Fostering competition and cultural diversity
in the European TV programming market

A response by the International Federation of Film Producers Associations
to the European Commission consultation on the Review
of the Television Without Frontiers directive

Introduction – about FIAPF

FIAPF is a global producers’ federation with a membership comprising 30 film and television producers’ associations from 25 countries worldwide, including the majority of EU countries, India, Japan, Canada and Argentina. FIAPF’s political action focuses on the promotion and defence of copyright and producers’ exploitation rights. FIAPF is also present at all the leading international fora on audio-visual technology, arguing for a deployment of digital broadband that permits reasonable copy control and preserves the capacity of the industry to create new business models. The organisation was behind the creation of AGICOA in nineteen eighties and was instrumental in launching ISAN as an official ISO standard.

FIAPF believes in the importance of the Television Without Frontiers directive in harmonising certain key provisions for cross-border broadcasting, in the EU, including jurisdictional aspects, sponsorship and measures to stimulate the supply of programmes across EU borders.

This paper, concentrates on three salient issues which were the object of lengthy debate during the June 23rd to 25th consultation between the Commission and industry.

1. Measures to stimulate cultural diversity and the competitiveness of the EU programme industry
2. Media chronology
3. Protection of minors

1. Measures to stimulate cultural diversity and the competitiveness of the EU programme industry
1.A. Articles 4 and 6 “European quota”

FIAPF has noted the Commission’s expressed satisfaction with the level of implementation of Article 4 in the majority of Member states. We also note the Commission’s concern with the fact that the quota is made up overwhelmingly of local programming. Recent studies are convergent in their conclusions that films and TV programmes made in individual EU Member states still experience substantial difficulties in finding market opportunities in other Member states. The endemic lack of buoyancy of intra-Community trade in audiovisual content is a missed opportunity in both economic and cultural terms.

Although FIAPF believes this deficiency will ultimately be addressed with any degree of lasting success through changes brought on by the market, we also believe the Commission is right to be considering measures that may help nudge the market in the right direction.

In this context, FIAPF welcomes the initiative of the Italian Presidency of the Union to convene a meeting of industry professionals during the Venice Film Festival to examine the issue of cross-border distribution of films within the EU. We hope these discussions may lead to a consolidation of the useful sales and distribution, measures of the MEDIA, in the context of the current review of the programme.

1.B. Article 5 “independent quota”

In its verbal contribution to the June 23-25th consultation on this important issue, FIAPF has argued the need for the Commission to go back to the strategic raison d’être of Article 5:

Like other measures of this type - such as the US Financial Interest and Syndication, (“Finsyn”) rules introduced in the American television market in the early eighties - the EU independent access quota was motivated by the need to address the market dysfunctions which the presence of large scale television oligopolies generate.

Historically, Europe has been dominated by the integrated broadcaster/producer model. Ushered in during the first wave of EU broadcasting deregulation, the independent production quota was therefore intended to bring about a degree of separation between the activities of broadcasting and production.

Properly conceived, monitored and implemented, independent production access regulation can have a number a virtuous effects, including:

- **introducing a measure of competition for programmes in terms of ideas, quality and price** – a market exclusively driven by a small number of broadcaster/producer structures is not able to foster such competitive dynamics – the result is a disbenefit to the consumer and an ineffectual use of public resources such as license fees collected as a tax on TV households to finance public service broadcasters;

- **fostering cultural diversity** through a more open and diverse commissioning and programme acquisition culture;

- **kick-starting the engines of creative innovation in programme-making**, which invariably become choked-up and less effectual under a monopolistic structure – Europe’s independent production companies lead the charge in developing co-production partnerships with other EU countries;

- **unlocking the potential for the circulation of programmes and films by creating a multi-polar system for the commercialisation of rights** – if primary broadcasters end up owning all rights in programming they acquire or pre-purchase, this stifles the impetus for international programme exchange, simply because sales is never a broadcaster’s primary business concern – programmes which may have been
usefully exploited on the secondary market by themed channels frequently end up being warehoused, locked away from the public gaze;

- giving SMEs in the audiovisual sector a chance to compete, to diversify and succeed at home, in the EU and the rest of the world – it is a documented fact that the independent sector captures creativity better than the large broadcaster-producer model, which tends to be slower in responding to shifts in cultural trends and tastes and is generally more risk-averse, less focussed on innovation.

- creating new highly skilled jobs, contributing to urban re-generation, technological innovation and general wealth creation.

Despite a two-decade shift from an exclusively public service model to a mixed public/private economy, the structure of European broadcasting is still predominantly a closed oligopoly, dominated by the large-scale integrated Broadcaster/producer operator, a fact that the advent of broadband technology has not challenged significantly: incumbents with dominant positions in the analogue broadcasting universe have been in a privileged position to exploit the benefits of broadband, making it difficult for new entrants with challenging consumer propositions, to break in.

