

Response from RTÉ (Ireland's public service broadcaster)
Issue Paper : Cultural Diversity and Promotion of European and Independent Audio-visual works

General Summary

- RTÉ welcomes the opportunity to make a submission to the Commission's Issues Papers on the Television without Frontiers Directive. RTÉ has actively participated in consultations, expert groups and contributed to other submissions on the same topic, including the EBU.
- The 'Television Without Frontiers Directive' (the Directive) is the key legislation regulating the free circulation of television services across the European Union. At its core lies the objective that viewers continue to have access to a rich variety of European programmes. This principle becomes ever more important at a time when niche and premium services achieve phenomenal growth and 'global content village' evolves from concept to reality.
- Another core element of this Directive is the 'country of origin' principle which makes it possible for viewers to freely receive television channels and services licensed in any one of the EU Member States. RTÉ recognises that this internal market objective – the free circulation of services - lies at the heart of the directive and needs to be achieved. This should not, however, be to the detriment of delivering a high level of protection for viewers and consumers in the European Union.
- RTÉ considers that these core principles enshrined in the Directive are important and should be maintained. There is a need for a minimum set of common support measures for Europe's production industry. However it must also be recognised that the domestic or national regulatory measures must a) be able enhance or complement these minimum support measures and b) be adhered to by all audio-visual content services which target that market.
- RTÉ agrees that the Directive needs to be adapted to take account of technological developments and new content services. Recent technological developments have blurred the distinction between different types of services (broadcasting and new media services) and between the regulation of infrastructure and content.
- RTÉ notes that the Commission recognises the necessity of an 'integrated approach to information society and audio-visual media policies in the EU' to take account of the convergence that is taking place. This 'integrated approach' provides an important and timely opportunity to clarify the objectives and scope of future European Audio-visual policy.
- The Directive should not be limited to removing the obstacles to the internal market but should also take account of general interest objectives in this area such as access, cultural diversity and media pluralism.
- Public service broadcasters have a requirement to meet a broad programming remit which includes, substantially, news, current affairs and sports (as well as

education, cultural and entertainment programming) yet broadcast regulation, through this Directive, does not recognise the value of such a broad remit.

- RTÉ suggests that the provisions which support cultural diversity (e.g. Articles 4 & 5) be re-evaluated in the context of this debate. RTÉ contests that the exclusion of news, current affairs and sports programming from the applicability of quotas is an overly narrow interpretation of what constitutes a European or Independent work. European and Independent Quotas should recognise the broad remit that is the pre-requisite of a Public Service Broadcaster.

ISSUE PAPER: Cultural Diversity and the Promotion of European and Independent Audio-visual Production

(Issue 1) European and Independent Quotas:

1. Public service broadcasters have a requirement to meet a broad programming remit which includes, substantially, news, current affairs and sports (as well as education, cultural and entertainment programming) yet broadcast regulation, through this Directive, does not recognise the value of such a broad remit. RTÉ believe that such inconsistencies need to be addressed during the review process. As stated earlier, there is a need for the Commission to consider the inclusion of the afore-mentioned categories within the quota system provided for in the Directive.
2. This point is particularly important for smaller countries that also experience considerable slipover from same language content from other countries. RTÉ invests very significant amounts in original production and independent production for coverage of a wide range of programme genres (which includes News, Current Affairs and Sports) which strengthens our national identity and yet these cannot qualify as European or Independent works.

(Issue 2) Non-Linear Services:

3. RTÉ acknowledges that non-linear services are likely to make increasing use of audio-visual content. However it may be premature to introduce binding measures at this juncture. It is vital that developments in these new and emerging markets are monitored so that their impact on broadcasting and on independent production in national markets can be measured. In the context of such a monitoring exercise, RTÉ notes the idea of a review clause put forward by the Commission. Any proposed application of measures concerning the promotion of cultural diversity and European works to non-linear services, would have to take cognisance of the specific characteristics of these new services, through a graduated and gradual approach. RTÉ supports the notion that any instrument should initially be non-binding until these markets achieve a greater level of maturity. RTÉ would have a

concern that the development of new services could be hindered by premature and overly stringent legislation.

(Issue 3) Monitoring the Application of Articles 4 and 5 in Member States:

4. RTÉ regards a certain degree of monitoring as essential if these provisions of the Directive are to be respected. RTÉ does not see the need to alter the existing monitoring scheme as provided for in Articles 4 and 5 and does not see the need to increase the level of monitoring in this regard. RTÉ is of the view that the monitoring process is one that is most appropriately carried out by the Member States at a national level.

