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**Study on the provisions existing within the Member States
and the EEA States to implement Chapter III of the
'Television without Frontiers Directive' (Directive 97/36/EC
of the European Parliament and the Council of 30 June 1997
amending the Council Directive of 3 October 1989)**

On behalf of the European Commission

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A. Introduction

The European Institute for the Media has conducted a study on the provisions existing within the Member States and the EEA (European Economic Area) States to implement Chapter III of the ‘Television without frontiers Directive’ (Directive 97/36/EC of the European Parliament and the Council of 30 June 1997 amending the Council Directive of 3 October 1989) on behalf of the European Commission.

The purpose of this six-month study was to provide the Commission with a description of the different provisions, which exist within the aforementioned States, to implement Chapter III of the TWF Directive. In this context, the term ‘provisions’ include all legislative, regulatory, self-regulatory or administrative measures. This description also covers the implementation of these provisions, e.g. the bodies which exist in the above-mentioned States to monitor these provisions and the way in which this monitoring is carried out.

In addition, the study also covers other obligations, imposed on broadcasters, which are intended to promote the distribution and production of television programmes, but which are not intended to implement the Directive or are stricter than those provisions required by the Directive.

Chapter III of the TWF Directive contains provisions concerning the promotion of distribution and production of television programmes. Articles 4 and 5 of the TWF Directive lay down that, Member States should ensure that where practicable, broadcasters reserve a majority proportion of their transmission time (excluding news, sports events, games, advertising, teletext services and teleshopping) for European works and at least 10% of their transmission time, or 10% of their programming budget, for European works created by producers who are independent of broadcasters. These requirements are to be achieved progressively. Whatever proportion is actually achieved may not, in general, be lower than that prevailing in 1988.

Article 5 of the Directive provides for a definition of ‘European independent works’. In this context the Directive refers to ‘European works created by producers who are independent of broadcasters’. It is for the Member States to decide how this is to be achieved. They must themselves introduce a definition of ‘independent producer’ to facilitate application of the rule requiring 10% of transmission time, or of programme budget, to be reserved for ‘independent productions’.

The Directive requires, pursuant to recital (31), that the definition introduced by the Member States should take appropriate account of specific criteria ‘such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights’.

The main methodological tool used by the EIM in conducting the study were detailed questionnaires sent, by post and by e-mail, to regulatory authorities and broadcasters in all 18 countries. In order to receive as much information as possible and in order to be able to double check it, the EIM drafted two questionnaires in English and in French; one for the regulatory authorities and one for the broadcasters.

One of the criteria for the selection of broadcasters was based on their popularity and audience share, where possible. Eighty broadcasters from all eighteen countries were selected. Furthermore, broadcasters were selected for the study from the following categories: public service, private, special interest, free-to-air, pay-TV.

In order to gather up-to-date and reliable information on all the countries, the questionnaires covered the following areas:

- Identification and inventory of the measures transposing Chapter III at national level, including legislative, regulatory, self regulatory and administrative provisions.
- Identification of further provisions intended to promote the distribution and production of television programmes, including provisions concerning specific types of content, specific language requirements and the origins of production.
- Information on the practical implementation and monitoring of the above-mentioned measures.

The completed and returned questionnaires have been analysed and evaluated. Sixty-five completed questionnaires out of ninety from regulatory authorities and broadcasters have been received. On this basis, and in order to provide an overview, a country report on each country has been produced in a comparable format. Telephone interviews and e-mail contacts, as well as existing literature and documentation, have also been used in order to clarify any remaining uncertainties and complete the country reports.

Every country report consists of five chapters:

- Incorporation of Article 4 of the TWF Directive – Quotas for European works
- Incorporation of Article 5 of the TWF Directive – Quotas for independent productions
- Further (additional or stricter) provisions set by national legislation to promote distribution and production of television programmes (such as provisions concerning specific types of content, specific language requirements and the origins of production), and
- Monitoring and application of the EU quotas and further national provisions
- National provisions implementing Articles 4 and 5 of the TWF Directive (e.g. the relevant articles of the different national legal instruments responsible for implementation of the quota provisions of the Directive).

Following the same format, the last chapter of the study is a comparative one consisting of analysis and comparative tables, in order that a general overview of the current situation in the Member States and the EEA States, with regard to quotas, can be provided. The aim was to identify similarities and differences, and alternative approaches in the incorporation of the relevant provisions of the Directive into national legislation and in the monitoring process. Comparison and analysis on the further provisions chosen by national legislation, in order to promote and distribute the production of television programmes, has also been carried out, in an attempt to categorise and identify possible similarities.

A list of all participating regulatory authorities and broadcasters, from which completed and returned questionnaires were received for this study is provided as Annex 1 to the study.

B. Country Reports

1. AUSTRIA

1.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

In Austria broadcasting is regulated on the basis of federal legislation and is subject to its provisions. Whereas the public service broadcaster ORF, a public corporation, is governed by the Broadcasting Law (*Bundesgesetz über die Aufgaben und die Einrichtung des Österreichischen Rundfunks – Rundfunkgesetz - RFG*)¹, private television is subject to the Cable and Satellite Broadcasting Law (*Bundesgesetz, mit dem Bestimmungen über den Kabel- und Satellitenrundfunk erlassen werden – Kabel und Satelliten-Rundfunkgesetz*)². There is as yet no private ‘terrestrial’ television in Austria. Although the intention was to incorporate terrestrial private television into the Cable and Satellite Broadcasting Law, the title of which would accordingly be changed to read Private Broadcasting Law, this item of planned legislation could not be decided on until very recently. Only in March 2001 did the Government put forward a draft law to permit the broadcasting of terrestrial nationwide and regional private television from the beginning of 2002³.

Austria has incorporated the provisions of the TWF Directive concerning ‘European works’ word for word. §2b of the Austrian Broadcasting Law states that ‘ORF, the public-service broadcaster should reserve, as far as practicable and with the appropriate means, a majority proportion (*Hauptanteil*) of its transmission time for European works. In cases where the aforementioned proportion cannot be attained, it must not be lower than the proportion attained in 1988’.

Cable and satellite channels have the same obligation, according to §33 of the Austrian Cable and Satellite Broadcasting Law.

Concerning the ‘relevant transmission time’, all programmes are included except news, sport, games, advertising, teleshopping and teletext services. Teleshopping is not mentioned in §2b of the Austrian Broadcasting Law due to the fact that teleshopping is not allowed for the ORF.

According to ORF, the definition of the Directive for ‘European works’ (Article 6) is being used. Works are evaluated as European when they fulfil the criteria of Article 6 of the TWF Directive.

1.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Concerning ‘independent productions’, the Austrian legislator stayed close to the wording of the TWF Directive. §2c of the Austrian Broadcasting Law and §34 of the Austrian Cable and Satellite Broadcasting Law state that ‘broadcasters shall reserve at least 10% of their transmission time, excluding the time appointed to news, sport, games, advertising and teletext services, or alternately at least 10% of their programming budget, for European works created by producers who are independent of broadcasters’. An adequate proportion of

¹ BGBl. Nr. 379/1984 idF BGBl. I Nr. 32/2001

² BGBl. Nr. 42/1997 idF BGBl. I Nr. 32/2001

³ Entwurf zu einem Privatfernsehgesetz (<http://www.bka.gv.at/bka/medien/medienrecht.htm#aku>)

this quota should be reserved for recent works, meaning works transmitted within five years of their production.

The Austrian legislator decided to give broadcasters the freedom to decide whether they want to reserve 10% of their transmission time or 10% of their budget for ‘independent productions’.

As for the definition of ‘independent producer’ there is no such provision under Austrian laws. No national definition of ‘independent producer’ has ever been established in national regulations. The guidelines and criteria laid down by the EC on the application of Article 5 of the TWF Directive (Recital 31) are being used in order to qualify programmes as independent.

1.3. Further (additional or stricter) provisions set by national legislation

In general, there are no further provisions imposed on broadcasters with the aim of promoting the production and distribution of television programmes. The Austrian legislator did not set out any specific provisions concerning specific type of content, specific language requirements, or origin of productions (i.e. support for independent production).

Only, the public service broadcaster ORF has the obligation to promote the Austrian film industry. The so called ‘Film-Television-Treaty’ (*Film-Fernsehvertrag*) between the public service broadcaster and the Austrian *Filminstitut*, which is a public body for supporting the Austrian film industry, states that the ORF is financing the support mechanisms for the production of Austrian cinema films. In 1999 the ORF financed the Austrian film industry with an amount of 150 Million Austrian Schillings.

1.4. Monitoring and application of the EU quotas and further national provisions

The Media Section of the Federal Chancellery (*Bundeskanzleramt*), up until 31 March 2001, acted as the secretariat (administrative office) of the following commissions and authorities: Private Broadcasting Authority (*Privatrundfunkbehörde*), Commission for the observance of the Cable and Satellite Broadcasting Act (*Kommission zur Wahrung des Kabel- und Satelliten-Rundfunkgesetzes*), Commission for the observance of the Broadcasting Act (*Kommission zur Wahrung des Rundfunkgesetzes*).

The Commission for the observance of the Broadcasting Act (*Kommission zur Wahrung des Rundfunkgesetzes*) was responsible for the legal supervision of the public broadcaster ORF. The Broadcasting Act is the legal basis for the ORF. The legal supervision of cable and satellite broadcasters was incumbent on the Commission for the observance of the Cable and Satellite Broadcasting Act (*Kommission zur Wahrung des Kabel- und Satelliten-Rundfunkgesetzes*).

According to a new law adopted by the Austrian Parliament on 1 March 2001⁴, a new regulatory body called *KommAustria* has been set up. The new body - which is a subordinate authority of the Federal Chancellor - is in charge of the licensing, the granting of the

⁴ Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria und eines Bundeskommunikations-senates (KommAustria-Gesetz, KOG), BGBl. I Nr. 32/2001

necessary technical facilities and the legal supervision of private broadcasters. *KommAustria* takes over the functions of the aforementioned existing authorities, meaning the *Privatrundfunkbehörde* and the *Kommission zur Wahrung des Kabel- und Satelliten-Rundfunkgesetzes*. The legal control of the *KommAustria* will be operated by an independent Federal Communications body, the *Bundeskommunikationssenat*, which will also be in charge of the supervision of ORF, the public service broadcaster. The new law came into force on 1 April 2001.

To date, the Federal Chancellery is responsible, every two years, for providing the Commission with the report on the application of Articles 4 and 5 of the TWF Directive in Austria.

According to §2d of the Broadcasting Law (*Rundfunkgesetz - RFG*), ORF has the obligation to transmit directly to the Austrian Government, by the end of June of each year, a report on the quotas of 'European works' and 'works made by independent producers' in the previous year.

All public service broadcaster programmes are entered and allocated to the particular categories by the finance and production managers during the programme registration. The analysis takes place electronically. ORF regards the system as reliable and satisfactory but some mixed or unclear results may occur with the allocation of purchased productions.

§35 of the Cable and Satellite Broadcasting Law (*Kabel- und Satelliten-Rundfunkgesetz*) states that all cable and satellite broadcasters have to provide the *KommAustria*, by the 30th May every year, with a report on the quotas of European works and independent productions. The obligations under §33-35 of the Cable and Satellite Broadcasting Law (according to Article 9 of the TWF Directive) are not applicable to programmes that are broadcast within one 'Land' and not transmitted nationwide (§36 of the Cable and Satellite Broadcasting Law). The authority must then transmit a written summarised report to the government.

The Media Section of the Federal Chancellery accepts and relies solely on the data provided by broadcasters. The data are being provided for channel by channel and the ORF-report includes a total annual broadcasting time schedule in addition.

According to the Chancellery, the conditions affecting broadcasters in attaining the quota provisions are costs (difficulty in finding European programmes at competitive prices), and the fact that Austria is a country with a low audiovisual production capacity.

The Chancellery does not have the right to act in situations where the broadcasters do not comply with the quota provisions. Furthermore, it does not have any right to impose sanctions or to take other measures against broadcasters.

1.5. National provisions implementing Articles 4 and 5 of the TWF Directive

1.5.1. Rundfunkgesetz - RFG (Broadcasting Law), §2b, §2c

§ 2b. (1) Der Österreichische Rundfunk hat bei der Erfüllung seiner Aufgaben gemäß § 2 im Rahmen des praktisch Durchführbaren und mit angemessenen Mitteln dafür Sorge zu tragen, daß der Hauptanteil seiner Sendezeit im Fernsehen, die nicht aus Nachrichten,

Sportberichten, Spielshows, Werbung oder Teletextleistungen besteht, der Sendung von europäischen Werken entsprechend Art. 6 der Richtlinie 89/552/EWG zur Koordinierung bestimmter Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über die Ausübung der Fernsehaktivität (Fernsehrichtlinie), ABl. Nr. L 298 vom 17. Oktober 1989, S 23, in der Fassung der Richtlinie 97/36/EG, ABl. Nr. L 202 vom 30. Juli 1997, S 60 vorbehalten bleibt. Dieser Anteil soll in den Bereichen Information, Bildung, Kultur und Unterhaltung schrittweise anhand geeigneter Kriterien erreicht werden.

(2) Kann der Anteil gemäß Abs. 1 nicht erreicht werden, so darf er nicht niedriger als der im Jahre 1988 erreichte Anteil sein.

§ 2c. Der Österreichische Rundfunk hat bei der Erfüllung seiner Aufgaben gemäß § 2 im Rahmen des praktisch Durchführbaren und mit angemessenen Mitteln dafür Sorge zu tragen, daß mindestens 10 vH seiner Sendezeit im Fernsehen, die nicht aus Nachrichten, Sportberichten, Spielshows oder Werbe- und Teletextleistungen besteht, oder alternativ mindestens 10 vH seiner Haushaltsmittel für die Programmgestaltung der Sendung europäischer Werke von Herstellern vorbehalten bleibt, die von Fernsehveranstaltern unabhängig sind. Dieser Anteil soll in den Bereichen Information, Bildung, Kultur und Unterhaltung schrittweise anhand geeigneter Kriterien erreicht werden. Dazu muß ein angemessener Anteil neueren Werken vorbehalten bleiben, das sind Werke, die innerhalb eines Zeitraums von fünf Jahren nach ihrer Herstellung ausgestrahlt werden.

1.5.2. Kabel- und Satelliten-Rundfunkgesetz (Law for cable and satellite broadcasting), §33, §34

Programmquoten

§ 33. Der Rundfunkveranstalter hat im Rahmen des praktisch Durchführbaren und mit angemessenen Mitteln dafür Sorge zu tragen, dass der Hauptanteil der Sendezeit seiner Fernsehprogramme, die nicht aus Nachrichten, Sportberichten, Spielshows, Werbung, Kabeltextleistungen und Teleshopping besteht, der Sendung von europäischen Werken entsprechend der Richtlinie 89/552 EWG zur Koordinierung bestimmter Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über die Ausübung der Fernsehaktivität, ABl. Nr. L 298 vom 17. Oktober 1989, S 23, in der Fassung der Richtlinie 97/36 EG, Abl. Nr. L 202 vom 30. Juli 1997, S 60, vorbehalten bleibt.

Förderung unabhängiger Programmhersteller

§ 34. Der Kabel- oder Satelliten-Rundfunkveranstalter hat im Rahmen des praktisch Durchführbaren und mit angemessenen Mitteln dafür Sorge zu tragen, daß mindestens 10 vH der Sendezeit seiner Fernsehprogramme, die nicht aus Nachrichten, Sportberichten, Spielshows oder Werbe- und Kabeltextleistungen besteht oder alternativ mindestens 10 vH seiner Haushaltsmittel für die Programmgestaltung der Sendung europäischer Werke von Herstellern vorbehalten bleibt, die von Fernsehveranstaltern unabhängig sind. Dieser Anteil soll in den Bereichen Information, Bildung, Kultur und Unterhaltung schrittweise anhand geeigneter Kriterien erreicht werden. Dazu muß ein angemessener Anteil neueren Werken vorbehalten bleiben, das sind Werke, die innerhalb eines Zeitraums von fünf Jahren nach ihrer Herstellung ausgestrahlt werden.

2. BELGIUM

Belgium is a Federal state and therefore, competence with regard to broadcasting is divided between its Communities. The Communities are allowed foreign relations in those areas where they have competence. For the aim of this study the Flemish and French Communities will be examined separately since they provide different broadcasting laws and regulatory authorities and no common overall regulation.

2.1. FLEMISH COMMUNITY

2.1.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The ‘quota provisions’ were proclaimed in 1994 with the Decree of 4 May 1994⁵, concerning cable networks and licenses for the application and the exploitation thereof and with regard to the support for the distribution and production of television programmes (Articles 16 and 17).

Later on, these definitions were implemented in the Flemish Decrees for radio and television, co-ordinated on 25 January 1995⁶ (Articles 102 and 103). These Decrees have been amended by the Decree of 28 April 1998⁷, in order to adapt the regulation in the Flemish Region to the amended TWF Directive.

The provisions of the Directive regarding ‘relevant transmission time’ and ‘majority proportion’ have been incorporated almost word for word. Article 102 of the Flemish Decrees for radio and television, as amended, states that all broadcasters shall try to reserve the biggest part of their transmission time, excluding the time appointed to news, sports, games, advertising, teletext and teleshopping, for European works. Article 2 paragraph 12 of the Flemish Decrees for radio and television, as amended, provides for the definition of ‘European works’.

According to the *Ministerie van de Vlaamse Gemeenschap*, due to the terms of the TWF Directive ‘where practicable and by appropriate means’, the so-called ‘non-slip-back clause’ has not been included in the aforementioned Decrees.

2.1.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Article 103 of the Flemish Decrees for radio and television, as amended, states that all broadcasters shall reserve at least 10% of their transmission time for European works created by independent producers. A considerable part of the transmission time should be reserved for recent works, meaning works broadcast within five years of their production.

The Flemish legislator has also incorporated Article 5 of the TWF Directive into national legislation, staying close to the wordings of the Directive. ‘Relevant transmission time’ is considered to be all programmes excluding news, sport, games, advertising, teletext services and teleshopping. There is also provision for a proportion of ‘recent works’.

⁵ Decreet van 4 mei 1994, Belgisch Staatsblad – 4 juni 1994

⁶ Decreet van 25 januari 1995, Belgisch Staatsblad – 30 mei 1995

⁷ Decreet van 28 april 1998, Belgisch Staatsblad – 20 mei 1998

The term ‘independent producer’ is not defined in the broadcasting provisions, but still there is a diverted definition in the film regulations, which states that ‘an independent producer is a person who creates audiovisual works and is not involved in a structural or a co-partnership way with a television broadcasting organisation’.

2.1.3. Further (additional or stricter) provisions set by national legislation

In the Flemish Community of Belgium, there are some further provisions imposed on broadcasters mostly concerning specific language requirements and origins of productions.

Article 102 of the co-ordinated Media Decrees for radio and television, as amended in 1998, also stipulates that a considerable proportion of the European works should be works originally produced in the Dutch language. The Flemish Government has the right to impose quotas in this matter. There are still no specific quotas imposed.

Article 103 of the co-ordinated Media Decrees states that a considerable part of the time reserved for independent productions (10%) should be reserved for recent works, i.e. works broadcast within five years of their production. The Flemish legislation uses the wording ‘considerable’ instead of the word ‘suitable’ which is mentioned in the Directive. A large part of the aforementioned amount should also be reserved for recent works originally produced in the Dutch language. The Flemish Government has the right to impose quotas in this case but to date no specific quotas have been imposed.

With regard to the public service broadcaster VRT, the administration-agreement between the Flemish Community and VRT for the period 1997-2001, stipulates that ‘it seeks to realise an output of at least 50% of Flemish productions from a total output of programmes transmitted between 18.00 hours and 23.00 hours’.

VRT also has some internal measures to promote independent productions. It created an in-house co-production Fund (*Coproductiefonds*) targeted towards co-production (fiction and non-fiction) with independent producers. VRT is also prepared to yearly commission an extra contemporary drama series (13 episodes) from the independent sector and to contribute 50% of the cost, under the condition that the Flemish Media Department provides the other 50% of the funding.

The pay-TV broadcaster Canal+ has also some internal measures to promote Flemish independent productions. It is high priority for them to obtain every locally made movie. In the phase of pre-production, it supports all Flemish productions requesting financial aid. Once a year, it co-produces a chosen production, which is allocated a significant budget.

2.1.4. Monitoring and application of the EU quotas and further national provisions

The *Vlaams Commissariaat voor de Media* (Flemish Media Authority) is responsible for the monitoring and application of the above provisions. However, the *Ministerie van de Vlaamse Gemeenschap* (Ministry of the Flemish Community) provides the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF Directive in the Flemish Community of Belgium.

All broadcasters have an obligation to submit, on a yearly basis, a report to the *Commissariaat voor de Media* setting out how they complied with the provisions of Articles 102 and 103 of the Flemish Decrees for radio and television, co-ordinated on 25 January 1995. This report must be submitted to the *Commissariaat* before the 31st of March (Article 104 of the Flemish Decrees for radio and television). The broadcasters are asked to submit this report according to the required lay-out of the European Commission. The *Commissariat* relies solely on the data provided by them.

In order to monitor the percentages and provide the quota report, VRT applies ESCORT 2.4 as an EBU standardised basis for a programme management information system of the programme transmission time, first on a monthly basis in Excel, and further on, on a yearly basis in Access. All the records within the framework of Articles 4 and 5 of the TWF Directive, are given a particular code in the special field 'Quota' of the programme database, so that they can be filtered out by a simple query. Following that, the query result is exported back to Excel for calculation with the help of pivot tables. The programme classification in the database allows the calculation of all the percentages of the 'European works', 'independent productions' and 'recent works', as the dimensions are immediately available in the ESCORT classification.

The pay-TV broadcaster Canal+ calculates the percentages in an Excel programme. It is, however, planning the application of a new software programme called Antenne. One of the features will be the automatic calculation of quotas, based on the French rules which are very demanding. This programme will definitely make it easier to monitor the percentages.

During past monitoring periods, there have been obstacles in the monitoring process, because the private broadcasters in particular rely on external institutions for their statistical data and this can cause problems in the categorisation of the data.

According to the *Ministerie van de Vlaamse Gemeenschap* and the pay-TV broadcaster Canal+, the conditions that affect broadcasters in attaining the quota provisions are costs (difficulty in finding European programmes at competitive prices), recently launched or thematic channel, pay-TV channel, and the fact that Belgium is a country with a low audiovisual production capacity and a restricted language area. According to VRT, the main reason is the fact that Belgium is a country with a restricted language area.

As reported by the *Ministerie van de Vlaamse Gemeenschap*, broadcaster Canal+ Television N.V. already had problems in attaining the quota provisions. It is expected also that recently launched channels will face the same problems in the near future.

Since 1998 the *Commissariaat voor de Media* has the right to act in situations of non-compliance with any of the provisions laid down in the Flemish Decrees on radio and television (the quota provisions included) and has the right to impose sanctions (Article 116 of the Flemish Decrees for radio and television). To date, no sanctions have been imposed.

2.1.5. National provisions implementing Articles 4 and 5 of the TWF Directive

2.1.5.1. *Decreten betreffende de radio-omroep en de televisie, gecoördineerd op 25 januari 1995 (Decrees for radio and television, co-ordinated on 25 January 1995, Articles 102, 103)*

2.1.5.2. *Decreet tot wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en televisie, gecoördineerd op 25 januari 1995 28 april 1998 (Decree of 28 April 1998 amending the Decrees for radio and television)*

Art. 56.

Artikel 102 van dezelfde decreten wordt vervangen door wat volgt :

“Art. 102. De televisieomroep van de Vlaamse Gemeenschap en de televisieomroepen die door de Vlaamse Gemeenschap erkend zijn op basis van artikel 41, 1°, 3°, 4° en 5°, streven ernaar om het grootste deel van hun zendtijd die niet aan nieuws, sport, spel, reclame, teletekst en telewinkelen gewijd is, te besteden aan Europese producties.

Een aanzienlijk deel ervan moet worden besteed aan Nederlandstalige Europese producties. De Vlaamse regering kan hiervoor quota's opleggen”.

Art. 57.

Artikel 103 van dezelfde decreten wordt vervangen door wat volgt :

“Art. 103. De televisieomroep van de Vlaamse Gemeenschap en de televisieomroepen die door de Vlaamse Gemeenschap erkend zijn op basis van artikel 41, 1°, 3°, 4° en 5°, streven ernaar om ten minste 10 procent van hun zendtijd die niet aan nieuws, sport, spel, reclame, teletekst en telewinkelen gewijd is, te besteden aan Europese producties die vervaardigd zijn door van de televisieomroepen onafhankelijke producenten.

Een aanzienlijk deel ervan moet worden besteed aan recente producties. Dit zijn producties die binnen een periode van vijf jaar nadat ze gemaakt zijn, worden uitgezonden.

Er moet voldoende ruimte worden gemaakt voor recente Europese Nederlandstalige producties.

De Vlaamse regering kan hiervoor quota's opleggen”.

2.2. FRENCH COMMUNITY

2.2.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The French Community of Belgium has incorporated Article 4 of the TWF Directive into its legal system by Article 24bis of the Broadcasting Decree of 17 July 1987 (Décret du 17 juillet 1987 sur l'audiovisuel) which was introduced by the Decree of 19 July 1991⁸. This Broadcasting Decree was last amended by the Decree of 4 January 1999⁹.

Article 24bis paragraph 1 of the Broadcasting Decree of 17 July 1987 states that 'the Belgian broadcaster of the French community (RTBF) and the other broadcasters shall reserve, in principle for European works, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services, teleshopping and self-promotion. In this proportion, Belgian works of the French Community are also included'.

This proportion cannot, in any case, be lower than the proportion achieved in 1988 by the broadcaster concerned. With this formulation, the so-called 'non-slip-back clause' has been incorporated into the law of the French Community of Belgium.

Article 24bis paragraph 3 of the Broadcasting Decree of 17 July 1987, states that the aforementioned proportions will be achieved progressively on the basis of the criteria defined by the Government, after the opinion (*avis*) of the broadcasters concerned, and the *Conseil supérieur de l'audiovisuel* (CSA hereinafter).

The provisions of the Directive have been incorporated almost word for word. Article 24bis of the Broadcasting Decree does not include the wordings 'where practicable and by appropriate means', but another wording, namely 'in principle'. With regard to the 'relevant transmission time', self-promotion is also excluded.

2.2.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Article 24bis paragraph 2 of the Broadcasting Decree of 17 July 1987, which was introduced by the Decree of 19 July 1991 states that 'broadcasters should ensure in principle, at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for works of the French Community of Belgium or works of the other Member States of the European Union created by producers who are independent of broadcasters'.

Article 24bis of the Broadcasting Decree does not include the wordings 'where practicable and by appropriate means', but uses another wording, namely 'in principle'. It also requires that the aforementioned 'independent productions' should not be more than five years older than the date of their first transmission.

A definition of 'independent producer' is to be found in the licensing contract between the French Community and the private broadcasting company TVi. An independent producer is

⁸ Moniteur belge 2 octobre 1991; erratum 8 février 1992, entrée en vigueur le 2 octobre 1991

⁹ Moniteur belge 11 février 1999, entrée en vigueur même date

considered to be every natural person or legal entity whose residence or registered office and office of business are situated in the Walloon region or in the Brussels Capital Region and where the following conditions are being fulfilled:

- the producer has a different legal entity to that of a broadcaster
- a broadcaster does not hold more than a 15% of the share capital of the producer
- the producer is not controlled by a public authority
- the producer does not provide more than 90% of its production, during a three year period, to only one and the same broadcaster.

The same definition is to be found in the licensing contract between the French Community and the private broadcasting company Canal+ Belgique.

2.2.3. Further (additional or stricter) provisions set by national legislation

In the French Community of Belgium there are some additional provisions which concern specific language requirements, and the origins of productions (i.e. support for independent production).

Article 24bis §5 of the Broadcasting Decree of 17 July 1987 states that according to the terms for broadcasters specified by the Government after consultation with the CSA, the proportion of works originally produced in the French language shall reach progressively one third of the proportion required for 'European works'.

With regard to 'independent productions', the legislator requires that they should all not be more than five years older than their first broadcast (Article 24bis of the Broadcasting Decree). In addition, Articles 16 and 19 of the Broadcasting Decree set specific percentages or minimum total amounts of own productions and co-productions for private free-to-air broadcasters and pay-TV respectively.

Private free-to-air channels should have 20% of their own productions, and programmes should highlight the cultural heritage of the French Community of Belgium. According to the terms laid down by the Government, they should also reserve at least 5% of their transmission time for agreements of co-production in the French language or external contracts with persons or entities established in the Walloon region or in the Brussels Capital Region or elsewhere in the European Community. The Government can fix a higher percentage. In addition, at least 2% of their programme schedules should be reserved for co-production agreements or external contracts with persons or entities established either in the Walloon region or in the Brussels Capital Region, or elsewhere. Pay-TV channels have the same obligations, the only difference being 5% of own productions.

In 1995, a contribution from cable operators to the audiovisual production has been contractually provided. In 1996, an order (*arrêté*) provided for negotiations of contracts (*conventions*) with cable channels. As annex to the licences, these contracts (*conventions*) provide for cable channels' contribution to audiovisual production and to the promotion of the cultural heritage of the French Community of Belgium.

The public service broadcaster RTBF must follow the obligations deriving from its *contrat de gestion* (Agreement on public service broadcaster). Apart from general public service

obligations, it should also promote in particular the cultural development of the French Community of Belgium and of the international French-speaking Community.

RTBF has a right with regard to the Fund of the French Community (*Fonds libérés par la Communauté française*), which aims to promote co-productions with independent producers. In return, it is engaged to invest 45,000,00 BEF in these co-productions.

2.2.4. Monitoring and application of the EU quotas and further national provisions

The *Conseil supérieur de l'audiovisuel* (CSA) is responsible for the monitoring and application of the above-mentioned provisions. However, the Ministry of the French Community provides the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF Directive in the French Community of Belgium (Article 24bis §4 of the Broadcasting Decree of 17 July 1987).

Article 24bis paragraph 4 of the Broadcasting Decree of 17 July 1987 states that RTBF, and the other broadcasters, should provide the CSA and the Government of the French Community, every two years, with a report on the application of this Article.

According to the CSA, monitoring of the application of the quota provisions is included in the annual monitoring of all broadcasters' obligations. The figures are based on sampling, during one random week every trimester. Data are provided by the broadcasters.

The RTBF monitors the application of the quotas on an annual basis. As reported, the channel faces problems with the monitoring and providing of data on 'recent independent productions' apart from its own.

During past monitoring periods, according to the CSA, the Authority faced some obstacles in the monitoring process. More specifically, there were difficulties in exercising effective control.

According to the CSA, the conditions affecting broadcasters in attaining the quota provisions are costs (difficulty in finding European programmes at competitive prices) and recently launched channel.

The CSA has the right to act in cases of non-compliance with the quota provisions. Article 45ter of the Broadcasting Decree of 17 July 1987 states that 'broadcasters who broadcast programmes outside of the conditions provided for in Article 24bis of the same Act, will be punished with a fine of between 500 BEF and 100,000 BEF'.

2.2.5. National provisions implementing Articles 4 and 5 of the TWF Directive

Décret du 17 juillet 1987 sur l'audiovisuel, modifié par le décret du 4 janvier 1999, Article 24bis

Article 24bis

§1er. La Radio-Télévision belge de la Communauté française (RTBF) et les autres organismes de radiodiffusion télévisuelle doivent assurer, en principe, dans leur

programmation une proportion majoritaire de leur temps de diffusion, à l'exclusion du temps consacré aux informations, à des manifestations sportives, à des jeux, à la publicité, à l'autopromotion, au télé-achat ou aux services de télétexte, à des œuvres européennes, en ce compris des œuvres originales d'auteurs relevant de la Communauté française.

Cette proportion ne peut, en aucun cas, être inférieure à la proportion d'œuvres diffusées en 1988 compte tenu du temps de diffusion de ces organismes, à l'exclusion du temps consacré aux informations, à des manifestations sportives, à des jeux, à la publicité, à l'autopromotion, au télé-achat ou aux services de télétexte, durant cette même année.

§2. Les organismes visés au §1er doivent assurer, en principe, dans leur programmation une part de 10% du temps d'antenne, à l'exclusion du temps consacré aux informations, à des manifestations sportives, à des jeux, à la publicité, à l'autopromotion, au télé-achat ou aux services de télétexte, à des œuvres de la Communauté française ou des Etats membres des Communautés européennes émanant de producteurs indépendants des organismes de radiodiffusion télévisuelle.

La production de ces œuvres ne peut être antérieure à cinq ans avant leur première diffusion.

§3. Les proportions prévues au §1er et au §2 seront atteintes progressivement sur la base de critères fixés par le Gouvernement, après avis des organismes de radiodiffusion, concernés et du Conseil supérieur de l'audiovisuel.

§4. La RTBF et les organismes de radiodiffusion doivent présenter tous les deux ans au Conseil de la Communauté française et au Gouvernement de la Communauté française un rapport sur l'application du présent article à partir du 30 septembre 1991.

§5. Selon les modalités qu'il détermine, après avis du Conseil supérieur de l'audiovisuel, le Gouvernement veille à ce que, pour les organismes de radiodiffusion visés au §1er, la part des œuvres originales d'expression française atteigne progressivement un tiers du temps de diffusion défini au §1er.

