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Subject: Notifications 2023/136-137/B

Decree amending the Decree of 27 March 2009 on radio broadcasting and television, as regards the stimulation of the audiovisual sector through financial contributions to the production of audiovisual works

Decision of the Flemish Government on stimulating the audiovisual sector through financial contributions to the production of audiovisual works

Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015

Madam,

Within the framework of the notification procedure laid down by Directive (EU) 2015/1535¹, the Belgian authorities notified to the Commission on 27 March 2023 the draft “*Decree amending the Decree of 27 March 2009 on radio broadcasting and television, as regards the stimulation of the audiovisual sector through financial contributions to the production of audiovisual works*” (hereafter “the notified draft decree”) and the draft “*Decision of the Flemish Government on stimulating the*

¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241, 17.9.2015, p. 1.

audiovisual sector through financial contributions to the production of audiovisual works” (hereafter “the notified draft decision”).

“Private broadcasters ... providing non-linear television services” as well as “video-sharing platform service providers”, as referred to by the notified draft decree, and falling under its scope, constitute information society services as defined in Article 1(b) of Directive (EU) 2015/1535 and therefore also within the meaning of Articles 1 and 2 of Directive 2000/31/EC (hereafter “the e-Commerce Directive”)², insofar as they fulfil the conditions mentioned therein (“*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*”).

The notified draft decree, together with the notified draft decision, aim to make use of the possibility provided for in Article 13(2) of Directive 2010/13/EU as amended by Directive (EU) 2018/1808³ (Audiovisual Media Services Directive, hereafter “AVMSD”) for a Member State to require media service providers established in other Member States but targeting audiences in its territory (hereafter “cross-border provider”) to contribute, in a non-discriminatory and proportionate way, to the production of European works. The notified draft decree also aims at transposing Article 13(6) of the AVMSD, which provides for mandatory exemptions from the possible requirement under Article 13(2) for companies with a low turnover or a low audience. In addition, the notified draft decree envisages to extend the contribution obligation to video-sharing platform providers and distributors of broadcasting services.

Article 8 of the notified draft decree inserts Article 188/1 into the decree of 27 March 2009, whose paragraph 1 defines the services that “participate annually in the production of audiovisual works in the form of a direct financial contribution to the production of audiovisual works or in the form of an equivalent financial contribution to the Flemish Audiovisual Fund”.

There are three services listed in Article 188/1, paragraph 1:

- 1°- distributors of services which make one or more of the broadcasting services of one or more television broadcasters under the competence of the Flemish Community available to the public in a linear or non-linear manner;
- 2°- private broadcasters, including private broadcasters established in a Member State of the European Union or of the European Economic Area, or outside, or established in Belgium and not falling under the competence of the Flemish Community, providing non-linear television services aimed at the Dutch-speaking area;

² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p.1.

³ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92.

- 3°- video-sharing platform service providers, including those established in a Member State of the European Union or of the European Economic Area, or outside, or established in Belgium and not falling under the competence of the Flemish Community, offering video-sharing platform services targeting the Dutch-speaking area.

The Belgian authorities explained that “distributors of services” do not have editorial responsibility but focus on the bundling of channels.

Article 15 of the notified draft decree inserts Article 188/4 into the decree of 27 March 2009, according to which private broadcasters providing non-linear television services (“private VOD providers”), in order to fulfil their obligation, can choose between paying a lump sum of EUR 6 million or an amount equal to 2 %, 3 % or 4 % of their turnover, depending on the amount of the turnover. Article 188/4 paragraph 2 clarifies that for broadcasters “falling under the competence of the Flemish Community” the revenues earned in the EU Member States are to be taken into account for the calculation of the turnover, whereas for cross-border VOD only the “revenues from services offered to residents in the Dutch-speaking area” shall be taken into account.

The same financial obligations apply to video-sharing platform service providers, according to Article 188/5 paragraph 1, introduced by Article 17 of the notified draft decree. Paragraph 2 of that provision clarifies that the “turnover” refers to the “turnover achieved in the Dutch-speaking region in the second year preceding the year of participation in the production of audiovisual works”.

Distributors of services, on the other hand, can choose between the lump sum of EUR 6 million and the payment of EUR 3 per subscriber in the Dutch-speaking region, according to Article 188/3, introduced by Article 13 of the notified draft decree. The current law already extends the obligation to distributors of services, so that the decree under review only adapts the obligations (for example, the amount per subscriber increases from EUR 1.3 to EUR 3 per subscriber).

