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COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Eighth Communication on the application of Articles 4 and 5 of Directive 89/552/EEC  
'Television without Frontiers', as amended by Directive 97/36/EC, for the period 2005  
2006**

**[SEC(2008) 2310]**

## 1. INTRODUCTION

This Communication is drawn up pursuant to Article 4(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities,<sup>1</sup> as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997<sup>2</sup> ('Television without Frontiers Directive', hereinafter referred to as 'the Directive'). Through this Communication, the Commission reports, for the eighth time since the adoption of the Directive, on the application of Articles 4 and 5, now for the period 2005-2006. It is based on the Member States' statistical statements on the achievement of the proportions referred to in these Articles by each of the television programmes falling within their jurisdiction and presents the Commission's opinion on the application of these provisions, including the main conclusions to be drawn from the Member States' reports.

The purpose of this biennial reporting exercise is twofold. First, the Communication brings the statistical statements by the Member States to the attention of the other Member States, the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions. Second, it aims to verify whether the measures adopted to promote European and independent productions have been properly applied in the Member States.

For the first time, the statistical statements of the ten Member States that joined the European Union (EU) on 1 May 2004 are presented and assessed for the entire reference period of the report (2005-2006).<sup>3</sup> Furthermore, it should be noted that Articles 4 and 5 (in particular the former) are being successfully applied in a changing audiovisual environment: for the first time, channels broadcasting in Digital Video Broadcasting-Handheld (DVB-H) are listed in a Member State's report.<sup>4</sup>

Additional detailed information can be found in the nine background documents in the Commission staff working paper accompanying the Communication. The Working Paper also contains statistical data provided for the reference period by the two new Member States that joined the EU on 1 January 2007, Bulgaria and Romania.<sup>5</sup> Although these Member States were not obliged to submit reports for the reference period; they decided to provide their statistical statements on a voluntary basis.

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<sup>1</sup> OJ L 298, 17.10.1989.

<sup>2</sup> OJ L 202, 30.07.1997.

<sup>3</sup> In the last (seventh) Communication (COM(2006) 459 final), compliance with Article 4 and 5 by these 10 new Member States was reported only for the relevant part of the reference period, namely from 1 May to 31 December 2004.

<sup>4</sup> Italy featured four such channels in its report. See Background Document 4, Commission staff working document accompanying this Communication, SEC (final) XYZ, (hereinafter 'Working Paper'), p. 88.

<sup>5</sup> See Background Document 5, Working Paper.

## 2. COMMISSION'S OPINION ON THE APPLICATION OF ARTICLES 4 AND 5

### 2.1. General remarks

#### 2.1.1. Articles 4 and 5 in the context of the European audiovisual landscape

The European audiovisual landscape has been constantly expanding. Every year, more and more broadcasters and channels are entering the European market, resulting in an increased fragmentation of audiences. The number of channels covered<sup>6</sup> by Articles 4 and 5 within the EU, which grew from 584 channels in 2003 to 765 in 2004, rose again to 949 channels in 2005 and 1096 channels in 2006.<sup>7</sup> This represents an increase of 512 channels, or 88%, in the number of channels covered over four years (2003-2006). This trend cannot solely be explained by the EU enlargement in 2004 (which added 111 new channels in 2004, rising to 155 in 2006): even the EU-15 experienced significant growth, with 357 new channels since 2003, representing an increase of 61%.<sup>8</sup> This reflects the continual growth in European television programming and thus the enduring vitality of the European audiovisual industry.<sup>9</sup>

At the same time, this development points to the rising fragmentation of European audiences. The audience share of the 'primary' channels has decreased, and a shrinking number of channels are able to attract a significant audience share. The major national markets, such as Germany, France, Italy and the UK, are the first to be affected by this ever-increasing fragmentation.<sup>10</sup>

#### 2.1.2. Methods of implementation and monitoring by the Member States

The methodology and intensity of monitoring varies substantially between the different Member States.<sup>11</sup> They range from mere estimates and surveys to regular monitoring of programming and sampling methods. In some Member States, independent regulatory authorities or government departments are responsible for data collection and analysis, whereas in other cases private research companies are entrusted with this task. In quite a number of Member States, the monitoring bodies rely on the statistical statements submitted by the broadcasters, confining themselves to cross-checking these submissions against the data at their disposal.

During the reference period, most Member States provided comprehensive information to the Commission. Following clarifications by the competent bodies, the Commission was able to compile the required data. There has been a considerable improvement in the quality of reporting, which is reflected in the number of channels reported.