3. DENMARK

3.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

Radio and television in Denmark are regulated by the 1992 Broadcasting Act, which since its introduction has been amended several times. The TWF Directive (including the quota provisions) has been currently implemented by the Broadcasting Act and a series of Executive Orders.

According to the Broadcasting Act as last amended, the Minister for Culture has the power to lay down rules on quotas. §6 (4) of the Broadcasting Act states that the Minister for Culture shall draw up statutes for Danmarks Radio (DR) and TV 2. §37 (1) and §42d of the Broadcasting Act stipulate that, as far as television broadcasting services are concerned, the Minister for Culture shall lay down rules on the programme services, including rules for the proportion of programmes of European origin to be included, and rules to ensure that consideration is shown for children and young people.

These rules have been laid down in the Executive Order No. 874 of 9 December 1998, for cable and satellite channels, Executive Order No. 1346 of 18 December 2000, on the statutes of TV 2, and Executive Order No. 1345 of 18 December 2000, on the statutes of DR (Danish Broadcasting Corporation).

These orders regulate satellite and cable broadcasting and the statutes of the two public service broadcasters, DR and TV 2. A new Executive Order will be issued for other types of broadcasters as they emerge – that is, nationwide and regional digital broadcasters.

More specifically, §6 (1) of the Executive Order No. 1345/00 states that DR shall reserve more than half of its transmission time, excluding the time appointed to news, sports events, games and teletext services, for European works.

§9 (1) of the Executive Order No. 1346/00 states that TV 2 shall reserve more than half of its transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services, for European works.

§2 (1) of the Executive Order No. 874/98 states that cable and satellite channels shall reserve more than half of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services, for European works.

With regard to the ‘relevant transmission time’, all programmes are included apart from news, games and competitions, sport, advertising, and teletext services. With regard to the wording ‘majority proportion’, the Danish Executive Orders speak of more than half of the ‘relevant transmission time’.

Since 1999 a substantial part of local television in Denmark participates in a network that includes 15 local television stations and is accessible to viewers by aerial, cable and satellite, in all regions. These channels should not be excluded from the quota provisions, according to Article 9 of the TWF Directive. Therefore, an amendment has been introduced to the Act in 2000 and §50a (3) of the Broadcasting Act now states that networking local television stations should comply with the EU quota regulations on ‘European works’, ‘programmes by

independent producers' and 'recent works'. More specifically, these rules have been defined in the Executive Order No. 1349 of 18 December 2000 on local broadcasting, Section 12 (6) and (7).

3.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Article 5 of the TWF Directive has also been incorporated into national legislation by a series of Executive Orders. These orders regulate satellite and cable broadcasting and the statutes of the two public service broadcasters, DR and TV 2.

More specifically, §6 (2) of the Executive Order No. 1345/00 states that DR shall reserve 10% of its transmission time, excluding the time appointed to news, sports events, games and teletext services, for European works or 10% of its programming budget for European works created by producers who are independent from broadcasters. An adequate part of this proportion should be reserved for works transmitted within five years of their production.

§9 (2) of the Executive Order No. 1346/00 states that TV 2 shall reserve 10% of its transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services, or 10% of its programming budget, for European works created by producers who are independent from broadcasters. An adequate part of this proportion should be reserved for works transmitted within five years of their production.

§2 (2) of the Executive Order No. 874/98 states that cable and satellite channels shall reserve 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services, or 10% of their programming budget for European works created by producers who are independent from broadcasters. An adequate part of this proportion should be reserved for works transmitted within five years of their production.

There is not yet a definition of the term 'independent producer' under Danish legislation.

3.3. Further (additional or stricter) provisions set by national legislation

The Statutes of DR and TV 2 stipulate that they must pay special attention to Danish culture and Danish or other Nordic language – but there are no specific percentages indicated. They must also promote Danish film production, e.g. concerning financial involvement in Danish film production and the use of independent producers.

More specifically, §4 (14) of the Executive Order No. 1345/00 states that DR shall reserve a considerable part of its Danish programmes from independent producers. It should also ensure that programmes are broadcast in Danish or another Nordic language in the original version (§6 (3) of the Executive Order No. 1345/00). DR also has an in-house rule concerning quotas in order to promote the national productions. 60% of the programmes broadcast between 5 p.m. and midnight should be produced in Denmark.

TV 2 should also ensure that programmes are broadcast in Danish or another Nordic language in the original version, according to §9 (3) of the Executive Order No. 1346/00.

3.4. Monitoring and application of the EU quotas and further national provisions

The Ministry of Culture (Department Radio and TV) is responsible for the monitoring and application of the above provisions. It is also responsible for providing the Commission every two years, with the report on the application of Articles 4 and 5 of the Directive.

The Ministry collects the data by sending, to all broadcasters, the questionnaire provided by the Commission in its Suggested Guidelines for the monitoring of the implementation of Articles 4 and 5 of the TWF Directive.

DR uses a programme category system for the monitoring of the percentages. All programmes are coded and when they are sent, their codes are logged in a database. There is a category called country of production, another one specifying whether the programme is produced by the broadcaster, in co-production with others or by an independent company. There is also a category which keeps track of production year (recent works). There are sometimes difficulties in knowing whether foreign programmes are produced by companies who are fully independent. TV 2 calculates the percentages at the end of the year.

The Ministry relies on a percentage record, channel by channel, of total annual broadcasting time and solely on data provided by broadcasters.

According to the Ministry, the conditions affecting broadcasters in attaining the quota provisions are costs, recently launched channel, thematic channel. To date, the Ministry did not face any obstacles in past monitoring periods.

The Ministry has the right to act in cases of non-compliance with the quota provisions. It has the right to impose sanctions. All broadcasters (except the public service broadcasters) may have their licence revoked if they infringe the regulations of the Act or regulations laid down in pursuance of the Act, provided that such infringement is serious or occurs repeatedly (§39 (1), §42d and §55 (3) of the Broadcasting Act). Otherwise, the broadcasters are issued with a warning. To date, warnings have been issued in cases of non-compliance.

3.5. National provisions implementing Articles 4 and 5 of the TWF Directive

3.5.1. Bekendtgørelse om radio- og fjernsynsvirksomhed ved hjælp af satellit eller kabel (Executive Order No. 874 of 9 December 1998 for cable and satellite)

§ 2. Indehaveren af en tilladelse til fjernsynsvirksomhed skal tilstræbe, at over halvdelen af den sendetid, der ikke består af nyheder, sportsbegivenheder, konkurrencer, reklamer og tekst-tv, afsættes til europæiske programmer, jf. bilaget.

Stk. 2. Indehaveren af en tilladelse til fjernsynsvirksomhed skal tilstræbe, at 10 pct. af den sendetid, der ikke består af nyheder, sportsbegivenheder, konkurrencer, reklamer og tekst-tv, eller 10 pct. af programbudgettet, afsættes til europæiske programmer fra producenter, der er uafhængige af tv-foretagender. En passende andel skal forbeholdes programmer af ny dato, dvs. programmer, der udsendes senest 5 år efter deres produktion.

3.5.2. Bekendtgørelse om vedtægt for TV 2 (Executive Order No. 1346 of 18 December 2000 on the statutes of TV 2)

§ 9. TV 2 skal tilstræbe, at over halvdelen af den sendetid, der ikke består af nyheder, sportsbegivenheder, konkurrencer, reklamer og tekst-tv, afsættes til europæiske programmer, jf. bilag 1.

Stk. 2. TV 2 skal tilstræbe, at 10% af den sendetid, der ikke består af nyheder, sportsbegivenheder, konkurrencer, reklamer og tekst-tv, eller 10% af programbudgettet, afsættes til europæiske programmer fra producenter, der er uafhængige af tv-foretagender. En passende andel skal forbeholdes programmer af ny dato, d.v.s. programmer, der udsendes senest 5 år efter deres produktion.

3.5.3. Bekendtgørelse om vedtægt for Danmarks Radio (Executive Order No. 1345 of 18 December 2000 on the statutes of DR)

§ 6. DR skal tilstræbe, at over halvdelen af den sendetid i tv, der ikke består af nyheder, sportsbegivenheder, konkurrencer og tekst-tv, afsættes til europæiske programmer, jf. bilag 1.

Stk. 2. DR skal tilstræbe, at 10 pct. af den sendetid i tv, der ikke består af nyheder, sportsbegivenheder, konkurrencer og tekst-tv, eller 10 pct. af programbudgettet, afsættes til europæiske programmer fra producenter, der er uafhængige af tv-foretagender. En passende andel skal forbeholdes programmer af ny dato, dvs. programmer, der udsendes senest 5 år efter deres produktion.

4. FINLAND

4.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The quota provisions were incorporated into Finnish Law with the Act on Television and Radio Operations, which was adopted on 9 December 1998 and published in the Finnish Official Journal on 15 October 1998. It entered into force on 1 January 1999.

According to Section 16 of the Act on Television and Radio Operations 744/1998, ‘a television broadcaster shall reserve for European works, a majority proportion of its annual transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping. Further provisions as to what programmes shall be deemed European works shall be issued by Decree’.

With regard to the definition of ‘European works’, a Decree on Television and Radio Operations (No 14/1999) was adopted on 15 January 1999 and published in the Official Journal on 20 January 1999. It entered into force on 1 February 1999. The definition adopted is similar to the one of the Directive.

It can be easily concluded, that Finland decided to stay close to the wording of the Directive and did not set any specific percentage for ‘European works’. Within the ‘relevant transmission time’, all programmes are counted, apart from news, games, sport, advertising, teletext services and teleshopping.

The Finnish legislation does not contain any provisions concerning the progressive achievement of the proportions. There has been no need for progressive, transitional provisions. More specifically, there has been no need for the so-called ‘non-slip-back clause’, due to the fact that the proportions were attained, even before enforcement of the legislation.

To date, there are four national television channels: TV1 and TV2 run by the Finnish Broadcasting Company, MTV3 which is run by the private MTV company and Channel Four run by another private media company, *Oy Ruutunelonen Ab*.

4.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

According to Section 17 of the Act on Television and Radio Operations 744/1998, ‘a television broadcaster shall reserve 10% of its transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, or alternatively 10% of its programming budget for programmes produced by independent producers. Half of the programmes included in the above share of independent productions should have been produced within the last five years’.

Further to Section 2 of the Act on Television and Radio Operations 744/1998, the following requirements must be fulfilled in order to be considered as an independent producer:

- An individual broadcaster cannot hold more than 25% of the share capital of the production company or more than 50% if there are several television broadcasters,
- The production company should not have produced more than 90% of its programmes for the same television broadcaster during the past three years.

4.3. Further (additional or stricter) provisions set by national legislation

In Finland, only the public service broadcaster has further obligations regarding promoting and distributing television programmes.

Section 7 of the Act on *Yleisradio Oy* (= The Finnish Broadcasting Company Ltd) 1380/1993 as last amended by the Act No. 746/1998, which lays down the Finnish Broadcasting Company's public service remit, states that the company shall, *inter alia*, treat, in its broadcasting, Finnish and Swedish speaking citizens equally and produce services in the Same and Romany languages, as well as, where applicable, also make provision for other language groups in the country.

The Finnish Broadcasting Company (YLE) plays a major role in producing and presenting programmes dealing with national, arts, educational programmes and children's programmes. It is Finland's major producer of educational programmes. The educational programme comprises 600 hours of broadcasts annually. YLE has close connections with the Finnish educational authorities and establishments. It also has a long tradition of co-operation with other European broadcasters at both a Nordic level and within the EBU. In the international market, YLE is especially known for its language courses.

YLE has an agreement with *SATU ry* (Association of Independent Producers in Finland) and *SEK* (Central Organisation of Finnish Film Producers) that a certain sum is allocated for the annual purchase of independent productions. It also has an agreement with *SES* (Finnish Film Foundation) on annual support for production and copyright fees of approx. 13 million FIM for the promotion of independent domestic audiovisual films of high quality.

YLE has in addition, in-house rules concerning quotas, meaning a Directive of its Administrative Council ruling that independent productions shall have a minimum 10% share in new domestic programming (excluding news and sports).

4.4. Monitoring and application of the EU quotas and further national provisions

According to Section 34 of the Act on Television and Radio Operations 744/1998, the Telecommunications Administration Centre (TAC hereafter) has the duty to supervise compliance with this Act. Therefore, the TAC is responsible for the practical monitoring and application of the quota provisions.

The Ministry of Transport and Communications is responsible for the preparation of the legislation and provides the Commission with the report on the application of Articles 4 and 5 of the TWF Directive.

The application of the quota provisions is monitored by sending a questionnaire to all broadcasters and analysing the information provided in the answers. The TAC relies on a percentage record of total annual broadcasting time of each channel and solely on data provided by broadcasters. To date, in past monitoring periods, there were no obstacles encountered by TAC.

The public service broadcaster YLE prepares the quotas reports from transmission statistics at regular intervals, at least every 4 months. In annual programme planning, allocation is made

for independent domestic productions. Concerning 'recent works', YLE did not register the year of programme completion until 1999. Programmes transmitted for the first time are never older than 5 years, which also applies to the majority of repeat transmissions. Problems can occur only in connection with feature films. Since 2000 the year of programme completion is also registered. Private broadcasters, MTV3 and Nelonen rely on statistics, four times a year and on a programme management system.

According to the public service broadcaster, the only condition affecting broadcasters in attaining the EU quota provisions is the fact that Finland is a country with a restricted language area. According to the private broadcasters, costs, recently launched channel and thematic channel, could also be added.

The TAC has the right to act in cases of violations of the Act on Television and Radio Operations. According to Section 36 of the Act on Television and Radio Operations 744/1998, 'should a television or radio broadcaster violate this Act or the provisions or regulations issued thereunder, the supervisory authority may issue a reminder and obligate them to correct their error or negligence. This decision may be enforced by the conditional imposition of a fine as provided for in the Act on the Conditional Imposition of a Fine (1990/1113)'.

According to Section 37 of the Act on Television and Radio Operations 744/1998, 'the Council of State may revoke a licence granted for television if the broadcaster, notwithstanding the measures provided in accordance with section 36, severely and repeatedly acts in violence of this Act or the provisions or regulations issued thereunder'.

4.5. National provisions implementing Articles 4 and 5 of the TWF Directive

Act 744/1998 on Television and Radio Operations

Section 16

European works

A television broadcaster shall reserve for European works a majority proportion of his annual transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping.

Further provisions in accordance with Council Directive (89/552/EEC) on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States and Article 6 of the Directive (97/36/EC) of the European Parliament and of the Council amending the said Directive as to what programmes shall be deemed European works referred to in paragraph 1 shall be issued by Decree.

Section 17

Programmes by independent producers

A television broadcaster shall reserve for programmes produced by independent producers 10 % of his transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, or alternatively 10 % of his programming budget. Half of the programmes included in the said share of the independent producers referred to above have to have been produced within the past five years.

5. FRANCE

5.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

According to Article 27 of the French Broadcasting Law n°86-1067 of 30 September 1986 as revised by Law n°2000-719 of 1 August 2000, all terrestrial broadcasters must broadcast, particularly during prime-time, a proportion of at least 60% of European audiovisual and cinematographic works.

Cable and satellite channels have the same obligation, with regard to European cinematographic works (Article 33 of the French Broadcasting Law n°86-1067 of 30 September 1986 as revised by Law n°2000-719 of 1 August 2000). The Decree n°92-882 of 1 September 1992, which defines the applicable framework for cable channels and which also applies in practice to satellite channels as well, requires that these channels should broadcast 60% of European audiovisual works. This proportion can be achieved progressively (*'montée en charge'*) in relation to the number of households reached and the nature of their programmes. However, in any case the proportion should not be less than 50%. The proportions, which consequently should be between 50 and 60 per cent, are defined by the licence agreements (*conventions*) agreed between the *Conseil Supérieur de l'Audiovisuel* (CSA hereafter) and the respective broadcasters. In this case the proportions fixed could depend on the importance of the broadcaster's investments in production (Article 33 of the French Broadcasting Law n°86-1067 of 30 September 1986 as revised).

The aforementioned obligations are defined in a Decree. For free-to-air terrestrial broadcasters, the obligations were already defined in Articles 7 and 8 of the Decree n°90-66, for cable channels by the Decree n°92-882 and for pay terrestrial channels and satellite channels by the Decree n°95-668. In practice, the Decree n°92-882 (*'décret câble'*) applies to satellite channels as well. The Decree n°95-668 provided for the framework concerning satellite channels that should be distributed on satellite TDF (*Télédiffusion de France* – provider of over-the-air TV broadcast services). This has never happened. Consequently, the 'cable Decree' applies indirectly to the current satellite channels because all of them are distributed on cable networks as well.

According to Article 48 of the Act of 30 September 1986, as amended, for France 2 and France 3 the obligation to respect the quotas is also included in their terms of reference (*cahiers de charges*) fixed by the Decree n°94-813 of 16 September 1994 as last amended by the Decree n°99-1229 of 31 December 1999¹⁰. For la Cinquième, the obligation to respect the quotas is also included in its terms of reference (*cahiers de charges*) fixed by the Decree n°95-71 of 20 January 1995.

Firstly, it should be noted, that the French legislation distinguishes between audiovisual works and cinematographic works. Furthermore, the definition of the 'audiovisual work' in France is narrower than that of the Directive (Decree n°90-66 of 17 January 1990).

Audiovisual works include all programmes which do not fall into one of the following categories: cinematographic works of long duration (when the duration is longer than an hour), news and information programmes, entertainment programmes (*variétés*), games,

¹⁰ Decree no.99-1229 of 31 December 1999 approving the lists of tasks and terms of reference for the companies France 2 and France 3, published in the Official gazette on 1 January 2000

programmes other than fiction programmes produced mainly in the studio, sport retransmissions, advertising, teleshopping, self promotion, teletext services (Article 4 of the Decree n°90-66).

Therefore, audiovisual works could be considered as: fiction programmes, animation programmes, current affairs documentaries produced mainly outside the studio, music videos, scientific programmes, concerts and retransmissions of theatrical, lyrical or choreographic programmes. Consequently, entertainment programmes, current affairs programmes, and talk shows, in all their forms, are also excluded from the ‘relevant transmission time’.

Cinematographic works under French legislation are works, which have obtained an exploitation visa (*visa d’exploitation*) according to Article 19 of the *Code de l’industrie cinématographique*, with the exception of documentaries that have first been broadcast on television in France and foreign works that have not obtained such a visa but which are cinematographically distributed commercially in their country of origin (Decree n°90-66, Article 2).

The definition of European works can be found in Article 6 of the Decree n°90-66.

With regard to the wording ‘majority proportion’, France has chosen to transpose it by means of a percentage. The law speaks of 60% of the relevant transmission time.

5.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Article 10 of the Decree n°90-67 provides that free-to-air terrestrial broadcasters must invest at least 10% of their net turnover from the previous financial year in orders for audiovisual works originally produced in the French language or originating from the European Community, complying with the three following conditions:

- contracts are concluded with an independent production company
- the broadcaster should not either personally undertake or share the financial, technical or artistic responsibility of the work or guarantee the output (*garantie de bonne fin*)
- the duration of broadcasting rights purchased by the broadcaster, cannot be longer than four years, which includes the year of delivery of the work (five years when the broadcaster co-produced the programme).

These obligations are more specifically defined in the terms of reference (*cahiers des charges*) for public service broadcasters and in the licence agreements concluded by the CSA with private broadcasters. There are therefore individual obligations for every broadcaster, distinguishable from each other in their details but all based on the above-described legal framework.

France 2 and France 3 must each devote 11.5% of their turnover to independent production. In principle, the maximum duration of rights acquired by France 2 may not exceed three years (five years for France 3), extended to five years (seven years for France 3) where a number of companies have financed the production (Article 22 of the Decree n°99-1229). These periods are extended by six months for works of fiction, which run for a number of episodes.

Article 3 of the Decree n°90-67 states that all free-to-air terrestrial channels should invest a minimum of 3% of the net turnover from the previous financial year to the production of cinematographic works. This proportion rises to 20% for the pay terrestrial channels (Canal Plus)¹¹. With regard to ‘independent cinematographic productions’, all terrestrial channels (free-to-air and pay-TV), should devote at least 75% of their expenditure on cinematographic production to concluding contracts with independent production undertakings, which are clearly and exhaustively defined in Article 3-1 of the Decree n°99-189 of 11 March 1999, which amends the Decree n°90-67.

Cable and satellite channels which broadcast audiovisual works must devote at least 10% of their broadcasting time or of their budget to audiovisual works made by independent producers. Higher percentages or specific modes of application could be provided in the licence agreements between the CSA and the respective channels. In addition, all cable and satellite channels (pay per view channels included) must reserve at least 10% of their broadcasting time or of their budget to cinematographic works made by independent producers¹².

In the new agreements between CSA and TF1 and M6, the proportion of independent production orders is fixed at two thirds of the total orders. Two thirds of both channels’ orders of animation works are classed as independent, solely due to the ‘duration of the distribution rights’ criteria, provided for in Article 10 of the Decree n°90-67 modified. The percentages of investment for independent cinematographic productions should increase to 73% in 1999 and 75% in 2000 for Canal+, to 75% for TF1, and to 85% for M6.

Several requirements concerning ‘independent cinematographic production’ must be fulfilled, in order to be considered as an independent producer:

- The broadcaster cannot directly or indirectly hold more than a 15% share capital,
- The production company should not be controlled, according to Article 355-1 of the law of 24 July 1966, by one or more shareholders, who control the broadcaster
- The production company is not allowed to have any links with a broadcaster, which might constitute a long-term commitment of interests between them. (Article 3-2 of the Decree 99-189)

With regard to the general term ‘independent production company’, France has defined it by a number of Decrees. The main definition is to be found in Article 11 of the Decree 90-67 of 17 January 1990.

A production company could be considered as independent if the following requirements are fulfilled:

- The broadcaster cannot directly or indirectly hold more than a 5% share capital of the production company,
- The production company cannot hold more than a 5% share capital of the broadcaster
- One or several shareholders controlling more than 5% of the equity of a broadcaster cannot own more than 20% of the production company, and
- The production company cannot have links with a broadcaster which might constitute a long-term commitment of interests between them (Decree n°90-67, Article 11).

¹¹ Article 10 of the Decree n°95-668

¹² Article 14 of the Decree n°92-882

This last requirement is vague and allows for a considerable level of flexibility in its implementation. To define whether a producer works systematically with only one broadcaster, having as consequence being characterised a dependant, requires court action by another producer. To date, this has not occurred.

According to the aforementioned provisions, producers who have an economic relationship with one broadcaster but produce programmes for another one could also be according to the law, considered as independent producers. For example, if Groupe Ellipse (the production company of Canal+) produces a fictional programme for another broadcaster, and this broadcaster is the sole broadcaster of the programme, then this programme will be defined as an independent production¹³.

5.3. Further (additional or stricter) provisions set by national legislation

In France, there are several provisions, in addition to the quota provisions of the TWF Directive, imposed on broadcasters in order to promote the production and distribution of television programmes. These provisions concern specific type of content, specific language requirements and the promotion of the cinematographic production.

5.3.1. Provisions concerning specific type of content

The French legislation distinguishes between audiovisual works and cinematographic works. Audiovisual works include all programmes which do not fall into one of the following categories: cinematographic works of long duration (when the duration is longer than an hour), news and information programmes, entertainment programmes (variétés), games, programmes other than fiction programmes produced mainly in the studio, sport retransmissions, advertising, teleshopping, self promotion, teletext services (Article 4 of the Decree n°90-66).

Broadcasters are obliged to broadcast certain amounts of audiovisual and cinematographic works and in addition, they should also broadcast them at specific times (prime-time).

According to Article 27 of the French broadcasting law n°86-1067 of 30 September 1986 as last revised, all terrestrial broadcasters must broadcast, particularly during prime-time, a proportion of at least 60% of European audiovisual and cinematographic works. Cable and satellite channels have the same obligation (Article 33 of the French broadcasting law n°86-1067 of 30 September 1986 as last revised and Article 12, paragraph 2 of the Decree n°92-882). The only difference is that the proportion with regard to audiovisual works originally produced in the French language can be achieved progressively (*'montée en charge'*) in relation to the number of households reached and the nature of their programme. However, in any case the proportion should not be less than 50%.

The aforementioned works have to be broadcast during the hours defined as prime time. These prime time hours, originally defined in the Decree n°90-66, are between 6.00 p.m. and 11.00 p.m. and on Wednesdays between 2.00 p.m. and 6.00 p.m.¹⁴ They are also mentioned

¹³ Koenen, A./Schmid, H./Woldt, R., Situation unabhängiger Produzenten in Großbritannien, Frankreich, und den Niederlanden, (expertise for the LfR), EIM Düsseldorf, January 2000.

¹⁴ Articles 8 and 9 of the Decree n°90-66

in the *cahiers des charges* of the public service broadcasters and in the licence agreements of the private channels. With regard to the latter, the CSA can negotiate and set a wider time frame. For example, in 1998, the prime time hours set by the CSA, were: for TF1: every day between 6.00 p.m. and 11.00 p.m. and on Wednesdays between 2.00 p.m. and 11.00 p.m.; for M6: every day between 5.00 p.m. and 11.00 p.m. and on Wednesdays between 2.00 p.m. and 11.00 p.m. The prime time hours for cinematographic works in 1998 were every day between 8.30 p.m. and 10.30 p.m.

For pay-TV channels, prime time hours are defined in the Decree n°95-668 (Article 7) and mentioned in their licence agreements. This Decree provides that prime time is between 8.30 p.m. and 10.30 p.m. Article 14 paragraph 3 of the aforementioned Decree provides for a broader time frame for services that 'are devoted to the distribution of cinematographic works' (such as Canal Plus). In this case, prime time is between 6.00 p.m. and 2.00 a.m.

More specifically, France 2 should transmit a minimum amount of classical music concerts interpreted by European and French orchestras and reserve a major place for French songs, in its entertainment programmes. It should also endeavour to support, as far as possible, the effective realisation of productions in the EU countries (Articles 26, 27 and 34 of its terms of reference).

France 3 should reserve a major place for French songs in its entertainment programmes and support, as far as possible, the effective realisation of productions in the EU countries. It should also transmit every week, at a prime-time hour, a programme on the departments and overseas territories produced by RFO (*Radio France Outremer*) (Articles 29, 36 and 50 of its terms of reference).

TF1 and M6 are also obliged to broadcast a minimum of 50% of trailers of European works, which are not co-productions. TF1 is also required to invest 0.6%, of its net turnover from the previous financial year, in orders for European animation films or animation films originally produced in the French language.

M6 is also required to invest 1% of its net turnover from the previous financial year in orders for European animation films or animation films originally produced in the French language (Article 24 of its licence agreement). This amount is included in the global contribution of the broadcaster into the programme industry, as defined in the Decree 90-67 as modified. In addition, it should invest every year at least 20% of its annual turnover from the previous year in orders of audiovisual works.

M6 should devote 30% of its annual programme to music programmes. A big part of these programmes should be of French origin. It co-produces and transmits every year 150 video clips devoted to French-speaking artists, of which 30 are new talents.

5.3.2. *Provisions concerning specific language requirements*

The French legislation provides for two kinds of obligations imposed on French broadcasters, aiming at the protection of the French language. Firstly, concerning quotas of broadcast programmes and secondly, concerning financial investment in the production.

According to Article 27 of the French broadcasting law n°86-1067 of 30 September 1986 as last revised, all terrestrial broadcasters must broadcast, particularly during prime-time, a proportion of at least 40% of audiovisual and cinematographic works originally produced in the French language.

Cable and satellite channels have the same obligation (Article 33 of the French broadcasting law n°86-1067 of 30 September 1986 as last revised and Article 12, paragraph 2 of the Decree n°92-882). The only difference is that the proportion with regard to audiovisual works originally produced in the French language can be achieved progressively ('montée en charge') in relation to the number of households reached and the nature of their programme. However, in any case the proportion should not be less than 50%.

5.3.3. Other provisions concerning investment into French and European audiovisual and cinematographic production

French legislation provides for further obligations to be imposed on broadcasters. An important provision, common to all channels, prohibits the showing of films on television on certain evenings of the week or before particular times. These rules aim mainly at protecting cinemas.

The public-sector channels (same for TF1 and M6 – see their contracts¹⁵) are not allowed to broadcast more than 192 films a year, of which 104 must be shown between 8.30 p.m. and 10.30 p.m. Films may not be shown on Wednesday and Friday evenings, at any time on Saturdays, and before 8.30 p.m. on Sundays; films may be broadcast on Wednesday and Friday evenings on condition that they are cinema-club films and are shown after 10.30 p.m.

In order to support the audiovisual production, all terrestrial channels are required either to:

- Invest, every year, 15% of their net turnover from the previous financial year, in orders for audiovisual works produced in the French language and to broadcast, every year, a minimum of 120 hours of audiovisual works produced in the French language, and broadcast in France for the first time. They also have to be broadcast between 8.00 p.m. and 9.00 p.m. or
- Invest, every year, a minimum of 20% of their net turnover from the previous financial year, in orders for works originating from the European Community, of which 15% must be in orders for audiovisual works originally produced in the French language (Art.9 of the Decree 90-67).

France 2 and France 3 are now required to invest 17 and 17.5% respectively (compared with 16 and 17% previously) of their net turnover from the previous financial year in orders for audiovisual works produced in the French language.

In order to support audiovisual and cinematographic production, all terrestrial broadcasters are required to contribute, every year, at least 3% of their annual turnover from the previous year towards the expenses of production development of European cinematographic works, of which at least 2.5% is to be used for production development of cinematographic works originally produced in the French language (Article 3 of the Decree n°90-67).

¹⁵ Décision n°96-614 du 17 septembre 1996 portant reconduction de l'autorisation délivrée à la société Télévision française 1 (TF1), Décision n°96-559 du 31 juillet 1996 portant reconduction de l'autorisation délivrée à la société Métropole Télévision (M6)

Canal+ is also required to invest at least 4.5% of its total resources (excluding VAT tax) for the previous financial year (art. 10 of the Decree no. 90-67 modified) in orders for European audiovisual works or audiovisual works originally produced in the French language (Article 24 of the agreement).

According to the Decree of 9 May 1995, the encrypted services such as those of Canal Plus, whose principal business is the programming of cinematographic works, are required to reserve at least 25% of their total annual resources, excluding VAT, to acquiring broadcasting rights for such works. 75% of such expenditure should be devoted to the acquisition of broadcasting rights for films originally made in the French language, from either independent production undertakings or undertakings which do not individually take, or jointly share, the initiative and financial, technical and artistic responsibility for the works under consideration or guarantee their completion (Decree no. 99-190 of 11 March 1999). These measures are aimed at guaranteeing the diversity of new cinematographic works.

The changes brought about by the French broadcasting law n°86-1067 of 30 September 1986 as revised by Law n°2000-719 of 1st August 2000 concern independent production as well. Article 70-1 states that the contracts concluded by a broadcaster for the acquisition of distribution rights of cinematographic work provide for the time scale, at the end of which the broadcasting of this work can intervene. When there is an agreement between one or more professional organisations of the cinematographic industry and a broadcaster, relating to the time bands which are applicable to one or more types of exploitation of cinematographic works on television, the broadcasting time bands provided for by this agreement are binding to the broadcaster.

Article 71 provides for guidelines to be used in the decrees provided for in Articles 27 and 33 of the Broadcasting Law. That is to say, they should specify the conditions under which cinematographic or audio-visual work can be taken into account, in accordance with the contribution of a broadcaster to the independent production, according to the following criteria:

1. duration of detention of distribution rights by broadcasters;
2. extent of the secondary rights and the mandates of marketing, held directly or indirectly by the broadcaster;
3. the nature and extent of responsibility of the broadcaster in the production.

These decrees also take into account the following criteria, with regard to the production company:

1. the share, direct or indirect, of the capital of the company held by the broadcaster;
2. the share, direct or indirect, of the capital of the broadcaster held by the company;
3. the share, direct or indirect, held by a shareholder or a group of shareholders in the capital of the broadcaster and, at the same time, in the capital of the company;
4. the control, by a shareholder or a group of shareholders, on the broadcaster and at the same time on the production company;
5. the share of turnover or the volume of works realised by the company with the broadcaster.

These decrees define the criteria mentioned in the present Article for cinematographic and audio-visual works and determine their means of application. It remains to be seen how the new Decrees will specify these conditions. It is suggested that the obligation of investment in

television works increases progressively, 1.5% in three years, for the public service broadcasters (from 17% to 18.5% for France 2, from 17.5% to 19% for France 3) and 1% for the private broadcasters (from 15% to 16% for TF1). The new decrees on production will probably have been adopted by May 2001.

France 2 has an agreement with the audiovisual production union (*Union Syndicale de la Production Audiovisuelle* - USPA). In this agreement mainly duration of broadcasting rights, and number of broadcasts are being negotiated.

The Decree n°84-467 of 15 June 1984 set up a Fund for the support of the audiovisual production industry named COSIP (*Compte de Soutien aux Industries de Programmes*). Every broadcaster is obliged to reserve 5.5% of its annual income from advertising, subscription fees or licence fees for COCIP. This Fund is administrated by the CNC (*Centre Nationale de la Cinématographie*).

5.4. Monitoring and application of the EU quotas and further national provisions

The *Conseil Supérieur de l'Audiovisuel* (CSA) is responsible for monitoring and application of the above provisions. It also provides the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF Directive.

