EC consultation on the Television Without Frontiers Directive

Executive Summary

The European Commission boasts that television broadcasters are devoting an average of 62% of their transmission time to European works branding the implementation of the Television without Frontiers directive as a success. However, today a broadcaster can comply with the EC Directive without showing a single European film. The review of the directive is an opportunity to change a situation where:

- the large majority of first films and non-commercial cinema no longer have access to TV platforms and therefore TV revenues.
- Independent producers have more and more problems accessing the broadcasting market and are being marginalized to the detriment of diversity and consumers choice.
- The growth of the European cinema sector remains slower than the growth in sales in US productions. Hollywood studios increased their 2002 revenue by 40% in Europe alone whilst European film companies are struggling to remain in business or are disappearing (Kinowelt, Film Four, Senator, Cecchi Gori, BAC films etc).
- The market for European films remains fragmented and the full potential of one large single market for cinema productions is still a distant dream.
- Broadcasters are held to ransom to acquire Hollywood movies and sport rights making it more difficult to finance and promote European cinema.
- The monitoring of the directive's implementation is left to the goodwill and reporting made by broadcasters.

Regulatory measures are needed to remedy market failures and to avoid the marginalisation of European companies in a global film market dominated by Hollywood studios. The proposed measures are not intended to affect the editorial freedom of broadcasting companies. They are merely aimed at granting European film companies access to the TV market, an essential source of revenue and avoiding further marginalisation of the independent film sector.

Broadcasters have become a major partner to the cinema industry which employs 250 000 people in the European Union. They rely on the craftsmanship of the cinema sector to discover new talents and develop creative ideas. Production entrepreneurship has to be sustained and encouraged if the European audiovisual industry is to remain competitive and innovative.

Since the adoption of the Television without Frontiers directive in 1989 the majority of EU member states have taken measures to ensure cinema productions a minimum market access and / or to promote independent productions. It is time to take stock of the different national measures with a view to showing that

- maximum flexibility with regard to the implementation of the quota obligation is no longer required (as 9 Member States impose strict broadcasting time obligations)
- the requirement regime should apply to stock programmes i.e. cinema and TV fiction. It should exclude games, talk shows etc.
- quota requirement in terms of independent production should be increased from 10 to 25% in order to reflect the fact that :
    - o according the EC broadcasters the average broadcasting time allocated to independent producers was above 40% in 2002
    - o a large number of Member States have legislated on this to protect independent productions.

General Observations on the Cinema Industry

According to recent market data, the audiovisual sector in Europe is experiencing a schizophrenic situation. Consumption in audiovisual media is at its highest. The upsurge in cinema going seems unstoppable, having survived the crisis that affected the media sector following the burst of the "dot.com" bubble and the economic downturn of post September 11th period. Admissions and box office revenues continue to grow, reaching levels that had disappeared since the 1980s. Total admissions to cinema in the European Union grew by 10% in 2001, with 929 million tickets sold. Gross box office revenues were up to € 5,047 million in 2001 (+ 11%).

In the last few years, the television market has also witnessed an explosive growth, with the multiplication of cable, satellite and pay-TV channels. The forthcoming switchover from analogue to digital signal and the emergence of interactive TV services promise to boost further the offer of available TV platforms. Home entertainment (video, DVD, video on demand) is growing at exponential rate. The videogames business has exploded in the last years: total leisure software sales value in Western Europe grossed € 5,253 million in 2001 (+2,2%).

Yet, audiovisual industries, and especially film companies, are undergoing an unprecedented crisis. The record of setbacks, losses and bankruptcies, even among well established companies, is impressive.

On the larger scale, the failure of big media conglomerates' plans to build profitable business on the expectations of convergence-driven technologies has led to worldwide cutbacks. Huge losses, debts and assets write-downs have badly hit once acclaimed global players such as Vivendi Universal, AOL Time Warner, Viacom, Fox and Disney. At European level, the biggest blow was the bankruptcy of German media giant Kirch group, but many others disappeared from the audiovisual scene. The obituary list includes French firms Sagitaire, Mercure, Noe Productions, Italy's Cecchi Gori as well as German counterparts UFA Theatre, Das Werk, Helkon International Productions, Kinowelt, Achterbahn, Fame, Peppermint, DoRo Fiction Film. France's Bac Productions repeatedly came close to bankruptcy, Germany's Senator Film registered a record loss in 2002, French pay TV group Canal + and Danish producer Zentropa were obliged to cut staff. Key production companies such as UK's FilmFour and Sony's German arm DCPF were closed down.

