of Directive 2000/31/EC") and prevents Member States from requiring video-sharing platform providers to take stricter measures to protect minors from harmful content and citizens from violence or hatred than the ones provided in the proposed Directive, unless the content is illegal (provided that they comply with Article 14 and 15 of Directive 2000/31/EC) or concerns child pornography.

SAA welcomes the inclusion of video-sharing platform services into the scope of the Directive as a recognition of the role played by these services in the European media landscape. It is a first step in the right direction and sends a good signal that the liability exemptions of the e-Commerce Directive are not an absolute shield against all liability.

- SAA supports the European Parliament (EP) co-rapporteurs' proposal to expand this inclusion into further requirements, in particular regarding advertising, sponsorship and product placement principles. As explained by the co-rapporteurs, in order to create a genuine level playing field, it is necessary to establish common rules for audiovisual media services and video sharing platforms.
- We question the need for a definition of a "user-generated-video" for the purpose of the Directive. Such a definition inserted in Article 1(b)a as "a set of moving images with or without sound constituting an individual item that is created and/or uploaded to a video-sharing platform by one or more users", might create problems from a copyright perspective. User-generated content is, in fact and simply, content uploaded by users, whatever the content (created or not by the user, protected or not by copyright). It does not need to be defined in this Directive and SAA calls for its deletion or at least for a simpler definition with no reference to "created".

Geographical scope

SAA welcomes the simplification of the criteria which help determine which Member State has jurisdiction over an audiovisual media service. We also welcome the new obligation on Member States to communicate to the Commission a list of the audiovisual media service providers under their jurisdiction and the criteria on which their jurisdiction is based (Art 2).

SAA regrets however that the proposed Directive does not try to cover services based outside the EU which target the European market. European Audiovisual Observatory figures from December 2014 show 236 services based in the USA, 15 in Switzerland and 2 in Canada that target Europe. There is a risk that these services benefit from a competitive advantage due to their non-application of the AVMS rules. This revision of the Directive would be the opportunity to close this loophole in the legislation.

The only move in that direction is made for video-sharing-platform services in Article 28b. "Member States shall consider that video-sharing-platforms which are not established on their territory, but which have either a parent company or a subsidiary or which are part of a group which has an entity established on their territory, shall be deemed established on their territory for the purpose" of applying the requirements on protection of minors and against violence and hatred.

SAA welcomes the requirement that, as is the case for audiovisual media services, Member States shall communicate to the Commission a list of video-sharing platform providers established on their territory and the criteria on which their jurisdiction is based.

Promotion of European works

SAA welcomes the fact that the current quotas are maintained for European works and independent production imposed on broadcasters by Art 16 and 17 of the AVMS Directive (broadcasters reserve a majority of their transmission time for European works and at least 10% of their transmission time or their programming budget for European independent productions) as a recognition of the continued important role played by linear TV in the circulation of European works.

SAA also welcomes new Art 13 which refines the obligations of on-demand audiovisual media services and provides for clear requirements and tools for the promotion of European works. SAA has long reported the inefficiency of Art 13 of Directive 2010/13/EU due to its lack of clear and practical provisions. The new proposed modifications seek to improve the promotion of European works by 1) obliging on-demand players to secure at least a 20% share of European works in their catalogues and to give prominence to these works and by 2) allowing Member States to impose financial contributions to the production of European works on providers of on-demand services established in their territory and providers established in other Member States but targeting audiences in their territories.

These requirements on the promotion of European works on linear and on-demand services are essential to guarantee space for such works in a competitive audiovisual market dominated by American productions. They encourage production and work for European screenwriters and directors. The increased availability and visibility of both national and non-national European works has societal benefits, enabling European citizens to learn about their culture and that of their European neighbours. They clearly pursue the objective of promoting cultural and linguistic diversity, in line with the UNESCO convention on the protection and promotion of the diversity of cultural expressions, to which a reference should be made (see proposed amendment below).

However, SAA is concerned about some elements of the requirements mentioned above that are not strict enough to produce the expected results, notably:

- the 20% minimum quota of the catalogue obligation in Art 13(1) is too low and must be raised to at least 30% to reflect the reality in most Member States (as shown in the

European Audiovisual Observatory's [study](#) published in April 2016¹). We are delighted to see that the EP co-rapporteurs' proposal is on the same page. We consider 30% a minimum and would even suggest that after 3 years of implementation of the Directive, this minimum be raised to 40%. This would minimise the gap with the broadcasters' obligation of 50%.

The EU should be proud of its highly diversified audiovisual production, trust the talent of European screenwriters and directors and help works break through the frontiers and reach audiences across the EU. With 1,593 feature films produced in 2014 and a growing number of TV series, there are many high-quality films and series made in Europe to be discovered.

- The possible measures to ensure prominence (the obligation to promote the visibility and accessibility of European works) should be detailed in a recital. It should refer to ensuring a clear presence on the homepage, targeted recommendations or the possibility for users to specifically search for European works through a classification of origin or a search by key words.
- The requirement for on-demand service providers to contribute financially to the production of European works, whether via direct investment in works or contributions to national funds, should not be optional but mandatory. This would be a natural complement to the catalogue obligation and would ensure adequate levels of investment in European works (recital 22). It would also establish a level-playing field with broadcasters who are very often subject to such requirements.
- SAA welcomes the mandatory exemption for “providers with a low turnover or low audience or if they are small and micro enterprises” (Art 13.5) since it aims at encouraging market development and allowing new players to enter the market. What constitutes low turnover or low audience may however differ from one Member State to another and be therefore left to be set at national level.
- We question the optional exemption for cases in which such requirements would be “impracticable or unjustified by reason of the nature or theme of the on-demand audiovisual media service”. We understand that this possible exemption replaces the general “where practicable” in the 2010/13/EU Directive's Art 13, which has been used in fanciful and uncontrolled ways in the past, but we fail to understand how the new wording would avoid such abuses.