With regard to monitoring, the system differs for terrestrial and cable broadcasters. The CSA exercises extensive control of terrestrial channels with regards to the monitoring of European works. Every programme is chronologically identified and categorised into a computerised database, according to the criteria laid down in the Directive for the transmission of works.

Regarding independent productions, terrestrial channels must provide the CSA every year with the necessary data, by way of a computerised standardised questionnaire produced by the CSA, after confirmation from the *Centre National de la Cinématographie* concerning the granted or subsidied works.

Cable channels must submit to the CSA all necessary data regarding European works and independent productions, by way of a standardised questionnaire produced by the CSA. The provided data is then analysed by the CSA, partly by hand and partly in computerised form.

For terrestrial channels, the CSA relies on a percentage record of the total annual broadcasting time. Proportions are calculated by the CSA and *a posteriori* checked with the data provided by the broadcasters. For cable channels, the CSA relies mainly on the data provided by the broadcasters but also on random samples for a period of four weeks. Consequently, the CSA does not rely solely on data provided by broadcasters but checks and verifies the data as well.

More specifically, France 2 monitors the percentages in the following way: (a) *a priori*, three times a year, when the draft weekly programme schedules applicable to the season or the year are adopted; (b) on a day to day basis with the keeping of a 'logbook' on the application of the various quotas; the Head of the Programme Department uses this logbook to measure the impact of any specific scheduling (e.g. event or season's schedule) on the fulfilment of the broadcasting quotas; (c) *a posteriori*, with the production of the monthly and annual reports, controlled by the CSA.

The system is effective for the production of the various reports. In order to allow a follow-up in real time, a software application of the channel's programming is under development: it will allow any necessary corrections to be more readily anticipated.

France 3 calculates monthly the percentages of all programmes defined as 'works' as well as the percentages only of 'European programmes'. According to France 3 the system is reliable due to the consistency of the information received and the precision of the monthly follow-up.

La Cinquième analyses the broadcast programmes using a database and calculates the percentages every three months.

The CSA has faced some obstacles in past monitoring periods mainly due to the increased number of cable channels and to the inexperience of new channels in their first years of operation.

According to the CSA, the conditions affecting broadcasters in attaining the quota provisions are costs, recently launched channel and thematic channel. It is mostly pay per view channels broadcasting mainly cinema films and channels which are right holders to specific catalogues, which have difficulties in meeting the quotas.

The CSA has the right to act in cases of non-compliance with the quota provisions. It can impose sanctions of administrative financial fines up to 3% of the net income of the broadcaster. Before imposing a fine, the CSA should issue a warning due to non-compliance with an obligation. In 1998, eight cable channels have been issued with a warning for not meeting the quotas.

5.5. National provisions implementing Articles 4 and 5 of the TWF Directive

5.5.1. Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication modifiée, Articles 27 et 33

Article 27

Compte tenu des missions d'intérêt général des organismes du secteur public et des différentes catégories de services de communication audiovisuelle diffusés par voie hertzienne terrestre, des décrets en Conseil d'État fixent les principes généraux définissant les obligations concernant: (...)

2° la diffusion en particulier aux heures de grande écoute, de proportions au moins égales à 60 p. 100 d'oeuvres cinématographiques et audiovisuelles européennes et de proportions au moins égales à 40 p. 100 d'oeuvres cinématographiques et audiovisuelles d'expression originale française;

Toutefois, pour l'application des dispositions prévues à l'alinéa ci-dessus aux oeuvres audiovisuelles diffusées par les services autorisés, le Conseil supérieur de l'audiovisuel pourra substituer aux heures de grande écoute des heures d'écoute significatives qu'il fixera annuellement, pour chaque service, en fonction notamment des caractéristiques de son

audience et de sa programmation, ainsi que de l'importance et de la nature de sa contribution à la production;

Article 33

Un décret en Conseil d'État, pris après avis du Conseil supérieur de l'audiovisuel, fixe, pour chaque catégorie de services de radiodiffusion sonore ou de télévision distribués par câble ou par satellite: (...)

9° les proportions d'oeuvres cinématographiques européennes et d'expression originale française diffusées, en particulier aux heures de grande écoute, au moins égales à, respectivement, 60 % et 40 %;

10° les proportions d'oeuvres audiovisuelles européennes et d'expression originale française, qui peuvent varier notamment en fonction de l'importance des investissements de l'éditeur de service dans la production, sans toutefois que la proportion d'oeuvres européennes puisse être inférieure à 50%.

Ce décret peut prévoir des dérogations aux dispositions des 5° à 10° pour les services émis dans une langue autre que celle d'un État membre de la Communauté européenne.

5.5.2. Décret no 90-66 du 17 janvier 1990 (quotas de diffusion) pour le hertzien

Obligations de diffusion d'oeuvres cinématographiques et d'oeuvres audiovisuelles originaires de la Communauté économique européenne et d'expression originale française.

Article 7

Modifié par Décret 92-279 27 Mars 1992 art 6 JORF 28 mars 1993.

Les sociétés nationales de programmes Antenne 2 et France Régions 3 et les services autorisés diffusés en clair par voie hertzienne terrestre doivent, dans le nombre total annuel d'oeuvres cinématographiques de longue durée diffusé, réserver: 60 p 100 au moins à la diffusion d'oeuvres européennes; 40 p 100 au moins à la diffusion d'oeuvres d'expression originale française.

Article 8

Modifié par Décret 92-279 27 Mars 1992 art 7 JORF 28 mars 1993.

Les sociétés nationales de programmes Antenne 2 et France Régions 3 et les services autorisés diffusés en clair par voie hertzienne terrestre doivent, dans le total du temps annuellement consacré à la diffusion d'oeuvres audiovisuelles, réserver: 60 p 100 au moins à la diffusion d'oeuvres européennes; 40 p 100 au moins à la diffusion d'oeuvres d'expression originale française.

5.5.3. Décret no 90 67 du 17 janvier 1990 (quotas de production) pour le hertzien

Article 3

Modifié par Décret 99-189 11 Mars 1999 art 1 JORF 13 mars 1999.

Les sociétés ou les services mentionnés à l'article 2 consacrent chaque année au moins 3 p 100 du chiffre d'affaires annuel net de l'exercice précédent à des dépenses contribuant au développement de la production d'oeuvres cinématographiques européennes dont au moins 2,5

p 100 de ce chiffre d'affaires à des dépenses contribuant au développement de la production d'œuvres cinématographiques d'expression originale française.

Toutefois, les dispositions de l'alinéa précédent ne sont pas applicables à ceux de ces services qui diffusent annuellement un nombre d'œuvres cinématographiques de longue durée inférieur ou égal à 52.

Article 3-1

Créé par Décret 99-189 11 Mars 1999 art 2 JORF 13 mars 1999

Afin de contribuer au développement de la production cinématographique indépendante, les sociétés et les services mentionnés à l'article 2 sont tenus de consacrer chaque année au moins 75 % des dépenses définies à l'article 3 à la conclusion de contrats avec des entreprises de production indépendantes.

La convention prévue à l'article 28 de la loi du 30 septembre 1986 susvisée et les cahiers des charges prévus à l'article 48 de la même loi précisent les conditions d'application de l'alinéa précédent, et notamment le pourcentage retenu. Celui-ci tient compte de la situation économique de la société ou du service et des conditions de règlement des sommes prévues à l'article 5.

Article 8

Modifié par Décret 95-1162 6 Novembre 1995 art 4 JORF 7 novembre 1995

Les dispositions du présent titre sont applicables : 1° Aux sociétés nationales de programme France 2 et France 3, ainsi qu'à la société visée à l'article 45 de la loi du 30 septembre 1986 susvisée ; 2° Aux services de télévision autorisés diffusés en clair par voie hertzienne terrestre.

Article 9

Modifié par Décret 95-1162 6 Novembre 1995 art 5 JORF 7 novembre 1995

Afin de contribuer au développement de la production audiovisuelle, les sociétés et les services mentionnés à l'article 8 du présent décret sont tenus, d'une part, de consacrer chaque année au moins 15 p 100 de leur chiffre d'affaires annuel net de l'exercice précédent à la commande d'œuvres audiovisuelles d'expression originale française et, d'autre part, de diffuser un volume horaire annuel minimum de cent vingt heures d'œuvres audiovisuelles européennes ou d'expression originale française n'ayant pas fait l'objet d'une diffusion en clair sur un réseau hertzien terrestre à caractère national et dont la diffusion débute entre 20 heures et 21 heures.

Dans la limite de 2 p 100 du chiffre d'affaires annuel net de l'exercice précédent, sont assimilées à des commandes retenues pour l'application du premier alinéa du présent article les sommes consacrées à l'acquisition de droits de diffusion d'œuvres audiovisuelles d'expression originale française, pour le montant de ces droits correspondant à la première diffusion de chaque œuvre par la société ou le service concerné.

Article 9-1

Modifié par Décret 95-1162 6 Novembre 1995 JORF 7 novembre 1995

Par dérogation aux dispositions de l'article précédent, chaque service mentionné au 2° de l'article 8 du présent décret peut conclure avec le Conseil supérieur de l'audiovisuel, en vertu des dispositions des articles 28 et 28-1 de la loi du 30 septembre 1986 susvisée, une convention déterminant un niveau de commande d'œuvres audiovisuelles supérieur à celui fixé au premier alinéa de l'article précédent. Dans ce cas, le Conseil supérieur de l'audiovisuel

peut fixer le volume de diffusion à un niveau inférieur à cent vingt heures. Pour les sociétés mentionnées au 1° de l'article 8 du présent décret, les cahiers des charges prévus à l'article 48 de la loi du 30 septembre 1986 susvisée peuvent déterminer un niveau de commande d'uvres audiovisuelles supérieur à celui fixé à l'alinéa 1° de l'article précédent. Dans ce cas, ils peuvent fixer le volume de diffusion à un niveau inférieur à cent vingt heures.

Ces conventions et cahiers des charges déterminent les conditions dans lesquelles peuvent être prises en compte dans la commande d'uvres audiovisuelles les sommes consacrées:

- a) A la commande d'uvres audiovisuelles d'expression originale française ;
- b) A la commande d'uvres audiovisuelles européennes ;
- c) A l'acquisition de droits de diffusion d'uvres audiovisuelles européennes ou d'expression originale française ;
- d) A la commande d'écriture et au développement d'uvres audiovisuelles européennes ou d'expression originale française.

Le total des dépenses réalisées au titre des b, c, et d de l'alinéa précédent ne peut être pris en compte au-delà du tiers du volume de commandes prévu par les conventions ou les cahiers des charges.

5.5.4. Décret no 92-882 du 1er septembre 1992 (pour les services distribués par câble)

Art. 12. - I. - Les services respectent, dans le nombre total annuel d'oeuvres cinématographiques de longue durée diffusées, les pourcentages prévus à l'article 7 du décret no 90-66 du 17 janvier 1990 susvisé, ainsi que les obligations résultant de l'article 9 du même décret en tant qu'elles concernent les oeuvres cinématographiques de longue durée.

II. - Sous réserve des dispositions particulières prévues au articles 22, 23 et 24 du présent décret, les services respectent, dans le total du temps annuellement consacré à la diffusion d'oeuvres audiovisuelles, les pourcentages prévus à l'article 8 du décret no 90-66 du 17 janvier 1990 susvisé.

Par dérogation à l'alinéa précédent, la convention conclue avec le Conseil supérieur de l'audiovisuel peut fixer, dans la limite de durée prévue à l'article 34-1 de la loi du 30 septembre 1986 susvisée et en fonction notamment du nombre de foyers recevant le service et de la nature de la programmation de celui-ci, un délai à l'issue duquel ce service doit se conformer aux dispositions de l'article 8 du décret no 90-66 du 17 janvier 1990 susvisé. Durant cette période, la convention fixera, en respectant un objectif de progressivité, les pourcentages minima qui devront être atteints chaque année. Ces pourcentages minima ne pourront être inférieurs à 50 p. 100 pour les oeuvres européennes et au dernier pourcentage constaté pour les oeuvres d'expression originale française.

Art. 14. - Tout service de télévision qui diffuse des oeuvres cinématographiques ou audiovisuelles doit réserver soit 10 p. 100 au moins du temps qu'il consacre à la diffusion de ces oeuvres, soit 10 p. 100 au moins de son budget de programmation à des oeuvres européennes émanant de producteurs indépendants des éditeurs du service au sens du décret no 90-67 du 17 janvier 1990 susvisé.

La convention fixe les conditions dans lesquelles l'obligation prévue à l'alinéa précédent est respectée par chaque service.

5.5.5. *Décret no 95-668 du 9 mai 1995 (pour les chaînes hertziennes cryptées)*

Article 6

Les services visés par le présent décret doivent, dans le nombre total annuel d'œuvres cinématographiques de longue durée diffusées, réserver: 60 p 100 au moins à la diffusion d'œuvres européennes; 40 p 100 au moins à la diffusion d'œuvres d'expression originale française.

Ces obligations doivent également être respectées aux heures de grande écoute. Sous réserve des dispositions du paragraphe III de l'article 14 ci-après, sont considérées comme diffusées aux heures de grande écoute les œuvres dont la diffusion intervient en tout ou partie entre 20 h 30 et 22 h 30.

Article 7

Les services visés par le présent décret doivent, dans le total du temps annuellement consacré à la diffusion d'œuvres audiovisuelles, réserver : 60 p 100 au moins à la diffusion d'œuvres européennes; 40 p 100 au moins à la diffusion d'œuvres d'expression originale française.

Ces obligations doivent également être respectées aux heures de grande écoute ou aux heures d'écoute significative fixées par le Conseil supérieur de l'audiovisuel. Sont considérées comme heures de grande écoute l'ensemble des heures comprises entre 20 h 30 et 22 h 30.

Article 9

Modifié par Décret 99-190 11 Mars 1999 art 1 JORF 13 mars 1999.

Sous réserve des dispositions des articles 10 à 13 ci-après, les dispositions du II de l'article 1er et des articles 3, 3-2, 5 à 7 et 9 à 12 du décret n° 90-67 du 17 janvier 1990 susvisé sont applicables aux services visés par le présent décret.

6. GERMANY

6.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The Agreement between Federal States on Broadcasting (*Rundfunkstaatsvertrag - RStV*) could be regarded as the national framework for broadcasting regulation in Germany and as the core element of the organisation of broadcasting at federal level. This Agreement has been concluded by all Länder (Federal States) and ratified by all Länder Parliaments in the interests of harmonisation. The fact that a specific matter is regulated in the Agreement between Federal States on Broadcasting does not rule out the possibility of that matter being the subject of a law or regulation by the Länder as well. Nonetheless the Länder are prevented by the Agreement from adopting laws of their own which diverge to any material extent.

The first section of the Agreement between Federal States on Broadcasting contains definitions of terms used in the Agreement, as well as the general provisions which apply to both private and public service broadcasters.

§6 paragraph 1 of the Agreement between Federal States on Broadcasting, as last amended, states that ‘in order to present the diversity of the German-speaking regions and of Europe as a whole and to promote European film and television production, television broadcasters shall reserve the main part of their total time scheduled for the transmission of feature films (*Spielfilme*), television movies, series, documentaries and comparable productions for European works’.

Similar wordings can sometimes be found in the different laws of the Länder (*Landesmediengesetze* or *Landesrundfunkgesetze*¹⁶), but mostly these simply refer to the Agreement between Federal States on Broadcasting (*RStV*) or do not even mention it. This procedure does not cause any problems because, as previously mentioned, in Germany federal law is always prior to the law of the Länder. Therefore a provision in the law of one of the Länder can never go further than the Agreement between Federal States on Broadcasting (*RStV*).

With regard to the wording ‘majority proportion’ Germany has chosen to transpose it by another wording. The Agreement between Federal States on Broadcasting (*RStV*) speaks of the ‘main part (*Hauptteil*) of the transmission time’ devoted to works of European origin.

Transmission time, of which the main part should be reserved for European works, is strictly defined by the German legislator. The ‘relevant transmission time’ includes only feature films, television movies, series, documentaries, and comparable productions.

According to public service broadcasters (ARD and ZDF), the definition given in the TWF Directive (Article 6), as well as the Commission’s guidelines for monitoring the application of Articles 4 and 5 of the Directive, are being used in order to define ‘European works’.

¹⁶ §4 Abs.1 LMG BaWü; §16 HMG; §19 HPRG; §21 NdsLRG; §12 Abs.6 LRG NW; §35 LRG RP; §7 SaarLRG; §14 SächsPRG; §23 LRG SH; §12 TPRG.

6.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

§6 paragraph 2 of the Agreement between Federal States on Broadcasting, as last amended in 2001, (*RStV*) states that general interest channels (*Fernsehvollprogramme*) should include a significant part of own, commissioned and joint productions from the German-speaking area and Europe as a whole. The same applies to thematic channels as far as their main content focus allows.

The German legislator did not use the wording of the TWF Directive and did not set a fix percentage for the transmission of ‘independent productions’. In addition, no provision just for independent productions has been set. The Agreement between Federal States on Broadcasting (*RStV*) speaks of inclusion of a ‘significant part (*wesentlicher Anteil*) of own, commissioned and joint productions’.

There is not yet a definition of the term ‘independent producer’ under German legislation. Nevertheless, indicative criteria, as set out in Recital 31 of TWF Directive, and the guidelines issued by the EC for the purposes of monitoring the application of Articles 4 and 5 of the TWF Directive are being taken into account. In addition the criteria defining a company being dependent of another in the sense of §15 of the law on stock companies (*Aktiengesetz*)¹⁷ are being used as general guidelines.

According to §15 of the law on stock companies, legally independent companies are considered as being connected or related to others, thus making them dependent, when there is share capital participation between them (majority share, cartel, etc.). According to §19 of the law on stock companies, the participation level should be more than 25 per cent.

Nevertheless it has to be pointed out once again that there is no binding definition of ‘independent producer’ in German law and that the aforementioned criteria only function as guidelines, to have an orientation in practice.

Again some laws of the Länder mention §6 of the Agreement between Federal States on Broadcasting (*RStV*) or refer to it, but can never go further, due to the principle under German law that federal law has priority over the law of the Länder.

6.3. Further (additional or stricter) provisions set by national legislation

§6 paragraph 1 of the Agreement between the Federal States on Broadcasting, as last amended, (*Rundfunkstaatsvertrag - RStV*) speaks of ‘presentation of the diversity of the German-speaking regions and of Europe as a whole and promotion of European film and television production’.

The formulation of the aforementioned Article indicates that broadcasters should ensure that a significant part of their transmission time is reserved for works originating from the German-speaking area. The fact that the legislator refers specifically to the German-speaking

¹⁷ §15 Aktiengesetz lautet: Verbundene Unternehmen sind rechtlich selbständige Unternehmen, die im Verhältnis zueinander in Mehrheitsbesitz stehende Unternehmen und mit Mehrheit beteiligte Unternehmen (§16), abhängige und herrschende Unternehmen (§17), Konzernunternehmen (§18), wechselseitig beteiligte Unternehmen oder Vertragsteile eines Unternehmensvertrages (§291, 292) sind.

area could be seen as a general measure to present and promote the German language and culture. Specific percentages or quotas have not however been set.

In the German dual broadcasting system, public service broadcasting has to adhere to the ‘*Grundversorgung*’ principle. According to the German Federal Constitutional Court *Grundversorgung* means concern for the fact that programmes, which inform comprehensively and in the full range of the classical order for broadcasting, are offered to the entire population and that diversity of opinions in these offers is guaranteed¹⁸.

Grundversorgung sets as a condition the wide range of programmes; the extent of which is, always to be determined where diversity of opinions are not already being established in some other way. The *Grundversorgung* principle can be described to this extent as a dynamic term¹⁹.

The content spectrum of the main channels (ARD ‘*Das Erste*’, ZDF) covers all programme categories, from current political information, documentaries, game shows, television films and series, to entertainment broadcast, sport transmission, cinema feature and theatre transmission. Various, thematically differentiated magazines, advice transmissions, and offers for certain groups (e.g. children and youths, older people), are also part of the channels.

The ‘Third Channels’ of ARD, originally created as educational and cultural channels for the regions, have been developed, to a large extent during the 1970s and 1980s, into general interest channels with specific priorities, which are now distributed all over the country by cable and satellite.

During the afternoon, most of the ‘third channels’ provide educational programmes of various kinds and in the early evening regional programmes are shown. The evening is dominated by a mixed offer of films, television games, documentaries and talk shows. Some ‘third channels’ also regard themselves as platforms, on which innovative forms of programmes can be tested, which are sometimes later incorporated within the ARD’s schedules²⁰.

With regard to private broadcasters, §31 of the Agreement between Federal States on Broadcasting (*RStV*) states that private broadcasters should under specific conditions provide transmission time for independent third parties. A window programme which is broadcast by virtue of this obligation must, without violating the programming autonomy of the principal broadcaster, make a further contribution to its programme’s plurality, notably in the fields of culture, education and information. Independent third parties are chosen by the relevant regulatory authority after consultation with the broadcaster.

At a federal level, there are no other provisions imposed on broadcasters, in order to promote the production and distribution of television programmes. However even at Länder level, the existing relevant provisions do not set any specific percentages or provide for certain and strict obligations.

¹⁸ BVerG 74, 297, 325f.

¹⁹ Hans-Bredow-Institut für Rundfunk und Fernsehen: Internationales Handbuch für Hörfunk und Fernsehen 98/99, p. 144

²⁰ Hans-Bredow-Institut für Rundfunk und Fernsehen: Internationales Handbuch für Hörfunk und Fernsehen 98/99, p. 202-204

It should be mentioned, that with regard to the public service broadcasters, the Broadcasting Council (*Rundfunkrat Fernsehrat*), due to its pluralistic structure, and the Director General (*Intendant*) of each public service corporation have the responsibility to put these general principles into practice (for more, see Section 4).

Under the different laws of the Länder (*Landesmediengesetze/ Landesrundfunkgesetze*²¹), it is sometimes mentioned that the broadcasters in each of the Länder shall bear in mind local peculiarities. Still there are no special quotas that ought to be fulfilled. In Brandenburg in particular it is mentioned that the sorbische culture and language shall be taken into account. Often it is listed that accepted religious communities (Catholic, Protestant, Jewish) have the right to appropriate broadcasting time, if they ask for it.²²

The public service broadcasters ARD and ZDF are involved in various activities concerning the promotion of film production. The regional broadcasters, which form the public service broadcaster ARD, are tied up in film promotion measures which exist in every *Bundesland* (*Filmförderung*), but the amount differs in each of the Länder responsible. The *Filmförderung* is a voluntary service of ARD and ZDF promoting German moviemaking. From 4 November 1974 there have been 7 agreements, each lasting several years, between the broadcasters on the one side and the Federal *Filmförderungsanstalt* (Film Support Institute) on the other side, and this has formed the financial basis for nationally and internationally acclaimed films.

Some of the Länder (i.e. Bavaria, Hesse, Hamburg or North Rhine-Westphalia) have also developed their own regional film promotion measures. In North Rhine-Westphalia, for instance, the *Filmstiftung NRW* was founded in 1991 by the Land of North Rhine-Westphalia and the public TV broadcast company WDR in Cologne. In 1997 public service broadcaster ZDF and the private broadcasters ProSieben and SAT.1 also joined the ranks. The *Filmstiftung* is committed to supporting writers, directors, producers, distributors and cinema owners, as well as low and high budget films and outstanding international television productions. In order to react flexibly to filmmakers' needs, the *Filmstiftung* assists in all phases of production, including script development, pre- and post production, production itself and the sales and distribution of the final product.

The main source of the support is this so-called 'NRW effect': producers must spend at least 1.50 DM in the Land of North Rhine-Westphalia for every DM granted by the *Filmstiftung* in the course of production. This condition binds a growing amount of investment capital to the film industry in the region of North Rhine-Westphalia. According to this principle, in 1999, the *Filmstiftung* has supported more than 300 films with a budget total of over 262 million DM (131 million Euro). The WDR is also obliged by law (§47 WDRG) to spend a certain amount of the license fees received by law, for the *Filmstiftung NRW*.

Similar regional film promotion measures as in North Rhine-Westphalia can be found in most other Länder in Germany.

²¹ §6 III HMG; Art. 4 BRG; §4 III WDRG; §4 II StaatsV SWR; §3 III StaatsV NDR.

²² §10 III ORBG; Art. 4 II Nr.3 BRG; §5 II LMG BW; §8 III WDRG.

6.4. Monitoring and application of the EU quotas and further national provisions

In Germany, broadcasting and broadcasting regulation are the responsibility of the Länder. While the public service broadcasting corporations effect their own, internal regulation due to the fact that they are established under public law, regulatory authorities (*Landesmedienanstalten*) have been set up in each Land for the private broadcasting sector. Each regional regulatory authority monitors the private broadcasters to whom they have granted a licence. The regulatory authorities of the Länder co-operate under an umbrella organisation (*Arbeitsgemeinschaft der Landesmedienanstalten in der Bundesrepublik Deutschland – ALM*). Its Conference (*Direktorenkonferenz - DLM*) co-ordinates the 15 regulatory authorities' duties and activities at a national level.

According to §9 of the Agreement of Federal States on Broadcasting (*Rundfunkstaatsvertrag*), the public service broadcasting corporations shall be obliged, upon request, to make available to the competent authority under Länder law, the information specified in that provision. The same shall apply to private television broadcasters who must make the information available, upon request, to the supervisory authority for the private broadcasters of the Land in which the licence was awarded. That authority shall pass the information on to the relevant authority supervising the legality of its measures.

In practice, the German Federal Commissioner on Culture and Media (*Beauftragter der Bundesregierung für Angelegenheiten der Kultur und der Medien*) forwards to the Chancellery of Rhineland-Palatinate, having currently the presidency of the *Commission for the Media of the Federal States (Medienkommission der Länder)* the Commission's request on the application of Articles 4 and 5 of the TWF Directive. The Chancellery again forwards the inquiry directly to the public service broadcasters (ARD, ZDF) and, with regard to the private broadcasters, to the different regional regulatory authorities (*Landesmedienanstalten*), which contact all private broadcasters under their jurisdiction. The regional regulatory authorities collect all relevant data provided by the broadcasters and this is passed on to the Chancellery of Rhineland-Palatinate. The Chancellery co-ordinates a general report on Germany, which is sent to the Commission via the Federal Commissioner on Culture and Media. This rather complicated structure is due to the federal structure of Germany.

Whatever their minor distinctions, the public broadcasting corporations all have more or less the same structure. They are headed by a Director-General (*Intendant*), who has sole responsibility for the corporation's programmes. He is subject to control by two bodies, a management committee, usually called the Administrative Council (*Verwaltungsrat*), which oversees the corporation's administration and finance, and a programme monitoring committee, usually known as the Broadcasting Council (*Rundfunkrat*). Since the latter's function is to ensure plurality of opinion, it is composed of representatives of all 'socially relevant' groups, such as political parties, trade unions, churches and religious communities, associations, etc. Its main responsibility is to ensure that the corporation's programmes do not present a one-sided picture of the views of a particular section of the population or political ideology.

The broadcasters ARD, Phoenix, Kinderkanal, ZDF and 3sat monitor and collect the percentages of 'European works' and 'independent productions' by in-house analysis of their broadcasting statistics.

According to previous German reports to the Commission on the application of Articles 4 and 5 of the TWF Directive²³, private channels that have been recently launched or restructured often face difficulties in attaining the quota provisions. Still the percentages of ‘European works’ have been slowly increasing in most cases. The so-called niche/ special interest channels have mostly problems fulfilling the quotas for ‘independent productions’. Their main programme consists normally of so-called event broadcasts and discussion programmes, which by their nature are in-house programmes and not commissioned from independent producers.

There are no provisions under German legislation regarding possible sanctions against broadcasters in cases of non-compliance with the quota requirements.

6.5. National provisions implementing Articles 4 and 5 of the TWF Directive

Rundfunkstaatsvertrag vom 31. August 1991, in der Fassung des fünften Rundfunkänderungsstaatsvertrags, in Kraft seit dem 1. Januar 2001, (Agreement between the Federal States on Broadcasting)

§ 6

Europäische Produktionen, Eigen-, Auftrags- und Gemeinschaftsproduktionen

(1) Zur Darstellung der Vielfalt im deutschsprachigen und europäischen Raum und zur Förderung von europäischen Film- und Fernsehproduktionen sollen die Fernsehveranstalter den Hauptteil ihrer insgesamt für Spielfilme, Fernsehspiele, Serien, Dokumentarsendungen und vergleichbare Produktionen vorgesehenen Sendezeit europäischen Werken entsprechend dem europäischen Recht vorbehalten.

(2) Fernsehvollprogramme sollen einen wesentlichen Anteil an Eigenproduktionen sowie Auftrags- und Gemeinschaftsproduktionen aus dem deutschsprachigen und europäischen Raum enthalten. Das gleiche gilt für Fernsehspartenprogramme, soweit dies nach ihren inhaltlichen Schwerpunkten möglich ist.

²³ Fourth Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC “Television without Frontiers” for the period 1997-8, COM(2000)442final, p. 19f

7. GREECE

7.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The quota provisions of the TWF Directive were originally incorporated into the Greek legal system by Article 3 of the Presidential Decree 236/92. This legal instrument was replaced by the Presidential Decree 100/2000, in order to adapt national legislation to the provisions of the amended TWF Directive (Directive 97/36/EC). This Decree was adopted on 14 March 2000 and entered into force from its publication in the Official Journal of the Government on 17 March 2000.

The Greek legislation adopted mainly the wordings of the Directive. Definitions such as ‘transmission time’, ‘majority proportion’ or ‘European works’ are similar or identical to those mentioned in the TWF Directive.

Article 10 paragraph 1 of the Presidential Decree 100/2000 states that ‘broadcasters shall reserve for European works at least 51% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping’.

The ‘relevant transmission time’ includes all programmes except from news, sport events, games, advertising, teletext services and teleshopping. Regarding the wording ‘majority proportion’, Greece has chosen to transpose it with a specific percentage. The Decree speaks of 51% of the ‘relevant transmission time’.

Paragraph 2 of Article 10 of the Presidential Decree 100/2000 provides for the definition of ‘European works’. The definition is similar to the one of the Directive.

For pay-TV channels, Article 10 paragraph 4 of the Law 2644/98²⁴ states that they have to reserve at least 25% of their total transmission time, in their first year of operation, for European works. This proportion should increase by 5% every following year until it reaches 45%. The proportion is calculated on the basis of the total annual transmission time, excluding the time appointed to news, advertising and teleshopping.

7.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Concerning independent productions, the Greek legislator stayed close to the wording of the TWF Directive. Article 10 paragraph 7 of the Presidential Decree 100/2000 states that ‘broadcasters shall reserve at least 10% of their yearly transmission time, excluding the time appointed to news, sports events, games, advertising, and teleshopping, for European works created by producers who are independent of broadcasters, according to Article 10 of the law 2328/1995’. Pay-TV broadcasters have the same obligation, according to Article 10 paragraph 5 of the Law 2644/98.

The term ‘independent producer’ has been defined under Greek legislation. Article 10 of the Law 2328/1995 provides for a precise definition.

²⁴ Law 2644/1998 of 9 October 1998 for the provision of pay radio and television services and relevant regulations, Official Journal of 9 October 1998, No 223

Paragraph 4 states that the status of an independent producer is incompatible with:

- The capacity of public or communal civil servant, or of employee of a state-owned legal entity;
- The capacity of owner, partner, shareholder or employee of an advertising company;
- The capacity of member of the board of directors or employee of ERT S.A. (public service broadcaster), owner or contract part or shareholder or employee of a private broadcaster or local radio station, as well as member of the National Council for Radio and Television.

Paragraph 2 states that the independent producer supplies all the necessary production facilities, has responsibility for all technical and financial matters concerning the production and conducts everything necessary for the production contracts and agreements.

7.3. Further (additional or stricter) provisions set by national legislation

The Greek legislation provides for further provisions concerning specific language requirements. All these measures aim at the protection of the Greek language.

Article 3 paragraph 18 of the Law 2328/95 states that the public service broadcaster ERT and all private broadcasters should reserve more than 25% of their transmission time, excluding the time devoted to news, sport, games, advertising and teletext services, for works originally produced in the Greek language.

Pay-TV broadcasters should also reserve at least 25% of their total monthly transmission time for audiovisual works originally produced in the Greek language (Article 10 paragraph 3 of the Law 2644/98).

The public service broadcaster and private broadcasters have the obligation to take all necessary measures so that the Greek language will be used correctly by journalists, makers of informative or educational programmes, with the formulation of the texts during the presentation of entertainment programmes, and with the subtitling or dubbing of programmes in another language (Article 3 paragraph 18 of the Law 2328/95).

They are also obliged to organise, every six months, a series of at least fifteen episodes (each of them should have a duration of at least 30 minutes), showing the correct use of the Greek language or how it is learnt by foreigners or illiterates (Article 3 paragraph 19 of the Law 2328/95).

7.4. Monitoring and application of the EU quotas and further national provisions

The Ministry of Press and Mass Media is responsible for the monitoring and application of the above provisions. It is also responsible for providing the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF Directive.

The Ministry requests that all broadcasters fill in a special form with all the relevant data. It gathers the completed forms, checks if the data is accurate and complete and then produces a table for all broadcasters. In order to check the data, it relies on sampling.