Against this gloomy landscape, the analysis of the European film industry made by the European Audiovisual Observatory in its 2002 Yearbook shows that the financial situation of the sector suffers structural weaknesses.

This report, based on the analysis of the top 50 film companies in the European Union, indicates that increasing debt ratios and declining profitability badly affect the economic performance of the European cinema sector. Production companies operate on the financial waterline, with performance ratios varying between +1% and -1%. The exhibition sector shows the greater financial fragility, overloaded with debts incurred for multiplex investment. The only branch with a healthier outlook is the video publishing and distribution sector, which is however dominated by subsidiaries of Hollywood studios.

The ongoing pay-TV crisis has provoked a global TV retreat from film buying. This phenomenon, which was compared by salesmen to a "virtual strike" from broadcasters, has particularly hit European territories such as France, Germany, Italy and Spain. Retrenchment was the common word at the 2002 and 2003 editions of EFM in Berlin and AFM in Los Angeles. The overall climate for buying and selling films was dark. With buyers in a state of nervous collapse and prices only half of what they used to be two years before, no wonder that the pre-sales market has been declared defunct by film industry operators.

Explanations are multiple however the pay-TV market, already weighed down by massive infrastructure investments, has been brought to disastrous financial results through steep increases in sport (mainly football) rights. The sport-rights bubble is exemplified by the growth in broadcasting rights for the FIFA World Cup: from $ 79 million in 1998 to $ 761 million in 2002, a tenfold jump. Coming to the European market, German pay-TV Premiere's annual deal with domestic football league amounted to $ 330 million in 2001, and the most recent English Premier League contract was valued at $ 2,35 billion over three seasons. To make a quick comparison, Canal +, the most generous financer of European cinema, invested € 137,35 million in the acquisition of European films in 2001.

As a result of this situation, the main pay-TV operators in continental Europe have been obliged to close down or merge in order to find a rescue from their financial situation.

Kirch's bankruptcy, Canal Plus' difficulties, the planned mergers in Spain and Italy pay-TV markets all provoked massive cutbacks in the money broadcasters were used to pump into film acquisition. Furthermore, the emergence of alternative TV content such as reality shows lessened the attractiveness of feature films as powerful audience winners.

The collapse of the TV window is all the more troubling as the sector represented for years a major source of financing for European distributors. As an example, Canal Plus, which used to provide a quarter of all money going into French film industry and which was involved in 80% of all French productions in 1999, is now renegotiating its level of investment in local film production and it has seen its acquisition capacity drop by almost 20% last year. Small producers and distributors are the ones who will suffer more from this situation. **Working Title, Europe's most successful film company, would not be into business today if it had not been supported by Channel 4, being required to finance UK films during the 1980s as part of its remit, acknowledged recently Tim Bevan, co –chairman of Working Title in Screen Finance.** At present, production levels are also sharply falling in Germany and in the UK (local production collapsed by 40% last year, following a 57% slump in inward investment from foreign productions in 2001).

Some voices have been raised to call on broadcasters for a stronger involvement in defence of national cinema industries. In Germany, where a revision of the Film Funding Law is expected by the end of the year, the industry is lobbying for broadcasters to increase their quota of financing of the Fund to the same level as exhibitors. At the same time, German leader pay-TV Premiere is asking for a reduction of VAT rate on pay-TV subscribing from 16% to 7% (VAT rate on magazines subscription), promising to invest the raised cash in film productions. In the UK, two ministers recently proposed to change the Communication Bill in order to force broadcasters to support the film industry.

The scenario is not always encouraging: in Spain, among the conditions imposed by national antitrust authorities for the clearance of pay-TVs CSD/Via Digital merger, none of them is dealing with protection of national film production or requirements for independent films acquisition. The only rules covering cinema issues concern deals between pay-TV and major Hollywood studios. The same scenario is likely to be repeated in Italy, where the planned merger between pay-TV competitors Stream and Telepiù will leave the market in a state of monopoly, certainly not the best situation for those willing to negotiate sales of feature films. A first sign of the pay-TV crisis affecting the Spanish and Italian markets is the fall of independent film prices recorded in the first quarter of 2003 for both territories.

