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Subject:	Comments from the Spanish delegation - Proposal amending Directive 2010/13/EU (AVMS)

Delegations will find attached additional comments from the Spanish delegation concerning the proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities.



MINISTERIO DE ENERGÍA,
TURISMO Y AGENDA DIGITAL

SECRETARÍA DE ESTADO PARA LA SOCIEDAD DE LA
INFORMACIÓN Y LA AGENDA DIGITAL

SUBDIRECCIÓN GENERAL DE CONTENIDOS DE LA
SOCIEDAD DE LA INFORMACIÓN

Madrid, 7.12.16

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL

amending Directive 2010/13/EU on the coordination of certain provisions laid
down by law, regulation or administrative action in Member States concerning
the provision of audiovisual media services in view of changing market realities

Amenmdents of the Spanish delegation



Amendment nº 1: Recital 21 (Prominence tools)

Regarding prominence tools referred to in Article 13.1, Spain proposes to include a Recital that would clarify which methods could be used by the different providers.

Editorial suggestion:

Recital 21.

Providers of on-demand audiovisual media services should promote the production and distribution of European works by ensuring that their catalogues contain a minimum share of quality European works from a diversity of Member States and that those are given enough prominence. Prominence is about promoting European works, creating an audience and facilitating access to quality European works. It may take various forms, as the appearance of European works on the welcome page, a special European works section, promotion and marketing activities, editorialised content and special campaigns. The focus should be on creating “smart editions” of online film catalogues which give European works preferential treatment and high visibility. This requires setting up an active strategy rather than relying on automatic methods of display

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Recital 21. b (New)

To promote European cultural diversity, the Directive encourages Member States to introduce effective measures for broadcasters and online platforms to secure more European non-national works and works of independent producers. Such measures could provide a diversity of European works from a minimum of five Member States.

Recital 24

Member States shall increase cooperation between competent authorities on financial contributions in order to avoid double imposition. When Member States impose financial contributions to providers of on-demand services such contributions shall seek an adequate promotion of European works, while avoiding risks of double imposition for service providers. With this view, 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 St



Amendment nº 2: Article 2. Jurisdiction over audiovisual service providers

The Commission's proposal to modify article 2.5 defines a procedure to determine the Member State with jurisdiction over an audiovisual service provider. We believe that the Contact Committee is the appropriate body to be consulted by the Commission as representatives from all Member States with competences on this issue are part of it.

Editorial suggestion:

"Article 2 is amended as follows:

(a) in paragraph 3, point (b) is replaced by the following:

"(b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where the majority of the workforce involved in the pursuit of the audiovisual media service activity operates;"

(b) the following paragraphs 5a and 5b are inserted:

"5a. Member States shall communicate to the Commission a list of the audiovisual media service providers under their jurisdiction and the criteria set out in paragraphs 2 to 5 on which their jurisdiction is based. They shall subsequently inform the Commission without undue delay of any changes to that list. The Commission shall ensure that the competent independent regulatory authorities have access to this information.

*5b. Where, in applying Articles 3 and 4 of this Directive, the Member States concerned do not agree on which Member State has jurisdiction, they shall bring the matter to the Commission's attention without undue delay. The Commission may request the ~~European Regulators Group for Audiovisual Media Services (ERGA)~~ **Contact Committee** to provide an opinion on the matter within 15 working days from submission of the Commission's request. If the Commission requests an opinion from ~~ERGA~~ **the Contact Committee**, the time-limits set out in Articles 3(5) and 4(5) shall be suspended until ~~ERGA~~ **the Contact Committee** has adopted an opinion."*



Amendment nº 3: Article 6. Incitement to hatred

We support France's position: " Whereas the text envisages incitement to violence or hatred directed against some specified groups of persons, incitement to the commission of terrorist acts may target other different groups. Complementary to the framework decision 2002/475/JHA of 13 June 2002 on combating terrorism, which is currently under renegotiation, the AVMS Directive should allow Member States to act before the content is broadcast or made available. This would be consistent with the present regime, where racial hate speech is combated through both the current AVMS Directive and the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. "

Editorial suggestion

"Article 6:

*Member States shall ensure by appropriate and **proportionate** means that audiovisual media services provided by media service providers under their jurisdiction do not contain:*

***a) any incitement to violate human dignity and** any incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, racial or ethnic origin, **nationality**, religion or belief, disability, age or sexual orientation;*

b) any incitement to the commission of terrorist acts neither glorification of such acts."