The Ministry faced some obstacles in past monitoring periods, in particular due to the fact that broadcasters were delayed in sending the forms to be completed back to the Ministry.

With regard to monitoring, the private broadcaster Mega uses a database containing categories such as European productions etc. The private broadcaster Antenna stated that its programme is scheduled and aired via a fully computerised system. Specialised personnel barcode each programme so that each tape and its contents and their origin may be monitored at all times. Bar-coding and the whole concept of the system secures and enhances scheduling reliability and the monitoring of quotas at all times.

According to the Ministry, conditions that could affect broadcasters in attaining the quota provisions are costs and the fact that Greece is a country with a low audiovisual production capacity and with a restricted language area.

Article 4 of the Law 2328/95, as amended by Article 16 of the Law 2644/98, and Article 12 of the law 2644/98 provide for administrative sanctions in cases of violation of the provisions of the national legislation and of the European Union concerning broadcasting services. The National Council for Radio and Television has the right to act and impose sanctions in such cases (Law 2863/2000). The sanctions vary from warnings, fines of 5,000,000 up to 500,000,000 drachmas (in the case of pay-TV services, the fines are from 10,000,000 up to 1,000,000,000 drachmas), either provisional or definite interruption of the programme in question, moral sanctions, or provisional or definite revocation of the licence according to the severity of the violation, the audience share of the channel and the continuity of the violation.

No penalties have been imposed to date, since all broadcasters comply with the quota provisions.

7.5. National provisions implementing Articles 4 and 5 of the TWF Directive

Presidential Decree 100/2000

ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ ΥΠ' ΑΡΙΘ. 100

Εναρμόνιση της ελληνικής ραδιοτηλεοπτικής νομοθεσίας στις διατάξεις της Οδηγίας 97/36/ΕΚ του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 30ης Ιουνίου 1997 (ΕΕ αριθ. L 202 της 30.7.97, σελ. 80) με την οποία τροποποιήθηκαν οι διατάξεις της Οδηγίας 89/552/ΕΟΚ του Συμβουλίου (ΕΕ αριθ. L 298 της 17.10.89, σ. 23) σχετικά με την παροχή τηλεοπτικών υπηρεσιών.

Άρθρο 10

Μετάδοση ευρωπαϊκών έργων - Ανεξάρτητοι παραγωγοί

1. Οι τηλεοπτικοί φορείς υποχρεούνται να μεταδίδουν ευρωπαϊκά έργα σε ποσοστό τουλάχιστον πενήντα ένα τοις εκατό (51%) επί του συνολικού χρόνου του μεταδιδόμενου από αυτούς προγραμμάτων. Στον υπολογισμό του συνολικού χρόνου μετάδοσης δεν περιλαμβάνεται ο χρόνος μετάδοσης που αφιερώνεται σε ειδήσεις, αθλητικές εκδηλώσεις, τηλεοπτικά παιχνίδια, διαφημίσεις, τηλεπώληση καθώς και σε υπηρεσίες τηλεκειμενογραφίας.

(...)

7. Οι τηλεοπτικοί φορείς μεριμνούν ώστε το δέκα τοις εκατό (10%) τουλάχιστον του υπολογιζόμενου σε ετήσια βάση συνολικού χρόνου των μεταδιδόμενων τηλεοπτικών προγραμμάτων, εξαιρουμένου του χρόνου των ειδήσεων, των αθλητικών εκδηλώσεων, των διαφημίσεων και των μηνυμάτων τηλεπώλησης, να αφιερώνονται σε έργα παραγωγών που είναι ανεξάρτητοι από τηλεοπτικούς φορείς κατά την έννοια του άρθρου 10 του ν. 2328/1985.

8. ICELAND

8.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The legislative framework, within which public and private television broadcasting in Iceland operate, derives from the Broadcasting Act of 1985 (Act no. 68/1985). This Act was amended in 1993 and 1995. Last amendments were introduced in 2000, to bring the Act in line with Iceland's international commitments as a member of the European Economic Area (Act no. 53/2000).

Article 7 paragraph 2 of the Icelandic Broadcasting Act, as last amended on 17 May 2000, states that broadcasters shall make every effort to ensure that the greater part of their transmission time is reserved for Icelandic and other European material.

'Transmission time' in this context refers to the total transmission time of television broadcasters, with the exception of time devoted to news, sports events, games, advertising, teletext services and teleshopping.

With regard to the 'majority proportion', the Icelandic Broadcasting Act does not set a specific percentage but speaks of a 'greater part' of the transmission time.

Article 7 paragraph 3 of the Icelandic Broadcasting Act also states that a more detailed definition of European programme material shall be laid down in a regulation.

8.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Article 10 of the Icelandic Broadcasting Act states that 'broadcasters shall ensure, where practicable, that at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, or at least 10% of their annual programming budget, is reserved for European works created by producers who are independent of broadcasters. Television broadcasters shall seek to transmit, as large a proportion as possible, of works by independent producers within five years of their production'.

The Icelandic legislator has given broadcasters the opportunity to make the decision of reserving either 10% of their transmission time or 10% of their budget for 'independent European productions'.

Article 10 paragraph 2 of the Icelandic Broadcasting Act states that a more detailed definition of independent producers for the purposes of this Article shall be laid down in a regulation. However, there is as yet no definition of the term 'independent producer' in Icelandic legislation.

8.3. Further (additional or stricter) provisions set by national legislation

In general, there are no specific or detailed provisions imposed on broadcasters to promote the production and distribution of television programmes.

However, broadcasters have some general obligations, mainly of a linguistic character. Article 7 of the Icelandic Broadcasting Act points out that broadcasters shall strive for general cultural advancement and to strengthen the Icelandic language. This is only a very general formulation, aiming at preserving the national language.

The public service broadcaster RUV has certain obligations, though of a general nature. Its programme output shall take into account the diversity of Icelandic society. It shall provide general education material and produce separate programmes dealing with Iceland or Icelanders specifically.

8.4. Monitoring and application of the EU quotas and further national provisions

The Broadcast Licensing Committee is responsible for monitoring and controlling the above provisions. According to Article 6h of the Icelandic Broadcasting Act, the Broadcast Licensing Committee can require television broadcasters to submit an attestation of European programme material pursuant to Article 7 and of material produced by independent producers pursuant to Article 10. The gathering of all necessary information and data is carried out by the broadcasters themselves, and then forwarded to the Broadcast Licensing Committee.

The public service broadcaster RUV monitors the percentages using a programme guide which includes categories such as year of production, country of origin for foreign programmes etc. The system is to be improved by use of a database, i.e. computerising the programme guide.

There is no provision in the Icelandic Broadcasting Act providing for sanctions in cases of non-compliance with the quota provisions. Consequently, the Broadcast Licensing Committee does not have the right to sanction broadcasters who do not meet the quotas.

8.5. National provisions implementing Articles 4 and 5 of the TWF Directive

Broadcasting Act, No. 53/2000

Article 7

Programme offer

(...) Television broadcasters shall make every effort to ensure that the greater part of their transmission time is reserved for Icelandic and other European material. 'Transmission time' in this context refers to the total transmission time of television broadcasters with the exception of time devoted to news, sports events, games, advertising, text television services and teleshopping.

A more detailed definition of European programme material shall be laid down in a regulation.

Article 10

Programmes created by independent producers

Television broadcasters shall ensure, where practicable, that at least 10 % of their transmission time pursuant to Article 7, second paragraph, or at least 10% of their annual

programming budget is reserved for European works created by producers who are independent of broadcasters. Television broadcasters shall seek to transmit as large a proportion as possible of works by independent producers within five years of their production.

A more detailed definition of independent producers for the purposes of this Article shall be laid down in a regulation.

9. IRELAND

9.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The Irish current basic legal framework concerning access and practice of television broadcasting is established under the Radio and Television Act 1988 and the Broadcasting Act 1990.

The long pending Broadcasting Bill 1999 finally passed all of the stages in the *Dail* (Parliament) on 6 March 2001 and was signed as law in April 2001. The main features are, *inter alia*, that the Independent Radio and Television Commission (IRTC hereafter) will henceforth be known as the Broadcasting Commission of Ireland (BCI); the BCI will be responsible for drawing up new Codes and Standards for Programming and Advertising and all broadcasters, including public service broadcasters, will be obliged to comply with these new codes; and the Irish language television station, TG4, will be established on a statutory footing.

In Ireland, there is currently only one independent national television service (TV3) in operation, licensed by the IRTC, launched in 1998. The public service broadcaster RTÉ is subject to a system of self-regulation. Under the terms of the Broadcasting Act 1960 and subsequent legislation, RTÉ is subject to the nine member RTÉ Authority, appointed by the Government.

Article 18 (4) of Radio and Television Act of 1988 states that ‘for the purpose of ensuring compliance with subsection (3) the Commission (IRTC) shall ensure that a reasonable proportion of the programme service is produced in the State or in another Member State of the European Communities’.

With regard to the wording ‘majority proportion’, Ireland has chosen to transpose it by another wording. The Radio and Television Act speaks of a ‘reasonable proportion’ of works produced in one of the Member States of the European Communities. There is no special mention of the ‘relevant transmission time’. The Act refers only to a reasonable proportion of the ‘programme service’ provided by a broadcaster.

With regard to the private broadcaster TV3, specific commitments in relation to Article 4 of the TWF Directive are included in its contract, concluded with the IRTC. This has been in place since 1998.

9.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Article 18 (4) of Radio and Television Act of 1988 states that ‘the Commission shall ensure that a reasonable proportion of the programme service is devoted to original programme material produced in the State or in another Member State of the European Communities by persons other than the contractor, his subsidiary, his parent or existing broadcasting organisations’.

With regard to the public service broadcaster, Section 5 of the Broadcasting Act of 1990 provides for the same obligation but also states that ‘as far as is practicable, that proportion shall not be less than that broadcast by the Authority in the year 1989’.

With regard to the private broadcaster TV3, specific commitments in relation to Article 5 of the TWF Directive are included in its contract, concluded with the IRTC. TV3 has to reserve at least 10% of its transmission time for ‘European independent productions’. The IRTC is currently refining the details of the independent production commitments in place with TV3, as part of negotiations for the approval of a new investment deal.

A definition of ‘independent television programme’ is provided in Section 5 of the Broadcasting Authority (Amendment) Act, 1993. This definition applies to the public service broadcaster. In this Act ‘independent television programme’ means a television programme made by a person who complies with the following conditions, namely:

- Each of the following matters in respect to the said programme is determined by him or by one or more persons on his behalf and over whose activities, in respect of the determination of such matters, he exercises control, namely: (i) the persons who are to participate in the said programme, (ii) the persons who are to be involved in the making of the said programme, and (iii) the equipment and facilities to be used in the making of the said programme;
- The person is not a subsidiary of a broadcaster; and
- The person is not a holding company of a broadcaster.

RTÉ established the Independent Productions Unit (IPU) as part of its response to the Broadcasting Authority (Amendment) Act 1993. The Unit is responsible for independent commissioning, the management of all aspects of commissioned programmes, and acts as a focal point for all independent producers in their dealings with RTÉ.

Regarding the private broadcaster TV3 there is no definition of ‘independent producer’ under the legislation. The criteria set out in Recital 31 of TWF Directive and the guidelines issued by the European Commission to Member States for the purposes of monitoring the application of Articles 4 and 5 of the TWF Directive are being taken into account.

9.3. Further (additional or stricter) provisions set by national legislation

The public service broadcaster has further obligations. According to the Broadcasting Act 2001, RTÉ is required to expend a sum of IR £20,000,000 in the year 2001. This amount of money should be invested in: (i) commissioning the making of independent television programmes; (ii) procuring the formulation by persons or proposals for the commissioning by RTÉ or the making of Independent television programmes; and (iii) assisting in the completion of independent television programmes the making of which has not been commissioned by RTÉ.

In order to contribute effectively to RTÉ’s programme schedule, the independent production sector must understand RTÉ’s programming requirements and priorities for the Television Schedule across both channels. The Independent Production Unit must also have an understanding of the capacity and creativity of the independent sector. Therefore, regular communications between the sector and the IPU are essential and these are handled by way

of consultation between RTE and Film Makers Ireland, the representative body of the independent sector. RTÉ has currently specific terms of trade with the Film Makers Ireland.

The Radio and Television Act provides for general programme obligations. Article 18 paragraph 3 of the Act states that the television programme service provided under this Act shall in its programming ensure that the programmes reflect the varied elements which make up the culture of the people of the whole island of Ireland and have special regard for the elements which distinguish that culture and in particular for the Irish language. It does not, however, set any specific quotas on the basis of language requirements.

9.4. Monitoring and application of the EU quotas and further national provisions

The public service broadcaster RTÉ is subject to self-regulation. The monitoring and control of the public service broadcaster are the responsibilities of the Government Department known as the Department for the Arts, Heritage, Gaeltacht and the Islands. The Broadcasting Bill, 1999 imposes new obligations on the RTÉ Authority to report to the Minister each year on the use of revenue from the TV licence fee. The Authority must also report annually on its management of the independent production account. Therefore the RTÉ Authority also has a monitoring role in this regard.

According to the Broadcasting Act 2001, RTÉ is obliged to spend £20 million in 2001 on independently produced programmes. In subsequent years RTÉ is obliged to spend the 'appropriate amount' as defined in the Act. The representative body of the Irish producers ensures that this spending is monitored closely. The Department for the Arts, Heritage, Gaeltacht and the Islands also has a monitoring role.

In addition, RTÉ through its Independent Production Unit monitors this spending, thus ensuring that it is spent on independently produced programmes. The Acquisitions Department of RTÉ also has an internal monitoring system and so as indicated above, is able to approximate the percentage of acquired programming which is comprised of EU originating programming.

The IRTC is responsible for monitoring the provisions of the private broadcaster TV3. In order to monitor the application of the provisions, daily schedules are analysed and the information is entered into a database designed to provide the relevant information. These schedules and other material are submitted by TV3. The IRTC looks at every broadcast day to check the information. In addition to the material submitted by TV3, published schedules are examined as well.

According to the IRTC, the condition that mostly affect broadcasters in attaining the quota provisions are high costs, i.e. the difficulty in finding European programmes at competitive prices. According to the RTÉ the fact that Ireland is a country with a low audiovisual production capacity and with a restricted language area should be also added.

To date, there have not been cases where a channel did not comply with the quota provisions. If such a case occurs (regarding private broadcasters) the IRTC has the right to act, but cannot impose any penalties or sanctions on the broadcaster.

9.5. National provisions implementing Articles 4 and 5 of the TWF Directive

9.5.1. *Radio and Television Act, 1988*

18. – (...)

(4) For the purpose of ensuring compliance with subsection (3) the Commission shall ensure that a reasonable proportion of the programme service –

- (a) is produced in the State or in another Member State of the European Communities, and
- (b) is devoted to original programme material produced therein by persons other than the contractor, his subsidiary, his parent or existing broadcasting organisations.

9.5.2. *Broadcasting Act, 1990*

5. – In the period from the commencement of this Act until the 3rd day of October, 1991, the Authority shall ensure that a reasonable proportion of the programme material on its television services is devoted to original programme material produced in the State or in another Member State of the European Communities by persons other than the Authority, its subsidiaries or other broadcasting organisations and that, as far as practicable, that proportion shall not be less than that broadcast by the Authority in the year 1989.

10. ITALY

10.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

Chapter III of the TWF Directive has been incorporated into the Italian legal system by the Law 122 of 30 April 1998²⁵ and the Regulation no. 9/99 on the application of the rules concerning the promotion of production and distribution of European works²⁶.

This Regulation was adopted on 16 March 1999 by the *Autorità per le Garanzie nelle Comunicazioni - AGCOM* (Communications Regulatory Authority) in order to complete the implementation of the quota provisions of the TWF Directive in Italy.

According to Article 2 of the Law 122/98, all national broadcasters have to reserve more than half of their monthly transmission time, excluding news, sport events, games, advertising, teletext services, talk shows and teleshopping, for European works. Article 1 of the Regulation no. 9/99 provides for the definition of ‘European works’.

Concerning the ‘relevant transmission time’, the wording of the Directive has been chosen with two differences. Talk shows are also excluded from the ‘relevant broadcasting time’ and the quota for ‘European works’ is calculated on a monthly basis.

With regard to the wording ‘majority proportion’, Italy has chosen to transpose it by means of a percentage. All national broadcasters, independently from the transmission mode, should reserve more than half of their monthly transmission time for European works. This proportion should be also respected during prime time hours (18.30-22.30). All different types of European works should be covered, but the proportion shall be reached with regard to the total of them. At least half of the proportion should concern works produced during the last five years. Films and programmes for children should also be covered (Article 2 of the Law 122/98 and Article 2 of the Regulation no. 9/99).

Where a broadcaster broadcasts on more than one channel, the proportions are calculated on the aggregate of those channels, provided there is a minimum of 20% of European productions on each channel. A fluctuation of 7% with regard to the aggregate is allowed if properly justified (Article 2 of the Regulation no. 9/99).

Thematic channels may apply for a partial or total derogation from the distribution and production quotas defined in the Regulation no. 9/99, if an explanation is given. AGCOM can allow them to derogate from the above-mentioned provisions. Channels which devote 70% of their programming to a special theme are classed as thematic channels (Article 5 of the Regulation no. 9/99).

As for satellite channels under Italian jurisdiction, Article 2 paragraph 9 of the Law 122/98, states that their obligation to promote and distribute Italian and European audiovisual works should be defined by a Regulation adopted by the AGCOM. Pursuant to this Article, the

²⁵ Legge 30 aprile 1998, n. 122, differimento di termini previsti dalla legge 31 luglio 1997, n. 249, relativi all’Autorità per le Garanzie nelle Comunicazioni, nonché norme in materia di programmazione e di interruzioni pubblicitarie televisive, pubblicata nella Gazzetta Ufficiale n. 99 del 30 aprile 1998

²⁶ Deliberazione n° 9/99, Approvazione del regolamento concernente la promozione della distribuzione e della produzione di opere europee, pubblicata nella Gazzetta Ufficiale n. 119 del 24 maggio 1999

adopted by the AGCOM Regulation no. 127/00 (Article 13) states that satellite channels are subject to the same quota obligations as the national terrestrial broadcasters in so far as there is no contrary provision. More specifically, for the promotion of European and Italian works, a minimum of 20 minutes of the weekly transmission time has to be reserved (Article 14 of the Regulation no. 127/00).

10.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Article 2 paragraph 3 of the Law 122/98 states that Italian broadcasters should reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services, talk shows and teleshopping, for European works created by independent producers. Public-service broadcasters should reserve at least 20% of the relevant transmission time for independent productions.

The definition of ‘independent producer’ is provided for in Article 2 paragraph 4 of the Law 122/98 and is better defined in the Regulation no. 9/99. According to the Italian legislation, a production company could be considered as independent when one of the following conditions are being fulfilled:

- The production company is not controlled by, or affiliated to, holders of concession, licence or authorisation for television broadcasting or,
- The production company does not supply, for a period of three years, 90% or more of its own production to only one broadcaster.

According to Italian regulation, for the first three years (up until 30 April 2001) only the criterion of control and affiliation to holders of concessions, licence or authorisation for television broadcasting should be applied. That means that up until 30 April 2001, the concept of independence is determined only by the production company’s share capital in the capital of a broadcasting organisation. The criterion of the amount of programmes supplied only to one broadcaster (less than 90% of the production in a three years period) will then be added and could also be applied. It is also provided that the AGCOM shall prepare a list of independent producers to be up-dated yearly.

Article 4 of the Law 122/98 also states that the duration of the broadcasting rights of productions which the broadcaster purchases, with regard to independent productions, is limited. The criteria about rights remaining with the producers would be set out by the AGCOM during the first three years from the adoption of the law (up until 30 April 2001).

The AGCOM can allow thematic channels to derogate totally or partially from the quotas for independent productions, if they apply for an exemption explaining the reasons (Article 5 of the Regulation no. 9/99).

10.3. Further (additional or stricter) national provisions set by national legislation

In Italy, there are additional provisions imposed on broadcasters to promote the production and distribution of television programmes. These provisions concern mostly the promotion of independent productions and of specific type of content (e.g. children’s programmes).

According to Article 2 paragraph 5 of the Law 122/98, all broadcasters under Italian jurisdiction, independently from the means of their transmission, should invest at least 10% of their profits of the previous financial year, which comes from advertising, in the production and acquisition of audiovisual programmes and programmes for children made by European producers, including independent producers. The films included in the aforementioned audiovisual programmes should cover at least 40% of this quota. Films are defined as being cinematographic films and TV films in one or more parts (as long as the total duration is at least 200 minutes). Where a broadcaster broadcasts on more than one channel, the proportions are calculated on the aggregate of those channels.

Even before the entrance into force of the Law 122/98, the broadcasting company Mediaset had signed an agreement with the APT (*Associazione Produttori Televisivi*) for three years (1997-1999) on the development of audiovisual productions. Mediaset committed itself to investing for each contractual year a quota of 10% of the net receipts from the advertising of its own television franchise-holder (RTI) calculated on the preceding operating year (and including revenues from sponsorship and teleshopping) in the production, co-production, advance purchase and purchase of domestic and European audiovisual works created by independent producers over the previous five years. These works would have been destined for television broadcasting on the Mediaset networks (Canale Cinque, Italia Uno and Rete Quattro).

With regard to the public service broadcaster, the aforementioned investment quota for audiovisual programmes and programmes for children made by European producers, including independent producers, is defined in its 'Service Contract' (*Contratto di Servizio*). From the year 1999, this quota cannot be less than 20% of its profits from the previous financial year, coming from sources complementary to the licence fee. In the framework of this quota, there should also be defined in the public service broadcaster's 'Service Contract' a quota for the production, or acquisition of animated cartoons produced for children's educational programmes which were made by Italian or European independent producers.

Public service broadcasters also have stricter obligations with regard to the broadcast of independent productions. They should reserve at least 20% of their transmission time, excluding the time appointed to news, sports events, games, talk shows, advertising, teletext services and teleshopping, for works made by independent producers.

Regarded as a measure to support the development of the Italian movie industry through the financial investment in pre-buys of TV rights (i.e. before the movie is actually produced) and/or co-productions, the special agreement signed between Canal+, which is the current ultimate owner of the Italian channel Telepiù, and the Italian Government in 1998 should be mentioned. The agreement was renewed for the year 2001 and 2002 and covers a total investment of 90 billion Italian Lire for the two years. A special interest is dedicated to independent cinema production and to the promotion of new talents, representing the future of the movie industry. A proportion of this amount (about 5%) is reserved for support of the Italian documentary production. Telepiù has a strong interest in this *genre* and intends to support independent productions which, though extremely interesting both in form and content, often find it difficult to have a TV window.

10.4. Monitoring and application of the EU quotas and further national provisions

The *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) is responsible for the monitoring and application of the above provisions and for providing the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF-Directive.

The AGCOM, considering the technical and objective problems deriving from the observance of the rules concerning quotas, and in order to safeguard the progressive development of broadcasting operators, verifies the compliance with these rules, taking into account the actual quantity of productions available on the market, the target of each broadcaster, the offer of programmes consistent with the maintenance of the editorial line and the peculiarity of the channel, with particular reference to the high audience hours (Article 2 paragraph 2 of the Regulation no. 9/99).

According to the Law 122/98 the quota provisions should be achieved on a monthly basis while the AGCOM monitors broadcasters' compliance on an annual basis, with reference either to the daily programme or the prime time programme. The AGCOM is organising a system of monitoring, which has the co-operation of broadcasters. It is a new system, currently being tested, with the aim of creating a better contact with broadcasters on the subject of European quotas.

To date, the AGCOM has commissioned the monitoring system of national TV terrestrial broadcasters (about ten) to a specialised Institute which records, every day, all their programmes on magnetic supports (videotapes) and then supplies the AGCOM with all the data it requires. Therefore, the AGCOM relies on the data supplied by the broadcasters related to the total annual broadcasting time but has also the possibility to control and double check the information provided, due to the magnetic supports of all programmes received from the Institute commissioned to record the broadcasters.

With regard to the investment quotas, the AGCOM relies on the data (income from previous financial year and percentage invested in audiovisual programmes and programmes for children) supplied by broadcasters. Broadcasters collect and analyse the data according to their own systems (e.g. periodic analysis of data by the RAI, database of broadcast programmes by Mediaset etc.)

AGCOM stated that it has not yet faced any obstacles in the monitoring process. However, there may be difficulties from the year 2001 on, since the AGCOM will also be responsible for monitoring all satellite broadcasters, thus increasing the number of channels which need to be controlled to about hundred.

According to the AGCOM, satellite channels authorised in 2000 might have problems complying with the quota provisions. This is due to high costs (difficulty in finding European programmes at competitive prices), the fact that they will be recently launched channels and additionally as Italy is a country with a low audiovisual production capacity in respect to the number of TV channels it has.

If the broadcasters do not comply with the limits imposed by the laws, the AGCOM can impose administrative fines according to the Law n. 249/97 (Article 7 paragraph 2 of the Regulation no. 9/99). Remedies against the measures of the Authority are the exclusive jurisdiction of the administrative tribunal and jurisdiction in the first instance is an exclusive

and non-transferable competence of Lazio administrative court (*TAR Lazio*). To date, there were no cases where the authority has imposed any sanctions.

10.5. National provisions implementing Articles 4 and 5 of the TWF Directive

10.5.1. Legge 30 aprile 1998, n. 122 (Law 122/98)

Art. 2.

(Promozione della distribuzione e della produzione di opere europee)

1. Le emittenti televisive nazionali, indipendentemente dalla codifica delle trasmissioni, riservano di norma alle opere europee, come definite dalla direttiva 89/552/CEE, del Consiglio, del 3 ottobre 1989, come modificata dalla direttiva 97/36/CE, del Parlamento europeo e del Consiglio, del 30 giugno 1997, più della metà del tempo mensile di trasmissione, escluso il tempo dedicato a notiziari, manifestazioni sportive, giochi televisivi, pubblicità, servizi teletext, talk show o televendite, anche con riferimento alle fasce orarie di maggiore ascolto. Tale percentuale deve essere ripartita tra i diversi generi di opere europee e deve riguardare opere prodotte, per almeno la metà, negli ultimi cinque anni. L'Autorità per le garanzie nelle comunicazioni, decorsi cinque anni dalla data di entrata in vigore della presente legge, ridefinisce le quote di riserva di cui al presente comma in conformità della normativa comunitaria.

(...)

3. I concessionari televisivi nazionali riservano di norma alle opere europee realizzate da produttori indipendenti almeno il 10 per cento del tempo di diffusione, escluso il tempo dedicato a notiziari, manifestazioni sportive, giochi televisivi, pubblicità, servizi teletext, talk show o televendite. Per le stesse opere la società concessionaria del servizio pubblico riserva ai produttori indipendenti una quota minima del 20 per cento.

10.5.2. Delibera 9/99 Approvazione del regolamento concernente la promozione della distribuzione e della produzione di opere europee (Regulation no 9/99)

Art. 2

Quote di emissione

1. Salvo quanto disposto dal comma 2, ciascuna emittente televisiva nazionale riserva alle opere europee più della metà del tempo mensile di trasmissione previsto dall'art. 2, comma 1 della Legge. La stessa quota di riserva deve essere rispettata anche nella fascia oraria di maggiore ascolto. Per fascia oraria di maggiore ascolto si intende quella compresa fra le ore 18.30 e le ore 22.30.

2. In attuazione del principio stabilito dall'art. 2 della Legge, che riserva di norma alle opere europee quote di programmazione, nell'ambito delle problematiche tecniche ed oggettive derivanti dal loro rispetto, l'Autorità verifica il rispetto dei limiti di cui al comma precedente tenendo conto, anche allo scopo di salvaguardare il progressivo sviluppo dei soggetti che operano nel settore radiotelevisivo, dell'effettiva quantità di prodotto disponibile sul mercato, del target di ciascuna emittente, dell'offerta di programmi coerente con il mantenimento della

linea editoriale e delle peculiarità della rete, con particolare riferimento alla fascia oraria di maggiore ascolto.

3. Le eventuali oscillazioni in difetto dovranno essere motivate dalle emittenti. Nel caso di oscillazioni superiori al sette per cento su base annuale, l'Autorità, nell'ambito della propria verifica valuta tali motivazioni rispetto ai termini attuativi del presente comma.

4. Qualora più canali televisivi appartengano a o siano controllati da un unico soggetto, la quota di riserva a favore delle opere europee viene determinata sulla programmazione complessiva dei canali stessi, fatto salvo un limite minimo del 20 per cento per ciascuno di essi. La quota di riserva sulla programmazione complessiva di cui al presente comma deve essere calcolata come percentuale della somma delle ore di programmazione di opere europee trasmesse complessivamente dai canali rispetto alla somma delle ore totali di trasmissione dei canali stessi.

5. Concorrono al raggiungimento della quota di riserva tutte le tipologie di opere europee; non è richiesto il raggiungimento della quota nell'ambito di ciascuna tipologia.

11. LIECHTENSTEIN

11.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

At present, there are two main legal instruments in the audiovisual sector, the Law on Radio and Television of 15 November 1978²⁷ (*Gesetz über Radio und Fernsehen*) and the Decree to the Law on Radio and Television of 10 December 1991²⁸ (*Verordnung zum Gesetz über Radio und Fernsehen*). By these legal instruments the TWF Directive has been incorporated into national legislation so far.

However, the current legislation on audiovisual media is under revision. It is planned to enact a totally revised (horizontal) Communications Law by the end of the year 2001 at the latest. A respective draft should be handed over to the *Diet*, the Liechtenstein Parliament, during the first quarter of the year 2001.

According to Article 16 of the Law on Radio and Television (*Radio- und Fernsehgesetz*) the organisation and distribution of television programmes require a licence. Article 21 paragraph 2 of the Law on Radio and Television states that ‘provisions about the transmission time and the programmes of a television station are included in the licence document’.

Article 6 of the Decree to the Law on Radio and Television of 10 December 1991, states that ‘the application for a licence should include, *inter alia*, information on the structure of the programme, the different types of programmes, the individual transmissions, in particular the programme schema’.

As it can be easily concluded, the current provisions incorporating Article 4 of the TWF Directive are very vague and general. They do not set any specific obligation to broadcasters to reserve a certain percentage of their transmission time for European works. In addition, no definitions of ‘relevant transmission time’ and ‘European works’ are included.

11.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

According to Article 16 of the Law on Radio and Television (*Radio- und Fernsehgesetz*) the organisation and distribution of radio or television programmes require a licence. Article 21 paragraph 2 of the Law on Radio and Television states that ‘provisions about the transmission time and the programmes of a radio or television station are included in the licence’.

Article 6 of the Decree to the Law on Radio and Television of 10 December 1991, states that ‘the application for a licence should include, *inter alia*, information on the structure of the programme, on the particular types of programmes, relation of own productions to the purchased productions, measures for the promotion of programmes of Liechtenstein’.

Also in this case, the current provisions incorporating Article 5 of the TWF Directive are very vague and general. They do not set any specific obligation of broadcasters to reserve a certain percentage of their transmission time for works created by producers who are independent of broadcasters. In addition, no definition of ‘independent producer’ is included.

²⁷ Liechtensteinisches Landesgesetzblatt, Jahrgang 1978, Nr. 42

²⁸ Liechtensteinisches Landesgesetzblatt, Jahrgang 1992, Nr. 2

11.3. Further (additional or stricter) provisions set by national legislation

In general, there are no further provisions imposed on broadcasters with the aim of promoting the production and distribution of television programmes. The legislator did not set out any specific provisions concerning any particular type of content, specific language requirements, or origin of productions (i.e. support for independent production).

11.4. Monitoring and application of the EU quotas and further national provisions

The Office for Communications is, by law, the responsible and competent authority for regulation of both the telecommunications and audiovisual sector. As regards the latter sector, the Office for Communications shares this task with the Government and the Media Commission (*Medienkommission*).

As mentioned at the beginning, in the television sector, there are at present no companies active which fall directly under the jurisdiction of the authorities of the Principality of Liechtenstein as defined in the TWF Directive. For this reason, the monitoring and application of the aforementioned provisions are not yet applicable in Liechtenstein.

11.5. National provisions implementing Articles 4 and 5 of the TWF Directive

11.5.1. Gesetz über Radio und Fernsehen vom 15.11.1978 (Broadcasting Law)

Art. 21

b) Konzessionsurkunde

(...) Die Konzessionsurkunde hat Bestimmungen zu enthalten über: (...)

e) die Sendezeiten und Programme

11.5.2. Verordnung zum Gesetz über Radio und Fernsehen vom 10.12.1991 (Decree to the Law on Radio and Television)

Art. 6

Inhalt des Konzessionsgesuches

Das Konzessionsgesuch ist schriftlich bei der Regierung einzureichen. Das Gesuch hat folgende Angaben zu enthalten: (...)

k) Inhalt und Aufbau des Programmes, Angaben über die vorgesehene Programmart, die eigenen Programme und die einzelnen Sendungen, insbesondere ein Programmschema, das erkennen lässt, wie der Gesuchsteller das Programm und die Sendungen gestalten will.

12. LUXEMBOURG

12.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The Directive 89/552/EEC was transposed in Luxembourg by the Law of 27 July 1991 on electronic media²⁹ (*Loi du 27 juillet 1991 sur les médias électroniques*). This Law has been recently modified by the Law of 2 April 2001³⁰, in order to adapt national legislation to the provisions of the amended TWF Directive (Directive 97/36/EC).