In addition to this, distribution of European films on television across national frontiers suffers from a chronic weakness. Figures provided by the European Audiovisual Observatory show that the market for feature films broadcast by unencrypted TV channels in most EU countries is dominated by US content. TV programmes sales by US companies in the European Union increased by 119% from 1995 to 1999, whereas during the same period European non-national films and TV fiction distribution only grew by 17,2%, remaining a marginal presence for the majority of European households.

Furthermore, a report by investment bank ABN-AMRO on the development of the film industry up to 2006 calculates that the cost of film making will increase by 6,6% in the next years, and that prints and advertising costs will similarly augment by 6% thus making life difficult for independent producers who do not have the strong financial power of Hollywood studios. This phenomenon is all the more disconcerting if analysed against the perspective of the future collapse of global release schedules. These considerations lead to increasing pessimism on the survival of independent cinema, in a market where polarisation of box office is already so sharp that 10% of world releases account for 50% of total box office.

In this already difficult context public support to the cinema sector is being questioned by EC antitrust authorities. The recent joint declaration from the European film agencies, claiming for continuity and clearness of rules for film support after the European Commission's review of state aid for cinema is ended in 2004, is an important step in securing a strategic defence of European cinema in a troubled period.

The Television without Frontiers (TWF) Directive

The central aim of the *Television Without Frontiers* Directive is to complete the internal market in broadcasting services and related activities by removing obstacles to the freedom of movement of these services. It establishes the rule that a broadcaster needs only to comply with the national law of the country where it is established to broadcast its programmes throughout the European Union.

In relation to cinema the Directive aims at fostering European film/audiovisual production in its diversity and at ensuring those productions a minimum of market access with regard to broadcasting rights. Indeed under the Directive Member States of the European Union have the obligation to ensure that broadcasting organisations set up on their territory broadcast a majority proportion of European works – "whenever this is practicable".

With a view to promote independent audiovisual productions (independent from broadcasting organisations) the Directive also provides that Member States must ensure "whenever it is practicable" that a minimum of 10% of broadcasters' transmission time or programming budget be devoted to the acquisition or commissioning of independent European productions.

The Directive, which was adopted in 1989 and revised in June 1997, is now subject to an overall review which must be carried out before December 2003. The present contribution is part of this review.

Besides specific support programmes, such as MEDIA + and the i2i Audiovisual initiative, the TWF directive represents the sole EU legal instrument affecting the film sector directly (apart from copyright regulations).

The Directive can concretely contribute to the development of the European audiovisual market. Television is a very important source of revenue in the commercial exploitation of a feature film.

Between 1995 and 1999 total film and programme sales to European TV increased by 22% p.a. Sales to free TV still account for the largest share (around 70% of total film and programme sales in 1999). The European cinema industry has also become very dependent on TV for revenues at both production and distribution levels. It has become a € 4 billion business with 820 national TV channels in Europe (there were 205 in 1995). Hollywood blockbusters represent attractive programming material for European broadcasters often held to ransom for the acquisition of such rights. As a consequence it becomes more and more difficult for European film producers to sell TV rights. This is particularly the case for non-commercial films, non-national European films or films with an average box-office return. In addition the whole creative chain benefits from TV exploitation as film directors, actors, writers, producers collect royalty fees in relation to each broadcast.

The Directive may also help European film companies to correct their competitive position due to insufficient financial resources. Commercial cinema requires heavy investments at both production (to ensure talent support) and at distribution levels (to ensure audience awareness). The expensive mechanisms used to attract audience to ever more costly entertainment products have accelerated the trend of media concentration. Today only a broad financial basis and a global distribution network allow a good international market positioning. The large majority of European film companies are put at a competitive disadvantage. This market situation can only be remedied by voluntary measures to ensure diversity. As a result the Directive may contribute to ensure involvement of broadcasters / service providers in the financing of European productions.

At international trade level on 25 October 1999, the Council of Ministers gave mandate to the European Commission to promote cultural diversity. The negotiating mandate granted by the council to the Commission in the context of international trade negotiations reads as follows:

> *« during the forthcoming WTO negotiations, the Union will ensure, as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audio-visual policies for the purpose of preserving their cultural diversity ».*

The objective of cultural diversity is also now enshrined in the draft Convention for a European constitution as an objective of the Union. The review of the TV without Frontiers directive is an opportunity to coordinate Member States policies to achieve this objective.