The expression “audiovisual works” referred to in Article 188/1 is meant to cover “an animation, documentarian or fiction film or an animation, documentarian or fiction series”, according to Article 2 paragraph 3 of the notified draft decree, and is further defined in Article 9 of the notified draft decision in conjunction with Article 188/5 of the notified draft decree.

According to Article 9 paragraph 1 of the notified draft decision, the audiovisual work in question must be a “Flemish production project” in order to be eligible for a direct financial contribution. A production project is qualified as Flemish “on the basis of the following criteria”:

- the Flemish artistic or productive talent present;
- the original Dutch language version;
- the Dutch-language text or dialogues;
- the underlying work in Dutch;

- the cultural link with Flanders;
- creative input from the Flemish cultural community;
- a topic related to Flemish society, history, culture, etc.

Also, according to Article 9 paragraph 4 of the notified draft decision, the production project “shall be submitted together with at least one producer with its registered office or permanent agency in the Flemish Region or the Brussels Capital Region acting as a delegated producer” in order for the project to be eligible as a direct financial contribution to the production of audiovisual works.

In relation to the aforementioned financial contribution scheme, the Commission issues the following comments:

- i) Application of the obligation to “private broadcasters” providing non-linear television services

According to the notified draft decree, the investment obligation does not apply to either broadcasters of linear television services of any kind or to on-demand media services operated by public service media. In addition, Article 188/1 paragraph 5, introduced by Article 8 of the notified draft decree, exempts “private broadcasters” whose offer “mainly consists of programmes based on Broadcaster Video-On-Demand Rights” from the scope of the obligation. The Belgian authorities explained that this exemption covers the situations where “private broadcasters” have acquired the rights to offer the programmes both in a linear and a non-linear manner.

As far as broadcasters (meaning providers that offer their content in a linear manner) are concerned, the differentiation could be supported by Recital 37 AVMSD which recognises that broadcasters already heavily invest in European content: *“Broadcasters currently invest more in European audiovisual works than providers of on-demand audiovisual media services. Therefore, if a targeted Member State chooses to impose a financial obligation on a broadcaster that is under the jurisdiction of another Member State, the direct contributions to the production and acquisition of rights in European works, in particular co-productions, made by that broadcaster, should be taken into account, with due consideration for the principle of proportionality. This is without prejudice to the Member States’ competence to establish, in accordance with their cultural policy and subject to compatibility with State aid rules, the level of financial contributions payable by media service providers under their jurisdiction”*.

However, in the case where a Member State decides to apply levies only to on-demand media services, this choice has to comply with the principles of EU law such as proportionality and non-discrimination, pursuant to Article 13(2) and (3) AVMSD.

So far, the Belgian authorities have not provided an explanation for the complete exclusion of broadcasters of linear television services of any kind and of on-demand media services operated by public service media from the financial obligations. Also, it is

not clear to which extent a private broadcaster's programme must consist of "Broadcaster Video-On-Demand Rights" in order for the criterion "mainly" to be fulfilled. This raises the question why a certain category of broadcasters is exempted completely from the contribution obligation, even though the reason for that exemption applies only to part of that broadcaster's activity.

The Commission would encourage the Belgian authorities to provide a justification regarding the non-discriminatory definition of the scope of the measure, for example, by providing concrete data on the investments undertaken by broadcasters and on-demand media service providers (commercial and public ones) in audiovisual works, as they are defined in the notified draft decree and the notified draft decision.

ii) Application of the obligation to video-sharing platform providers

The AVMSD does not prevent Member States from obliging video-sharing platform providers to make financial contributions for the promotion of European works. In particular, video-sharing platform providers are not in the scope of Article 13(2) AVMSD, so that that provision's explicit permission for Member States to extend such obligations for media service providers to cross-border providers does not mean that Member States could not require video-sharing platform providers to make a contribution as well.

Nevertheless, the principles of proportionality and non-discrimination have to be complied with. The Commission notes in that respect that the aforementioned Article 188/5 paragraph 2 refers to the "turnover achieved in the Dutch-speaking region in the second year preceding the year of participation in the production of audiovisual works", creating thereby a link between the obligation and the activity of the obligations' addressee. It is also noted that the amount of the financial obligation is equivalent to the one that private VOD providers are subject to.

iii) Investment in "audiovisual works"

According to Article 9 paragraph 1 of the notified draft decision, the obligation can only be fulfilled by investing in a "Flemish production project", as far as the option of a direct investment in an audiovisual work is concerned. It is unclear from that provision how the formulation "on the basis of the following criteria" is to be understood, in particular whether it suffices for the work to qualify as "Flemish production project" that (at least) one of the mentioned criteria is fulfilled.