Article 27 of the Law of 27 July 1991 on electronic media as amended by the Law of 2 April 2001 states that the provisions on ‘European works’ and ‘works of independent producers’ are fixed by a Decree (règlement grand-ducal). This Decree of 5 April 2001³¹ was published together with the Law of 2 April 2001 in the *Mémorial A*, No 42 on 17 April 2001.

Article 3 paragraph 1 of the Decree of 5 April 2001 states that ‘where practicable and by appropriate means broadcasters, independently of means of transmission, should reserve for European works a majority proportion of their broadcasting time, excluding the time appointed to news, sport, games, advertising, teletext services and teleshopping’.

The ‘relevant transmission time’ includes all programmes, apart from news, sport, games, advertising, teleshopping and teletext services. With regard to the ‘majority proportion’, Luxembourg decided to use the wording of the Directive, without setting a specific percentage.

The so-called ‘non-slip-back clause’ has been incorporated into National Law in Article 3 paragraph 2 of the Decree of 5 April 2001.

12.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Article 4 of the Decree of 5 April 2001 states that ‘broadcasters shall reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for European works created by producers who are independent of broadcasters’.

National law in Luxembourg provides for a definition of the term ‘independent producer’. According to Article 2 paragraph 6 of the Decree of 5 April 2001, independent producers are considered to be producers of audiovisual works who are not broadcasters and every legal person who produces audiovisual works without being a broadcaster and whose capital is not mainly controlled by a broadcasting company.

²⁹ Loi du 27 juillet 1991 sur les médias électroniques, publié au *Mémorial A* No 47 du 30 juillet 1991.

³⁰ Loi du 2 avril 2001 portant modification de la loi du 27 juillet 1991 sur les médias électroniques et transposition de la directive 97/36/CE du Parlement Européen et du Conseil du 30 juin 1997, publié au *Mémorial A* No 42 du 17 avril 2001

³¹ Règlement grand-ducal du 5 avril 2001 fixant les règles applicables en matière de contenu en oeuvres européennes et en oeuvres de producteurs indépendants des programmes de télévision réputés relever de la compétence du Luxembourg conformément à la directive européenne “Télévision sans frontières”

12.3. Further (additional or stricter) provisions set by national legislation

According to the Ministry of State (*Ministère d'Etat*), in Luxembourg there are no further provisions concerning quotas. In general, there are no further provisions imposed on broadcasters with the aim of promoting the production and distribution of television programmes. The legislator did not set out any special provisions concerning specific type of content, specific language requirements, or origin of productions (i.e. support for independent production).

12.4. Monitoring and application of the EU quotas and further national provisions

The *Service des Médias et des Communications* (Media Department) is a service of the Prime Minister who in general is responsible for the audiovisual sector. Its main mission is to assist the Prime Minister in the definition and implementation of the audiovisual policy. In this context, it could be involved in the elaboration of a law or a decree whose definitive adoption depends on the legislative power.

The *Service des Médias et des Communications* is responsible for the monitoring and application of the above provisions and is also responsible for providing the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF Directive in Luxembourg.

According to Article 5 of the Decree of 5 April 2001, every broadcaster must provide the *Service des Médias et des Communications*, every two years, with a report on the achievement of the aforementioned quota proportions, including the reasons for failure to attain that proportion and the measures adopted or envisaged in order to achieve it.

The monitoring takes place on the basis of the statistical information the broadcasters are obliged to hand out to the *Service des Médias et des Communications* every two years. This is the only source of information for the *Service des Médias et des Communications*.

The percentage records, used for the following monitoring, are calculated channel by channel. The *Service des Médias et des Communications* monitors compliance with the quotas with a statistical report on the broadcast of European works and independent productions produced by the broadcasters. On the basis of this report, it can be seen whether the required proportion has been attained.

According to the *Service des Médias et des Communications*, the conditions which mostly affect broadcasters in attaining the quota provisions are costs, recently launched channel and also channels undergoing restructuring. According to the broadcasting company CLT-UFA, the conditions are costs, recently launched channel, thematic channel, country with a low audiovisual production capacity and with a restricted language area.

Regarding the compliance with the quota provisions, the broadcasting company CLT-UFA stated that certain channels achieved the quotas progressively since the Directive came into force, some (such as RTL7) could not reach a 'majority proportion' during the first years after their launching and others did not achieve the quotas because of economic restructuring (such as RTL9) or thematic restructuring.

In general, in cases of non-compliance with the provisions of the Law, the Minister asks the broadcasters to provide explanations (Article 35 of the Law of 27 July 1991 on electronic media as modified). In cases of continuous violation, the Government can revoke the licence.

In the past there were certain rare cases where channels did not achieve the required proportion of European works. These channels were invited to provide explanations and to indicate the measures undertaken by them in order to address the situation.

12.5. National provisions implementing Articles 4 and 5 of the TWF Directive

12.5.1. Loi du 27 juillet 1991 sur les médias électroniques

Art.27.- Promotion de la distribution et de la production de programmes télévisés

(1) Un règlement grand-ducal fixera les règles applicables en matière de contenu en œuvres européennes et en œuvres de producteurs indépendants en conformité avec la directive Télévision sans Frontières.

12.5.2. Règlement grand-ducal du 5 avril 2001 fixant les règles applicables en matière de contenu en œuvres européennes et en œuvres de producteurs indépendants des programmes de télévision réputés relever de la compétence du Luxembourg conformément à la directive européenne «Télévision sans frontières».

Art.3. Contenu en œuvres européennes

(1) Chaque fois que cela est réalisable, tout programme de télévision réserve à des œuvres européennes, au sens de l'article 2 ci-dessus, une proportion majoritaire de son temps de diffusion, à l'exclusion du temps consacré aux informations, à des manifestations sportives, à des jeux, à la publicité, aux services de télétexte et au télé-achat. Cette proportion, compte tenu des responsabilités de l'organisme de radiodiffusion télévisuelle à l'égard de son public en matière d'information, d'éducation, de culture et de divertissement, devra être obtenue progressivement sur la base de critères appropriés.

(2) Lorsque la proportion définie au paragraphe (1) ne peut être atteinte, elle ne doit pas être inférieure à celle qui est constatée pour le programme en moyenne en 1988.

Art.4. Contenu en œuvres européennes de producteurs indépendants

Chaque fois que cela est réalisable tout programme de télévision réserve au moins 10% de son temps d'antenne à l'exclusion du temps consacré aux informations, à des manifestations sportives, à des jeux, à la publicité, aux services de télétexte et au télé-achat à des œuvres européennes émanant de producteurs indépendants de l'organisme de radiodiffusion télévisuelle. Cette proportion, compte tenu des responsabilités de l'organisme de radiodiffusion télévisuelle à l'égard de son public en matière d'information, d'éducation, de culture et de divertissement, devra être obtenue progressivement sur la base de critères appropriés; elle doit être atteinte en réservant une proportion adéquate à des œuvres récentes, c'est-à-dire des œuvres diffusées dans un laps de temps de cinq ans après leur production.

13. NETHERLANDS

13.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

In the Netherlands there are different regulations for public-service broadcasters (Media Act) and private broadcasters (Media Decree). Though the instruments are different, they have the same status. Both are in the same way binding for the broadcasters.

The provisions of the TWF Directive have been incorporated almost completely word for word into national law (Article 54 of the Media Act and Article 52k of the Media Decree). With regard to the definition of 'European works', the Media Act, as well as the Media Decree, refer to Article 6 of the TWF Directive.

For public service broadcasters the relevant provisions can be found under the Media Act of 21 April 1987 (*Staatsblad* 249 of 1987). More specifically, the provisions of Articles 4 and 5 of the TWF Directive have been incorporated into Article 54 of the Dutch Media Act.

According to Article 54, paragraph 1 of the Media Act, public service broadcasters should devote at least fifty per cent of their television broadcasting time to programmes which may be qualified as European works within the meaning of Article 6 of the TWF Directive. With regard to national public service broadcasting, the percentage applies to each individual national television channel. The national public service broadcasters are broadcasting on three national television channels.

Article 54 has been incorporated in the Dutch Media Act by the amendment introduced to the Media Act by the Act of 18 Mai 1995. This Act was published in *Staatsblad* 320 in 1995 and came into force on 1 July 1995.

This article was changed for the first time by the amendment introduced to the Media Act by the Act of 5 July 1997: due to this amendment paragraph 4, under d, now states that the nationally broadcast teletext programme service will be disregarded for the purpose of Article 54. This Act has been published in *Staatsblad* 336 in 1997 and came into force on 1 September 1997.

Therefore, with regard to the relevant transmission time, the amended Art. 54 paragraph 4 of the Media Act states that, for the purposes of this Article, programmes consisting of news, programmes relating to sport, programmes which have the character of a game, with the exception of programmes of a cultural or educational nature which also have the character of a game, and the nationally broadcast teletext programme service should be disregarded. Paragraph 5 of Article 54 also excludes programmes of the Radio and Television Advertising Foundation (STER).

For private broadcasters, the relevant provisions can be found under the Media Decree of 19 November 1987 (*Staatsblad* 573 of 1987). More specifically, the provisions with relation to the European and independent works, can all be found in Article 52k of the Dutch Media Decree.

According to Article 52k, paragraph 1 of the Media Decree, private broadcasters should devote at least fifty per cent of their television broadcasting time to programmes which may be qualified as European works, within the meaning of Article 6 of the TWF Directive.

Article 52k has been incorporated into the Dutch Media Decree with the amendment introduced to the Media Decree by the Decree of 22 June 1992. This Decree was published in *Staatsblad* 334 in 1992 and came into force on 8 July 1992.

A few years later, Article 52k was amended by the introduction of the current paragraph 6 which says: 'In the case of programme services for special broadcasting purposes (which means subscription channels), the Media Authority (*Commissariaat voor de Media - Commissariaat* hereinafter) may, in exceptional circumstances, grant a temporary, partial exemption from the provisions of paragraph 1, on the understanding that the proportion may never be less than ten per cent.'

At first, Article 52k required, for subscription channels, only a percentage of ten per cent of European works. According to the European Commission, this exception made for subscription channels on the provisions of the TWF Directive was far too general. Therefore, the Dutch legislator has introduced the possibility of a temporary, partial exemption. The reason for creating the possibility of an exemption is that subscription channels sometimes have more difficulty devoting at least fifty per cent of their broadcasting time to European productions. This amendment of Article 52k has been incorporated in the Dutch Media Decree with the amendment introduced to the Media Decree by the Decree of 14 November 1996. This Decree was published in *Staatsblad* 589 in 1996 and came into force on 1 February 1997.

At the moment the government is preparing an amendment to the Media Decree which will enable the *Commissariaat* to also grant to private thematic channels (which are not necessarily on a subscription basis) in exceptional circumstances, a temporary, partial exemption from the provisions of paragraph 1 of Article 52k Media Act, on the understanding that the proportion may never be less than ten per cent. The reason for this amendment is that, due to the very nature of thematic channels, there will be limited content available for a given theme and not all of this content will originate from one of the EU Member States. In many of the subject areas of thematic channels, such content may not be in existence and, even where it does exist, can be very hard to licence.

By an amendment of the Media Decree by the Decree of 20 February 1999, the wording of Article 52k has been changed: due to the introduction of the Telecommunication Act which introduced new terms, the term 'subscription programmes' has been replaced by the current term 'programme services for special broadcasting purposes' which has the same meaning. The Decree of 20 February 1999 was published in *Staatsblad* 104 in 1999 and entered into force retroactively from 15 December 1998.

With regard to 'relevant transmission time', the same definition applies to private broadcasters as well, i.e. programmes consisting of news, programmes relating to sport, programmes which have the character of a game, with the exception of programmes of a cultural or educational nature which also have the character of a game, programmes relating to advertising or teleshopping and the nationally broadcast teletext programme service should be disregarded.

13.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Article 5 of the TWF Directive has also been incorporated by a Media Act for public service broadcasters and a Media Decree for private broadcasters.

With regard to national public service broadcasters, the provisions of Article 5 of the TWF Directive have been incorporated into Article 54 of the Media Act. This article was changed a second time, with the amendment introduced to the Media Act by the Act of 13 November 1997. As a consequence of this amendment, as proposed by the Dutch Parliament, the national public service broadcasters have to devote at least 25% of their television broadcasting time to independent programmes. Until that amendment, the percentage was – as with the private broadcasters – 10%. The Act was published in *Staatsblad* 544 in 1997 and entered into force on 1 January 1999.

Consequently, Article 54, paragraph 2 of the Media Act requires national public service broadcasters to devote at least 25% of their television broadcasting time to European works, which can be regarded as independent productions. This percentage applies to the national public service broadcasters as a whole, on the understanding that each national television channel broadcasts at least 17.5% of independent productions. An adequate proportion for recent works is defined in the Dutch Media Act as being at least one third of the independent productions.

Article 52k, paragraph 2 of the Media Decree requires private broadcasters to devote at least ten per cent of their relevant broadcasting time to European works which can be regarded as independent productions.

Article 54, paragraph 2 of the Media Act, as well as Article 52k, paragraph 2 of the Media Decree, describe under which conditions a company can be regarded as an independent producer.

As independent productions could be considered all programmes which have not been produced by:

- the broadcaster broadcasting the programme, or another broadcaster;
- a legal person in which a broadcaster holds either directly or indirectly through one or more of its subsidiaries, a share capital of at least 25%;
- a legal person in which two or more broadcasters hold either directly or indirectly through one or more of their respective subsidiaries, a share capital of more than 50%; or
- a company in which a broadcaster or one or more of its subsidiaries is as a general partner fully liable to the production company's creditors for its debts.

For consideration of programmes as independent productions, the same aforementioned criteria also apply to private broadcasters.

13.3. Further (additional or stricter) provisions set by national legislation

In the Netherlands, there are several provisions, in addition to the quota provisions of the TWF Directive, imposed on broadcasters to promote the production and distribution of

television programmes. These provisions concern specific type of content, specific language requirements and origins of productions.

13.3.1. Provisions concerning specific type of content

The first paragraphs of Article 50 of the Media Act, as last amended (in force since 1 January 2001) state that national public service broadcasters should use their television broadcasting time to provide a complete programme service, which must at least include programmes of a cultural, informative, educational and entertainment nature.

More specifically, at least twenty five per cent of the programming must consist of programmes of a cultural nature and at least thirty five per cent must be programmes of an informative or educational nature. Some of the programmes which are cultural in nature, equivalent to at least twelve and a half per cent of the broadcasting time allocated to the broadcasting association in question, shall consist of or relate to the arts.

On a national level, there is also a specific public service broadcaster, which has the legal task to provide programmes for cultural and ethnic minorities: the Programme Service Foundation (NPS). According to Article 15 of the Media Decree, the programme of the Programme Service Foundation (NPS) should include at least fifteen per cent of programmes for or in relation to ethnic and cultural minorities; and programmes of an educational nature aimed at young people. In the latest amendment of the Media Act (Concession Bill), it is announced that the percentage will be raised to 20%. At the moment the government is preparing an amendment to the Media Decree to that effect.

Article 51e of the Media Act provides for explicit obligations for regional public service broadcasters. A regional broadcasting establishment shall use its broadcasting time to provide a programme service of which:

- (a) at least fifty per cent consists of programmes of an informative, cultural and educational nature with a particular relevance to the province for which the programme service is intended; and
- (b) a minimum percentage, as shall be determined by Order in Council, consists of programmes which are produced by, or exclusively for, that establishment (Article 25 of the Media Decree states that this proportion should be at least 50%).

Although Chapter III of the TWF Directive is not applicable to local broadcasters, it could be mentioned that Article 51f of the Media Act provides for explicit obligations for local public service broadcasters. A local broadcasting establishment shall use its broadcasting time to provide a programme service of which:

- (a) at least fifty per cent consists of programmes of an informative, cultural or educational nature which have a particular relevance to the municipality for which the programme service is intended; and
- (b) a minimum percentage, as shall be determined by Order in Council, consists of programmes which are produced by, or exclusively for, that establishment (Article 25 of the Media Decree states that this proportion should be at least 50%).

13.3.2. Provisions concerning specific language requirements

According to Article 54a of the Media Act, public service broadcasters should devote at least fifty per cent of their relevant broadcasting time to programmes originally produced in the Dutch or Friesian language. Friesian language is the official second language of the Netherlands and is spoken in Friesland, one of the 12 provinces in the country. This obligation does not apply to the Radio and Television Advertising Foundation, government agencies, religious or ideological societies and political parties.

According to Article 52l of the Media Decree, private broadcasters should devote at least forty per cent of their television programme service to programmes originally produced in the Dutch or Friesian language. This obligation does not apply to programme services for special broadcasting purposes.

With regard to these further national obligations, a number of temporary exemptions on a channel by channel basis have been granted to the broadcasting company UPC by the *Commissariaat*. The national quota exemptions as granted by the Dutch Media Authority are as follows: 10% for channels Extreme Sports Channel, Sport1, Film1, Club, Avante for the years 2000, 2001 and 2002; 0% for Film1 (German Feed) for the years 2000, 2001 and 2002; and 10% for EXPO, Innergy for the years 2001 and 2002.

The reason for these exemptions is that, due to the very nature of thematic channels, there will be limited content available for a given theme and not all of this content will be available in the Dutch language.

13.3.3. Provisions concerning origins of productions

As already mentioned, since 1 January 1999 the national public service broadcasters as a whole are obliged by the Dutch Media Act to reserve at least twenty-five per cent of their broadcasting time for independent productions. The purpose of this modification was to strengthen the position of the independent producers, as well to stimulate the plurality of public broadcasting in the Netherlands. The legislator wanted public service broadcasters to have a more stimulating role in the development of the independent producers sector in the country.

As the *Commissariaat* stated, the public service broadcasters had many objections to the new quota. The aforementioned broadcasters considered the quota to be harmful to their autonomy as programme makers. The broadcasters found that they derive their right to exist from the making of programmes. For that reason they cannot be forced by the government to order more programmes from third parties. The producers on the other hand indicated that their position had become weaker over the last few years because the broadcasters seemed to produce more programmes themselves.

According to the producers, there was also the tendency for former employees of broadcasters to form autonomous production companies and subsequently produce only for their former employers. In the view of the Association of Independent Producers (OTP), it was unfair to consider these companies as fully independent producers.

As the parties involved failed at first to come to an agreement, the Dutch State Secretary for Media Affairs asked the *Commissariaat* to report on the reached percentages during the years 1996 and 1998. The *Commissariaat* established many differences between the way broadcasters classify programmes and the way producers label programmes. Often a broadcaster labelled a programme as an own production, when it had actually been made by an independent production company. After there was a correction of the data, it became apparent that public service broadcasters had almost fulfilled the quota of 25 per cent. There was even a rise from 22.7 to 24.7 per cent. This percentage includes programmes made by independent producers on the request of a broadcaster, co-productions between broadcasters and producers and also reruns. The *Commissariaat* concluded there had indeed been an increase in the number of production companies working exclusively for one broadcasting company, in some cases their former employer.

After long talks between the National Broadcasting Foundation (NOS), which represents the national public service broadcasters, the OTP, the State Secretary for Media Affairs and the *Commissariaat*, an agreement (*Convenant*) was signed between the *Commissariaat* and the NOS on 16 November 1999. In this *Convenant* it was stated how the public service broadcasters as a whole should meet the legal obligation to broadcast at least 25 per cent of independent productions.

The *Convenant* states that:

- only programmes which have been produced at the request of the public service broadcaster will be regarded as independent;
- in terms of reaching the percentage, reruns will also be counted, but only programmes broadcast between 16.00 and 24.00 hrs can be counted as independent productions, in order to exclude reruns broadcast during the night and morning;
- programmes made by former employees of broadcasters will be regarded as independent, but only after two years have passed since the producer left his employer;
- the NOS will report to the *Commissariaat* every three months;
- the *Commissariaat* will control each year whether the legal percentage of 25 per cent is met by the public service broadcasters as a whole;
- if in a certain year, the percentage has not been reached, the public service broadcasters will have to compensate for this during the next year.

13.4. Monitoring and application of the EU quotas and further national provisions

The *Commissariaat voor de Media* has the supervision of the observance of the Media Act, the Media Decree and the regulations of the *Commissariaat*, which are based on the Media Act and Media Decree. Therefore, the *Commissariaat* is responsible for the monitoring and application of all the aforementioned provisions. The Ministry is responsible for providing the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF Directive; the *Commissariaat* provides the relevant data.

The *Commissariaat* requests all broadcasters, public service as well as private, on request of the Ministry to provide all relevant data on the European and independent programmes in the last two years. As an explanation of the request, the *Commissariaat* includes a copy of the guidelines for monitoring the application of Articles 4 and 5 of the TWF Directive. So the definitions of Media Act, Media Decree and guidelines are applicable. The broadcaster is free

to choose either to make checks at random or to report on the whole period. Each individual channel of a broadcaster should be reported on.

The *Commissariaat* is now preparing a regulation to improve the monitoring and application of the above provisions. This regulation will also include a form which broadcasters will have to fill out when they report to the *Commissariaat*. The *Commissariaat* relies on data provided by broadcasters. In order to provide the *Commissariaat* with the relevant data, the different broadcasters have to do in-house monitoring. This monitoring is carried out in different ways.

For example, UPC (private broadcaster with thematic channels) has a special software (MediaMachine) that monitors the percentage of EU works by identifying the country of origin of each programme. Unfortunately it is not possible to monitor the language content of a given programme. Therefore, monitoring has to be done manually or with the co-operation of the various Channel Managers who provide the company with a list of all Dutch and Fries spoken programmes. A manual calculation on the linguistic quota achieved is based on the data provided.

Another private broadcaster (SBS) does not yet have an accurate automatic monitoring system, so the monitoring has to take place by hand, but they are working on a software application, which will enable them to monitor the required percentages as part of the programming process.

With regard to national public service broadcasting, the quota percentages apply to each individual national television channel. Each broadcast organisation within the system of public broadcasting is obliged to inform the NOS and the *Commissariaat* about the percentages of European works and independent productions in their programmes.

According to the *Commissariaat*, conditions that affect broadcasters in attaining the quota provisions of the Directive or the further provisions set by the Dutch legislation are: costs of purchasing European programmes, recently launched channels, thematic channels, pay-TV channels. According to some of the broadcasters questioned, the fact, that the Netherlands is a country with a restricted language area could also be seen as a disadvantage. NOS stated that copyright problems could be also added.

In past monitoring periods, the *Commissariaat* faced obstacles in the monitoring process. Some pay per view channels did not provide data because they were of the opinion that the provisions of Articles 4 and 5 of the TWF Directive do not apply to them.

During the period 1997-1998, the private broadcasters SBS6, TV10 and Canal+ did not meet the obliged percentages. For SBS6, the main reason given by the channel was the transmission time which should be taken into account. Programmes such as news, sports and games do not count towards the percentage, thus creating difficulties as SBS6 invests a large amount of its programming budget in these types of broadcasts made by Dutch producers. TV10 was in the transitional period before starting a new format. Canal+ obtained an exemption from the *Commissariaat*.

The *Commissariaat* has the right to act in situations of non-compliance with the EU quota provisions. It can impose fines to a maximum of 200,000 Dutch guilders (90,657 Euro). To date, SBS6 and TV10 have been fined. The *Commissariaat* imposed provisional fines.

With regard to SBS, a suspended fine of NLG 20,000 was imposed by the *Commissariaat* in 1999 due to non-compliance with the European quota requirement in 1997 and 1998. The execution of the fine was suspended because the *Commissariaat* agreed that there was no clarity on which transmission time has to be taken into account and how some programmes must be qualified. If SBS does not meet the European quota requirement in 1999/2000, the fine will then come into effect.

13.5. National provisions implementing Articles 4 and 5 of the TWF Directive

13.5.1. Media Act, Article 54

Article 54

1. At least fifty per cent of the total broadcasting time on each television programme service network of broadcasting establishments which have obtained national broadcasting time shall be devoted to programmes which may be qualified as European works within the meaning of article 6 of the European Directive.

2. At least twenty-five per cent of the total broadcasting time of broadcasting establishments which have obtained national broadcasting time shall be devoted to programmes of the kind referred to in subsection 1 which may be considered independent works. At least seventeen and a half per cent of the total broadcasting time on each television programme service network shall be devoted to programmes as referred to in the previous sentence. Programmes shall be considered independent works if they have not been produced by:

- (a) an establishment which has obtained national broadcasting time, or another establishment which provides a programme service;
- (b) a legal person in which an establishment which provides a programme service holds either directly or through one or more of its subsidiaries an interest of at least twenty-five per cent;
- (c) a legal person in which two or more establishments which provide a programme service hold either directly or through one or more of their respective subsidiaries a joint interest of more than fifty per cent; or
- (d) a company in which an establishment which provides a programme service, or one or more of its subsidiaries, is as a partner fully liable towards the company's creditors for its debts.

3. Further rules may be laid down by Order in Council concerning the application of subsection 2 and rules may be laid down on the basis of which, in cases other than those referred to in subsection 2 (a to d), programmes shall be considered independent works.

4. For the purposes of this section, the following television programmes shall be disregarded:

- (a) programmes consisting of news;
- (b) programmes relating to sport;
- (c) programmes which have the character of a game, with the exemption of programmes of a cultural or educational nature which also have the character of a game;
- (d) the nationally broadcast teletext programme service.

5. This section shall not apply to the broadcasting time of the Radio and Television Advertising Foundation, government agencies, religious and other spiritual organisations and political parties.

6. Establishments which have obtained regional broadcasting time shall devote at least fifty per cent of their broadcasting time to programmes which may be considered European works within the meaning of article 6 of the European Directive.

Establishments which have obtained regional broadcasting time shall devote at least ten per cent of their broadcasting time to programmes as referred to in the previous sentence which may be considered independent works. Subsection 2, third sentence, and (a) to (d), and subsections 3 to 5 shall apply *mutatis mutandis*.

7. Subject to the coordination regulation referred to in section 19a, subsection 1 (f), the board of directors shall ensure that the use of the broadcasting time satisfies the provisions laid down by or pursuant to subsections 1 to 5.

13.5.2. Media Decree, Art. 52k

Article 52k

1. Commercial broadcasting organisations shall devote at least fifty percent (50%) of their television programme to individual programmes which may be qualified as European works within the meaning of Article 6 of the European Directive.

2. Commercial broadcasting organisations shall devote at least ten percent (10%) of their television programme to individual programmes of the kind referred to in the preceding paragraph which have not been produced by:

- (a) the relevant organisation itself or another organisation which provides a programme;
- (b) a legal entity in which an organisation which provides a programme holds (through one or more subsidiaries) an interest of at least twenty-five percent (25%);
- (c) a legal entity in which two or more organisations which provide a programme hold (through their respective subsidiaries) a joint interest of more than fifty percent (50%); or
- (d) a company in which an organisation which provides a programme, or one or more of its subsidiaries, is as a partner fully liable towards the company's creditors for its debts.

3. At least a third of the individual programmes referred to in the second paragraph shall be no more than five years old.

4. For the purposes of this Article, the following individual television programmes shall be disregarded:

- (a) individual programmes consisting of news;
- (b) individual programmes relating to sport;
- (c) individual programmes which have the character of a game, with the exception of individual programmes of a cultural or educational nature which also have the character of a game;
- (d) individual programmes consisting of commercials;
- (e) individual programmes consisting of a series of displays with alpha-numeric data and other static images.

5. This Article shall not apply to commercial broadcasting organisations which provide television programme that can be received in one municipality only or in a limited number of adjacent municipalities.

14. NORWAY

14.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

European television programme material in Norway is regulated by the Broadcasting Act³² and additional Regulations No. 153 relating to broadcasting³³.

§2-6 of the Broadcasting Act provides that the King will issue further rules concerning the use by television companies of European programme material, including which programme categories the rules apply to, the definition of European programme material and the implementation of such rules.

These rules were issued by Chapter 2 of the Regulations No. 153 of 28 February 1997 relating to broadcasting, which entered into force on 28 February 1997.

According to §2-1 of the Regulations No. 153/1997, ‘television companies shall ensure that at least 50 per cent of their television transmission time that does not consist of news, sport, entertainment programmes which include competitions, advertising or teletext services shall be set aside for broadcasts of European works. The Ministry may issue further rules concerning the implementation of the above-mentioned provision, including transitional provisions’.

§2-3 of the Regulations No. 153/1997 provides for the definition of ‘European works’, which is similar to the one of the Directive.

The provisions of the Directive concerning quotas for ‘European works’ have been transposed almost word for word. Differences are minor and only for reasons of adjusting them to the Norwegian legal system.

Concerning the ‘relevant transmission time’, all programmes are included except news, sport, entertainment programmes including competitions, advertising and teletext services.

With regard to the ‘majority proportion’, the Norwegian legislator defined it by means of a specific percentage (50%).

14.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

According to §2-2 of the Regulations No.153 relating to broadcasting, ‘television companies shall ensure that at least ten per cent of their transmission time that does not consist of news, sport, entertainment programmes which include competitions, advertising or teletext services shall be set aside for broadcasts of European works produced by producers who are independent of the television company. An appropriate share of transmission time shall be set aside for programmes which are broadcast no more than five years after they were produced’.

³² Act No. 127 of 4 December 1992 relating to broadcasting

³³ Broadcasting Regulation of 28 February 1997 (Forskrift om Kringkasting), pursuant to the Act No.127 of 4 December 1992

The Ministry may issue further rules concerning the implementation of the provision in the first paragraph, including transitional provisions.

The term ‘independent production’ has not been defined in the Norwegian legislation. There is no definition of ‘independent producer’ included in the Regulations No.153 relating to broadcasting. However, the Mass Media Authority, which is responsible for monitoring the application of the EU quota provisions, by collecting the annual statistics from the broadcasters, encloses the suggested guidelines from the Commission and urges them to use these guidelines when processing the relevant data. Consequently, the guidelines and criteria laid down by the EC on the application of Article 5 of the TWF Directive (Recital 31) are generally used in order to qualify programmes as independent.

14.3. Further (additional or stricter) provisions set by national legislation

In Norway, there are some additional provisions imposed on broadcasters to promote the production and distribution of television programmes. These provisions concern mostly specific language requirements and the promotion of independent productions.

14.3.1. Provisions concerning specific language requirements

According to public service obligations, nationwide terrestrial broadcasters must also transmit programmes in the Sami language. These obligations are not set by the Broadcasting Act, but are terms in the licence. More specifically, the broadcast licence of TV2 stipulates quotas relating to Norwegian programming, as well as for genres, e.g. news, minorities.

TV2 was granted a licence on certain conditions. It must have at least one newscast a day, and it is required to have a certain public service profile, including a given percentage of programmes produced in Norway. A minimum of 50 per cent of the channel’s programmes must be produced in Norway within 8-9 years. The transmissions should also, in the long-term, contain a broad range of programmes suitable for both large and small viewer groups, including the Sami community and minorities. The stated aim is that TV2 shall contribute to the preservation and promotion of the Norwegian language, culture and identity.

14.3.2. Provisions concerning origins of productions

An in-house rule of the public service broadcaster NRK provides for a certain obligation, in that 50% of its programmes should be own productions. TVNorge has also an in-house rule which aims to improve the percentage of European and Norwegian programming every year.

TV2 is involved in the financing of film and television productions through its involvement in AVF (*Audiovisuelt produksjonsfond*). TV2 contributes NOK 10 million annually. The objective behind the AVF is to promote co-operation between the feature film and television sectors. Grants are given to independent producers that have a co-operation agreement with the contributing television company TV2 AS.

From the 1 July 2001, the Audiovisual Production Fund will be merged into the new Norwegian Film Fund. The Norwegian Film Fund will be established with a Board of Trustees having over-all responsibility for implementation of the various support measures.

The Ministry of Cultural Affairs will propose an amendment to the Broadcasting Act, which will allow a tax charge to be made to the State Treasury for allocation of the licence to broadcast nationwide programmes financed by advertising. Provided that the Norwegian Parliament (the Storting) adopts the Ministry's amendment bill, the licensee is obliged to pay a tax of NOK 25 million which will be earmarked annually for Norwegian audiovisual productions. The licence is to be awarded for a period of seven years with effect from 1 January 2003.

14.4. Monitoring and application of the EU quotas and further national provisions

The Mass Media Authority (*Statens Medieforvaltning*) is responsible for the monitoring and application of the above-mentioned provisions. Due to the fact that Norway is Member of the EFTA (European Free Trade Association) and party to the EEA (European Economic Area), the Royal Ministry of Cultural Affairs provides the ESA (EFTA Surveillance Authority), every two years, with the report on the application of Articles 4 and 5 of the TWF Directive.

According to §2-4 of the Regulations No. 153/1997 'television companies shall keep annual statistics which show the proportion of European works broadcast, including productions of more recent date. Annual statistics shall be sent to the Mass Media Authority by 1 March of the following year. The Ministry may issue further provisions relating to the collection of statistics'.

The Mass Media Authority produces a form based on the one that the Commission has issued for its reports, enclosing the Guidelines from the Commission as well and asks the broadcasters to follow these in their preparation of the statistics. TV2 uses, when monitoring the percentages, the 'analysis tool' within the plan master of the Encoda systems 'Broadcast master' – BSS, which is found to be fast and accurate. TVNorge monitors the percentages partly manually and partly by Excel, due to the fact that it is a small station. However, information is to be implemented into inventory/scheduling software for easier and more accurate reporting.