Amendment nº 4: Article 7. Accessibility

Spain supports to keep article 7 in the AVMSD. Nevertheless, in order to be more ambitious it could also be considered to establish a universal accessibility as a goal by 2027 supporting in this regard self-regulation and co-regulation.

Editorial suggestion:

“Article 7

1. Member States shall ensure that media service providers under their jurisdiction make their services continuously and progressively more accessible to people with a visual or hearing disability aiming for an almost complete accessibility by the end of 2027.

2. With regard to the implementation of this article, Member States shall encourage the development of self- and co-regulatory codes of conduct. The Commission and ERGA shall encourage media service providers to exchange best practices on self-regulatory systems across the Union.”



Amendment nº 5: Article 13. Promotion of European Works

In general Spain supports the French proposal regarding article 13.

The percentage of European audiovisual works in catalogues of VODs services in the Commission's proposal is lower than the one established under Spanish legislation, which is 30 % (article 5.2 LGCA 72010). Therefore, Spain supports to increase the quota from 20% to 30%.

In addition, we propose that the quota obligation also applies to providers of on-demand audiovisual media services targeting audiences in their territories, but established in other Member States, in order to achieve a level playing field between VODs services.

Regarding article 13.5, in our opinion it is necessary to harmonize the concept of providers with a low turnover and the meaning of small and micro enterprises.

Editorial suggestion:

Article 13

1. Member States shall ensure that providers of on-demand audiovisual media services under their jurisdiction secure at least a ~~20~~30% share of European works in their catalogue and ensure prominence of these works, setting up an editorialization of their catalogue by qualitative methods that outline these European works against other content.

This proportion must be achieved by earmarking an adequate proportion for European works created by producers who are independent of on-demand audiovisual media services providers and for recent works, that is to say works transmitted within 5 years of their production.

▮

2. Member States may 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~~in content created by producers who are independent of on-demand audiovisual media services providers and contributions to national funds. Member States may require providers of on-demand audiovisual



media services, targeting audiences in their territories, but established in other Member States to make such financial contributions.

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, a Member State shall refer to indicators such as advertisement or other promotions specifically aiming at customers in its territory, the main language of the service or the existence of content or commercial communications aiming specifically at the audience in the Member State of reception.

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-In this case, the financial contribution shall be based only on the revenues earned in the targeted Member States. 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. Any financial contribution shall comply with Union law, in particular with State aid rules.

In the Member States imposing a financial contribution, providers of on demand services shall inform the relevant competent authorities about the turnover generated in the targeted country and any other data necessary to calculate the contribution.

3. Member States shall report to the Commission by [date – no later than three years after adoption] at the latest and every two years thereafter on the implementation of paragraphs 1 and 2.

4. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraphs 1 and 2, taking into account the market and technological developments and the objective of cultural diversity.

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– as defined in Commission Recommendation 2003/361/EC. 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.–

6. Competent authorities in Member States shall exchange relevant information about the financial contributions imposed to providers not established in their jurisdiction and the interpretation of paragraph 5.



Amendment nº 6: Article 20. Integrity of the programmes

Spain supports the French proposa, as we believe that it is necessary to keep the status quo in order to protect the integrity of audiovisual works. With the Commission's proposal (interruption every 20 minutes) viewers would then be faced with more advertising spots.

Editorial suggestion:

"Article 20

1. (...)

2. 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~~ 30 minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping shall be inserted during religious services. "



Amendment nº 7: Article 23. Commercial communications

The time schedule included in Commission's proposal does not fit in the Spanish prime time TV (DTT). According to CNMC Annual Report on Electronic Communications and audiovisual services¹, DTT implies 80,6% of the total audience of the audiovisual services in Spain. As the limit of 20% proposed for advertising ends up at 23:00, this could have a negative impact on the audience who could suffer an overexposure to advertisement after 23:00. Therefore, we propose to revise this limit and evaluate the possibility to fix it at 00:00.

