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Proposal for a

COUNCIL DECISION

on the extension of the entitlement for co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The Free Trade Agreement (FTA) between the European Union and its Member States and Korea was signed on 6 October 2010 and has been concluded in 2015 by adopting the Council Decision 2015/2169 on the conclusion of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part ("the Decision"). The Protocol on Cultural Cooperation (hereafter: the Protocol), concluded by the Parties within the framework of the FTA, established a framework within which the Parties shall cooperate to facilitate exchanges in cultural activities, goods and services, including in the audio-visual sector, and to improve the conditions governing such exchanges.

With the Protocol, the Parties, in conformity with their respective legislation, agreed inter alia to grant an entitlement for audio-visual co-productions between producers from the EU party and Korea to benefit from their respective schemes for the promotion of local/regional cultural content according to certain specific conditions.

Such co-productions can be considered European works within the EU and Korean works within Korea, as long as they respect the conditions stipulated in Article 5 of the Protocol (see points 8(a) to (c) in particular).

This entitlement was established for a period of three years (from 1 July 2011 until 30 June 2014) and it was renewed twice for another three years. The first renewal ran until 30 June 2017, while the current entitlement runs until 30 June 2020. It is now proposed that the Council makes a statement on the entitlement's renewal for another three years.

• Consistency with existing policy provisions in the policy area

The Creative Europe MEDIA sub-programme supports the development and distribution of European audiovisual works from participating European countries. Beneficiaries from third countries may participate under certain schemes if certain conditions are met.

Certain schemes help create an environment conducive to co-productions, notably the Market Access and Training schemes which fund markets, networking meetings and workshops, including with Korea. In addition, the International Co-productions scheme helps European and international co-production partners, including from Korea, to come together and provides indirect support for audio-visual works co-produced by international co- production funds, including co-productions with Korea under certain conditions.

• Consistency with other Union policies

The Protocol on Cultural Cooperation was concluded by the EU and Korea in 2015 as part of the Free Trade Agreement. Specifically, it was seen as an instrument to promote the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention of 2005 on the Protection and Promotion of the Diversity of Cultural Expressions.

The existing entitlement foresees co-productions supported by groupings of national schemes and funds for audio-visual productions. The entitlement also allows the co-produced works to qualify as European works under the definition of European works referred to in Article 1 (n) (iii) in the Audio Visual Media Service Directive (AVMSD).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The procedure for renewing the entitlement is provided for in Article 5 of the Protocol. The required steps have been taken.

Article 5(8) of the Protocol stipulates that if it is decided that the entitlement should be renewed, it can be extended for another three year period and, thereafter, it will be automatically renewed for further successive periods of the same duration unless a Party terminates the entitlement by giving notice in writing of at least three months before the expiry of the period. Co-productions which predate any such termination can still benefit from the respective schemes for the promotion of local/regional cultural content.

It is opportune to make a proposal for a Council Decision on the renewal of the entitlement. Such proposal should be based on Article 218(6) TFEU as it concerns the statement of the extension in time of the application of a part of an international agreement. The rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves. Council decisions concluding international agreements cannot derogate from the Treaties as regards the procedure for making a statement of the extension in time obligations arising from international agreements which are thereby concluded.

• Subsidiarity (for non-exclusive competence)

The renewal of the entitlement will represent an opportunity for the European audiovisual industry to maintain its presence and further gain market share, experience and knowledge in the Korean market, which is growing fast.

Whilst some Member States have successfully undertaken audiovisual co-productions on a bilateral basis, many others still have not and therefore the entitlement at EU level still has the potential to allow for participation by a wider number of countries.

The European Commission has limited competences regarding production of films whereas this is the role of national film funds, including as regards international co-productions. Therefore, more engagement of the national film funds will be necessary in order to implement the Protocol in practice.

• Proportionality

Studies and data from the European Audiovisual Observatory have shown that co-productions lead to higher audiences. In 2017 European films in Korea make up 17% of the films on release, but only 5% of cinema admissions. The gap between the cinema releases and the admissions shows that there is a big unexploited potential and better collaboration could help tap into this potential. The co-production entitlement could create more opportunities for the European audiovisual industry in terms of export and promotion to Korea and a gateway to Asia. Therefore implementation of the coproduction entitlement would help build market

share at a time when the market is growing (the general box office trend in Korea increased by 23% between 2013 and 2017). However, the presence of Korean films in the EU is quite limited (the figures for 2014-2018 show that the share of films on release is 0,4% while the share of admissions is 0,1%).

