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"Study on the implementation of the provisions of the Audiovisual
Media Services Directive concerning the promotion of European
works in audiovisual media services"

Final Study Report
Executive Summary
13 December 2011

attentional
an instinct for entertainment

headway
international



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Table of Contents

1.	Executive Summary	5
1.1.	Legal analysis	5
1.2.	Economic analysis.....	7
1.3.	Linear content analysis.....	8
1.4.	Non-linear content analysis.....	10
1.5.	Prospective analysis.....	12

1. Executive Summary

1.1. Legal analysis

The aim of this section is to identify and analyse national legal measures implementing Articles 16 and 17 of the AVMS Directive (linear services) and Article 13 of the AVMS Directive (on-demand services).¹ For Articles 16 and 17, this is mainly an update of the study delivered to the European Commission in March 2008 capturing the changes between 2008 and 2010. For Article 13, the report consists of brand new content, and analyses national provisions that were adopted after the 2008 Study.

The legal analysis looks at how the Directive has been transposed into national legislation in each Member State, to determine whether the modes of implementation were prescriptive or flexible. In particular, the different approaches to a number of key terms have been compared. The data were collected through questionnaires sent to national regulatory authorities, supplemented by follow-up e-mails and telephone conversations, as well as consultation of on-line sources.

There are some differences between the national transpositions of Articles 16 and 17. Key terms have been transposed differently from one Member State to another. A few Member States have adopted a definition of *total 'qualifying' hours*² that is more prescriptive than the Directive. Some Member States have incorporated the Directive's qualifying term '*where practicable*' or other measures allowing lower proportions of European works and independent productions. Most, but not all, have defined the term '*independent*' producer, essentially using a combination of different elements suggested by the Directive (ownership of production company, amount of programmes supplied to the same broadcaster, ownership of secondary rights). Most Member States have simply reproduced the wording of the Directive mandating that '*an adequate proportion*' of independent works be '*recent works*', but some States went further and specified a minimum proportion.

The target for independent productions is usually based on transmission time. A vast majority of Member States have chosen a proportion of '*transmission time*' dedicated to independent productions or an option between '*transmission time*' and '*programming budget*'. Only France and Italy incorporated a financial requirement on broadcasters, based on their net annual revenues.

Most Member States apply some measures stricter than Articles 16 & 17. Some Member States apply higher percentage requirements for European works or independent productions than those contained in the Directive (on

¹ Directive 2010/13/EU of 10 March 2010 - OJ L 95 of 15.4.2010.

² According to Articles 16 and 17 qualifying transmission time excludes "the time allotted to news, sports events, games, advertising, teletext services and teleshopping."

some or all broadcasters). Almost all Member States place some form of additional content requirements on broadcasters to reflect linguistic or cultural or regional specificities in a Member State. Several Member States require that a certain proportion of broadcasting time shall be allocated to programmes originally produced in a national language. In more and more countries, broadcasters have to provide funding for the production of European works.

There are different approaches for monitoring and sanctioning adherence to Articles 16 and 17. Most Member States simply require broadcasters to submit statements of the achieved proportions of European works and independent productions, but some Member State authorities do take additional steps to verify the submitted data or carry out independent monitoring of broadcasts. Three Member States have not established any sanctions for failure to achieve the required proportions, but authorities in most Member States have a range of sanctions at their disposal. Typically, sanctions may be warnings and fines, but in some Member States, it is possible to shorten or revoke broadcasting licences in the most serious cases.

National regulations implementing Articles 16 and 17 are tending to be more prescriptive. The evolution of national legislations has been scored to track the direction, either toward more flexibility or more prescriptiveness. Over the last two years, the number of countries becoming more prescriptive is higher than the number of those becoming more flexible.

Article 13 offers a variety of methods to ensure promotion of European works. A majority of Member States merely reproduced the language in Article 13 and left it for later determination; seven Member States imposed requirements on on-demand services under their jurisdiction for a 'share or prominence' of European works in their catalogue; and three countries embodied all the different methods suggested by Article 13, i.e., 'share or prominence' of European works, as well as financial contribution to the production and rights acquisition of European works.

Those Member States that reproduced the language in Article 13 did also include a '*where practicable*' clause allowing operators to be exempted in certain circumstances.