The Mass Media Authority relies on a percentage record, channel by channel, of total annual broadcasting time. It relies solely on data provided by broadcasters.

According to the Mass Media Authority, the only condition affecting broadcasters in attaining the quota provisions are costs, meaning the difficulty in finding European programmes at competitive prices. According to TV2 and TVNorge, the fact that Norway is a country with a restricted language area could also be added.

To date, there have been cases in Norway where channels did not comply with the quota provisions of the Directive. TVNorge, a commercial satellite broadcaster, had only 22 per cent European programmes in 1999. The channel has never actually reached the target of 50%, but the amount is increasing. According to TVNorge, in the year 2000, the number of hours transmitted with regard to 'European works' and 'independent productions' has increased considerably.

In cases of violation of the Broadcasting Act or of provisions laid down pursuant to this Act, the Mass Media Authority has the right to act and can issue a formal warning (§10-2 of the Broadcasting Act). In the event of repeated or serious violations of the Broadcasting Act or of provisions laid down pursuant to this Act, the Authority may revoke the licence. Such revocation may be time-limited (§10-4 of the Broadcasting Act). To date, the Mass Media Authority has not issued any sanctions against broadcasters for not complying with the quota provisions. However, the Authority has informed the broadcaster TVNorge that its proportion of European works is unacceptably low. TVNorge has been instructed to submit a report detailing how its proportion of European works will be increased.

14.5. National provisions implementing Articles 4 and 5 of the TWF Directive

14.5.1. Act No 127 of 4 December 1992 relating to broadcasting

Section 2-6. European television programme material

The King will issue further rules concerning broadcasters' use of European programme material, including which programme categories the rules apply to, the definition of European programme material and the implementation of such rules.

14.5.2. Regulations No 153 of 28 February 1997 relating to broadcasting, Chapter 2

Chapter 2 - European television programme material

§ 2-1. European television programme material

Television companies shall ensure that at least 50 per cent of the television transmission time that does not consist of news, sport, entertainment programmes which include competitions, advertising or teletext services shall be set aside for broadcasts of European works, cf. § 2-3.

The Ministry may issue further rules concerning the implementation of the provision in the first paragraph, including transitional provisions.

This section shall not apply to local television.

§ 2-2. Television programmes produced by independent producers

At least ten per cent of the television transmission time that does not consist of news, sport, entertainment programmes which include competitions, advertising or teletext services shall be set aside for broadcasts of European works produced by producers who are independent of the television company. An appropriate share of transmission time shall be set aside for programmes which are broadcast no more than five years after they were produced.

§ 2-1, second and third paragraphs, shall apply correspondingly.

15. PORTUGAL

15.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The Portuguese current basic legal framework concerning access and exercise to television broadcasting is established under Law no. 31-A/98. In particular, Articles 36 to 41 of this legal instrument implement Chapter III of the TWF Directive.

Formally adopted by the national parliament, Law 31-A/98 was published on 14 July 1998 in the *Diário da República* (i.e. the Portuguese Official Journal) and entered into force five days after its publication. The provisions of this instrument are applicable to all broadcasters under the Portuguese jurisdiction.

The quota provisions of the TWF Directive were originally implemented in Portugal by Articles 20 and 21 of Parliament's Law no. 58/90, of 7 September 1990, which defined the general rules of television activity. This legal instrument was replaced by the above-mentioned law, in order to adapt national legislation to the developments in the field of television broadcasting and, in particular, to comply with several of the amendments introduced in 30 June 1997 to the TWF Directive.

The Portuguese legislator mainly adopted the wordings of the Directive. Definitions such as 'transmission time', 'majority proportion' or 'European works' are similar or identical to those mentioned in the TWF Directive.

Article 37 paragraph 1 of the Law 31-A/98 states that 'broadcasters (...) shall reserve for European works a majority percentage of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping'.

Regarding the wording 'majority proportion', Portugal has chosen to transpose it with another wording. Law 31-A/98 speaks of a 'majority percentage' of 'European works'. However, the meaning is the same as that of the Directive. As for the 'relevant transmission time' of which a majority percentage should be reserved for European works, it includes all programmes, except for news, sports, games, advertising, teletext and teleshopping.

Since Article 37(1) of Law 31-A/98 already requires a 'majority percentage' for European works, and bearing in mind the reasons which led to the adoption of the so-called 'non-slip-back clause', the Portuguese authorities did not consider it necessary to formally incorporate that provision into national law.

15.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Concerning 'independent productions', the Portuguese legislator stayed close to the wording of the TWF Directive. Article 38 of the Law 31-A/98 states that 'broadcasters (...) shall reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for European works created by producers who are independent of broadcasters, which have been produced within the last five years'.

The Portuguese public television broadcaster (RTP) has a double obligation with regard to independent productions. Not only should a 10% minimum of the respective transmission time be reserved for independent productions (Article 38 of Law 31-A/98) but also, at least 10% of the programming budget should be devoted to the investment of independent productions (Clause 6th of the Agreement on Public Service Mission signed with the Government in December 1996).

There is not yet a definition of the term ‘independent producer’ under Portuguese legislation. Nevertheless, indicative criteria, as is set out in Recital 31 of TWF Directive, and the guidelines issued by the EC for the purposes of monitoring the application of Articles 4 and 5 of the TWF Directive are being taken into account.

According to the broadcasters questioned, productions made by production companies that have no links to broadcasters and productions made outside the broadcaster’s facilities (studios) in which all the resources are provided by the producer, and where the broadcaster pays only a global price, including all charges (‘turn-key’ contracts) are considered by them as independent productions. The same applies for co-productions in which the main responsibility for production lies with the producers, but certain means of production, or facilities, other than money, are supplied by the broadcaster.

15.3. Further (additional or stricter) provisions set by national legislation

The Portuguese legislator provided for further provisions which mainly relate to the protection of the Portuguese language. However, and in addition to cultural and language policy goals, these provisions also concern specific types of content requirements and the origins of productions.

15.3.1. Provisions concerning specific type of content

The Portuguese public television broadcaster (RTP), according to the terms of the Agreement on public service mission signed with the Government in December 1996, is committed to the fulfilment of several obligations for the production and broadcast of television programmes.

The RTP is obliged to produce and broadcast, on a regular basis, drama, choreographic or music programmes made for television or represented by independent companies for a minimum of 26 hours per year. The same amount of time should be also reserved for Portuguese fiction works and ‘creative documentaries’, for each category of programmes. It should also produce and broadcast new fiction works (first releases) for a minimum of 12 hours per year in order to help new talents (Clause 6th of the above mentioned Agreement on Public Service Mission).

15.3.2. Provisions concerning specific language requirements

According to Article 36 of the Law 31-A/98, channels with national coverage must dedicate at least 50% of their transmission time, excluding the time appointed to advertising, teleshopping and teletext services, to programmes originally produced in the Portuguese

language. In addition to that, television broadcasters must also dedicate at least 15% of their transmission time to the broadcasting of creative programmes originally produced in the Portuguese language.

The aforementioned percentages may be fulfilled, by up to 25%, with programmes originating from Portuguese speaking countries, apart from Portugal. The compliance with the aforementioned percentages should not occur during low audience time hours.

The Portuguese legislator set out specific percentages for the broadcast of works originally produced in the Portuguese language. The relevant transmission time of which 50% should be reserved for works originally produced in the Portuguese language, includes all programmes except for advertising, teleshopping and teletext services. That means news, sports events, and games are also included in the definition of the relevant transmission time, contrary to the respective definition adopted for European works.

Special mention has also been made in relation to the audience times. The percentages of the works originally produced in the Portuguese language should not be achieved in low audience times. Such a requirement has not been set out for the broadcast of 'European works' or 'independent productions'.

15.3.3. Provisions concerning origins of productions and finance of audiovisual production

As mentioned above, the public service broadcaster (RTP) is committed to the fulfilment of several obligations for the production and broadcast of television programmes, including the need to keep a balance between in-house and independent production. Not only should a 10% minimum of the respective transmission time be reserved for independent productions (Article 38 of Law 31-A/98) but also, at least, 10% of the programming budget should be devoted to the investment of independent productions (Clause 6th of the above mentioned Agreement on Public Service Mission).

By indirect means, all terrestrial television broadcasters also give their contribution to the increase of production and distribution of television programmes, once they are obliged to pay a tax of 4% on their advertising income. This is then used to fund the Portuguese cinema and audiovisual aid mechanism.

Emphasis should be given to the innovative voluntary 'partnership agreements' between the public authorities (The Ministry of Culture, by its administrative body the Institute for the Cinema, Audiovisual and Multimedia - ICAM) and all the national and terrestrial Portuguese television broadcasters: RTP (public service broadcaster), SIC and TVI (commercial broadcasters). Under these agreements, in general terms, the Portuguese government repays the investment of the broadcasters in film production in order to facilitate the finance of further audiovisual production.

15.4. Monitoring and application of the EU quotas and further national provisions

The *Instituto da Comunicação Social* (Institute for the Media - ICS hereinafter) is responsible for the monitoring and application of the above-mentioned provisions and for providing the Commission, every two years, with the report on the application of Articles 4 and 5 of the

TWF-Directive. (Article 66 of the Law 31-A/98; Article 3 of the Decree-Law 34/97, as amended by the Decree-Law 65/99).

The criteria used in the implementation of the quota provisions are established in Article 39(1) of the Law 31-A/98, which states that ‘the accomplishment of the percentages referred to in Articles 36 to 38 (*that is to say, the percentages related to the protection of the Portuguese language and to European and independent productions*) is evaluated on an annual basis, having regard to the specific nature of the thematic channels, the broadcaster’s informational, educational, cultural and entertainment responsibilities and, in the case of non-public service channels, the market conditions or the results presented in the previous year of activity’.

All television broadcasters have an obligation to present, in the first quarter of each year, to the ICS, in accordance with the model defined by it, all the elements necessary to verify the accomplishment of the obligations foreseen in Articles 36 and 38 referring to the previous year (Article 41 of the Law 31-A/98).

The information presented by broadcasters is complemented with the recording by the ICS of all relevant broadcasts. Data referring to such broadcasts is analysed and provided by an independent private corporation (Markttest), and then verified by ICS’s monitoring services.

Therefore, the monitoring of the quota provisions is based on treatment of all the information provided by the random selection of regular broadcasts during six weeks per year (three for each semester), analysed channel by channel. The ICS did not face any obstacles during past monitoring periods.

According to the ICS, the conditions that affect broadcasters in attaining the quota provisions are: costs of the purchase of European programmes, recently launched channel, country with a low audiovisual production capacity, and country with a restricted language area. According to the broadcasters questioned, these conditions are limited to costs, country with a low audiovisual production capacity and a restricted language area.

According to the ICS, new thematic and pay-TV channels that recently emerged in the Portuguese audiovisual landscape may experience, in the near future, the difficulties already felt by similar broadcasters in attaining the quota provisions laid down in the TWF Directive. The monitoring of these special channels in later reports will be carried out according to the suggested new guidelines prepared by the Commission.

There were cases in Portugal where channels did not comply with the quota provisions of the Directive. The existing cases of non-compliance are only related to the quotas for European works (with the exception of the private broadcaster TVI, which also did not reach the proportions foreseen for independent productions from 1993 to 1995, that is to say during the first three years of its activity).

With regard to the quotas for European works, SIC and TVI (private commercial channels) have not yet complied with the percentages of that provision. However, in both cases, the ICS stated that the performances of the aforementioned channels on this subject have increased since the launching of their activity (1993). Apart from their recent arrival on the market, other reasons given by the broadcasters for failing to comply with the quotas are the restricted

nature of the Portuguese advertising market and the fragility of the national production industry.

The ICS has the right to act in cases of non-compliance with the quotas. According to Article 64 of the Law 31-A/98, infringements to quota provisions established under national law 31-A/98 are deemed to be *contra-ordenações*, meaning a type of a sanction placed, from the Portuguese main doctrinal point of view, between penal and administrative sanction categories. These infringements are also punishable by a fine of between 2,000,000 to 20,000,000 Portuguese escudos (around 10,000 and 100,000 Euro, respectively).

The Portuguese authorities have already drawn the attention of private commercial broadcasters SIC and TVI to the need to make all possible efforts to bring the percentages of European works closer to the objectives laid down by the TWF Directive. However, the progressive improvement noted in both cases, the fact that the guidance given by the Directive is only a recommendation and also the fact that the Portuguese authorities are aware that any penalty could have serious effects on the broadcasters, have prevented them from imposing penalties. However they are closely monitoring the situation in their regular dialogue with these broadcasters.

15.5. National provisions implementing Articles 4 and 5 of the TWF Directive

Lei n.º 31-A/98 de 14 de Julho, (Law 31-A/98), Art. 36-41

Artigo 37.º

Produção europeia

1 - Os operadores de televisão que explorem canais de cobertura nacional devem incorporar uma percentagem maioritária de obras de origem europeia na respectiva programação, uma vez deduzido o tempo de emissão consagrado aos noticiários, manifestações desportivas, concursos, publicidade, tevenda e teletexto.

2 - A percentagem a que se refere o número anterior deve ser obtida progressivamente, tendo em conta os critérios a que se referem os n.º 1 e 3 do artigo 4.º da Directiva n.º 89/552/CEE, do Conselho, de 3 de Outubro, alterada pela Directiva n.º 97/36/CE, do Parlamento e do Conselho, de 30 de Junho.

3 - A qualificação prevista no n.º 1 processa-se de acordo com os instrumentos do direito internacional vinculativos do Estado Português.

Artigo 38.º

Produção independente

Os operadores de televisão que explorem canais de cobertura nacional devem assegurar que pelo menos 10% da respectiva programação, com exclusão dos tempos consagrados aos noticiários, manifestações desportivas, concursos, publicidade, tevenda e teletexto, sejam preenchidos através da difusão de obras europeias, provenientes de produtores independentes dos organismos de televisão, produzidas há menos de cinco anos.

16. SPAIN

16.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

The TWF Directive was incorporated into Spanish legislation in 1994 by the Law 25/94. This law was adopted on 12 July 1994³⁴ and has been last modified by the Law 22/99 of 7 June 1999. The modified Law applies to terrestrial, satellite and cable TV, and to all public and private broadcasters.

In general, the wordings of the Directive have been used. However, there are some noticeable differences. Specific percentages have been set out and more detailed rules, due to linguistic aims, have been imposed. Investment obligations have also been imposed. A transition period has been foreseen in order to adapt progressively and meet the quotas.

Article 5 paragraph 1 of the Law 25/94 provides that ‘all broadcasters shall reserve 51% of their annual transmission time for European works’.

With regard to the ‘transmission time’, the wording of the Directive has been chosen. ‘Relevant transmission time’ includes everything, apart from time appointed to news, sports events, competitions or games, advertising, teletext services and teleshopping (Article 7 of the Law 25/94 as amended). Article 7 paragraph 2 provides for an exemption. For pay-TV, where channels offered in a ‘bouquet’ by the same broadcaster, the total amount of transmission time should be considered as ‘relevant transmission time’.

With regard to the majority proportion, the Spanish legislator has chosen to transpose it by means of a percentage. Article 5 paragraph 1 of the Law 25/94 speaks of a 51% of broadcaster’s transmission time (as defined above). It should be taken into account that Spanish legislation allows for a process of gradual harmonisation.

Thus, the First Transitional Provision of the Law 25/94 states that ‘the proportion established on Article 5 for the transmission of European works might be attained by broadcasters gradually, so that at the end of the fourth year counted from the date that this law came into force (this period ended on 14 April 1998) or, for later broadcasters, at the beginning of their broadcast, the proportion should attain 40% of relevant transmission time. Nevertheless, the percentage must be attained gradually. When this period has passed, the percentage must be raised every year until the set proportion (51%) is achieved, as stated by Article 5’.

In that sense, there is a ‘non-slip-back clause’, due to the fact that the transitory provisions demand that the approximation to the percentage of 51% should be gradual. That means, that until the 51% legal percentage is reached, the broadcasters should not broadcast a percentage lower than the one achieved in previous years as already determined.

³⁴ Ley 25/1994, de 12 de Julio, publicada en el B.O.E. Núm. 166, de 13 de Julio de 1994, por la que se incorpora al ordenamiento jurídico español la directiva 89/552/CEE, sobre la coordinación de disposiciones legales, reglamentarias y administrativas de los estados miembros, relativas al ejercicio de actividades de radiodifusión televisiva, modificada por la ley 22/1999, de 7 de junio, publicada en el B.O.E. Núm. 136, de 8 de Junio de 1999.

16.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

In Spain, all broadcasters shall reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for European works created by producers who are independent of broadcasters (Article 6 of the Law 25/94, as amended by Law 22/99). More than half of these broadcasts should be recent works, meaning works produced in the last five years.

Also with regard to ‘independent productions’, the Spanish legislation allows for a process of gradual harmonisation. Thus, the Second Additional Provision states that the proportion established on Article 6 of the Law 25/94, could be attained in a gradual process, but within a maximum period of four years. For broadcasters in operation after the 31 December 1988, their first broadcast year should be regarded as the year of reference.

Spanish national law provides for a definition of the term ‘independent producer’. According to Article 3g) of the Law 25/94 an ‘independent producer’ is considered to be, every natural or legal person who is not under the dominant influence of broadcasters because of either ownership reasons, capital sharing reasons, financial participation or by the management rules.

There is a dominant influence, directly or indirectly, due to ownership or capital sharing reasons, when a broadcaster:

- holds more than 50% of the capital share of the production company, or
- disposes the majority of the rights of vote, or
- has the right to appoint more than the half of the administrative or executive bodies.

16.3. Further (additional or stricter) provisions set by national legislation

Spain has further provisions imposed on broadcasters which are aimed at the production and distribution of television programmes concerning mainly language requirements, specific type of content and investment mechanisms.

According to Article 5.1 of the Law 25/94, ‘broadcasters should allocate at least 5% of their annual income of the previous financial year, in accordance with their operating account, towards the financing of European feature films and European films made for television’. According to the Audiovisual Council of Catalonia (*Consell de l’Audiovisual de Catalunya* - CAC hereafter), the reasons for this obligation is to be more effective in promoting European works. In fact, this kind of quota is considered by the CAC more effective than the quotas of transmission time. This obligation was brought by modification of the Law in 1999.

According to Article 5.2 of the Law 25/94, more than 50% of the transmission time reserved for European works, shall be devoted to European works originally produced in one of the official Spanish languages (Catalán, Gallego, Vasco and Castellano).

According to Article 2 paragraph 5 of the Law 25/94 as amended, the Autonomous Communities (*Comunidades Autónomas*) can introduce content rules equivalent to the ones contained in Chapter II of the Law (EU quotas) with the aim of promoting the audiovisual production in the respective languages applicable to the local broadcasters under their

jurisdiction. As examples could be regarded the Catalan Law³⁵ introducing the obligation for the film industry and radio and TV broadcasters to comply with quotas for audiovisual works in Catalan and the Galician Audiovisual Law of September 1999³⁶ which is concerned mainly with the promotion of the Galician film industry and the Galician language in audiovisual works.

In order to promote audiovisual production, some broadcasters have agreements with independent producers. Sogecable (Canal+) has signed an agreement with the *Federación de Productores de Cine y Audiovisual* (FAPAE), and is investing 3,600 millions of Spanish pesetas each year in the Spanish independent audiovisual production. It is a three years agreement (from 1999 to 2001).

The broadcasting channel TV3 of Catalonia has a special agreement with the *Associació Catalana de Productors Cinematogràfics i Audiovisuals Catalans* (ACPCA), and with *Barcelona Audiovisual*. The agreement will be valid for 3 years (from 1999 to 2001), comprising a total financial amount of € 21,035,423.

16.4. Monitoring and application of the EU quotas and further national provisions

The *Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información* (State Department for Telecommunications and for the Information Society - SETSI hereafter) within the Ministry of Science and Technology is responsible for monitoring and controlling the above provisions.

However, due to the federal structure of Spain, this authority has no powers concerning several broadcasters, which are controlled by the relevant regional authority (Article 19 of the Act 25/94, as amended by the Act 22/99). This situation affects:

- Broadcasters directly managed by the Autonomous Communities (e.g. the public regional broadcasters: ETB in the Basque Country; TVG in Galicia) or
- Broadcasters whose license has been granted by an Autonomous Community (e.g. the private regional DTTV operators Onda 6 and Quiero TV/Onda Digital, who provide their services in the Autonomous Community of Madrid, and whose concessions have been granted by the Government of the Autonomous Community of Madrid) or
- Broadcasters whose services are provided within the territory of a single Autonomous Community.

The Autonomous Community of Catalonia is the only one with an independent audiovisual authority, the *Consell de l'Audiovisual de Catalunya* (CAC). In the rest of the Autonomous Communities (Andalucía, Aragón, Asturias, Baleares, Basque Country, Canarias, Cantabria, Castilla-La Mancha, Castilla-León, Comunidad Valenciana, Extremadura, Galicia, Madrid, Murcia, Navarra, La Rioja) the relevant authority is a Department of the Government of the Autonomous Community in question.

It must be taken into account that, at national level, nearly all the audiovisual powers (including content control, the granting of concessions or the ability to appoint or dismiss the Director of the national public TV) still belong to the Government. The only existing national

³⁵ Ley catalana de política lingüística, 1/1998

³⁶ Ley 6/1999, de 1 de septiembre, del audiovisual de Galicia, Diario Oficial de Galicia Nr. 174

regulatory authority with responsibilities in the audiovisual sector, the Telecommunications Market Commission (*Comisión del Mercado de las Telecomunicaciones*), mainly deals with free competition in the audiovisual sector and with enforcement of the Spanish legislation implementing the EC Directive 95/47. For the moment, there is not a national regulatory authority on audiovisual contents in Spain.

The *Subdirección General de Contenidos de la Sociedad de la Información para el desarrollo de la sociedad de la información* (Administrative Department for Information Society contents) is responsible for providing the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF Directive. This organisation is dependent upon the *Dirección general para el desarrollo de la sociedad de la información* (Directorate-General for the Development of the Information Society) and attached to SETSI.

The total broadcasts of general interest channels are controlled by the *Subdirección General de Contenidos de la Sociedad de la Información*. The broadcasters provide this Department with all the necessary data in order to determine whether the quota requirements have been met. For the channels of conditional access or the satellite channels, samples are analysed periodically, with regard to programme and broadcasts.

Consequently, for channels of conditional access or satellite channels, the authority relies solely on sampling. For all the others, calculation of the quotas is made on the basis of a percentage record of the total annual broadcasting time.

SETSI applies the data referred to in Articles 4 and 5 of the Directive, which has been collected by the different operators, and compares them with that obtained by the responsible administrative department. In cases of significant disparity, it launches a procedure in order to determine the accuracy of the data given by the channels. This procedure should facilitate the necessary documents which justify the obtained percentages.

More specifically, the broadcaster of Catalonia TV3 monitors its broadcasts by integrated information systems for control and planning. The databases for programmes have the appropriate fields to monitor such information. In case of productions bought from other countries, information fields in databases are fed with data received from distributors. According to TV3 the system is mostly satisfactory. The only problematic aspect is the occasional lack or incompleteness of data on some programmes, in particular with the purchase of big packages of programmes from distributors (this happens in about 10% of cases, but the situation is improving). There is also some uncertainty about the criteria used for the definition of nationality of production between distributors' databases and whether they coincide with the definition of the TWF Directive.

According to the pay-TV channel Canal+, the monitoring and collection of the data is being carried on by the department responsible for the purchase of audiovisual works-rights. This department gives all relevant information to a database produced by the channel. Moreover, there is a supervision from Antenna management in order to amend possible mistakes. The system is satisfactory due to its automation and speed but there is a need for supervision, as if any database fields are not completed, the results could be partially wrong.

According to Article 6 of the Real Decreto 1462/1999 of 17 September 1999, broadcasters should, before the 30th June of each year, provide the *Secretaría General de Comunicaciones* with a report indicating the way in which they complied with the obligation of financing

feature films and television films as required by Article 5.1 paragraph 2 of the law 25/94. The *Secretaría General de Comunicaciones* can request from the broadcasters, additional data which will allow them to verify or check the compliance with the aforementioned obligation.

With regard to channels, under the jurisdiction of the Autonomous Communities, the First Additional Provision of the Law 25/94 as amended, states that the Autonomous Communities should provide the Government, upon request, with all necessary data to inform the EC about the quota provisions compliance of the broadcasters under their jurisdiction.

In Catalonia, CAC within the framework of its new powers (in accordance with the law 2-2000, of 4 May) is analysing how this monitoring could be executed. This monitoring would affect the Catalan broadcasters, and would be done in co-operation with the Ministry of Science and Technology.

During past monitoring periods, SETSI faced some obstacles in the monitoring process. In 1998, there were problems with the channels transmitted by newly introduced digital platforms.

According to SETSI, the conditions affecting broadcasters in attaining the quota provisions are recently launched channel, thematic channel and pay-TV channel. According to TV3 and Canal+ the fact that Spain is a country with a restricted language area could be also added. According to the public service broadcaster TVE, costs and difficulty in finding European programmes at competitive prices and of interest to the audience are the main factors.

SETSI has the right to act in non-compliance cases. According to Article 20 of the Law 25/94 as amended, non-compliance with the quota obligations concerning 'European works', 'independent productions' and 'recent works' is considered as a severe infringement which could be punishable with fines of up to 50 million Spanish pesetas. To date, no sanctions have been imposed.

16.5. National provisions implementing Articles 4 and 5 of the TWF Directive

16.5.1. Ley 25/1994, de 12 de julio (Law 25/1994 of 12 July 1994)

Artículo 5. Obras europeas.

1. Las entidades que presten directa o indirectamente el servicio público de televisión deberán reservar el 51 por 100 de su tiempo de emisión anual a la difusión de obras europeas.
2. Más del 50 por 100 del tiempo de reserva a que se refiere el número anterior, se dedicará, a su vez, a la emisión de obras europeas en expresión originaria en cualquier lengua española.

Artículo 6. Obras europeas de productores independientes.

Los prestadores del servicio público de televisión, dentro del tiempo de reserva establecido en el número 1 del artículo anterior, reservarán un mínimo del 10 por 100 de su tiempo de emisión a obras europeas de productores independientes de las entidades de televisión, de las que más de la mitad deberán corresponder a obras producidas en los últimos cinco años.

Artículo 7. Exclusión de cómputo.

A los efectos de los artículos anteriores de este capítulo, no se computará como tiempo de emisión el dedicado a informaciones, transmisiones deportivas, concursos o juegos, publicidad, servicios de teletexto y a las ofertas directas al público para la venta, compra, alquiler de productos o prestación de servicios.

16.5.2. Ley 22/1999, de 7 de junio, de Modificación de la Ley 25/1994, de 12 de julio (Law 22/1999 of 7 June modifying Law 25/1994 of 12 July)

Cinco. Se modifica la redacción del artículo 5 en los siguientes términos:

1. Se da nueva redacción al apartado 1, con el siguiente texto:

«1. Los operadores de televisión deberán reservar el 51 % de su tiempo de emisión anual a la difusión de obras audiovisuales europeas.

Para el cumplimiento de esta obligación, deberán destinar como mínimo, cada año, el 5 % de la cifra total de ingresos devengados durante el ejercicio anterior, conforme a su cuenta de explotación, a la financiación de largometrajes cinematográficos y películas para televisión europeas.»

(...)

Seis. Se sustituye la actual redacción del artículo 6 por la siguiente:

«Artículo 6. Obras europeas de productores independientes.

Los operadores de televisión, dentro del período de tiempo establecido en el apartado 1 del artículo anterior, reservarán un mínimo del 10 % de su tiempo total de emisión a obras europeas de productores independientes respecto de las entidades de televisión, de las que más de la mitad deberán haber sido producidas en los últimos cinco años.»

Siete.

1. El artículo 7 pasa a ser apartado 1 del mismo artículo, con la redacción siguiente:

«1. A los efectos de los artículos anteriores de este capítulo, no se computará como tiempo de emisión el dedicado a informaciones, transmisiones deportivas, concursos o juegos, publicidad, televenda y servicios de teletexto.»

2. Se crea un nuevo apartado, con el número 2, en el artículo 7, con el siguiente texto:

«2. A los mismos efectos, en los servicios de pago para las emisiones de televisión de un operador que se contraten de forma conjunta e inseparable dentro de una determinada oferta, las disposiciones de los citados artículos se aplicarán a su tiempo total de emisión.»

17. SWEDEN

17.1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

Articles 4 and 5 of the TWF Directive have been incorporated into Swedish legislation by the Act concerning the Satellite Transmissions of Television Programmes to the General Public (SFS 1992:1356). The Act was adopted on 17 December 1992 and entered into force on 1 January 1994.

In 1996 the Radio and Television Act repealed that Act. The Radio and Television Act (Swedish Broadcasting Law) was adopted on 19 June 1996 and entered into force on 1 December 1996. The Radio and Television Act was amended on 17 December 1998 and entered into force on 1 February 1999 (SFS 1996:844).

Section 8 of Chapter 6 of the Radio and Television Act states that ‘unless special cause otherwise dictates, any person who broadcasts television programmes by satellite or by virtue of a licence issued by the Government shall ensure that more than half of the annual broadcasting time is taken up by programmes of European origin’.

For the purposes of this section, ‘broadcasting time’ means the time when programmes are broadcast with content other than news, sport, competitions, announcements and sales programmes. Nor shall transmissions of text only be included in the transmission time.

With regard to ‘majority proportion’, the Swedish legislator did not transpose it by a certain percentage. However, the Act speaks of ‘more than half of the annual broadcasting time’, which could be interpreted as 51 per cent.

17.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

Section 8 of Chapter 6 of the Radio and Television Act states that ‘unless special cause otherwise dictates, any person who broadcasts television programmes by satellite or by virtue of a licence issued by the Government shall ensure that at least ten per cent of the annual broadcasting time or at least ten per cent of the programme budget is dedicated to programmes of European origin which have been produced by independent producers; as large a portion as possible should consist of programmes which have been produced during the immediately preceding five years’.

The Swedish legislator has incorporated Article 5 of the TWF Directive almost word for word. Broadcasters are free to choose whether they want to reserve 10% of their broadcasting time for or to invest 10% of their budget in ‘European independent programmes’.

The term ‘independent production’ has not been defined in the Radio and Television Act or in any other legal instrument. Indicative criteria, as set out in Recital 31 of TWF Directive, and the guidelines issued by the EC for the purposes of monitoring the application of Articles 4 and 5 of the TWF Directive are being taken into account.

17.3. Further (additional or stricter) provisions set by national legislation

The Radio and Television Act has provided for further provisions concerning the achievement of language policy goals, and origin of productions. These provisions aim at promoting Swedish audiovisual production and at protecting the Swedish language.

Section 8, paragraph 3 of Chapter 6 of the Swedish Radio and Television Act states that any person who broadcasts television programmes by satellite or by virtue of a licence issued by the Government shall, unless special cause dictates otherwise, contain to a significant extent programmes in the Swedish language, programmes with Swedish artists, and works of Swedish authors.

The public service broadcaster *Sveriges Television* (SVT hereafter) is subject to the provisions of the Radio Act, to terms set out in the charter between SVT and the state, as well as internal programming guidelines. The SVT charter was renewed on 1 January 1997 for a five year period. According to §11, 12, 14, 16 of the Charter between SVT and the state:

- SVT shall redouble the company's commitments as a medium of cultural expression. SVT shall promote artistic and cultural innovation and contribute to Swedish film production.
- SVT shall offer a broad variety of quality programmes in the Swedish language, and programming shall promote Swedish cultural life, broadly defined. Programmes from and about Sweden's Nordic neighbours shall be offered with a view to strengthening the spirit of Nordic community.
- SVT has a responsibility to take the needs of linguistic and ethnic minorities into account, with particular attention to the Samí, Finnish and Tornedal-Finnish cultural spheres.
- SVT shall increase the volume of production outlays, co-productions and purchases of finished products from Sweden-based producers. The demand for regional in-house production was raised to 55%.

SVT has agreed to make a contribution of 15 million SEK in 1999 to the Swedish Film Institute in support of, among other things, Swedish film production. The contribution is part of the 1993 financing agreement between the Government, the film industry, the video industry, Sveriges Television and TV4 AB.

As for the private broadcaster TV4, its new licence on 1 January 1997 provides for some general obligations (e.g. promotion of Swedish culture, presentation of views and events in other parts of the country apart from Stockholm) without setting detailed quotas. The only quota rule which remained is the obligation to broadcast at least five hours of children's programmes. At least half of these have to be produced originally in Swedish or any other Nordic language.

17.4. Monitoring and application of the EU quotas and further national provisions

The Swedish Radio and TV Authority (hereinafter the Authority) is responsible for the monitoring and application of the above provisions. The Ministry of Culture is responsible for providing the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF Directive. However, the Swedish Radio and TV Authority is responsible for collecting the data.

According to Section 4 of Chapter 9 of the Radio and Television Act ‘any person who transmits television programmes via satellite or pursuant to a Government licence shall annually report to the Swedish Radio and TV Authority the percentage of its activities which comprise such programmes as referred to in Chapter 6, section 8, first paragraph’.

The Authority collects the data by sending the broadcasters a questionnaire and a table to fill in. These sheets are based on the suggested model in the European Commission’s Suggested Guidelines for the monitoring of the implementation of Articles 4 and 5 of the TWF Directive.