Additionally, Article 9 paragraph 4 of the notified draft decision requires that the production project is submitted "together with at least one producer with its registered office or permanent agency in the Flemish Region or the Brussels Capital Region acting as a delegated producer".

It must be noted that Article 13(2) AVMSD refers to the financial support for the production of European works and does not include any similar provision concerning financial obligations for the support of national cinematographic films and audiovisual activities. Equally, the Directive does not include any provision concerning the earmarking of a part or all of the relevant revenues to works in the official language of a Member State or works that have been produced by producers established in a certain Member State or a certain region of a Member State.

However, according to settled case-law, measures affecting the freedom to provide services may be justified if they pursue a legitimate public interest, such as cultural and linguistic diversity. Considering in particular the obligation to finance the production of European works, the Court of Justice of the European Union (CJEU) has ruled that protecting linguistic diversity can justify restrictions to the free movement of services, as long as the national measures are proportionate.⁴ While the judgment concerned obligations imposed on providers under the Member State's jurisdiction, the Commission understands that the same objective can be invoked also in relation to obligations imposed on cross-border providers to contribute financially to European works, if the principles of non-discrimination and proportionality are respected.

Even though the list of criteria in Article 9 paragraph 1 of the notified draft decision does not refer to language only, the Commission is of the view that it could have the effect of creating an advantage for production companies which work in Dutch language or are of Flemish or Dutch origin and which, accordingly, may in practice mostly comprise undertakings established in Flanders or the Netherlands. This is even more so with regard to the requirement of Article 9 paragraph 4, since preponderantly production companies of Flemish or Belgian origin have a registered office or permanent agency in the Flemish region or the Brussels Capital region. In this light, the Commission would like to remind the Belgian authorities that such a high proportion of Flemish production projects (100%) benefitting from investment obligations, compared to European works, would need to be justified and proportionate in view of the Treaty on the Functioning of the European Union. The Commission considers that the proportionality of this choice related to the investment obligation that applies exclusively to "Flemish production projects", as defined in the notified draft decision, would require additional reasoning as opposed to an investment obligation that earmarks only a part for such content from the overall investment obligations dedicated to European works.

Furthermore the Commission notes that, according to Article 4 of the notified draft decision, certain categories of investors who contribute to the financing of a production project "may take into account the market-conform remuneration they pay in order to acquire broadcasting rights for a production project aimed at the Dutch-speaking region for up to 30 % of the financial contribution due, provided that the investor participates at least 20 % in the production of the audiovisual work in the case of a fiction, documentarian or fiction or documentary film, and at least 10 % in the case of an animation or animation film." The Commission notes that the term "production project aimed at the Dutch-speaking region" is not defined in the notified texts. It is not entirely

⁴ Judgment of 5 March 2009, C-222/07 – *Uteca*.

clear whether the notified draft decision allows to take into account only the expenses incurred for acquiring the exploitation rights of the productions only for the Dutch-speaking region. In this regard, the Commission recalls that the circulation of works among Member States contributes to the objective of promoting cultural diversity, and, furthermore, that the objectives of fostering more diversity in video-on-demand catalogues and improving the access to and availability of audiovisual content are expressly mentioned in the Media Action Plan⁵. Depending on how the above-cited term is interpreted, the provision could negatively impact the cross-border availability of works, by limiting the eligible expenses to the exploitation of the works in the Dutch-speaking region.

Moreover, the Commission notes that Article 9 of the notified draft decision only applies to the option of a direct financial contribution. On the other hand, it remains unclear which kind of works are supported by the Flemish Audiovisual Fund with the help of the payments accomplished by contributors who choose the option of such a payment, in particular to what extent the Flemish Audiovisual Fund would support “Flemish production projects”. In this context, it is also important that the distribution of the contributions by the fund is compliant with State aid law. Based on the information provided so far regarding the potential beneficiaries of the distribution of the contributions by the fund, this cannot be assessed yet.

The Belgian authorities are invited to take into account the above comments and considerations in order to ensure that national legislation is adopted and applied in conformity with the applicable EU law. The comments issued for these notifications are without prejudice to the assessment, once adopted, of the Belgian legislation in the framework of the notification of national measures for the transposition of the AVMSD.

The Commission furthermore recalls that once the definitive texts have been adopted, they have to be communicated to the Commission in accordance with Article 5(3) of Directive (EU) 2015/1535.

Yours faithfully,

For the Commission

Thierry Breton
Member of the Commission

⁵ Europe’s Media in the Digital Decade: Action Plan to Support Recovery and Transformation, COM/2020/784 final