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## **REVISION OF THE TELEVISION WITHOUT FRONTIERS DIRECTIVE GESAC POSITION**

The Commission has published a consultation on changes that could be made to the Television Without Frontiers Directive (TWF) arising out of the discussions and work done over recent years. A proposal for an overhaul of the directive should be put forward before the end of 2005.

The two main issues of most direct concern to GESAC member authors' societies are:

- extending the directive to include new services, and
- promoting European and independent producers' works.

### **Preliminary observations:**

1. ***Most of GESAC's members believe that quotas - including for music broadcasts - are essential*** if European creators are to retain the opportunity to get their works known and find an audience for them<sup>1</sup>.
2. The Commission issue paper on "cultural diversity" and the secondary rights of independent producers must clearly not ***in any circumstances be construed as an endorsement of any form of automatic transfer of copyright to independent producers.***
3. On the right to information, ***GESAC must point out that no extension of the copyright exceptions can be made via the TWF Directive, as that is not within the Directive's purpose.*** The only applicable legislation on this is Copyright Directive 2001/29 of 22 May 2001 which affords broadcasters the benefit of certain exceptions

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<sup>1</sup> However, the British authors' society PRS believes that this is better achieved through national rules and in particular effective monitoring by media and communication regulators to ensure that consumers have access to a wide range of works and genres.

## 1 – Extending the Directive’s rules to new types of services

### 1.1 The scope of the TWF Directive

The TWF Directive does not cover the “new” services that deliver audio-visual content in a “nonlinear” fashion (on-demand services). The Commission’s proposed approach would be to extend to these new services a number of obligations that exist today only for television services strictly defined.

The recommendation for this is to adopt a two-tier definition of the services covered by the Directive, the first covering all audio-visual content services, the second applying specifically to linear services only (corresponding to “traditional” television). Audio-visual content services would be the Treaty-defined services for the delivery of moving images with or without sound to the general public by electronic communication networks. Linear audio-visual services would cover only scheduled services comprising a succession of programmes arranged throughout the day where the viewer does not control the timing of the transmission. **Some Member States have already looked into this, and some have come up with definitions that could provide a basis for the Commission’s thinking. An extract from the French Confidence in the Digital Economy Act of June 2004 is attached by way of example (see annex).**

### 1.2 Application of the rules relating to quotas and independent producers

The issue of greatest concern to most European authors’ societies in the extension of the scope of the TWF Directive is the option it would give to apply the rules on support for intellectual creation (quotas, production aid schemes, independent producers, etc.) in other sectors than television alone.

The potential competition to broadcasters from webcasters argues for adopting provisions that will result in webcasters contributing to the promotion of European works on similar terms to broadcasters. The first thing that needs doing, however, is to determine what kind of “cultural promotion” provision could be imposed on “nonlinear” services like on-demand services.

Arguably, the TWF Directive’s *quota* and independent production *provisions* are sufficiently light to be *transposable to “nonlinear” services* without undue risk.

However, applying the TWF Directive to “nonlinear” services would mean settling the issue of which was the competent Member State for laying down the rules applicable to such services (which holds good not just for cultural policy rules, but the other spheres, too: advertising, protection of minors, etc). ***The Commission’s suggestion that the connection criterion should be the State in which the content services provider is established using the E-commerce Directive criteria (place of establishment defined as the place where the provider effectively pursues an economic activity for an indefinite period) seems a reasonable solution, possibly supplemented by the establishment criteria used for television services if need be.***

*A real difficulty arises, however, in identifying the competent State where the service is not established in an EU Member State. The issues papers suggest that such a service would be able to choose which Member State's laws would apply to it by opting to be registered in there. Where a service did not register in that way, any Member State in which that service was accessible could apply its own legislation to it.*

*This system has the undoubted advantage of being reasonably straightforward. But the risk is that nonlinear services would choose to register in the State with the laxest laws on contribution to cultural policy. Thought therefore needs to be given to a more satisfactory rule.*

### **1.3 Extending the Directive to radio broadcasting**

The consultation puts the question of bringing radio into the TWF Directive. *GESAC would support such an extension of the Directive's scope if it were to result in the broadcast quotas regime being introduced into a European instrument* (which is not being said as such). Many States do not have rules on promoting European or national works on the radio, and this would be an opportunity to bring them in.

*Under no circumstances should any such extension end up by calling into question the specific rules adopted by certain States on the matter (quota levels, percentages, methods of calculation); it should leave each State free to set rules that provide greater protection for cultural diversity.*

## **2 – Strengthening the cultural obligations currently applicable to television services**

The issues papers conclude that there is no need to modify in substance articles 4 and 5, as studies show consistent growth in European and independent works, and hence that the existing rules are working. It is significant, however, that the application of articles 4 and 5 is subject to the qualification “where practicable”, and so *thought should certainly be given to a more binding system.*

The second issue addressed is that of monitoring channels' broadcasting obligations. Past performance shows that channels' reporting obligations are not complied with and/or not properly policed or enforced. The Commission therefore suggests that reporting should be backed up by independent audits, sanctions for non-reporting, and substituting sample-based controls at European level for the increasingly onerous reporting obligations in a Europe of 25 countries with a growing number of programmes.

GESAC obviously supports the introduction of measures to help tighten up enforcement of the implementation of the Directive. *But sample-based controls can only ever be an addition, not an alternative, to channels' (usually more detailed and comprehensive) reports transmitted by States to the Commission.*

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Annex:

The French Confidence in the Digital Economy Act of June 2004 (hereafter CDE) distinguishes audio-visual services from audio-visual communication services with a view to extending the application of specific measures to develop and support creation to other areas than television and radio alone.

Audio-visual services are defined as:

*“audio-visual communication services as defined in article 2 and all services making audio-visual, cinematographic or sound works available to the public or a category of the public whatever the technical means used to make them available”* (CDE - article 1, subparagraph 2)

Audio-visual communication is defined as:

*“any communication of radio or television services to the public regardless of how made available to the public, and any communication to the public by electronic means of services other than radio or television services not being a form of online communication to the public...”* (CDE - article 2, subparagraph 3).

Television itself is specifically defined:

*“A television service is any service of communication to the public by electronic means intended to be received simultaneously by the public generally or a category of the public whose main programme schedule consists of a succession of arranged programmes with sound”* (CDE - article 2, subparagraph 4).

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