This notwithstanding, some Member States' reports listed a rather high number of 10 or more channels for which no data were communicated on either European works or independent productions, or both.<sup>12</sup> The Commission reiterates that the reporting obligation under Article

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<sup>6</sup> See Indicator 1, Background Document 1, Working Paper.

<sup>7</sup> See Background Document 2, Chart 1, Working Paper.

<sup>8</sup> See Background Document 2, Table 1, Working Paper.

<sup>9</sup> See Background Document 2, Chart 1, Working Paper.

<sup>10</sup> See Background Document 4, Working Paper.

<sup>11</sup> Ibid.

<sup>12</sup> The report by the Czech Republic listed 13 channels for which no data were communicated as regards European works and 20 channels with no data on independent productions for 2005. For Italy, the figure was 10 channels as regards both categories for 2006. For France, no data were provided on 18

4(3) of the Directive applies to ‘each of the television programmes falling within the jurisdiction of the Member State concerned’, irrespective of its mode of transmission or audience share.<sup>13</sup> It is the responsibility of each Member State to provide a comprehensive list of and full data on all channels covered by Articles 4 and 5 of the Directive, unless specific and substantiated reasons are given for not doing so.

The application of Articles 4 and 5 of the Directive still varies considerably among the Member States. For example, the minimum proportion of independent works required under Article 5 of the Directive can relate either to broadcasters’ transmission time or their programming budget: the choice is left to the discretion of the Member States.<sup>14</sup> Certain divergences can be observed as regards the notion of qualifying transmission time: while the majority of the Member States have directly implemented in national law the ‘negative’ definition contained in Articles 4 and 5, some of them have excluded further categories of programmes from this definition, or introduced a ‘positive’ definition of qualifying programmes, thus making it more difficult to achieve the required proportions. Moreover, many Member States have established more detailed or stricter rules in the area concerned.<sup>15</sup>

These and other variations within the scope allowed by the Directive make an objective measurement of the statistical statements of the Member States difficult. Nevertheless, the findings presented below allow the Commission to draw reliable conclusions from the national reports as to the actual implementation of Articles 4 and 5.

### 2.1.3. *Analysis and assessment tools*

Under Article 4(3) of the Directive, the Commission ensures the application of Articles 4 and 5 in accordance with the provisions of the Treaty. In order to help the Member States fulfil their reporting obligation, guidelines defining certain terms and clarifying key concepts in the implementation of Articles 4 and 5 have been drawn up.<sup>16</sup> Moreover, a number of indicators<sup>17</sup> have been defined to provide an objective analysis grid to assess the reports submitted by Member States.

The above considerations form the background for the Commission’s opinion as presented in this Communication, which sets out below the general trends in the application of the

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channels as regards independent productions for both 2005 and 2006; the Slovenian report lists 11 such channels.

<sup>13</sup> As confirmed in the Suggested Guidelines for the Monitoring of the Implementation of Articles 4 and 5 of the ‘Television without Frontiers’ Directive of 11 June 1999, ‘(...) where a broadcaster broadcasts more than one channel, the proportions (of European and independent works) shall, in principle, be given for each relevant channel’, available at [http://ec.europa.eu/avpolicy/docs/reg/tvwf/eu\\_works/controle45\\_en.pdf](http://ec.europa.eu/avpolicy/docs/reg/tvwf/eu_works/controle45_en.pdf).

<sup>14</sup> Until recently, France was the only Member State which informed the Commission that it made use of the second option. The proportions of independent productions are calculated in France on the basis of turnover for digital terrestrial channels and on the basis of programming budget for cable and satellite channels, see Background Document 4, Working Paper, p. 83. Italy has now followed by replacing the obligation to reserve at least 10% of broadcasting time for independent productions with the obligation to invest at least 10% of a channel’s revenue in such works, see Background Document 4, Working Paper, p. 97.

<sup>15</sup> As explicitly permitted by Article 3(1) of the Directive. A number of Member States have made use of this option, e.g. they oblige some or all broadcasters to comply with higher percentage requirements than those provided for in the Directive.

<sup>16</sup> See footnote 13 above.

<sup>17</sup> See Background Document 1, Working Paper.

measures to promote the production and distribution of European television programmes at EU level.<sup>18</sup>

#### 2.1.4. *Application of Article 4*

This section contains an analysis of compliance with the obligation to broadcast, where practicable and by appropriate means, a majority proportion of European works as set out in Article 4 of the Directive.

In the EU, the average transmission time reserved for European works by all the reported channels in all EU-25 Member States was 63.52% in 2005 and 65.05% in 2006, representing an increase of 1.53 percentage points over the reference period. Compared with the last reporting period (65.18% in 2003 and 63.32% in 2004), the average proportion of transmission time dedicated to European works decreased slightly by -0.13 percentage points over the four consecutive years (2003-2006). Looking at a period of six years (66.95% in 2001 and 66.10% in 2002), the average proportion decreased by -1.90 percentage points.