Monitoring is a key feature for implementation of Article 13. On the one hand, monitoring by regulatory authorities under Article 13 is very similar to monitoring of obligations under Articles 16 and 17. Most Member States opted for a flexible approach, relying on the reports made by the operators themselves. Others will verify such reports while, in two countries, an independent analysis is to be conducted. On the other hand, monitoring of on-demand services takes due account of their novelty and the high level of uncertainty regarding the appropriate regulation. Accordingly, a certain number of countries have not prescribed a specific method of implementation in their primary legislation but have included a monitoring system to help them watch the development of VOD services for a certain period of time before regulating on the basis of Article 13.

For the first time, this study compares the approaches adopted toward the provisions of Articles 16/17 and toward Article 13. Most Member States' implementation related to linear services is prescriptive, while their

national regulation on non-linear services is considered as flexible. Only three Member States have opted for prescriptive approaches on both linear and on-demand services.

1.2. Economic analysis

The aim of the economic section is to develop an informed analysis of the market for audiovisual works in the 30 EU and EEA markets, exploring the structure of the broadcasting industry on a country by country basis, quantifying sources of turnover, and looking at developments in independent production in each. The 2011 study includes a new section looking at the evolution of business models for content creation.

Total TV industry revenues have been flat since the 2008 study with growth barely keeping pace with inflation. TV industry revenue totalled just over €77 billion in 2009. Advertising revenues are down and there is now a heavier reliance on public funding. Pay-TV continues to be the main growth driver. Cable relay revenues continue to decline with the migration to digital. Other revenues are still relatively small, but gaining in importance.

Video-on-Demand is growing in importance, but is still a nascent market representing less than 1% of total TV revenues. Of this revenue, very little flows to content owners. In the case of broadcasters, spend on on-demand services typically amounts to less than 1% of their total programme budget. Evidence suggests most growth is now coming from advertising rather than pay. The majority of services are delivered via open systems, i.e. freely available to everyone, and not subscription based. These services are typically ad funded or funded through public funding.

As in the 2008 study, the five largest markets still represent around 70% of total TV revenue. Germany and the UK are by far the two largest TV markets in Europe; France and Italy – which have similar sized economies to that of the UK – are somewhat smaller. The gap between the UK and France has narrowed significantly since the last study. However, this is largely due to fluctuation in exchange rates since 2006.

The mix of TV revenue streams varies considerably between markets. It is therefore difficult to generalise on market structures across countries. Newer Member States tend to have a higher reliance on advertising and a lower reliance on public funding and Pay-TV than older Member States. The proportion of income from ancillary revenues tends to be higher in older Member States.

The number of premium Pay-TV homes has increased with digitization of TV reception. The number of analogue terrestrial homes continues to fall. The growth in cable relay and free satellite homes has been overall stagnant with some growth in newer Member States. Digital Terrestrial TV (DTT), both free and pay, is now reaching almost 60 million households. IPTV continues to grow, but only has a significant presence in some markets.

An increasing number of markets have now reached Pay-TV penetration levels of 50% or above. However, the level of Pay-TV penetration still varies significantly across the Member States.

The majority of on-demand services are VoD rather than catch-up, but catch-up services still account for around half of usage. We estimate there are 435 individual catch-up and VoD services across the E30. The main delivery method for on-demand services (in terms of delivery, but not necessarily in terms of usage) is the internet, followed by IPTV and cable.

The main network channels account for about 56% of gross industry revenue but over 90% of all new commission spending. Total programme spending has shown little growth since the 2008 study. Secondary channels tend to be carried within Pay-TV packages, where a large proportion of revenues either goes to the platform providers or is spent on premium acquisitions, such as top feature films or sport.

The level of originated and external spending varies significantly between markets. Our estimates of the TV value chains show a positive correlation between public funding and investment into originated content. However, this does not always translate into spending on externally sourced originations. The proportion of public funding tends to be lower across newer Member States, which in turn also follows the level of originated spending.

The global softening of the economy in recent years has affected broadcaster margins with a knock-on effect on the independent production sector. Independent producers have become increasingly reliant on secondary and ancillary revenues to drive profits, with commission spending by broadcasters generally only covering the production cost for the producer.

As part of the study we surveyed broadcasters on their programme spending decisions. There appears to have been an overall increase in acquisition spending. There is a less clear picture of a shift towards spending on externally commissioned content as was observed in the 2007 study. Factual magazines, entertainment and games have increased in importance as a source of independent content. Format spending appears to be stable and the main users of formats remain commercial broadcasters. Commissioned programmes are still mainly sourced domestically and acquisitions mainly sourced from the US.