What are the issues at stake?

The TWF directive's obligations have been unequally transposed by Member States. Some countries such as France impose strict quotas rules. Some others are much more flexible, such as the United Kingdom in the implementation. It is therefore difficult to assess the true efficiency of the measure. It is also difficult to imagine a consensus to remove the flexibility in implementation of the quota regime. Furthermore, the methodology adopted by the European Commission to monitor the implementation of the Directive's rules on requirements for European and independent works too often relies on self-assessment from broadcasters.

- The TWF Directive may have helped develop European film production but the growth in European audiovisual production remains slower than the growth in sales of US productions.

- The TWF Directive has not improved the circulation of European audiovisual works within Europe. National productions are largely confined to broadcast in their country of origin. The market for European films remains fragmented and the full potential of one large single market for cinema productions remains a distant dream.

- The quota regime applies for both films and TV fictions. EFCA members argue that the TWF Directive should aim at boosting the cinema sector – the flagship of the audiovisual industry and its more artistic/cultural component. Cinema represents 900 hours of European production compared to 5 900 hours for TV fictions.

- It becomes more and more difficult for first films and non-commercial cinema to sell TV rights.

- The TWF Directive has had a limited impact on the promotion of independent productions. This calls for a reinforcement of the measure and a reinforcement of obligations on broadcasters to commit more funds or broadcast time to independent productions.

EU Regulation already plays a primary role in supporting the European cinema industry by providing copyright protection, by setting up the legal framework in relation to e-commerce, a beneficial VAT regime for cinema tickets or by enforcing antitrust rules that aim at protecting consumer choice and diversity. The European Union is also key in the context of international trade negotiation to safeguard the ability to enact support policies for cultural industries. EFCA takes the view that this legitimate policy goal in the promotion of cultural diversity must be echoed in the instrument aimed at harmonising rules for trans-frontier broadcasting.

Broadcasting is a key element in the process of EU integration and better understanding amongst European citizens. Cinema production is a reflection of local or national culture – quality European cinema productions deserve a chance on the market place. Broadcasting is a major source of revenue for the European cinema sector. The broadcast market is an essential component in the film industry's value chain, as it offers millions of people the chance to see a movie that may have attracted just a few admissions in cinema theatres. In the UK, the major European audiovisual market, box office gross was € 528 million in 2002, but films on TV generated € 700 million in revenues. In addition to that, an average of 2,9 million people watched each film on peak-time TV compared with 2 million people for a typical top-50 film at the cinema. Cinema is largely dependent on broadcasters for its survival (*Source: Films in the UK 2002 – Statistical Yearbook – UK Film Council*).

There are four main issues that should be taken into account when considering the impact of the TWF directive on the European film industry:

1- Requirements on Transmission Time

Article 4 of the Directive provides that

> *"Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, **a majority proportion of their transmission time**, excluding the time appointed to news, sports events, games, advertising and teletext services".*

All EU member states have correctly implemented this provision by retaining the literal expression of this article or expressions formally comparable. However, France proceeded with a stricter application by fixing a percentage of 60% of European works. In addition to this, eight EU member states (Belgium – German speaking Community, Germany, Spain, Finland, France, Greece, Netherlands and Portugal) imposed a stricter obligation by not mentioning the expression "where practicable".

EFCA takes the view that this measure acts as an incentive to broadcast national and European films. This provision should be maintained and the obligation should be strengthened with a view to ensuring European film producers access to the broadcast market and as a result an important source of financing. The expression "where practicable and by appropriate means" should be deleted to ensure consistent implementation of the obligation at EU level.

As a matter of fact, some European broadcasters formally respect the requirements laid down in art. 4 **without spending a single euro for European films**.

For instance, although last year's Communication from the Commission on the implementation of art. 4 & 5 of the TWF directive states that UK channels "BBC1, BBC2, ITV, Channel 4 and Channel 5 […] broadcast an average of 64% and 68,8% of European works in 1999 and 2000 respectively", recent statistics from the UK Film Council show that the five channels mentioned above only broadcast 60 recent (i.e. less than 8 years old) UK films in 2002. This equals a share of **2,8%** of the total number of films broadcast in 2002.