Thus, the mid-term trend seems to suggest slightly declining figures. However, it is important to note that the reliability of such comparisons is subject to a number of caveats. First, the report for the period 2001-2003 covered EU-15 states only. The last report for the period 2003-2004 included the statistical statements of the Member States joining the EU in May 2004 for just a limited period of a few months. The average proportion of transmission time devoted by these countries to European works during the reference period (2005-2006) was 64.15% in 2005 and then 67.30% in 2006, while in the post-accession period (May to December 2004) they had a significantly lower average of 61.77%. Considering that the new Member States still needed a period of adaptation to the requirements of the Directive, their performance merits acclaim. It lies well above the proportions achieved by the EU-15 (1.05 percentage points higher than EU-15 in 2005 and 3.75 points in 2006). In other words, the successful implementation of Article 4 in these Member States, already foreshadowed in the last report, is now confirmed. These optimistic results give reason to hope that possible stagnation within the EU-15 will be offset by a positive trend in the EU-10.

Second, it must be borne in mind that, since the last report, the average proportions of European works have been based on all channels and not solely on those with an audience share of at least 3%.<sup>19</sup> As a result of the growing fragmentation of the sector, a considerable number of small niche channels have emerged, which may initially have problems in showing a majority proportion of European works. Finally, it must be emphasised that the figures have remained relatively stable and on average well above the 50% minimum, which testifies to the generally sound application of Article 4 throughout the EU.

Looking at Member State level, the average share of transmission time varied between 47.31% (Slovenia) and 81.14% (Denmark) in 2005 and between 45.44% (Sweden) and

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<sup>18</sup> Details of the application in each Member State are presented in Background Document 4 of the Working Paper.

<sup>19</sup> The previous methodology of excluding channels with less than a 3% audience share from reporting may have had the merit of yielding more 'weighted' results. However, it was adopted because at the time channels with audience shares below 3% were considered to be of marginal importance. With the considerable increase in the number of channels, this consideration is no longer justified. Nonetheless, in order to underline the relative importance of 'primary' channels, Background Document 7 of the Working Paper shows the proportions of transmission time reserved for European works by channels with audience shares above 3%.

81.07% (Poland) in 2006. The trend in terms of the average share of transmission time devoted to European works over the reference period was positive in 15 and negative in 10 Member States. Over the medium term, looking at the previous reference period and the subsequent development, performance has been mixed: thirteen Member States have not made any progress in meeting the 50% proportion of European works, while twelve Member States increased their average majority proportion either over four years (2003-2006) or from the beginning of reporting in 2004 (for the EU-10). This seemingly less satisfying result is mitigated, however, when taking into account that nine Member States saw a decrease in performance of just five percentage points or less over the four-year term. Only three Member States encountered difficulties in achieving the majority proportion specified by Article 4 in either 2005 or 2006.<sup>20</sup>

As regards the total number of channels complying with the majority proportion requirement of Article 4, the average compliance rate for all reported channels in all Member States was 68.60% in 2005 and 72.88% in 2006. This represents an increase of 4.28 percentage points during the reference period and 4.60 points over the period 2003-2006 (68.28% in 2003 and 72.80% in 2004). Taking into account the fragmentation of the sector, accompanied by a growing number of special-interest and niche channels, the positive development already noted in the last report has been sustained, as the compliance figures have stabilised at a relatively high level. The compliance rates for all channels covered at Member State level ranged from 30% (Slovenia) to 100% (Latvia, Malta and the Slovak Republic) in 2005. In 2006, they varied between 41% (Slovenia and Sweden) and 100% (Estonia, Malta and the Slovak Republic). During the reference period, compliance rates rose in twelve, remained unchanged in five and decreased in eight Member States.

The above results show a generally positive picture as regards the objectives of Article 4. Overall, the majority proportion required by Article 4 has largely been achieved by the Member States, including the new Member States, the average proportion having stabilised at a relatively high level of over 63%, well above the 50% minimum set by the Directive, with continuously rising compliance rates. Moreover, as demonstrated by the figures voluntarily provided by Romania and Bulgaria,<sup>21</sup> the integration of these new Member States within the regime of the Directive for the next report should pose no problems as regards the promotion of European works.

#### *2.1.5. Application of Article 5*

This second part of the Communication looks at compliance with the minimum requirement under Article 5 of the Directive.