1.3. Linear content analysis

The schedules of 54 broadcasters from 11 Member States have been sampled and analysed to provide data relevant to Articles 16 and 17 using a consistent methodology and following the guidelines set in the past two Studies. Indicators include the proportions of qualifying works in total schedules, of European works and of European independent productions in total qualifying schedules, of recent independent productions in total European independent qualifying productions.

These independent findings are very consistent with biennial declarations by Member States although some differences are seen for some markets or channels, where national regulations may use different definitions to reflect their specific policy objectives. This is especially true of Independent works, but only marginally concerns European works and Recent works.

2010 data confirm the general level of compliance of European broadcasters with Articles 16 and 17. In 2010 broadcasters typically offer:

- 50-90% of European works (average of 66.4% across our sample).
- 15-40% of Independent European works (average of 29.4%).
- 80-100% of Recent Independent European works (average of 85.2%).

Levels of compliance have been on the rise over the past two decades as, in the mid-90s, the measures typically averaged 60% for European works, 20% for Independent works and 70% for Recent works. But the rise has slowed down since the 2007 economic crisis. European works have declined on non-leading channels. Independent works have declined on all channels, especially private ones. Only Recent works continued to rise.

Proportions of linear schedules translate into very similar proportions of linear viewing. European works generate a relatively higher proportion of total TV viewing than their share of the schedules, but this is less true for younger viewers. Independent works generate an even higher relative proportion of TV viewing, whether for older or younger viewers. Recent works achieve the same, especially with young adults.

Qualifying programmes make up 67.6% of the total transmission hours. They are less prominent on leading channels, which offer substantial volumes of news, games and sports events. They are more prominent on pay channels that mainly offer cinema and TV fiction.

European works made up 66.4% of the total qualifying transmission hours in 2010. They are relatively less attractive to younger viewers, who watch more US content than their elders. Proportions are very similar in primetime. While European transmission hours have increased, European viewer hours have decreased, reflecting the current vitality of American production and the success of US drama and comedy broadcast in Europe.

European programmes are more prominent on leading channels and on public channels. Highest public channels offer 85-95% of European works (EEN, ETV, France 2, France 3, Das Erste, ZDF, Rai1, Ned1, Ned2, SVT1, BBC1). Lowest public channels are still above the sample average. Some private channels offer up to 85-95% of European works, too (Direct8, RTL, Sat.1, Canale 5, Tele 5, ITV1) and most others are around 50-60%.

Non-domestic European works make up 8.1% of the total qualifying transmission hours in 2010, compared to 7% of total qualifying viewer hours. Proportions are lower in primetime (5.9% of transmission hours and 5% of viewer hours). They are significantly more prominent in small countries

(14% vs. 4.9% in large countries) and new Member States (13.5% vs. 6.4% in old Member States). They are significantly more prominent on publicly funded channels (9.5% vs. 7.3% on commercial channels and 4.7% on pay channels).

Independent European works make up 29.4% of the total qualifying transmission hours in 2010 and they generate an even higher proportion of viewing (33%). Practically all European broadcasters are comfortably above the 10% requirement of Article 17. Proportions are higher in primetime (32.6%). They declined between 2007 and 2010, reflecting the economic crisis and the attempt by broadcasters to curb their external costs.

Independent European works are more prominent in old and large Member States. In some countries public channels offer more Independent works than private channels (Belgium, France and Italy), in others the situation is reversed (Estonia, Germany, the Netherlands and Spain). Many public channels rely heavily on Independent works (France 3, Channel 4, CT1, CT2, Rai 2, NED2, TVE1, SVT1). Private channels sometimes rely heavily on Independent works, too (RTL, Sat.1, RTL4, SBS6, Five, Canal+, Sky One).

Recent independent European works make up an average of 85.2% of the total Independent European hours in 2010, compared to 89.3% of total independent viewer hours. Proportions are higher in primetime (90.6% of transmission hours and 91.9% of viewer hours). Broadcasters from new and smaller Member States tend to show fewer Recent Independent works (77.6% and 82.1% respectively) while private channels show slightly more than public channels (86.2% vs. 83.4%).