The Authority relies on a percentage record, channel by channel, of total annual broadcasting time and solely on data provided by broadcasters. In general, the Authority monitors the application by using the criteria and definitions laid down in the European Commission’s Suggested Guidelines for the monitoring of the implementation of Articles 4 and 5 of the TWF Directive.

According to the Authority, the conditions that affect broadcasters in attaining the quota provisions are recently launched channel, thematic channel and pay-TV channel. According to SVT, the conditions are rather costs (difficulty in finding European programmes at competitive prices) and the fact that Sweden is a country with a restricted language area.

The pay-TV broadcaster Canal+ Television AB reported that it faces many difficulties in attaining the quota provisions mainly due to the special nature of its programme’s channels (sports and films). As pay-TV channels, they must reflect the preferences of the public; therefore the majority of the broadcast films are US movies. Local movies are also part of the public’s preferences and therefore part of the programme, though very small, due to the scarcity of commercially exploitable local movies made each year.

According to the Authority, cases of non-compliance with the quota provisions occur mostly due to difficulties in defining ‘independent productions’. The respective broadcasters stated that the majority of the broadcast programmes were bought from different film companies and it was not possible to conclude whether a programme was produced by an independent producer or not.

The Authority cannot impose sanctions if broadcasters do not meet the quota requirements. Only if a broadcaster breaches the obligation provided in Section 8 of Chapter 6 of the Act, i.e. does not report to the Swedish Radio and TV Authority on the quota percentages, may they be ordered to comply with the provision. An order may be issued subject to a conditional fine (Chapter 10, Section 9).

17.5. National provisions implementing Articles 4 and 5 of the TWF Directive

The Radio and Television Act

Section 8.

Unless special cause otherwise dictates, any person who broadcasts television programmes by satellite or by virtue of a licence issued by the Government shall ensure that:

1. more than half of the annual broadcasting time is taken up by programmes of European origin; and

2. at least ten per cent of the annual broadcasting time or at least ten per cent of the programme budget is dedicated to programmes of European origin which have been produced by independent producers; as large a portion as possible should consist of programmes which have been produced during the immediately preceding five years.

For the purposes of this section, "broadcasting time" means the time when programmes are broadcast with content other than news, sport, competitions, announcements and programme services as referred to in Chapter 7, section 5, third paragraph. Nor shall transmissions of text only be included in the transmission time.

18. UNITED KINGDOM

18.1. *Incorporation of Article 4 of the TWF Directive – Quotas for European works*

In the United Kingdom, a combination of law and administrative processes has been chosen in order to implement Chapter III of the TWF Directive.

With regard to the public service broadcaster BBC, the requirements as to ‘European works’ are included in the BBC License Agreement under paragraph 4. Their Governors are required by virtue of Article 7(1)(f) of the Royal Charter to monitor and supervise the BBC’s fulfilment of its legal and contractual obligations. This would include compliance with the TWF Directive. Further, clause 4.4(f) of the BBC’s Agreement provides that the BBC shall publish an account in its Annual Report of its compliance with statutory and regulatory requirements including the proportion of matter included in programmes broadcast or transmitted by or on behalf of the BBC which is of European origin.

Sections 16(2)(g), 25(2)(e), and 29 of the Broadcasting Act 1990 set requirements for European programmes for ITV, Channel 4, and Channel 5 respectively. Compliance with the relevant sections is a condition of the license granted to each broadcaster. A proper proportion of programmes transmitted on these channels must be of European origin. The qualification of ‘where practicable’ is not included.

More specifically, as regards Channel 4, its revised licence of 1998 states that the Channel ‘will comfortably exceed the minimum requirement and strive to increase the proportion of European programmes’.

Special mention should be made of the fourth channel in Wales allocated to S4C which is required to provide a Welsh language service. This channel has a special nature and programme remit, namely to provide television programmes for broadcasting on the fourth Channel in Wales, a significant proportion of which must be in Welsh. It broadcasts around 30 hours of Welsh language programmes per week at peak viewing hours, supplemented by other programmes provided free of charge from Channel 4 in accordance with Sections 58(2), (4) and (5) of the Broadcasting Act 1990. S4C is regulated by the Welsh Fourth Channel Authority. There is no specific mention of European works quotas.

As for terrestrial digital programme services, the Broadcasting Act 1996 (Section 19(2)(a)) requires that a proper proportion of the matter included in the programmes provided on a digital programme service is of European origin. This has been interpreted as a majority where practicable as required by the EC Directive. In order to secure compliance with this requirement, the digital programme licence shall include the necessary conditions.

For cable and satellite services, the provisions of the Directive have been implemented by the Department of Culture, Media and Sport (DCMS hereafter) by administrative means. The Independent Television Commission (ITC hereafter), which is now responsible for licensing cable and satellite services has, under the Broadcasting Act 1990, no obligations to ensure that every licensed service includes in its programmes proper proportions of European material. Instead, every licensee of a national programme service has been informed by the UK Government that it is subject to the EC Broadcasting Directive and that the origination of their programmes must be monitored. The ITC acts as the collection agency for this

information and passes the details to the Department of Culture, Media and Sport, which is responsible for implementing the policy. Section 188 of the Broadcasting Act 1990 also gives the Secretary of State power to direct the ITC, if necessary, to give effect to any of the UK's international obligations.

With regard to the wording 'majority proportion' the UK has chosen to transpose it by another wording. The Broadcasting Act 1990 speaks of a 'proper proportion' of works of European origin. The legislation gives discretion to the ITC to specify minimum amounts. In practice the wording 'proper proportion' is interpreted to mean at least 50%. In addition, the 'where practicable' provision does not apply to ITV, Channel 4 or Channel 5. It applies only to DTT, cable and satellite channels. The definition used for European works is the one set out in Article 6 of the TWF Directive.

18.2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

In the UK, private terrestrial broadcasters (each of the Channel 3 licence holders, Channel 4 and Channel 5) must ensure that in each year of the licence not less than 25% of the total amount of time allocated to the broadcasting of 'qualifying programmes' is allocated to a range and diversity of 'independent productions' (Sections 16(2)(h), 25(2)(f) and 29(2)(b) of the 1990 Act). This statutory obligation for Channel 3, Channel 4 and Channel 5 in relation to the 25% quota is incorporated into their ITC licence.

With regard more specifically to ITV, one of its positive licence requirements states that at least 25% of qualifying programme transmissions in the service must be independent productions covering a range and diversity both in terms of programming strands and cost of acquisition. At least 10% of transmissions except news, sports events, games, advertising and teletext, must consist of independent productions which are 'European works'.

With regard to recent works, as a general rule, ITV plans to transmit programmes within a month of commissioning, if not earlier. This applies to all its new commissions, whether from a regional licensee or independent producer - so this five year rule does not directly apply. The Network is only allowed to hold certain rights, and no copyright, so it is restricted in this sense. In addition, contracts generally have a five year licence period, therefore to screen something after 5 years would be going beyond the licence terms. As a result, programme repeats are generally also shown within five years.

As for Channel 4, it has encouraged a large and diverse independent production sector. From its inception, it has always obtained the majority of its commissioned programmes from the independent sector. Therefore, it expects to continue to exceed the quota provisions concerning independent production. Within this it will continue to obtain programmes for inclusion in the Channel 4 Service from as wide a range of sources as possible.

With regard to Channel 5 Broadcasting, it proposed to transmit more than 57 per cent of original productions/commissions from the start of the service, and more than 67 per cent from year six. This proposal was made a licence condition. The minimum requirements were subsequently reduced to 53.9% in 1998 and 52.7% in 1999-2001 but increasing to 70.6% from 2002.

The BBC is also to ensure that at least 25% of its output in any relevant period consists of independent programmes (Section 186(1) of the Broadcasting Act).

As regards digital terrestrial programme services, the Broadcasting Act 1996 (Section 19(2)(b)) requires that in each year not less than 10 per cent of the total amount of time allocated to the broadcasting of qualifying programmes included in the service is allocated to the broadcasting of a range and diversity of independent productions. In order to secure compliance with this requirement, the digital programme licence shall include the necessary conditions.

Also for digital programme services ‘independent productions’ and ‘qualifying programmes’ have the same meaning as in section 16(2)(h) of the 1990 Act, and the reference to a range of independent productions is a reference to a range of such productions in terms of cost of acquisition as well as in terms of the types of programme involved. The Secretary of State may, by order, substitute a different percentage to the percentage presently specified there.

With regard to ‘relevant transmission time’, the UK law speaks of ‘qualifying programmes’. The interpretation of ‘qualifying programmes’ (basically everything except acquired programmes, repeats, news, programmes provided by or on behalf of the Open University or Open College and broadcasts on behalf of political parties) was issued in the Statutory Instrument, The Broadcasting (Independent Productions) Order 1991.

With regard to percentage, all public service broadcasters should reserve 25% of their total amount of time allocated to the broadcasting of ‘qualifying programmes’ for a range and diversity of ‘independent productions’.

‘Range and diversity of independent productions’ means a range of costs of acquisitions as well as in terms of the types of programmes. That means that independent productions should not only be commissioned in low cost strands but also in high cost ones and should cover as many types of programmes as possible (drama, documentary, sport, religion, current affairs etc.).

The Act does not distinguish between regional and non-regional programmes within the 25% independent quota but applies to total transmissions. However a number of Channel 3 licensees, in their applications for a licence, made commitments to the commissioning of regional programmes from independents as part of their core proposals.

The term ‘independent productions’ embraces all programmes made by independent producers, subject to several variations and conditions. The definition of ‘independent producer’ contains detailed provisions to ensure that the producers contributing to the 25% requirement are truly independent.

Further to the Broadcasting (Independent Production) Order 1991 (Statutory Instrument No. 1408 as amended by Statutory Instrument No. 1925 of 1995), a production company could be qualified as ‘independent’ when the following conditions are being fulfilled:

- The producer should not have a shareholding greater than 25% in a broadcaster or be a corporate body in which a broadcaster has a shareholding of more than 25%³⁷, or in which any two or more broadcasters together have an aggregate shareholding greater than 50%.
- The contract between the independent producer and the broadcasting company must not include, as a condition, a requirement to use the production facilities of the broadcaster.

According to these provisions, cross-ownership, common employees, long term contracts, contractual obligations to use the productions studio and equipment of the broadcaster are taken into account in qualifying a producer as 'independent'. However, there are no legal provisions concerning the broadcasting rights and intellectual property rights of the independent productions. That is a critical point for the producers due to their interest in the resale of their programmes, particularly concerning fictional works or documentaries which could be rebroadcast. It should be noted that a producer established in the European Economic Area may hold any quantity of shares in a broadcaster outside it without losing its independent producer status (Amendment introduced by the Broadcasting (Independent Production) Order 1995).

18.3. Further (additional or stricter) provisions set by national legislation

In the UK, there are several provisions, in addition to the quota provisions of the TWF Directive, imposed on certain broadcasters to promote the production and distribution of television programmes. These provisions concern specific type of content, specific language requirements and origins of productions.

18.3.1. Provisions concerning specific type of content

Requirements for independent productions applying to ITV, Channel 4, Channel 5 and DTT include a requirement to provide 'a range and diversity' of independent productions, in terms of cost and acquisition and types of programme. ITV, Channel 4 and Channel 5 also have a variety of public service obligations and quotas to meet in various programme strands (news, current affairs, documentaries, first-run programmes etc).

Sections 31, 32 and 39 of the 1990 Act provide for special arrangements to be made for the supply of news and network programmes on ITV. ITV is the biggest regional broadcaster in the UK, tailoring its news and other broadcasts to its 14 regions and 27 sub-regions. A further quota requirement is for 80% of the hours of these broadcasts to be made within their region.

Section 16(2)(d) of the 1990 Act provides for a minimum proportion of regional programmes to be produced in each region, while section 15(3)(e) makes provision for studios and staff in the regions. Although the legislation does not set minimum requirements for investment in programmes, the ITC was able to take this into account in awarding licences for ITV and Channel 5, and monitors the performance of these channels in this area. Channel 4 is a non-profit making organisation and the revenue it earns is expected to be re-invested in programmes.

³⁷ This percent increased from 15 to 25 following a proposal contained within Media Ownership: the Government's proposals which came into force with the Broadcasting (Independent Productions) (Amendment) Order in July 1995.

As a channel with public service obligations, ITV also has a number of prescribed content obligations specifying genre and minutage, e.g. regional C3 licensees must include nine programme strands: drama, entertainment, sport, news, factual programmes (including current affairs), education, religion, arts, children's programmes.

As for Channel 4, its revised licence in 1998 extends and clarifies the channel's remit and its public service commitments. Channel 4 is required to include 'a suitable proportion' of programmes of an educational nature. The Channel will devote on average at least seven hours weekly to its educational output, a substantial proportion transmitted in peak-time. 'Sufficient time' should be devoted to news and current affairs programmes of high quality. Channel 4 is also committed to provide on average at least three hours per week of multicultural programmes, and also to schedule at least some of these in peak time.

Channel 5 should also attain certain percentages of programmes by genre. Currently it has to meet 14 different genre targets which add up to the total 168 transmission hours of the schedule per week.

18.3.2. Provisions concerning specific language requirements

S4C is required to provide a Welsh language service. The fourth channel in Wales is allocated to S4C which broadcasts around 30 hours of Welsh language programmes per week at peak viewing hours, supplemented by other programmes provided free of charge from Channel 4 in accordance with Sections 58(2), (4) and (5) of the Broadcasting Act 1990. S4C is regulated by the Welsh Fourth Channel Authority.

Sections 183 & 184 of the Broadcasting Act 1990, as amended by Section 95 of the Broadcasting Act 1996 requires Channel 3 (ITV) in Scotland to broadcast Gaelic programmes.

The ITC's Invitation to Apply for regional Channel 3 licences states that the Central Scotland and North of Scotland licensees must broadcast at least one hour a week on average of programmes in the Gaelic language, funded by themselves. They must, in addition, broadcast programmes in the Gaelic language on a regular basis up to 200 hours a year funded by the CCG (the Gaelic Broadcasting Committee). It is a licence condition that Grampian TV show 53 minutes a week of Gaelic programmes funded by themselves plus an additional 30 minutes a week which may be supplied by Scottish Television. It is a licence condition that Scottish Television shows 30 minutes a week of Gaelic programmes funded by themselves plus an additional 30 minutes a week which may be supplied by Grampian TV.

18.3.3. Provisions concerning origins of productions

In the UK, there are stricter rules for independent productions and original productions applying to BBC, ITV, Channel 4 and Channel 5 in particular. All these channels are subject to a 25% independent production quota. The 25% independent production quota was mainly created to nurture and protect a newly emerging market of small independent producers by giving them assured exposure on the BBC and ITV.

More specifically, the BBC should also contain a reasonable proportion and range of programmes for national audiences which are made in Northern Ireland, Scotland, Wales and in the English regions outside London and the South East. The BBC has also imposed a voluntary target (in-house rule) to obtain at least one third of its networked programmes from in-house or independent producers in the nations and regions. These measures could be regarded as an effort to give a voice to those outside London and to ensure that the nations and regions benefit economically from programme production.

Regarding Channel 3 (ITV)³⁸, it has special regional obligations including support for independent producers in the regions and a majority of programmes (65%), transmitted in a calendar year, have to be originally produced or commissioned for regional Channel 3 services, including repeats of these programmes. Consequently, not more than 35% should be acquired programmes (again including repeats) originally made for another market.

More specifically, regarding Channel 3 licensees, Section 39 of the Act requires them to draw up networking arrangements that would enable them to provide a nationwide service capable of competing effectively with other television services. The proposed networking arrangements should satisfy the competition test specified in Schedule 4 of the Act³⁹.

In 1992 the DGFT concluded that the arrangements did not satisfy the competition test and the matter was referred to the Monopolies and Mergers Commission (MMC) who came to the same conclusion that rather than directly contracting with the Network Centre, an independent producer had to contract with one of the Channel 3 companies which would be an actual or potential competitor in producing programmes.

The main changes specified by the MMC were related to the way programmes were provided to the ITV Network Centre by independent producers and the acquisition by the network of broadcasting rights. Under the revised arrangements, an independent producer can submit a programme proposal direct to the Network Centre and programme rights cannot normally be acquired for more than 5 years. The role of the Channel 3 company would be to ensure that the programme complied with ITC codes and licence conditions.

With regard to Channel 4, it has a special remit to support independent producers and obtain its programmes from as wide a range of sources as possible as it is committed to the UK film industry and to continuing its substantial annual investment in UK feature film production, giving some preference to innovative and risky subjects and treatments. In addition to the licensing requirements imposed on Channel 4, the broadcaster has chosen to actively pursue policies designed to encourage and nurture the independent production sector, particularly production from the nations and regions of the UK.

Channel 4 shall also ensure that in 2002 and any subsequent calendar year at least 30 per cent of its programme budget is allocated to the production of programmes by companies based outside the London region. From 1999 and thereafter the overall amount of repeat material should be less than 40 per cent of total hours and 20 per cent of peak hours broadcast.

³⁸ ITC Notes, No. 12 of October 1996

³⁹ The test is in two parts: (a) whether the arrangements have the effect of restricting competition and, if they do have such effect, (b) whether the arrangements are economically beneficial. The test is applied by the Director General of Fair Trading (DGFT).

Channel 5 is also required to attain specific percentages of commissioned programmes and repeats in the schedule.

18.4. Monitoring and application of the EU quotas and further national provisions

The public service broadcaster BBC is subject to self-regulation. Its compliance with the EU quota requirements is monitored by the Office of Fair Trading (OFT hereafter), which reports annually on the matter to the Secretary of State for Culture, Media and Sport. The Department for Culture, Media & Sport of the Ministry (DCMS hereafter) is therefore responsible, on the basis of statistics collected by OFT, for monitoring the performance of the BBC. On the basis of returns from the cable, satellite and most DTT programme services, DCMS is responsible for their quota and performance.

The Independent Television Commission (ITC hereafter) is responsible for monitoring the performance of ITV, Channel 4 and Channel 5 (commercial broadcasters with public service functions).

DCMS is responsible for providing the Commission, every two years, with the report on the application of Articles 4 and 5 of the TWF Directive concerning all broadcasters under UK jurisdiction.

With regard to monitoring, for BBC, ITV, Channel 4 and Channel 5, data is collected on individual programmes. The BBC, ITV, Channel 4 & 5 and S4C supply information on an annual basis. Cable, satellite and DTT programme services supply summary data, quarterly, on forms, although broadcasters are expected to keep more detailed records themselves in case the quarterly figures need to be checked. The ITC monitors and collects information from broadcasters on the origination of programmes and passes the information to the DCMS.

A percentage record is kept channel by channel, based on the actual programmes broadcast throughout the year. The ITC does not rely solely on data provided by broadcasters. Monitoring by ITC staff provides an additional check. From time to time the ITC also checks on co-productions, including the sources of funding.

More specifically, the BBC monitors the percentages using a database containing transmissions which are coded for country and independent status. In the sixth report transmitted by the BBC in October 2000 it is stated that the inclusion of digital services has raised two issues of interpretation. The first is whether Section 186(3) of the Act requires the BBC to report on its performance of the quota as an overall figure, combining analogue and digital independent productions, or separately. The second is which criteria should be used in order to determine what qualifies as news for the purposes of the Order. This issue has arisen because of the introduction of News 24 and the difficulty of determining whether certain programmes broadcast on that channel should be classified as qualifying programmes.

The view was taken that the content obligation, ensuring that independent production companies have access to the BBC's schedules, remains the same regardless of the delivery platform and it does not matter whether programmes are broadcast via analogue or digital platforms.

As for the definition of ‘qualifying programmes’, each programme broadcast on News 24 has been considered. For example, it has been concluded that annual review programmes such as *Sports Review*, *World Review* and *Business Review* are not news because they report events that have occurred during the previous year and are not recent enough to be considered news.

As for ITV, each of the 15 ITV licensees make a monthly return of their transmissions to the ITC, and all of these can look very different. The ITV Network Centre oversees the co-ordination of the returns, in order to standardise the format of the information submitted to the ITC. These returns give the times of transmission, production, origination and genre for each month. This process allows the companies to keep track of their own records as well as making them accountable to the regulator. In addition to these measures, the network commissioning process keeps these quota targets in mind. As all the licensees bid separately for their licences, they have all agreed different levels of delivery in certain programme areas. Therefore the additional opportunity for the individual licensees to commission locally allows them the flexibility to adjust their quota levels where necessary, thereby not making them dependent on the network levels which may not alone allow them to reach their target levels for the quotas mentioned.

Channel 4 holds all the percentages as data fields against programmes already screened, as well as scheduled programmes. Channel 5 provides for a computerised scheduling system which includes software written especially to make these calculations. Each programme and series is coded according to whether it is European and/or independent. The system ignores the relevant exceptions (news etc) for the European calculation. For ‘recent works’ year of production for all European productions is entered. Channel 5 finds the system reliable and satisfactory due to the automation of the computer returns, and the ability to monitor progress monthly from system reports (in advance and retrospectively).

DCMS did not face, on the whole, any obstacles in the monitoring process. However, due to the large number of channels/broadcasters, which have appeared in the UK in the last ten years, the monitoring has become a large and time-consuming exercise.

According to the DCMS, the conditions affecting broadcasters in attaining the quota provisions are: costs, recently launched channel, thematic channel, pay-TV channel, difficulties of restricted rights distribution, particularly affecting cartoon/animation programming, and pan-European rights scarcity.

According to ITV, ‘many big independents have been, or are seeking to be, taken over by a broadcaster, which means they automatically lose their independent status⁴⁰. These changes in the market directly affect the ability of broadcasters to meet the 25% quota and create uncertainty in commissioning’⁴¹.

According to the DCMS, there are a number of services which do not meet the European content majority proportion level. DCMS accepts that there are channels which are doing everything reasonable to meet the requirements, however because of the conditions affecting them in attaining the quota provisions as mentioned above⁴², it is not practicable for them to

⁴⁰ For example, Action Time UK, which produces 8 or 9 programmes for the ITV Network, has been taken over by Carlton, and Pearson lost its independent status when it recently acquired a bigger shareholding in Channel 5.

⁴¹ Excerpt from recent ITV submission on the UK Communications White Paper

⁴² Film channels experience particular difficulties because of the competitive advantages of Hollywood studios and the difficulty in obtaining suitable European products. Many channels have small audiences and therefore

be able to do so. DCMS encourages such services to increase the amount of European programmes where practicable. DCMS is in regular correspondence with cable and satellite companies, asking them for precise reasons for, e.g., failing to achieve more than 50 per cent of European works, or failing to improve, year on year, on the relevant percentages.

The DCMS can, by Parliament Order, direct the ITC to authorise sanctions against a broadcaster in cases of non-compliance with the statutory requirements. This would include financial penalties, shortening of licence and revocation of licence (Section 188 of the 1990 Act).

The ITC can take enforcement action against ITV, Channel 4 and Channel 5, if they fail to meet either the European works or independent production quotas. Meeting the quotas is not only a statutory requirement but also a licensee condition. If a licensee is found to be in breach of its licence, there is a scale of proceedings which can be started against them by the ITC. The Commission may issue a formal warning, require on-screen apologies, forbid a repeat, impose financial penalties, shorten or (in extreme circumstances) revoke a company's licence.

The OFT monitors the BBC's compliance with the independent production quotas but has no powers to act in the case of the quota not being met, other than to report the matter to the Secretary of State.

There were no cases to date where sanctions have been imposed.

18.5. National provisions implementing Articles 4 and 5 of the TWF Directive

Broadcasting Act 1990

16.— Procedure to be followed by Commission in connection with consideration of applications for licences.

(...)

(2) Where the service to be provided under the licence is a regional Channel 3 service, the requirements referred to in subsection (1)(a) are—

(...)

(g) that a proper proportion of the matter included in those programmes is of European origin; and

(h) that in each year not less than 25 per cent. of the total amount of time allocated to the broadcasting of qualifying programmes in the service is allocated to the broadcasting of a range and diversity of independent productions.

(3) Where the service to be provided under the licence is a national Channel 3 service, the requirements referred to in subsection (1)(a) are such (if any) of the requirements specified in subsection (2) as the Commission may determine to be appropriate having regard to the nature of that service.

(...)

have limited funds to originate or commission programmes and thus cannot meet targets for independent productions.

(5) In subsection (2)(h)—

(a) "qualifying programmes" and "independent productions" mean, in each case, programmes of such description as the Secretary of State may by order specify for the purpose; and

(b) the reference to a range of independent productions is a reference to a range of such productions in terms of cost of acquisition as well as in terms of the types of programme involved.

(6) The Secretary of State may by order amend subsection (2)(h) by substituting a different percentage for the percentage for the time being specified there.

(...)

(8) In this section "programme" does not include an advertisement.

25.— Conditions to be included in Channel 4 licence.

(...)

(2) The requirements referred to in subsection (1) are—

(...)

(e) that a proper proportion of the matter included in Channel 4 programmes is of European origin; and

(f) that in each year not less than the prescribed percentage of the total amount of time allocated to the broadcasting of qualifying programmes on Channel 4 is allocated to the broadcasting of a range and diversity of independent productions.

(...)

(4) In subsection (2)(f)—

(a) "qualifying programmes" and "independent productions" have the same meaning as in section 16(2)(h), and "the prescribed percentage" means the percentage for the time being specified in section 16(2)(h); and

(b) the reference to a range of independent productions is a reference to a range of such productions in terms of cost of acquisition as well as in terms of the types of programme involved.

(...)

(6) In this section "programme" does not include an advertisement.

Application to Channel 5 of provisions relating to Channel 3.

29.—(1) Subject to subsections (2) and (3), sections 15 to 21 shall apply in relation to a Channel 5 licence as they apply in relation to a regional Channel 3 licence.

(2) In its application in relation to a Channel 5 licence—

(a) section 15(1)(b)(i) shall be read as referring to any such minimum area of the United Kingdom as is determined by the Commission in accordance with section 28(2); and

(b) section 16(2) shall (except where subsection (3) below applies) have effect with the omission of paragraphs (c) and (d).

(3) Where the Commission make a determination under section 28(3), section 16(2) shall, in its application in relation to each Channel 5 licence, have effect to such extent as they may determine to be appropriate having regard to the nature of the service to be provided under that licence.

C. Comparison

1. Incorporation of Article 4 of the TWF Directive – Quotas for European works

With regard to the incorporation of Article 4 of the TWF Directive into the national legal systems of the 15 Member States and the EEA States, analysis and comparison has been conducted in two different ways. First of all, comparison has been made as to how the aforementioned countries have defined the ‘relevant transmission time’, of which a ‘majority proportion’ according to the Directive should be reserved for ‘European works’. Secondly, comparison has been made as to how the wording ‘majority proportion’ has been incorporated into the respective national legal systems.

1.1. ‘Relevant transmission time’

In most countries, the definition of the ‘relevant transmission time’ includes all programmes apart from news, sports events, games, advertising, teletext services and teleshopping. The only difference, in some cases, is that more programmes are excluded (France, Germany, Italy) or less (Netherlands, Norway) than the aforementioned ones.

In cases where there is less exclusion, teleshopping is usually not mentioned in the national definition. This is due to the fact that this amendment of the TWF Directive of 1997 has not yet been incorporated into national legislation.

In Italy, talk shows are also excluded. In Germany, the ‘relevant transmission time’ includes only feature films, television movies, series, documentaries, and comparable productions.

France is a special case, being the only country which distinguishes between audiovisual works and cinematographic works. Audiovisual works are considered to be: fiction programmes, animation programmes, current affairs documentaries produced mainly outside the studio, music videos, scientific programmes, concerts and retransmissions of theatrical, lyrical or choreographic programmes. Consequently, entertainment programmes, current affairs programmes, and talk shows in all their forms are also excluded from the ‘relevant transmission time’.

It should also be mentioned that in the UK, there is no definition of the ‘relevant transmission time’ under national law.

Country	Definition as in Directive	Other Definition
Austria	Yes	
Belgium (Flemish Community)	Yes	
Belgium (French Community)	Mainly, but self-promotion is also excluded	
Denmark	Yes	
Finland	Yes	
France	Mainly, but entertainment programmes, current affairs programmes, talk shows in all their forms and self-promotion are also excluded	
Germany		The ‘relevant transmission time’ includes only feature films,

		television movies, series, documentaries, and comparable productions.
Greece	Yes	
Iceland	Yes	
Ireland		No mention of the relevant transmission time
Italy	Mainly, but talk shows are also excluded	
Liechtenstein		There is yet no definition
Luxembourg	Yes	
Netherlands	Mainly, but teleshopping is not mentioned	
Norway	Mainly, but teleshopping is not mentioned	
Portugal	Yes	
Spain	Yes	
Sweden	Yes	
United Kingdom		No mention of the relevant transmission time

1.2. Proportion of 'European works'

Regarding the term 'majority proportion', most of the countries have chosen a different wording or an exact percentage, instead of simply using the wording of the TWF Directive. Almost half of the countries set a specific percentage for 'European works'. Of the remainder, some used the wording of the Directive and the others different wordings, which have almost the same meaning as the wording 'majority proportion'.

In France, Greece, Italy, the Netherlands, Norway, Sweden and Spain, the national legislator has chosen to stipulate a certain proportion of 'European works', which broadcasters have to attain, either by setting a specific percentage (e.g. 60% in France, 51% in Greece) or by using the wording 'more than half of the transmission time'.

Other countries (Germany, Iceland, Ireland, UK) have chosen wordings that are comparable to the wording of the Directive, but not the same. However, there is no real difference between 'majority proportion', as stated in the Directive or 'biggest part', 'main part' and 'greater part'.

The wordings chosen by Ireland and the UK ('reasonable proportion' and 'proper proportion' respectively), seem to be slightly more vague, not having exactly the same meaning as the wording 'majority proportion'. However, in the UK, in practice, the wording 'proper proportion' is interpreted to mean at least 50%.

Country	Majority proportion	Other wording
Austria	Yes (<i>Hauptanteil</i>)	
Belgium(Flemish)		biggest part
Belgium (French)	Yes	
Denmark		More than half of the transmission time
Finland	Yes	
France		at least 60% of European audiovisual and cinematographic works
Germany		main part (<i>Hauptteil</i>)
Greece		51% of the transmission time
Iceland		greater part

Ireland		reasonable proportion
Italy		more than half of the monthly transmission time
Liechtenstein		No definition
Luxembourg	Yes	
Netherlands		at least 50 % of the broadcasting time
Norway		at least 50 % of the transmission time
Portugal		majority percentage
Spain		51% of the transmission time
Sweden		more than half of the annual broadcasting time
United Kingdom		proper proportion

2. Incorporation of Article 5 of the TWF Directive – Quotas for independent productions

With regard to the incorporation of Article 5 of the TWF Directive into the national legal systems of the 15 Member States and the EEA States, analysis and comparison has been conducted in two different ways. Firstly, comparison has been made between the proportion reserved for ‘independent productions’, e.g. the percentage of transmission time or percentage of budget or other combination. Secondly, a comparison of if and how the aforementioned countries defined the term ‘independent producer’ has been made, with an attempt to identify common criteria within these definitions.

2.1. Proportion of ‘independent productions’

Article 5 of the Directive states that broadcasters should reserve either 10% of their transmission time or 10% of their programming budget for ‘independent productions’. It is up to the Member States to decide which option they want to adopt. In most countries there is provision for broadcasters to reserve 10% of their transmission time for ‘independent productions’. In some countries, the national legislator has chosen to stay close to the wording of the Directive and let the broadcasters decide. There are also some countries which imposed stricter obligations on broadcasters, with regard to ‘independent productions’, e.g. either to reserve a proportion of the transmission time and the budget, or to reserve a higher percentage of the transmission time.

More specifically, in Denmark, Finland, Iceland and Sweden the national legislator has chosen to stay close to the wording of the Directive and give broadcasters the opportunity to make the decision of reserving either 10% of their transmission time or 10% of their budget for ‘independent productions’.

Belgium, Greece, Ireland, Luxembourg, Norway, Portugal and Spain imposed on broadcasters the obligation to reserve 10% of their broadcasting time for ‘European independent productions’.

In a few cases, the legislator (Italy, Netherlands, Portugal, UK) chose an even stricter regulation. This can mean, either a broadcaster has to comply with both (10% of budget and 10% of transmission time, as in Portugal but only with regard to the public service broadcaster RTP), or that the percentages set under national law are higher than 10%.

Sometimes the stricter provisions only apply to public service broadcasters (Italy, Netherlands). In these countries, public service broadcasters are required to reserve 20%

(Italy) or 25% (Netherlands) of their transmission time for ‘independent productions’. In the UK, the BBC and the private terrestrial broadcasters should reserve 25% of their total time allocated to the broadcasting of ‘qualifying programmes’ for a range and diversity of ‘independent productions’.

In France, free-to-air terrestrial broadcasters must invest at least 10% of their net turnover from the previous financial year in orders for ‘independent audiovisual works’ originally produced in the French language or originating from the European Community. With regard to ‘independent cinematographic productions’, all terrestrial channels (free-to-air and pay-TV) should devote at least 75% of their expenditure on cinematographic production to concluding contracts with independent producers. Cable and satellite channels can choose to reserve either at least 10% of their broadcasting time or of their budget to audiovisual and cinematographic works made by independent producers.

The special characteristic in France is that these obligations are more specifically defined in the terms of reference (*cahiers des charges*) for public service broadcasters and in the licence agreements concluded by the CSA with private broadcasters, thus meaning that the agreed percentages could be higher than the general 10% requirement.