The lack of implementation of the protocol so far seems due to a lack of concrete information about the incentives available for co-productions at national level. Therefore targeted measures should be taken (covering access to funding, training, network building), both at European and national level.

Also, the success of bilateral co-productions shows there is the capacity and potential to do more. In preliminary discussions in the Audiovisual Working Party, Member States have indicated their willingness to collaborate at Union level in order to promote co-productions under the Protocol, drawing on best practices at bilateral level.

- **Choice of the instrument**

The appropriate instrument for any explicit statement of renewal of the entitlement is a Council Decision, based on Article 218(6) TFEU as it concerns the extension in time of the application of a part of an international agreement.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable

- **Stakeholder consultations**

The Protocol foresees that each Party shall establish a Domestic Advisory Group (DAG), comprised of cultural and audio-visual representatives active in the fields covered by this Protocol. The EU DAG met on 17 October 2019 in Brussels in order to evaluate the results of the implementation of the entitlement in terms of enhancement of cultural diversity and mutually beneficial cooperation on co-produced works. Stakeholders also contributed to the consultation by sending their written comments.

Overall, stakeholders noted the lack of EU-Korea audio-visual co-productions under the conditions mentioned in the Protocol andthat the Protocol has nonetheless the potential of being a useful tool. They were open to the renewal of the entitlement for EU-Korean co-productions althouh there were some reservations about its added value in practice, which had to be clarified. Stakeholders also concluded that there is a need to promote the Protocol at industry, state and EU level in order to highlight the advantages.

It is following the consultation of the Member States and in light of the opinion of the DAG that the Commission is now invited to endorse that the entitlement should be renewed.

- **Collection and use of expertise**

Studies and data from the European Audiovisual Observatory have shown that co-productions lead to higher audiences.

Compared to other export markets, in 2017 European films in Korea make up 17% of the films on release, but only 5% of cinema admissions. The gap between the cinema releases and the admissions shows that there is a big unexploited potential and better collaboration could help tap into this potential. The co-production entitlement could create more opportunities for the European audiovisual industry in terms of export and promotion to Korea and a gateway to Asia. Therefore implementation of the coproduction entitlement would help build market share at a time when the market is growing (the general box office trend in Korea increased by 23% between 2013 and 2017). However, the presence of Korean films in the EU is quite limited (the figures for 2014-2018 show that the share of films on release is 0,4% while the share of admissions is 0,1%).

- **Impact assessment**

Not applicable.

- **Regulatory fitness and simplification**

Not applicable.

- **Fundamental rights**

Not applicable.

4. BUDGETARY IMPLICATIONS

None.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will continuously monitor the implementation of the audiovisual co-production entitlement, drawing on data from the European Audiovisual Observatory and from industry, in particular as regards the animation sector.

Once a year a Cultural Cooperation Committee will meet between the European Union and the Member States on one side and the Republic of Korea on the other to monitor progress and discuss challenges and opportunities.

- **Explanatory documents (for directives)**

Not applicable.

- **Detailed explanation of the specific provisions of the proposal**

The entitlement will be extended for another three years, until June 2023. The entitlement is set out in Article 5 of the Protocol, as follows:

"For the purposes of this Protocol, a co-production means an audiovisual work produced by producers of both Korea and the EU Party into which those producers have invested in accordance with the terms of this Protocol.

The Parties shall encourage the negotiation of new and implementation of existing co-production agreements between one or several Member States of the European Union and Korea. The Parties reaffirm that the Member States of the European Union and Korea may grant financial benefits to co-produced audiovisual works as defined in relevant existing or future bilateral co-production agreements to which one or several Member States of the European Union and Korea are parties.

The Parties, in conformity with their respective legislation, shall facilitate co-productions between producers from the EU Party and Korea, including through entitlement for co-productions to benefit from respective schemes for the promotion of local/regional cultural content.