1.4. Non-linear content analysis

The catalogues of a sample of 51 non-linear media services from the same 11 Member States were sampled and analysed to provide data relevant to Article 13, based on a methodology similar to that used for the linear content analysis. Indicators include proportions of qualifying works in total catalogues, of European works in total catalogues, and of European works in total qualifying catalogues. A qualitative and quantitative analysis of Prominence is also conducted.

These independent findings cannot be compared to declarations as the first Member States' reports to the Commission are due for 19 December 2011. Independent data are based on the catalogues of non-linear services in April-July 2011. They cover catch-up and video-on-demand services operated by broadcasters, telecom operators or independent players from the IT, manufacturing, production or rights business.

2011 data cannot be systematically used to assess compliance to Articles 13 as the Directive mentions only the “share” of European works in catalogues and as only seven countries so far provided a numerical target (comprised between 10% and 60%). Our research shows that in 2011:

- **65.1% of total non-linear hours are European works** across our sample (68.4% of total titles).
- **96.2% of total hours on catch-up services are European works** (99.0% of titles).
- **45.1% of total hours on video-on-demand services are European works** (48.7% of titles).

Catch-up catalogues are thus closely linked to linear content for which broadcasters retain rights, which are predominantly national and thus European, while video-on-demand services, which struggle to get access to such rights, feed their catalogues with a majority of non-European works from large international film libraries.

European works are more prominent in the catalogues of broadcasters (81.1% of hours and 83.7% of titles) **than of independent players** (46.7% in hours and 40.9% in titles) **and telecom operators** (31.2% of hours and 48.8% of titles). **They are more prominent in the catalogues of public services** (99.1% of hours and 99.4% of titles) **than private services** (55.8% of hours and 59.9% of titles). Public services tend to focus on national production and a broad range of news content. Private services are more likely to include some key foreign acquisitions in their catalogues, especially when they are independent of broadcasters.

Figures for European titles are generally very similar to European hours except for telecom operators (48.8% in titles vs. 31.2% in hours) **and public services** (47.2% in titles vs. 76.3% in hours). **Services with the lowest proportions of European works are generally new players, typically showing proportions of 10-20%.** These include Cine 1 in Italy, Blinkbox in the UK, iTunes by Apple, Lovefilm in Germany, FHV in France and Sky Player in the UK.

Some independent services offer among the highest proportions of European works across our sample, above 70-80%. These include Universciné, an independent service originating from the production business in France, Televeo, an independent service originating from the technology sector in Spain as well as MSN video player in the UK, a video-on-demand service by Microsoft featuring 100% of European or national content.

There is no provision in Article 13 regarding qualifying works. However, when reviewing this indicator we see that:

- 89.4% of total non-linear hours are qualifying works across our sample (86.6% of titles).
- 98.3% of total hours on video-on-demand services are qualifying works including mostly cinema, TV fiction and documentary (98.8% of titles).
- 75.6% of total hours on catch-up services are qualifying works originally made for television, while the rest is generally made of news and games (67.7% of titles).

We determined on three criteria to monitor prominence on sampled services. We looked at the share of European works on the homepage of each non-linear service, that is, content that is “pushed”. We looked at whether it was possible to search for European works (either through a classification by origin or through search by key words). And we looked at whether the origin of productions was provided title-by-title as part of the description given for each film (origin, duration, release date, etc.). Main conclusions include:

- **63.1% of “pushed” works are European on sampled services.**
- **93.7% of “pushed” works are European on catch-up services.**
- **43.4% of “pushed” works are European on VOD services.**
- **13.7% of sampled services allow a search by origin,** mostly through dedicated sections based on geographic origin.
- **29.4% of sampled services provide the origin for each work in the content details.** The figure is higher for video-on-demand services (45.2%) as catch-up services, having a majority of their catalogues comprised of domestic works, have less need to provide country of origin as a search criterion.

1.5. Prospective analysis

In this Section we assess to what extent current provisions are sufficient to meet the objectives of the Directive and provide Europeans with good access to a wide range of European works.

The regulatory framework of the Directive indicates both economic and cultural objectives. The legislation has a dual role. The economic objectives stress the transition from national markets to a common programme production and distribution market, optimal conditions of competitiveness and legal certainty, and the creation of small and medium enterprises. The cultural objectives emphasise freedom of information, diversity of opinion, media pluralism, education and culture, along with respect for the cultures of the individual Member States.