In the EU, the average proportion of European works by independent producers (independent productions) on all reported channels in all Member States was 36.44% in 2005 and 37.59% in 2006, representing an increase of 1.15 percentage points over the reference period. This represents an improvement compared with the previous reference period (2003-2004), when there was only a slight increase of 0.11 percentage points (31.39% in 2003 and 31.50% in 2004). Examined over four years (2003-2006), the average proportion therefore increased by 6.20 percentage points. Over six consecutive years (2001-2006), a stabilising trend can be

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<sup>20</sup> Lithuania broadcast an average of 46.98% European works in 2006, Slovenia 47.31% in 2005 and Sweden 45.44% in 2006.

<sup>21</sup> The average transmission time devoted to European works in Bulgaria was 67.65% in 2005 and 72.83% in 2006. The Romanian figures were 51.08% and 57.95% for 2005 and 2006, respectively.

observed, since, after a considerable decline of -6.25 percentage points during the period 2001-2004, the percentage then rose to a level (37.59%) comparable with that recorded in 2001 (37.75%). Broadcasters in the Member States must therefore be encouraged to maintain this improved performance. At the same time, it must be recalled that the reporting obligation has applied to a larger group of 25 Member States since May 2004. Naturally, the broadcasters in the 10 new Member States may find it more difficult to invest in independent productions, as they do not yet have much experience in the application of Article 5 of the Directive. In fact, the average figures for the 10 new Member States (30.54% in 2005 and 31.64% in 2006) are below the average percentages achieved by the EU-15 (40.38% in 2005 and 41.55% in 2006). The overall proportions of the vast majority of the Member States remained far above the 10% minimum set by the Directive: 18 Member States were able to stabilise their performance as regards independent works at well above 25% — in other words one quarter — of total qualifying transmission time. Only one new Member State needs to improve its record in order to attain the 10% minimum.<sup>22</sup>

The EU average compliance rate for channels in all Member States was 75.92% in 2005 and 79.20% in 2006, representing an increase of 3.28 percentage points over the reference period. In comparison with the two preceding reference periods (90.67% in 2001, 89.13% in 2002, 78.40% in 2003 and 81.92% in 2004), the compliance rate rose by 0.80 percentage points over a period of four years (2003-2006) but fell by -11.47 points over six consecutive years (2001-2006). This represents a considerable but understandable decrease, taking into account that the figures now include data for the 10 new Member States. However, it is noticeable that within the reference period, compliance rates recovered, despite the relatively poorer performance of the new Member States and the change in methodology since the last report.

The average compliance rate for channels in each Member State ranged from 20% (Cyprus and the Czech Republic) to 100% in five Member States (Estonia, Ireland, Latvia, Malta and the Slovak Republic) in 2005 and from 20% (Cyprus) to 100% in six Member States (Estonia, Ireland, Latvia, Malta, the Slovak Republic and Finland) in 2006. The average compliance rate increased in 10 Member States, remained stable in nine and declined in six others. Compared with the results recorded in the last report, this confirms a positive compliance trend for Article 5 of the Directive.

The EU average share devoted to recent European works by independent producers (recent works<sup>23</sup>) was 68.65% of all independent European works (recent or not) in 2005 and 66.75% in 2006, representing a slight decrease of -1.90 percentage points during the reference period. In comparison with previous reference periods (61.78% in 2001, 61.96% in 2002, 71.66% in 2003 and 69.09% in 2004), there was a decrease of -4.91 points over four years (2003-2006) but an increase of 4.97 points over six years. This may be less impressive than the development between 1999 and 2004, which saw an increase of almost 30%, but indicates that after a period of considerable progress with respect to recent works, the proportion has stabilised at a very satisfactory level.

At Member State level, the average percentages varied between 26.13% (Estonia) and 100% (Cyprus and the Slovak Republic) in 2005 and between 24.80% (Ireland) and 100% (the Slovak Republic) in 2006. There was a positive trend in the average share of recent works in 10 Member States, no change in one Member State, and a negative development in 15

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<sup>22</sup> Cyprus devoted 9.70% of transmission time to European works by independent producers in 2005 and 6.48% in 2006.

<sup>23</sup> I.e. works broadcast within five years of their production.



Member States. It is also worth stating that the percentages of transmission time devoted to recent works by independent producers remained above 25% (25.02% in 2005 and 25.09% in 2006) of total qualifying transmission time. This confirms the positive trend in the scheduling of recent works, which increased by 2.59 percentage points over four years (2003-2006).<sup>24</sup>

The above results suggest that the objectives of Article 5 of the Directive are being achieved comfortably at Community level in terms of the scheduling of independent productions, including an adequate proportion of recent works. The figures submitted voluntarily by Bulgaria and Romania<sup>25</sup> give reason to hope that these countries will be able to contribute to reaching the objectives of Article 5 in the following reference period.