Editorial suggestion:

"Article 23

1. The daily proportion of television advertising spots and teleshopping spots within a given clock hour the period between 7:00 and ~~23:00~~ 0:00 shall not exceed 20 %."

1

https://www.cnmc.es/Portals/0/Ficheros/Telecomunicaciones/Informes/Informes%20Anuales/2016_Informe%20Telecos%20y%20Audiovisual%202016.pdf



Amendment nº 8: Article 28 a. Video Sharing Platforms

Regarding article 28 a paragraph 1:

Video-sharing platforms have become audiovisual mass media. They have a major impact over the audience and their business plan take into account the audience of the service in order to monetize the content (income/revenues). Not only the user generated content is hosted in the platforms but also the traditional broadcasters have their channels in the platform to increase their audience. For that reason, Spain considers that it is a key issue to include these platforms in the new audiovisual legal framework.

Regarding the method to extend audiovisual regulation to platforms, we consider appropriate self-regulation or co-regulation to protect minors or general audience. These methods could be easily applied to fight harmful contents or contents that promote hate or violence or contents containing incitement to the commission of terrorist acts or glorification of such acts.

However, the Commission's proposal does not include the application of commercial communication rules (quantitative or qualitative) to them. As in some way platforms and on demand services compete for the same audience and offer similar contents, there is room for manoeuvre for the Commission to evaluate the extension of qualitative advertisement rules to these platforms (eg: alcohol, medicine).

Regarding article 28 a paragraph 2:

Spain supports the French proposal as far as it believes that platforms should put in place additional measures such as the prevention from uploading content previously removed (notice and take down and stay down measures).

Editorial suggestion:

"Article 28a

1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers take appropriate measures to:



- (a) protect minors from content, which may impair their physical, mental or moral development;
- (b) protect all citizens from content and audiovisual commercial communication violating human dignity and containing incitement to violence or hatred based on sex, nationality, racial or ethnic origin, religion or belief, disability, age or sexual orientation; ~~directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin.~~
- (c) protect all citizens from content containing incitement to the commission of terrorist acts or glorification of such acts;
- (d) protect all citizens from audiovisual commercial communications, which may impair their physical, mental or moral development.

2. What constitutes an appropriate measure for the purposes of paragraph 1 shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created and/or uploaded the content as well as the public interest.

Those measures shall consist of, as appropriate:

- (a) defining and applying in the terms and conditions of the video-sharing platform providers the concepts of incitement to violence or hatred as referred to in point (b) of paragraph 1 and of content which may impair the physical, mental or moral development of minors, in accordance with Articles 6 and 12 respectively;
- (b) establishing and operating mechanisms for users of video-sharing platforms to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 stored on its platform;
- (c) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;
- (d) establishing and operating systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;
- (e) providing for parental control systems with respect to content which may impair the physical, mental or moral development of minors;
- (f) establishing and operating systems through which providers of video-sharing platforms explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (b).



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(g) durable withdrawal of content referred to in paragraph 1 through the use of reliable automated recognition systems.

(...).”



Amendment nº 9: Article 30 and 30 a. National regulatory authorities

- With regard to article 30, we support DE, AT, DK, FI, LT, NL, SE and IT as we believe that the provisions set out in this article are very detailed and could be contrary to the subsidiarity principle.
- With regard to article 30 a, we propose the following amendments:

“Article 30a

1. (...).

3. ERGA's shall have the following tasks:

(a) to advise ~~and assist~~ the Commission in its work to ensure a consistent implementation in all Member States of the regulatory framework for audiovisual media services;

(b) to ~~advise and assist the Commission as to any matter~~ provide all the information and advice requested by the Commission regarding any matter related to audiovisual media services within the Commission's competence. If justified in order to advise the Commission on certain issues, the group may consult market participants, consumers and end-users in order to collect the necessary information, upon the Commission's request;

(c) to provide for an exchange of experience and good practice as to the application of the regulatory framework for audiovisual media services;

(d) to cooperate and provide its members with the information necessary for the application of this Directive, in particular as regards Articles 3 and 4 thereof;

(e) to give prepare opinions, when requested by the Commission, on the issues envisaged in Articles 2(5b), 6a(3), 9(2), 9(4) and on any matter relating to audiovisual media services, in particular on the protection of minors and incitement to hatred.

(...)”.