

Summary

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. This description covers both the implementation of these provisions, and also 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.

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 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. 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)

- 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.

More specifically, 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.

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. France is a special case, being the only country which distinguishes between audiovisual works and cinematographic works. In cases where there is less exclusion, usually 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.

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 Directive. Almost half of the countries 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’. Of the remainder, some used the wording of the Directive and the others different wordings (e.g. ‘biggest part’, ‘main part’), which have almost the same meaning as the wording ‘majority proportion’.

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, in most countries there is provision for broadcasters to reserve 10% of their transmission time for ‘independent productions’. In some countries (Denmark, Finland, Iceland and Sweden), the national legislator has chosen to stay close to the wording of the Directive and gave broadcasters the opportunity to make the decision of reserving either 10% of their transmission time or 10% of their budget for ‘independent productions’. 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 (public service broadcaster in Portugal), or to reserve higher percentages of the transmission time or the budget (France, Italy, Netherlands, UK).

However, 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.

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. 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, the definition under Italian law excludes production companies, which are affiliated to a 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 as 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.

Ireland includes the criteria of staff, participants and facilities in its classification of independent productions, with regard to the public service broadcaster RTÉ. In the UK, common employees, long term contracts, contractual obligations to use the production 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.

Apart from the provisions implementing Articles 4 and 5 of the TWF Directive, 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.

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 all these countries,

broadcasters are required to allocate a certain proportion (percentages vary from 25% to 50%) of their transmission time to programmes, originally produced in the respective national language.

In the Nordic countries, it is generally stated that broadcasters (in some cases only the public service broadcasters) should broadcast programmes in the respective national language or another Nordic language or the language of a minority. However, in all cases, no specific percentages have been set.

Some countries set specific percentages also for the broadcast of certain types of programmes. In the Netherlands, at least 25% of the programmes of the public 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.

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 (European feature films in Spain, programmes for children in Italy, animation films in France). In Portugal and the UK, the public service broadcasters should meet general diversity obligations and quotas and are required to broadcast specific amounts of different types of programmes (e.g. programmes made outside London for the UK, fiction works and 'creative documentaries' for RTP in Portugal).

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. (20% in Italy for the public service broadcaster, 25% Netherlands for the public service broadcaster, 25% in the UK for 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, Austria and the French Community of Belgium public service broadcasters have the obligation to finance audiovisual or film production, either made by independent producers or in general.

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.

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 (e.g. *Filmförderung* measures in Germany).

As a special case, it should be noted that in Portugal there is an innovative voluntary 'partnership agreement' between the public authorities and all the national and terrestrial Portuguese television 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.

The monitoring of the aforementioned provisions 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 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. The Autonomous Community of Catalonia is the only one with independent audiovisual authority, the *Consell de l'Audiovisual de Catalunya* (CAC).

In Belgium, competence with regard to broadcasting is divided between its Communities. It should also be noted, that in Ireland and UK the responsible authorities for the public service broadcasters and private ones are different.

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.

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 (France, Ireland for the private broadcaster, Greece, Portugal, UK for the private terrestrial channels) 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.

For example, 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 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 verifies the data as well.

Italy is the only country exercising a special monitoring system. 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.

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, at first, 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.

Only in four countries (French Community of Belgium, Italy, Portugal, Spain) is it stated specifically that the authorities can impose sanctions (administrative fines) in cases of broadcasters non-compliance with the quota provisions.

To date, only warnings or explanation requests 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.