Channel 5, the network broadcasting the highest number of film in the UK (574 in 2002) (and more than the other four channels altogether at peak time!) only transmitted one recent UK film (less than 8 years old) during the whole year. It is evident that the compliance of art. 4 of the TWF directive may easily be fulfilled with a zero investment in European cinema. This is unacceptable and makes a mockery of the objective set out by the directive to encourage diversity.

2- Requirements in Favour of Independent Producers on Broadcasting Time and Programming Budget

Article 5 provides that:

> *"Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve **at least 10 % of their transmission time**, excluding the time appointed to news, sports events, games, advertising and teletext services, **or** alternately, at the discretion of the Member State, **at least 10 % of their programming budget**, **for European works created by producers who are independent of broadcasters**".*

The entirety of the EU member states implemented this obligation, either by retaining the two options of art. 5 (Austria, Denmark, Finland, France, Ireland, Sweden), the other opting for the obligation of transmission time. However, some member states went beyond minimal requirements: the UK and the Netherlands fix a threshold of 25% for broadcasting obligations concerning independent producers, Italy has a threshold of 20% for public broadcaster RAI, the Belgian Flemish Community requires a "majority part" of transmission time to be devoted to independent productions and France lays down an obligation resting on the channels' turnover and not the programming budget.

EFCA believes that this provision should be maintained to ensure the development of creative structures independently of the business imperatives of television companies. EFCA prefers an obligation based on a % of the programming budget. EFCA is in favour of **increasing these quota requirements to a minimum of 25%**. They should as a minimum be made mandatory throughout the EU.

In relation to the question of the definition of the independent producer EFCA proposes that the criteria of independence are assessed through the shareholding structure of a company. A company qualifies as independent provided the broadcaster owns less than 25 % of the share and/or the voting right. A producer owning a TV company should not qualify as independent.

3. Definition of European Works

Art. 6 of the Directive provides for a definition of European works as follows:

> *"(a) works originating from Member States*
> *(b) works originating from European third States party to the European Convention on Trans-frontier Television of the Council of Europe and fulfilling the conditions of paragraph 2;*
> *(c) works originating from other European third countries"*

In addition to this, there are different definitions of European works at national, EU and international level, such as those elaborated by the Council of Europe's Convention on cinematographic co-productions or by EURIMAGES and MEDIA + programmes.
EFCA takes the view that the definition provided by art. 6 is too loose and that the requirements regime should apply **exclusively to stock programmes, i.e. cinema fictions**. This measure is justified by the market dominance of US production as well as by the implementation of valuable cultural policy objectives.

4- Requirements on advertising

Art. 11§3 provides that

> *"The transmission of audiovisual works such as **feature films** and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their scheduled duration is more than 45 minutes, **may be interrupted once for each period of 45 minutes**. A further interruption shall be allowed if their scheduled duration is at least 20 minutes longer than two or more complete periods of 45 minutes"*

EFCA believes that the integrity of films, as that of any artistic work, should be protected from the intrusion of external interventions. Excessive advertising, and especially the insertion of spot breaks at the very beginning of a film, may also result into the viewers getting annoyed by the continuous interruptions of the film being watched. This is neither in the interest of creators nor of broadcasters. Therefore, EFCA takes the view that the provisions expressed by art. 11§3 should remain unchanged.

5. Other requirements

Amongst the other issues to be considered, EFCA strongly favours the introduction into the Directive of investment obligations. This obligation would provide the cinema industry with much needed means for its investments in production and distribution. The investment obligation should be a % of the broadcaster's turnover. It should affect free as well as pay-TV channels but possibly exclude thematic channels that are not related to cinema. This money should be used by the broadcaster to finance audiovisual production and to commission work with independent production companies.

Moreover, the Directive should not act as a barrier to entry for new players in the broadcasting sector. A transitional regime of 3 years for instance to comply with the obligations set in the Directive could be established. However such regime should be considered in the Directive only if obligations are made compulsory and Member States are not granted flexibility in the way these obligations are implemented. For thematic channels, EFCA takes the view that these channels should be given a competitive advantage over those that contribute to the overall cultural policy objectives. It would be for the Member States to compensate for this undue market advantage by requiring these channels to contribute to film funds managed on behalf of the audiovisual industry. These contributions would be equivalent to the investment obligations imposed upon traditional broadcasters falling within the scope of the Directive. Alternatively the quota requirement should be managed on a platform level.

Please visit EFCA website at www.efcasite.org

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