Co-produced audiovisual works shall be entitled to benefit from EU Party scheme for the promotion of local/regional cultural content referred in the form of qualification as European works in accordance with Article 1(n)(i) of Directive 89/552/EEC as amended by Directive 2007/65/EC, or by its subsequent amendments[1] for the purposes of the requirements for the promotion of audiovisual works as provided for by Articles 4.1 and 3i.1 of Directive 89/552/EEC as amended by Directive 2007/65/EC, or by its subsequent amendments[2]. Co-produced audiovisual works shall be entitled to benefit from Korean schemes for the promotion of local/regional cultural content referred to in paragraph 3 in the form of qualification as Korean works for the purposes of Article 40 of the Promotion of Motion Pictures and Video Products Act (Act No. 9676, May 21, 2009), or its subsequent amendments and of Article 71 of the Broadcasting Act (Act No. 9280, Dec. 31, 2008), or its subsequent amendments and Notice on Programming Ratio (Korea Communications Commission Notice No. 2008-135, Dec. 31, 2008), or its subsequent amendments.

The entitlement for co-productions to benefit from the respective schemes for the promotion of local/regional cultural content shall be granted on the following conditions:

(a) The co-produced audiovisual works are realised between undertakings which are owned and continue to be owned, whether directly or by majority participation, by a Member State of the European Union or Korea respectively and/or by nationals of a Member State of the European Union or nationals of Korea respectively;

(b) The representative director(s) or manager(s) of the co- producing undertakings have the nationality of a Member State of the European Union and Korea respectively and can demonstrate their domicile therein;

(c) Participation of producers from two Member States of the European Union will be necessary for each co-produced audiovisual work, other than animation works. With respect to animation works participation of producers from three Member States of the European Union will be necessary. The proportion of financial contribution of a producer or producers of each Member State of the European Union shall be no less than 10 percent;

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1 The most recent amendment was Directive 2018/1808/EU 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*

2 Idem 1; the revised AVMSD strengthens the promotion of European works by requiring in Article 13.1 that video on demand secure at least 30% of European works in their catalogue and ensure prominence of those works.

(d) The minimum respective financial contributions to a co-produced audiovisual work other than animation works, of the producers of the EU Party (taken together) and the producers of Korea (taken together) may not be less than 30 percent of the total production cost of the audiovisual work. With respect to animation works this contribution may not be less than 35 percent of the total production cost;

(e) The contribution of each Party's producers (taken together) includes effective technical and artistic participation and a balance is ensured between the two Parties' contributions. In particular, in co-produced audiovisual works other than animation works the technical and artistic contribution of each Party's producers (taken together) shall not vary by more than 20 percentage points compared to their financial contribution and cannot in any case represent more than 70 percent of the overall contribution. With respect to animation works the technical and artistic contribution of each Party's producers (taken together) shall not vary by more than 10 percentage points compared to their financial contribution and cannot in any case represent more than 65 percent of the overall contribution;

(f) Participation of producers from third countries that have ratified the UNESCO Convention in a co-produced audiovisual work is accepted to a maximum of 20 percent, where possible, of the total production costs and/or the technical and artistic contribution to the audiovisual work."

The Parties reaffirm that the entitlement for co- productions to benefit from their respective schemes for the promotion of local/regional cultural content ensures reciprocal benefits, and that the co-productions fulfilling the criteria are awarded the status of European/Korean works respectively without any additional conditions.

The entitlement for co-productions to benefit from the respective schemes for the promotion of local/regional cultural content is established for a period of three years.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 167 (3) in conjunction with Article 218 (6) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament,

Whereas:

(1) On 1 October 2015 the Council adopted the Decision of 2015/2169 on the conclusion of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.

(2) The /Agreement contains a Protocol on Cultural Cooperation ("the Protocol") which, according to Article 1 thereof, sets up the framework within which the Parties cooperate for facilitating exchanges regarding cultural activities, goods and services, including inter alia, in the audio-visual sector.

(3) Pursuant to Article 5(8)(b) of the Protocol, following the initial period of three years the entitlement will be renewed for further successive periods of the same duration, unless a Party terminates the entitlement by giving notice in writing at least three months before the expiry of the initial or any subsequent period.

(6) The Domestic Advisory Group provided for in Article 3(5) of the Protocol has been consulted on the extension of the period of entitlement, as provided for in Article 5(8) of the Protocol.

(7) This Decision should not affect the respective competences of the Union and the Member States.

HAS ADOPTED THIS DECISION:

Article 1

The Council states the renewal of the entitlement for audio-visual co-productions to benefit from the respective schemes of the Parties for the promotion of local/regional cultural content, as provided for in Article 5 of the Protocol, for a duration of three years, from 1 July 2020 to 30 June 2023.

Article 2

This Decision shall enter into force on 1 April 2020.

Done at Brussels,

For the Council
The President