The first requirement of the prospective analysis is to find an appropriate balance between the economic and cultural objectives of the Directive.

In the first stage of our analysis we review the impact of the digital revolution. The digital revolution is a tendency, not an event. We are still in its early stages.

The digital revolution has the potential to change fundamentally the distribution and consumption of broadcast content and its traditional business models. Because the digital revolution significantly reduces the cost of digital storage and distribution, and will virtually eliminate the problem of “spectrum scarcity”, it is already introducing new sources of competition for traditional broadcasters.

The main broadcasters have been losing audience share for some time, yet they remain the primary funders of much new content. Their ability to invest in new content is being undermined by the changing economics of TV which favours Pay-TV and thematic channels.

The most important impact of the digital revolution identified by our Study is this: the semi-automatic link or correlation between the content shown on TV channels and the viewing of that content is weakening. In the early years of broadcasting there was only room for a few channels and viewing was strongly conditioned by the available content. Thus there was a correlation between the amount of European content available on television and the viewing of European content.

Nevertheless European still have a strong preference for content made in their own countries. This preference largely explains, in our view, continuing compliance with Article 16 of the Directive, which requires 50% of TV schedules to consist of European works.

However the preference is not absolute. Popular drama series produced on higher budgets than individual countries can afford are also popular across the European Union. Most of this content is American.

Though the preference for European content remains strong, we find that it is weakening, especially among young adults. We believe this trend will continue as younger generations of digital natives become mainstream users and as the older generations migrate to new technologies and media.

These developments raise an important question about the current measures: **if the viewing of European works is no longer driven by the volume of European works, is volume (that is, the amount of transmission time given to European works) any longer the best measure?**

While the requirements of the current provisions are largely met on linear services, the high volumes of European works are mostly national works, produced and shown in the same Member State. There is only limited circulation, or joint development, of European works.

From an economic viewpoint, this prevents European productions from taking full advantage of a single European audiovisual market, with its ability to raise higher levels of funding to invest in quality creation and to produce strong European content for internal circulation and for export.

Though still around 30%, three times higher than required, the proportion of Independent works has dropped over recent years. Yet support for independent production is a key part of the economic objectives of the Directive.

The definition of Independent varies from country to country and remains undefined in some countries. These inconsistencies do not help the development of pan-European enterprises in the audiovisual sector.

We conclude that the economic objectives of the Directive are not being well met. In economic terms the European audiovisual production industry remains highly fragmented.

We go on to ask whether key definitions in the current legislation are still appropriate and relevant.

The notion of “European work” is clearly defined in the legislation. However the definition is relatively narrow in scope. Should the scope be reviewed to better reflect contemporary media markets and structures? Or better calibrated to the objectives of the Directive?

The meaning of “audiovisual service”, as defined in the legislation, excludes from the scope of the Directive a number of players. It requires that such services have editorial responsibility over the content they offer. But this excludes content aggregators or multi-channel platforms with a leading role in the distribution and the consumption of audiovisual content in digital media. Should the provisions broaden their scope to cover such players?

We believe that the findings of our Study therefore propose the following issues for policy review:

Is the current focus on distribution of European content and volume measurement still effective? It is likely that compliance with a volume measure will deliver less and less viewing to European works. Would it therefore make sense to consider moving the regulatory emphasis from volume to value, i.e. investment?

How can we encourage better performance on the economic measures? The Commission might want to consider further measures that promote co-production and the broadcasting of works from other Member States (non-domestic works). Europe’s digital media economy needs innovators. This speaks for measures designed to promote and incentivise European co-production, investment, and the stimulation of independent production.

Is a channel the appropriate measurable? Currently, channels are regulated at the point of editorial responsibility. But as a result of the digital revolution, single channels have become portfolios of channels and play across many platforms. Would it not make more sense to regulate at service or portfolio level rather than channel level?

Are the qualifying genres correct? There is a case for revisiting the very basis of “qualifying genres”. Some factual entertainment formats are well-suited to a multi-lingual community and have encouraged the circulation of content throughout the European Union. Reviewing the definitions of “qualifying” European works might be considered to bring them closer to current practice and better calibrated to the objectives of the Directive.

Promotion will become increasingly important. Ensuring that good promotional techniques are developed and that they actively promote European content will be one key to safeguarding European works in future on both linear and non-linear services. Setting some common practices and guidelines for the promotion of European works on both linear and on-demand services might be contemplated.