Whereas there is now a far greater diversity of services on offer than ten years ago, a look at the pie chart of the value of audiovisual programming investments in the majority of EU Member states will almost invariably reveal one, occasionally two, player(s) with an overwhelming dominance over the programme commissioning and acquisition market. A 2001 study by Consultants David Graham Associates for the British Government\(^1\) revealed for instance, that the BBC accounts for some 42 % of all investments in new programming in the UK market. In 2001, the BBC’s spend on new UK-originated network programming represented just over 50% of total UK spend by network channels\(^2\). Similar patterns of concentration are also in evidence in other EU Member states and they are not always limited to public service broadcasters.

Whilst such a high concentration of buying power can be a rational solution for an emergent market or for the ongoing provision of certain types of public goods or services, FIAPF and its European members believe the model works poorly in the context of Audiovisual: it delays the emergence of mature production sectors at national level and stifles the growth of a genuine cross-border EU market for programming.

In this context, the independent sector can be seen as a means to an end. The means is entrepreneurial creative SMEs, the end is achieving a healthy, transparent, fair and truly competitive supply and demand equation for the production and dissemination of TV programming within the EU.

The question arises of how much more consolidation and growth do the EU independent sectors need in order to fulfil their role as a means of making the market for programmes more competitive, more diverse and more effective in terms of international programme sales? A lot more, we think. In many countries, the sector’s growth is stifled by resistance to change on the part of the large-scale Broadcaster/producer monopolies: opportunities for programme commissioning are too narrow, the fees paid by broadcasters allow very little – if any – mark up and the primary and secondary rights are locked away for over ten years or in perpetuity.

Consequently, FIAPF believes the Commission should consider a substantial adjustment to Article 5 – we also think the Commission should in parallel, consider a soft action that would help accompany the fulfilment of this part of the directive more meaningfully:

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1 “Out of the Box” A study on the UK TV value chain, David Graham & Associates, 2001
2 “Scottish report TV” A David Graham study for Pact Scotland, 2002
• Concerning the change to Article 5, the current “assiette” of 10% - whilst a useful incentive for Member states to consider competitiveness issues in their respective AV markets - is not sufficient to deliver substantive changes to the structure and dynamics of the programming market. Going by experiences in some Members states who have empowered their independent sectors over time (UK, France), we see that critical mass and significant market changes require a substantially higher percentage. Therefore, FIAPF recommends that the independent quota in the directive should be no lower than 25% of airtime (or programming budgets).

• Secondly, the Commission should look at an ‘initiative d’accompagnement’ in the shape of a Best Practice document – the document would highlight all aspects of best practice in implementing fair and transparent terms between broadcasters and independent producers.

2. Article 7 - Chronology of media exploitation (Windows)

In the course of the Commission consultation of June 23rd to 25th, FIAPF made clear its position that there would be no benefit in attempting to harmonise media chronology at EU level.

Exploitation “windows” are a necessary fixture of the audiovisual economy. Whether they are decided upon through individual negotiation or regulated for at national level, they are constantly evolving to reflect changes in the relative value of each exploitation media. Technological developments generate new opportunities for content delivery to the consumer, which create pressures on window arrangements in existing media, as the advent of on-line video streaming has demonstrated. Industry adjustment to windows are made to best accommodate consumer access while maximising revenues for content suppliers. Therefore, market rather than regulatory requirements should continue to decide chronology of media exploitation.

FIAPF believes the advent of digital media (packaged video product and on-line services) calls for more flexibility than ever before. The film and TV industries need to drive those changes according to contractual agreements based on their sense of what constitutes an optimal length of time between media in order to deliver the best value proposition to the consumer. In those Member states where there is a tradition of defining windows through state regulation, the competent state agencies should behave as committed partners of the local AV industry and make statutory changes when deemed necessary by the professionals representing all distribution interests.

In the context of rapidly mutating media markets, an attempt to harmonise windows at EU level would almost certainly be counter-productive. Patterns of use of entertainment by consumers are increasingly complex and subject to substantial cultural variations; cinema-going, television watching and the rates of take up of new AV product such as DVD, digital “bouquets” or video-on-demand are distinct in each Member state. Trying to contain these complexities within a rigid one-size-fits-all regulatory system could only result in delays to structural changes requiring a capacity to adapt swiftly and flexibility to patterns in consumer use and to the availability of new product or services.

3. Protection of minors – Article 22

The protection of minors is a matter of concern to the audiovisual production community at large. On this important issue, FIAPF favours voluntary classification and information systems stemming from the initiative of local film industries and taking into account the specific social and cultural sensitivities of the individual Member state. The syntax of classification should be clear enough and information on sensitive content should be such
that parents are able to make conscious choices about protecting the minors in their charge from certain films/programmes.

Self-regulation (which also involves a constructive dialogue with relevant State agencies) puts the onus on the film/TV industry itself to provide for adequate parental guidance based on its ability to gather and interpret qualitative data about consumer reactions to content across the demographic spectrum. As socio-cultural trends evolve with the times, the industry itself is better placed to respond to such changes than State governments, because of the necessity for it to reflect such cultural change in order to remain relevant as an entertainment, education and information medium.

FIAPF does not support the idea of an EU-harmonised single regime of film/TV classification. Again, because striking differences exist in cultural responses to the depiction of sex and violence on the screen, an attempt to harmonise such regimes would risk imposing unduly restrictive constraints.

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