While SAA accepts that it would be unreasonable to force a service dedicated to Korean cinema to include European works, we are concerned that a service dedicated to action films or children could be considered “thematic” and therefore under no obligation to respect the Directive. Tighter language would be beneficial here.

- Efficient monitoring, by ERGA and national regulators, of compliance with these obligations is crucial for these to actually have an impact and to prevent the poor Art 13 implementation scenario from repeating itself. Indeed, a suggestion would be for ERGA to draft guidelines on the implementation of the catalogue obligation, prominence, financial contribution and derogations.

The SAA is pleased to see that Member States will remain free to require media services providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by the Directive (Art 4 of Directive 2010/13/EU). A number of Member States are very active in terms of promotion of European works and cultural and linguistic diversity. They already go beyond the requirements of the proposed Directive, which are only minimal requirements. It is essential that they are not restricted from doing so.

¹ 27% of films available on VOD in the EU are European productions, compared with 59% for US films (75 VOD catalogues analysed) and 30% of films available on SVOD in Europe are of European origin, compared with 60% for US films (16 SVOD catalogues analysed).

Finally, it is important to note that the investment and financing of European production is independent from the remuneration of authors for the use of their works and from copyright/authors' rights. It should not be perceived as limiting the participation of online distributors and services in the remuneration schemes of authors for the use of their works. Audiovisual authors should indeed be remunerated for every exploitation of their work and new schemes should be developed in the online environment to ensure that such remuneration reaches them².

Commercial communications: respect for creative works

In the long list of relaxed rules on commercial communications, the SAA would like to draw the attention of the European Parliament and the Council to the proposed amendment to Art 20(2) which seeks to increase interruptions of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes, every 20 minutes instead of every 30 minutes.

This is regrettable and contradicts Recital 18 of the proposed Directive, which notes that “in order to safeguard the specific character of the European television landscape, interruptions for cinematographic works and films made for television as well as for some categories of programmes that still need specific protection should remain limited”.

We remain unconvinced by the Commission's claims that competition in the sector will prevent excesses and that more money will flow into production. This provision risks putting authors' works under even more pressure from advertising and decreasing media services' attractiveness to consumers.

- The status quo, i.e. interruptions every 30 minutes, should be restored in Art 20(2) (see the Annex below). Broadcasters already have sufficient flexibility to ensure that the advertising is placed at moments that fit the logic of each audiovisual work. This is essential to guarantee the integrity of European authors' works and the moral rights of their authors.

SAA proposed amendments

Amend recital 21:

(21) Providers of on-demand audiovisual media services should promote the production and distribution of European works by ensuring that their catalogue contain a minimum share of European works and that those are given enough prominence. These requirements are essential for the promotion of cultural and linguistic diversity online, in line with the UNESCO convention on the protection and promotion of the diversity of cultural expressions.

New recital 21a:

(21a) The obligation to ensure prominence relates to the visibility and accessibility of European works on on-demand audiovisual media services. Such prominence might, for example, take the form of a clear presence of European works on the homepage, targeted recommendations or the possibility for users to specifically search for European works through a classification of origin or a search by key works.

² See SAA [white paper](#) on audiovisual authors' rights and remuneration in Europe (2015) and its proposal for an unwaivable right to remuneration for the making available right of audiovisual authors, to be collected from the online distributors of the works and distributed to authors via their CMOs.

Delete Article 1(ba) or amend it:

“(ba) ‘user-generated video’ means a set of moving images with or without sound constituting an individual item that is ~~created and/or~~ uploaded to a video-sharing-platform by ~~one or more~~ a users.

Amend Art 1(15):

(15) Article 13 is replaced by the following:

“Article 13

- 1. Member States shall ensure that providers of on-demand audiovisual media services under their jurisdiction secure at least a 320% share of European works in their catalogue and ensure prominence of these works. This minimum share shall be raised to 40% after three years of implementation of the Directive.*
- 2. Member States ~~may~~ shall require providers of on-demand audiovisual media services under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contributions to national funds. Member States ~~may~~ shall require providers of on-demand audiovisual media services, targeting audiences in their territories, but established in other Member States to make such financial contributions. ~~In this case, t~~The financial contribution shall be based only on the revenues earned in the targeted Member States. (...)*
- 5. Member States shall waive the requirements laid down in paragraphs 1 and 2 for providers with a low turnover or low audience or if they are small and micro enterprises. Member States may also waive such requirements in cases where they would be impracticable or unjustified by reason of the nature ~~or theme~~ of the on-demand audiovisual media services.”;*

Delete Art 1(16):

~~(16) In Article 20, paragraph 2, the first sentence is replaced by the following:~~

~~“The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 20 minutes.”;~~

Amend Art 1(22):

(22) the following Article 30a is inserted:

“Article 30a

(...) 3. ERGA’s shall have the following tasks:

(...) (f) to provide for guidelines for the implementation of Article 13, in particular for the implementation of the catalogue obligation, the prominence obligation, the financial contribution obligation and the derogations.”;