Germany is the only country that did not set any percentage figures, but used the term ‘significant part’ of ‘independent productions’.

Country	10% of time	10% of budget	10% of time and budget	10% of time or budget	Other provisions
Austria				Yes	
Belgium (Flemish)	Yes				
Belgium (French)	Yes				
Denmark				Yes	
Finland				Yes	
France		Yes, for terrestrial channels		Yes, for cable and satellite channels	Higher percentages could be provided in the terms of reference or in the licence agreements
Germany					Programmes should include ‘a significant part’ (<i>wesentlicher Anteil</i>) of own, commissioned and joint productions from the German-speaking area and Europe as a whole
Greece	Yes				
Iceland				Yes	
Ireland	Yes for TV3				Reasonable proportion for RTÉ
Italy	Yes, with regard to private broadcasters				Public service broadcasters have to reserve 20% of their transmission time
Liechtenstein					No definition
Luxembourg	Yes				
Netherlands	Yes, with regard to				Public service broadcasters have to

	private broadcasters				reserve 25% of their transmission time
Norway	Yes				
Portugal	Yes		Yes for RTP		
Spain	Yes				
Sweden				Yes	
United Kingdom	Yes				BBC and private terrestrial broadcasters have to reserve 25% of the total amount of time allocated to the broadcasting of 'qualifying programmes' for 'independent productions'

2.2. *Definition of 'independent producer' under national laws*

Article 5 of the Directive provides for a definition of 'European independent works'. In this context the Directive refers to 'European works created by producers who are independent of broadcasters'. It is for the Member States to decide how this is to be achieved. They must themselves introduce a definition of 'independent producer' to facilitate the application of the rule requiring 10% of transmission time or of programme budget to be reserved for independent productions.

The Directive requires, pursuant to recital (31), that the definition introduced by the Member States should take appropriate account of specific criteria 'such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights'.

The term 'independent producer' has not been defined in all countries. Only half of the countries have adopted a definition of 'independent producer'. In countries which provide for a definition, there are several similarities in the definitions, but also certain differences. There are several criteria in defining an independent producer, which can be found in most of the regulations.

One common criterion is the ownership of share capital in a production company by a broadcaster. Though this is used in most definitions (French Community of Belgium, France, Ireland, Luxembourg, Netherlands, Spain, UK), there are still considerable differences in the detail.

Some of the countries use percentage figures, limiting the share capital a broadcaster is allowed to hold in a production company. These vary from a maximum of 5% in France, 15% in the French Community of Belgium, 25% in Finland, the Netherlands and the UK and up to a maximum of 50% in Spain.

In other countries the share capital is a criterion, but the wordings in the national regulation are not as precise as a percentage figure would be. As an example, in Ireland it is merely stated that the production company must not be a subsidiary of the broadcaster, and the other way round. The definition under Italian law excludes production companies, which are affiliated to a broadcaster. In the draft version of a new law in Luxembourg, it is simply stated that the capital of the production company must not be held mainly by the broadcaster.

The amount of programmes supplied to the same broadcaster is also another criterion that can be found in the definitions of some countries (French Community of Belgium, Finland and Italy). Under these definitions, a producer must not provide more than 90% of his production during the last three years to only one and the same broadcaster.

Among the different definitions, special criteria can also be identified which are not common or differentiate from each other in some way. For example, in the Netherlands one criterion is, that the broadcaster must not be liable for the credit debts of the production company, while in Spain a producer is no longer considered independent, if a broadcaster has the right to appoint more than half of the executive bodies.

In Greece, the status of an independent producer is incompatible with specific capacities (e.g. the capacity of public or communal civil servant, or owner, shareholder or employee of an advertising company, or member of the board of directors or employee of ERT S.A. (public service broadcaster), owner or shareholder or employee of a private broadcaster or local radio station, as well as member of the National Council for Radio and Television).

Ireland includes the criteria of staff, participants and facilities in its classification of independent productions, with regard to the public service broadcaster RTÉ. RTÉ is not allowed to control those persons participating in the programme, or being involved in the making of it or providing the equipment for this purpose.

In the UK, common employees, long term contracts, contractual obligations to use the productions studio and equipment of the broadcaster are taken into account in qualifying a producer as ‘independent’.

Only in France is the criterion of ownership of intellectual property rights applied. In general, the duration of broadcasting rights purchased by the broadcaster cannot be longer than four years, which includes the year of delivery of the work (five years when the broadcaster has co-produced the programme).

In general, in the countries where there is no definition of ‘independent producer’ under national legislation, the guidelines and criteria laid down by the EC on the application of Article 5 of the TWF Directive (Recital 31) are used, in order to qualify programmes as independent.

Country	Definition of ‘independent producer’	
Austria		No definition
Belgium (Flemish Community)	There is a diverted definition in the film regulations, which states that ‘an independent producer is a person who creates audiovisual works and is not involved in a structural or a co-partnership way with a television broadcasting organisation’.	
Belgium (French Community)	In the licensing contracts between CSA and TVi and CSA and Canal+ An independent producer is considered to be every natural person or legal entity whose	

	<p>residence or registered office and office of business are situated in the Walloon region or in the Brussels Capital Region and where the following conditions are being fulfilled:</p> <ul style="list-style-type: none"> - the producer has a different legal entity to that of a broadcaster - a broadcaster does not hold more than a 15% of the share capital of the producer - the producer is not controlled by a public authority - the producer does not provide more than 90% of its production, during a three year period, to only one and the same broadcaster. 	
Denmark		No definition
Finland	<p>The following requirements must be fulfilled in order to be considered as an independent producer:</p> <ul style="list-style-type: none"> - An individual broadcaster cannot hold more than 25% of the share capital of the production company or more than 50% if there are several television broadcasters, - The production company should not have produced more than 90% of its programmes for the same television broadcaster during the past three years. 	
France	<p>A production company could be considered as independent if the following requirements are fulfilled:</p> <ul style="list-style-type: none"> - The broadcaster cannot directly or indirectly hold more than a 5% share capital of the production company, - The production company cannot hold more than a 5% share capital of the broadcaster - One or several shareholders controlling more than 5% of the equity of a broadcaster cannot own more than 20% of the production company, and - The production company cannot have links with a broadcaster which might constitute a long-term commitment of interests between them (Decree n°90-67, Article 11). 	
Germany		No definition
Greece	<p>The status of an independent producer is incompatible with:</p> <ul style="list-style-type: none"> - The capacity of public or communal civil servant, or of employee of a state-owned legal entity; - The capacity of owner, partner, shareholder or employee of an advertising company; - The capacity of member of the board of directors or employee of ERT S.A. (public service broadcaster), owner or contract part or shareholder or employee of a private broadcaster or local radio station, as well as member of the National Council for Radio and Television. <p>The independent producer supplies all the necessary production facilities, has responsibility</p>	

	for all technical and financial matters concerning the production and conducts everything necessary for the production contracts and agreements.	
Iceland		No definition
Ireland	<p>The definition applies only to the public service broadcaster. In this Act 'independent television programme' means a television programme made by a person who complies with the following conditions, namely:</p> <ul style="list-style-type: none"> - Each of the following matters in respect to the said programme is determined by him or by one or more persons on his behalf and over whose activities, in respect of the determination of such matters, he exercises control, namely: (i) the persons who are to participate in the said programme, (ii) the persons who are to be involved in the making of the said programme, and (iii) the equipment and facilities to be used in the making of the said programme; - The person is not a subsidiary of a broadcaster; and - The person is not a holding company of a broadcaster. 	
Italy	<p>A production company could be considered as independent when one of the following conditions are being fulfilled:</p> <ul style="list-style-type: none"> - The production company is not controlled by, or affiliated to, holders of concession, licence or authorisation for television broadcasting or, - The production company does not supply, for a period of three years, 90% or more of its own production to only one broadcaster. 	
Liechtenstein		No definition
Luxembourg	Independent producers are considered to be producers of audiovisual works who are not broadcasters and every legal person who produces audiovisual works without being a broadcaster and whose capital is not mainly controlled by a broadcasting company.	
Netherlands	<p>Independent productions could be considered to be all programmes which have not been produced by:</p> <ul style="list-style-type: none"> - the broadcaster broadcasting the programme, or another broadcaster; - a legal person in which a broadcaster holds either directly or indirectly through one or more of its subsidiaries, a share capital of at least 25%; - a legal person in which two or more broadcasters hold either directly or indirectly through one or more of their respective subsidiaries, a share capital of more than 50%; or - a company in which a broadcaster or one or more of its subsidiaries is, as a general 	

	partner, fully liable to the production company's creditors for its debts.	
Norway		No definition
Portugal		No definition
Spain	<p>An 'independent producer' is considered to be, every natural or legal person who is not under the dominant influence of broadcasters because of either ownership or capital sharing reasons, financial participation or by the management rules.</p> <p>There is a dominant influence, directly or indirectly, due to ownership or capital sharing, when a broadcaster:</p> <ul style="list-style-type: none"> - holds more than 50% of the capital share of the production company, or - disposes the majority of the rights of vote, or - has the right to appoint more than the half of the administrative or executive bodies. 	
Sweden		No definition
United Kingdom	<p>A production company could be qualified as 'independent' when the following conditions are fulfilled:</p> <ul style="list-style-type: none"> - The producer should not have a shareholding greater than 25% in a broadcaster or be a corporate body in which a broadcaster has a shareholding of more than 25%, or in which any two or more broadcasters together have an aggregate shareholding greater than 50%. - The contract between the independent producer and the broadcasting company must not include, as a condition, a requirement to use the production facilities of the broadcaster. 	

3. Further (additional or stricter) provisions set by national legislation

Recital 44 of the TWF Directive states that 'Member States remain free to apply to broadcasters under their jurisdiction, more detailed or stricter rules in the fields co-ordinated by this Directive, including, *inter alia*, rules concerning the achievement of language policy goals, protection of the public interest in terms of television's role as a provider of information, education, culture and entertainment'.

In most of the countries there are further (additional or stricter) provisions, in order to promote the production and distribution of television programmes. They can be categorised into provisions concerning specific type of content, provisions concerning specific language requirements and provisions concerning the origin of productions and production investment.

3.1. Provisions concerning specific language requirements

Some countries imposed quotas (specific percentages) on broadcasters in order to promote the official language or languages of ethnic minorities (French Community of Belgium, France, Greece, Netherlands, Norway, Portugal, Spain, UK).

In France, there are detailed provisions concerning works originally produced in the French language (audiovisual and cinematographic). All terrestrial broadcasters must broadcast, particularly during prime-time, a proportion of at least 40% of audiovisual and cinematographic works originally produced in the French language. Cable and satellite channels have the same obligation, but the proportion could be achieved progressively. However, in any case the proportion should not be less than 50%.

In Portugal, channels with national coverage have to allocate at least 50% of their transmission time to programmes, originally produced in the Portuguese language. 25% of these programmes may be produced in Portuguese speaking countries, apart from Portugal. These percentages should not be achieved during low audience times. In the Netherlands, there is a quota for productions in the Dutch or Friesian language, being 50% for public and 40% for private broadcasters.

In Spain, more than 50% of the transmission time reserved for European works should be devoted to works originally produced in one of the official Spanish languages (Catalan, Gallego, Vasco and Castellano). The Autonomous Communities (*Comunidades Autónomas*) can also introduce content quotas with the aim of promoting the audiovisual production in the respective languages applicable to the local broadcasters under their jurisdiction. As examples could be regarded the Catalan Law introducing the obligation for the film industry, radio and TV broadcasters to comply with quotas for audiovisual works in Catalan and the Galician Audiovisual Law of September 1999 which is concerned mainly with the promotion of the Galician film industry and the Galician language in audiovisual works.

In Greece, the public service broadcaster ERT and all private broadcasters should reserve more than 25% of their transmission time, excluding the time devoted to news, sport, games, advertising and teletext services, for works originally produced in the Greek language. For pay-TV broadcasters the proportion is at least 25%.

In the UK, the fourth channel in Wales allocated to S4C is required to provide a Welsh language service. Channel 3 (ITV) in Scotland is also required to broadcast Gaelic programmes.

In the Nordic countries, it is generally stated that broadcasters (in some cases only the public service broadcasters) should ensure and broadcast programmes in the respective national language or another Nordic language or the language of a minority (Sami in Finland, Norway). In Sweden, every broadcaster should, to a significant extent, include programmes in the Swedish language, programmes with Swedish artists, and works of Swedish authors. However, in all cases, no specific percentages have been set.

3.2. Provisions concerning specific type of content

As a general comment, in almost every country, the public service broadcasters have to fulfil certain obligations of a public-service-type (e.g. variety of programming of good quality and interests, interests of minorities, diversity of opinion, pluralism etc). In some countries, even certain commercial broadcasters have to fulfil similar obligations.

In Germany, due to its dual broadcasting system, public service broadcasting has to adhere to the '*Grundversorgung*' principle. According to the German Federal Constitutional Court *Grundversorgung* means concern for the fact that programmes, which inform comprehensively and in the full range of the classical order for broadcasting, are offered to the entire population and that diversity of opinions in these offers is guaranteed.

Some countries set specific percentages for the broadcast of certain types of programmes. In the Netherlands, at least 25% of the programmes of the public service broadcasters must be of a cultural nature and at least 35% must be programmes of an informative or educational nature. Of these cultural programmes at least 12.5% shall consist of or relate to the arts.

There is also a specific public broadcaster in the Netherlands, which has the legal task of providing programmes for cultural/ethnic minorities, called NPS. The programmes of NPS should include at least 20% of programmes for, or in relation to, ethnic and cultural minorities and programmes of an educational nature aimed at young people.

In France, all broadcasters are obliged to broadcast certain amounts of audiovisual and cinematographic works and in addition, they should broadcast them at specific times (prime-time). The prime time hours are originally defined in the Decree n°90-66. For private channels the CSA can set a wider time frame. For pay-TV channels, prime time hours are defined in the Decree n°95-668 and mentioned in the licence agreements.

Other countries (France, Italy, Spain) obliged broadcasters to finance certain genres. In Spain, broadcasters should allocate at least 5% of their annual income of the previous financial year, in accordance with their operating account, towards the financing of European feature films and European films made for television.

In Italy, all broadcasters under Italian jurisdiction, independently from the means of their transmission, should invest at least 10% of their profits of the previous financial year in the production and acquisition of audiovisual programmes and programmes for children, made by European producers, including independent producers. For the public service broadcasters the proportion is 20%.

In France, TF1 is required to invest 0.6%, of its net turnover from the previous financial year, in orders for European animation films or animation films originally produced in the French language. M6 is also required to invest 1% of its net turnover from the previous financial year in orders for European animation films or animation films originally produced in the French language.

In Portugal and the UK, public service broadcasters should meet general diversity obligations and quotas and are required to broadcast specific amounts of different types of programmes.

For example, the public service broadcaster in Portugal, RTP, is obliged to produce and broadcast, at least 26 hours per year, drama, choreographic or music programmes and also Portuguese fiction works and 'creative documentaries'. It should also produce and broadcast new fiction works (first releases) for a minimum of 12 hours per year in order to promote new talents.

In the UK, ITV has special regional obligations (e.g. support for independent producers in the regions, 80% of the hours of news broadcasts and network programmes to be made within

their region). Channel 4 and Channel 5 should also attain certain percentages of programmes by genre. The BBC should contain a reasonable proportion and range of programmes for national audiences, which are made in Northern Ireland, Scotland, Wales and in the English regions outside London and the South East. Channel 4 has a similar obligation as well.

3.3. Provisions concerning origin of productions

In some countries there are further provisions in order to promote productions of a certain origin (e.g. 'independent productions') or the audiovisual and film production in general. With regard to the promotion of independent productions, either higher percentages than the 10% set by the Directive have been set or specific amounts of investment have been imposed, (Italy, Netherlands, UK).

In Italy, the percentage for transmission of independent productions is 20% for public service broadcasters and in the Netherlands, 25%. In the UK the 25% quota applies for the BBC and all private terrestrial channels.

In France, terrestrial broadcasters have many further obligations mainly concerning investing in orders for audiovisual and cinematographic productions. Certain percentages are defined in the Decrees on productions. Broadcasters are also obliged to reserve a certain amount of their annual income for COSIP, a Fund for the support of the audiovisual production industry.

In Ireland, the public service broadcaster RTÉ is required to invest a sum of IR £20,000,000 in 2001 in commissioning the making of independent television programmes. In subsequent years RTÉ is obliged to spend the 'appropriate amount' as defined in the Broadcasting Act 2001. The public service broadcaster in the French Community of Belgium, RTBF has also an obligation to invest in co-productions with independent producers. In Austria, the public service broadcaster ORF has, according to the *Film-Fernsehabkommen* between the public service broadcaster and the Austrian *Filminstitut*, the obligation to finance the support mechanisms for the production of Austrian cinema films.

It should be stated that, in most countries, agreements between broadcasters and film producers' associations or film institutes have been concluded in order to promote either the independent producers specifically or in general the development of the film industry.

Many public service, and also private broadcasters, invest in the purchase and promotion of independent productions (VRT in the Flemish Community of Belgium, YLE in Finland, Telepiù in Italy, Canal+ and TV3 in Spain etc.).

Concerning general measures to promote film production, many broadcasters are involved in the direct or indirect financing of film and television productions through their involvement in different activities. For example, in Germany the public service broadcasters ARD and ZDF are tied up in film promotion measures which exist in every Bundesland (*Filmförderung*). Some of the Länder (i.e. Bavaria, Hesse, Hamburg or North Rhine-Westphalia) have also developed their own regional film promotion measures, such as the *Filmstiftung NRW* in North Rhine-Westphalia. Similar agreements and activities are also to be found in Norway (for the private broadcaster TV2) or in Sweden (for the public service broadcaster SVT).

As a special case, it should be noted that in Portugal there is an innovative voluntary 'partnership agreement' between the public authorities (The Ministry of Culture, by its administrative body the Institute for the Cinema, Audiovisual and Multimedia - ICAM) and all the national and terrestrial Portuguese television broadcasters: RTP (public service broadcaster), SIC and TVI (commercial broadcasters). Under these agreements, in general terms, the Portuguese government repays the investment of the broadcasters in film production in order to facilitate the finance of further audiovisual production.

Country	Specific type of content	Specific language requirements	Origin of productions Investment measures
Austria	No	No	Yes for ORF
Belgium (Flemish Community)	No	Yes (a considerable proportion of European works should be in the Dutch language)	No
Belgium (French Community)	No	Yes (1/3 of the proportion reserved for European works should be in the French language)	Yes Broadcasting quotas, investment obligations
Denmark	No	Yes (general formulation, without percentages)	Yes Broadcasting quotas, investment obligations
Finland	No	Yes (only for YLE)	No
France	Yes	Yes (40% of audiovisual and cinematographic works in the French language)	Yes Investment obligations Restriction on broadcasting of films
Germany	No	Only in the law of the Land Brandenburg is it mentioned that the sorbische culture and language shall be taken into account	No
Greece	No	Yes (25% for works in the Greek language)	No
Iceland	No	Yes (general formulation, without percentages)	No
Ireland	No	No	Yes for RTÉ investment obligations
Italy	Yes (e.g. quotas for children's programmes)	No	Yes investment obligations
Liechtenstein	No	No	No
Luxembourg	No	No	No
Netherlands	Yes (e.g. quotas for educational, cultural programmes)	Yes (50% for public service, 40% for private broadcasters)	Yes for NOS
Norway	No	Yes (general formulation, without percentages)	No
Portugal	Yes for RTP (e.g. quotas for cultural programmes, fiction works)	Yes (25% for works in the Portuguese language)	Yes for RTP Broadcasting quotas, investment obligations
Spain	Yes (e.g. investment quotas for feature films)	Yes (50% for works in one of the official languages)	No
Sweden	Yes (e.g. quotas for cultural programmes)	Yes (general formulation, without percentages)	No

United Kingdom	Yes for ITV, Channel 4 and Channel 5	Yes (S4C, ITV)	Yes Broadcasting quotas, investment obligations
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4. Monitoring and application of the EU quotas and further national provisions

4.1. Responsible regulatory authorities

The monitoring within the countries is, by and large, carried out by one regulatory authority, which is responsible for all broadcasters under its jurisdiction. In Germany, Belgium and Spain, the system is more complicated, mainly due to the federal structure of those countries.

In Germany, due to the country's federal structure, broadcasting and broadcasting regulation are the responsibility of the Länder. While the public service broadcasting corporations effect their own internal regulation, due to the fact that they are established under public law, regulatory authorities (*Landesmedienanstalten*) have been set up in each Land for the private broadcasting sector. Each regional regulatory authority monitors the private broadcasters to whom they have granted a licence. In practice, with regard to the quotas, the Chancellery of Rhineland-Palatinate, having currently the presidency of the *Medienkommission der Länder*, gathers the report with all the relevant data directly from the public service broadcasters (ARD, ZDF) and, with regard to the private broadcasters, from the different regional regulatory authorities (*Landesmedienanstalten*).

In Belgium, competence with regard to broadcasting is divided between its Communities. The Flemish and French Communities provide different broadcasting laws and regulatory authorities and no common overall regulation. Therefore, each regulatory authority is responsible for monitoring broadcasters under its jurisdiction.

In Spain, the *Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información* (State Department for Telecommunications and for the Information Society - SETSI hereafter) within the Ministry of Science and Technology is responsible for monitoring and controlling the EU quota provisions. However, this authority has no powers concerning several broadcasters, which are controlled by the relevant regional authority. This situation affects: broadcasters directly managed by the Autonomous Communities, broadcasters whose licence has been granted by an Autonomous Community, or broadcasters whose services are provided within the territory of a single Autonomous Community. The Autonomous Community of Catalonia is the only one with independent audiovisual authority, the *Consell de l'Audiovisual de Catalunya* (CAC). In the remainder of the Autonomous Communities, the relevant authority is a Department of the Government of the Autonomous Community in question.

In Liechtenstein, there is a regulatory authority, though it should be noted that, in the television sector, there are at present no companies active which fall directly under the jurisdiction of the authorities of the Principality of Liechtenstein as defined in the TWF Directive. Therefore, the monitoring and application of the EU quota provisions are not yet applicable in Liechtenstein.

It should also be noted, that in Ireland and UK the responsible authorities for the public service broadcasters and private ones are different. In Ireland, the monitoring and control of

the public service broadcaster RTÉ are the responsibilities of the Government Department for the Arts, Heritage, Gaeltacht and the Islands. The RTÉ Authority and the Acquisitions Department of RTÉ have also a monitoring role with regard to the use of revenue from the TV licence fee and the expenses towards independently produced programmes respectively. The IRTC is responsible for monitoring the provisions of the private broadcaster TV3.

In the UK, the Department for Culture, Media & Sport of the Ministry (DCMS hereafter) is responsible, on the basis of statistics collected by OFT, for monitoring the performance of the BBC and also for cable, satellite and most DTT programme services. The Independent Television Commission (ITC) is responsible for monitoring the performance of ITV, Channel 4 and Channel 5.

Country	Responsible regulatory authority for quotas
Austria	Federal Chancellery KommAustria
Belgium (Flemish)	Vlaams Commissariaat voor de Media
Belgium (French)	Conseil Supérieur de l'Audiovisuel - CSA
Denmark	Ministry of Culture (Department Radio and TV)
Finland	Telecommunications Administration Centre - TAC
France	Conseil Supérieur de l'Audiovisuel - CSA
Germany	Chancellery of Rhineland-Palatinate Landesmedienanstalten
Greece	Ministry of Press and Mass Media National Council for Radio and Television
Iceland	Broadcast Licensing Committee
Ireland	Department for the Arts, Heritage, Gaeltacht and the Islands Independent Radio and Television Commission - IRTC
Italy	Autorità per le Garanzie nelle Comunicazioni - AGCOM
Liechtenstein	Office for Communications
Luxembourg	Service des Médias et des Communications
Netherlands	Commissariaat voor de Media
Norway	The Mass Media Authority
Portugal	Instituto da Comunicação Social
Spain	Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información under the Ministry of Science and Technology Audiovisual Council of Catalonia - CAC Governmental Departments of the Autonomous Communities
Sweden	Swedish Radio and TV Authority
United Kingdom	Department for Culture, Media and Sport - DCMS Independent Television Commission - ITC

4.2. *Monitoring and collection of relevant data with regard to quotas*

In almost every country, monitoring of the application of the quota provisions is carried out by sending a special questionnaire to all broadcasters and analysing the information provided in the answers. In some cases, the regulatory authorities only request the broadcasters to provide all relevant data on the European and independent programmes. As an explanation of the request, sometimes the authorities include a copy of the Commission's guidelines for monitoring the application of Articles 4 and 5 of the TWF Directive.

According to most national laws, television broadcasters are required to provide the relevant authority with a statistical report on the achievement of the EU quota proportions, i.e.

percentages for European works and independent productions. The gathering of all necessary information and data is carried out by the broadcasters themselves, and then forwarded to the relevant authority. In order to provide the respective authority with the relevant data, the different broadcasters have to do in-house monitoring. This monitoring is carried out in different ways. Most of the regulatory authorities rely solely on data provided by broadcasters. Broadcasters use different monitoring systems, mainly software databases or programmes with special categories.

Nevertheless, in some countries this is not the only way data is acquired. In order to complete or verify the accuracy of the data provided by broadcasters, there are additional measures taken by the authorities.

In France, the system differs for terrestrial and cable broadcasters. The CSA exercises extensive control of terrestrial channels with regards to the monitoring of European works. Every programme is chronologically identified and categorised into a computerised database, according to the criteria laid down in the Directive for the transmission of works. For terrestrial channels, the CSA relies on a percentage record of the total annual broadcasting time. Proportions are calculated by the CSA and *a posteriori* checked with the data provided by broadcasters. For cable channels, the CSA relies mainly on the data provided by the broadcasters but also on random samples for a period of four weeks. Consequently, the CSA does not rely solely on data provided by broadcasters but checks and verifies the data as well.

In Ireland, the IRTC looks at every broadcasting day to check the information. In addition to the material provided by TV3, published schedules are examined as well. In Greece, the Ministry of Press and Mass Media checks the provided data on the basis of sampling.

In Portugal, the information presented by broadcasters is complemented with the recording by the ICS of all relevant broadcasts. Data referring to such broadcasts is analysed and provided by an independent private corporation (Marktest), and then verified by ICS's monitoring services. Therefore, the monitoring of the quota provisions is based on treatment of all the information provided by the random selection of regular broadcasts during six weeks per year (three for each semester), analysed channel by channel.

In the UK, a percentage record is kept channel by channel, based on the actual programmes broadcast throughout the year. Monitoring by ITC staff provides an additional check. From time to time, the ITC also checks on co-productions, including the sources of funding.

Italy is the only country exercising a special monitoring system. The AGCOM has commissioned the monitoring of national TV terrestrial broadcasters to a specialised institute which records, every day, all of their programmes on magnetic supports (videotapes) and then supplies the AGCOM with all the data it requires. Therefore, the AGCOM relies on the data supplied by the broadcasters related to the total annual broadcasting time but is also able to control and double check the information provided, due to the magnetic supports of all programmes received from the institute commissioned to record the broadcasters.

4.3. *Sanctions in cases of non-compliance with the quotas*

In almost all countries, the regulatory authorities have the right to act in cases of violation of the provisions of the respective national media laws and regulations by the broadcasters

under their jurisdiction and impose sanctions. The authorities can, in the beginning, issue rather mild sanctions, such as warnings or informal orders. They can then impose fines. In cases of continuous and severe violation, in most countries the authority can shorten or even revoke the licence.

Since the quota provisions are part of the respective national laws, it can be concluded that, where the opposite is not stated, the authorities can also act in cases of broadcasters non-compliance with the quota provisions, although there are no specific provisions with regard to sanctions in cases where the quota provisions are not met.

More specifically, in four countries (Austria, Germany, Iceland and Ireland), the regulatory authorities stated that they do not have the right to act in situations where the broadcasters do not comply with the quota provisions. Furthermore, they do not have any right to impose sanctions or to take other measures against broadcasters.

In Sweden, sanctions can be imposed if the broadcasters do not provide the data on European works and independent productions as requested, or if the data is false. More specifically, if a broadcaster does not report to the Swedish Radio and TV Authority on the quota percentages, an order may be issued to comply with the provision. This order may be subject to a conditional fine.

Only in four countries (French Community of Belgium, Italy, Portugal, Spain) is it stated specifically that the authorities can impose sanctions in cases of broadcasters non-compliance with the quota provisions. In the French Community of Belgium and in Italy, the respective authorities (CSA and AGCOM) have the right to impose fines. In Spain, non-compliance with the quota obligations concerning ‘European works’, ‘independent productions’ and ‘recent works’ is considered as a severe infringement, which could be punishable with fines of up to 50 million Spanish pesetas.

In Portugal, infringements to quota provisions established under national law 31-A/98 are deemed to be *contra-ordenações*, meaning a type of a sanction placed, from the Portuguese main doctrinal point of view, between penal and administrative sanction categories. These infringements are also punishable by a fine of between 2,000,000 to 20,000,000 Portuguese escudos (around 10,000 and 100,000 Euro, respectively).

To date, only warnings have been issued (Denmark, France, Luxembourg, Portugal). Only in the Netherlands have there been cases, where fines were imposed on broadcasters not complying with the quotas. The Commissariaat imposed provisional fines but their execution was suspended.

Country	Ability to impose sanctions	Cases, where sanctions were imposed
Austria	No	No
Belgium (Flemish Community)	Yes	No
Belgium (French Community)	Yes, fines	No
Denmark	Yes, warnings or revocation of licence	Yes, warnings
Finland	Yes, warnings, fines or revocation of the licence	No
France	Yes, warnings and fines	Yes, warnings

Germany	No	No
Greece	Yes, <i>i.a.</i> , warnings, fines or revocation of the licence	No
Iceland	No	No
Ireland	No	No
Italy	Yes, administrative fines	No
Liechtenstein	-	-
Luxembourg	Yes, explanation request or revocation of the licence	Yes, explanation requests
Netherlands	Yes, fines	Yes, fines (not executed)
Norway	Yes, warnings or revocation of the licence	No
Portugal	Yes, fines	No
Spain	Yes, fines	No
Sweden	No	No
United Kingdom	Yes, warnings, fines, shortening or revocation of licence	No

D. ANNEX 1

List of participating Regulatory Authorities and Broadcasters

Country	Regulatory Authorities	TV-Broadcasters
Austria	Federal Chancellery	♦ORF - Österreichischer Rundfunk ♦ATV - Austria TV
Belgium Flemish Community	Ministerie van de Vlaamse Gemeenschap Vlaams Commissariaat voor de Media	♦VRT - Vlaamse Radio-en Televisieoemroep ♦Canal + Televisie
Belgium French Community	Conseil Supérieur de l'Audiovisuel	♦RTBF - Radio-télévision Belge Francophone
Denmark	Ministry of Culture (Radio and TV Department)	♦DR Danish Broadcasting Corporation ♦TV 2/ DANMARK
Finland	Ministry of Transport and Communications	♦YLE - Yleisradio Oy ♦MTV Oy ♦Nelonen - Oy Ruutunelonen Ab
France	Conseil Supérieur de l'Audiovisuel - CSA	♦France Télévision ♦M6 Métropole Télévision
Germany		♦ARD - Erstes Deutsches Fernsehen ♦ZDF - Zweites Deutsches Fernsehen ♦VOX
Greece	Ministry of Press and Mass Media	♦Antenna - Antenna TV S.A. ♦Mega Channel - Teletypos S.A.
Iceland		♦RÚV- Icelandic National Broadcasting Service - TV
Ireland	Independent Radio and Television Commission - IRTC	♦RTE - Radio Telefís Éireann
Italy	Autorità per le Garanzie nelle Comunicazioni - AGCOM	♦RAI - Radiotelevisione Italiana ♦Mediaset ♦Europa TV Spa – Tele+ Group ♦TV Internazionale S.p.A.
Liechtenstein	Office for Communications	
Luxembourg	Ministère d'Etat - Service des Médias et des Communications	♦CLT- UFA S.A.
Netherlands	Commissariaat voor de Media	♦NOS - Nederlandse Omroep Stichting ♦RTL/de Holland Media Groep ♦SBS Broadcasting B.V. ♦UPC – United Pan-Europe Communications N.V.
Norway	The Mass Media Authority	♦NRK – Norwegian Broadcasting Corp. ♦TV 2 Norway ♦TV NORGE AS
Portugal	Instituto da Comunicação Social - ICS	♦RTP - Radiotelevisão Portuguesa S.A. ♦TVI- Televisão Independente S.A.
Spain	♦Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información - SETSI ♦Audiovisual Council of Catalonia - CAC	♦RTVE - Radio Televisión Española ♦TV3 - Televisió de Catalunya S.A. ♦Canal+ - Sogecable S.A.
Sweden	Radio and TV Authority	♦SVT - Sveriges Television AB ♦Canal+ Television AB
United Kingdom	♦DCMS - Department of Culture, Media and Sport ♦ITC - Independent Television Commission	♦BBC - British Broadcasting Corporation ♦ITV - Independent Television ♦Channel Four Television Corporation ♦Channel 5 Broadcasting ♦Granada Sky Broadcasting

		♦PACT - UK
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Note: PACT is a trade association representing independent television, film, animation and new media production companies