(Issue 4) Encouraging the Production and Distribution of European Co-Producers:

5. RTÉ does not consider it necessary to introduce regulatory measures in favour of exchanging and distributing European works. In this context sub-quotas for non-national works would be inappropriate. RTÉ would have concerns that they might have the effect of creating editorial constraints and pose a threat to programme independence.

(Issue 5) The Concept of an Independent Producer:

6. RTÉ is not adverse to the notion of further clarification of the concept of “independent producer”. However any assessment of the independence of a producer must take account of the differences in the economic context of each country and the specific and unique structure of its audio-visual market. The concept of “independent producer” cannot be applied in the same way in the national legislation of large and small countries. Such flexibility is particularly necessary whenever there is any proposed interference with the “terms of trade” between producers and broadcasters in particular with regard to the acquisition and retention of rights. RTÉ does not see how such flexibility could be compatible with the notion of harmonising this concept at a European level.
7. RTÉ submits that the “ownership of rights” and “independence” are two separate things. Indeed RTÉ fails to see how the criterion of holding secondary exploitation rights is relevant to the notion of the producers “independence”. Even if it was possible to achieve a more harmonised concept of “independent producer” within the Directive, it would not be possible for such a definition to be based on criteria relating to the acquisition and retention of rights. In addition copyright issues are outside the scope of the Directive and any attempts to mix cultural and media policy considerations with complex copyright issues could be problematic.
8. RTÉ would question how the criterion of holding secondary exploitation rights could alter or affect a producer’s independence, as asserted in the Issue Paper. The Commission’s document does not define exactly what “secondary” rights are and what they cover. In countries such as France, Italy and the United Kingdom, “secondary rights” cover commercial exploitations which are very different from each other and are difficult to compare. The same applies to the “primary” rights

held by producers. Such differences make it unrealistic to envisage harmonisation of these systems at European level. These concepts should be dealt with at the individual member level taking into account the specific structure and needs of the specific audio-visual industry and the specific structure and needs of the broadcaster. For example RTÉ is a dual funded broadcaster and its structure and needs are different to say the BBC which does not have to rely on commercial revenue as part of its funding.

9. RTÉ submits that it is contrary to economic logic for broadcasters to assume a large portion of the risk and be deprived of the exploitation rights to the audio-visual work. Rights should follow the risks. Some amortisation of the costs of the broadcaster is at least possible through the secondary exploitation rights. This is all the more necessary in the case of a dual funded broadcaster such as RTÉ which relies on commercial revenue. RTÉ is one of the few Public Service Broadcasters with a very low percentage of licence fee income with the balance being commercially generated income. It is therefore imperative for a broadcaster such as RTÉ to seek to maximise its commercial returns from its investments and that ceding rights (not profits) from the exploitation of programme material is arguably subsidising the private television production sector with public funds.
10. RTÉ submits that in addition the Commission seems to disregard the possibility that a greater level of net profits can be given to the producer from such exploitation rather than ceding the rights themselves. Indeed the terms of trade in operation in Ireland with the independent producers is more generous in this regard than in many other countries. The Commission's report stresses that broadcasters have often exceeded their independent production obligations. RTÉ is no exception. However it is highly likely that the adoption of such measures would likely have a deterrent effect on a broadcaster's production policy. Broadcasters would have little incentive other than to merely respect their legal obligations, making no attempts to go beyond them.
11. The Commission cites the examples of France and the UK, however the rest of Europe has not taken the approach which has been taken there in terms of national regulations affecting the terms of trade. In almost all other European countries these are contractual matters which are dealt with at a contractual level between the producer and broadcaster. In light of this it would be even more difficult to achieve some overall level of EU harmonisation in this regard.
12. RTÉ notes that the Commission states that the unbundling of rights would ensure that "sleeping rights" are put on the market. RTÉ does not agree with this view. Firstly it pre-supposes the existence of "sleeping rights" which has not been proven. Also this presumption fails to recognise realistic market considerations. They are that in today's market broadcasters are well placed in both structural and economic terms to ensure that audio-visual works receive appropriate circulation. Furthermore it must be recognised that there are many instances where the level of demand or exploitation potential for certain independently commissioned works is limited outside of national markets. In such instances independent producers allege that the broadcaster is not sufficiently promoting its works. However the reality is that frequently outside of the national member state the demand for such works is limited.

13. RTÉ submits that the retention of secondary rights by independent producers could be likely to have a range of effects on to national markets not only on competition but also on content grounds. It could for instance encourage independent producers to invest in lucrative formats which is not the declared intention of the Directive with regard to cultural diversity. As the Graham report itself reflects, it is of fundamental importance to evaluate the impact of such measures before envisaging the use of the notion of “secondary rights” criterion in assessing a producer’s independence.