### 3. CONCLUSION

According to the statistical statements provided by the Member States, the scheduling of European works at Community level increased over the current reference period, following a decline during the last reference period. The trend over four years has been relatively stable, while over six years (2001-2006) there has been a slight decrease. Overall, however, the proportion of European works broadcast on EU screens has stabilised at a relatively high level of above 63%. However, there are four factors that hinder a fully consistent evaluation. First, starting from the last report, figures now include the statistical statements of the ten Member States that joined the EU in 2004. Second, the method of calculation has been altered, in as much as figures for channels with an audience share of less than 3% have been included in the averages since the last report. Third, the growing fragmentation of the sector produces economic pressure and a need for cheap and easily accessible content, thereby creating a more difficult environment for investment in and scheduling of European works. Finally, the number of channels for which no data were communicated has fallen.

This notwithstanding, the stabilising trend in terms of the scheduling of European works is undeniable and is further confirmed by the positive trend in the average compliance rate of the channels covered. This rose by more than 4 percentage points during the reference period, and also developed positively over the four-year term (2003-2006). In conclusion, the overall situation is satisfactory for the transmission of European works on EU television channels, although there is still scope for progress in certain Member States. The scheduling of European works at European level has stabilised well above 60%, and a proportion above 65% or more is sustainable in future. This positive assessment applies equally to the 10 new Member States — which actually performed better than the ‘old’ Member States in the reference period — showing that their initial efforts to comply with Article 4 have been successful.

With respect to the implementation of Article 5 of the Directive, a positive trend can also be observed: after a considerable decline of -6.25 percentage points during the period 2001-2004, the 2006 rate stabilised at a level comparable with that recorded in 2001 (37.59% compared with 37.75%). This means that the average proportion increased quite substantially by 6.20 points over four years, despite the impact of the factors described above. It is remarkable that the vast majority of the Member States were able to stabilise their performance as regards

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<sup>24</sup> See Chart 2, Background Document 2, Working Paper.

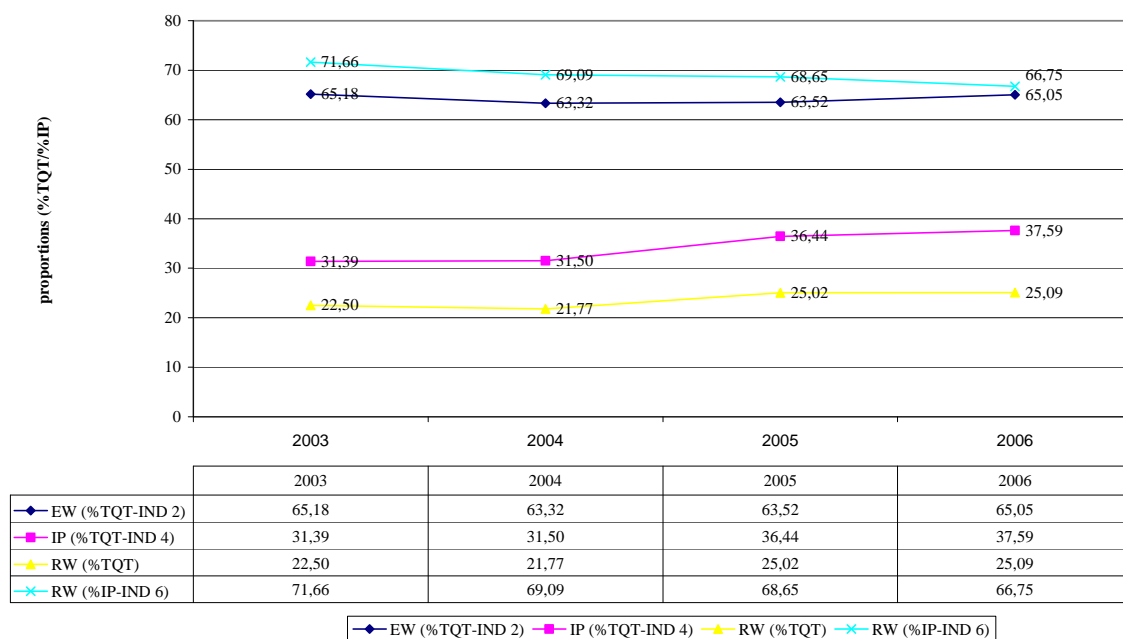
<sup>25</sup> In Bulgaria, 17.42% and 14.94% was devoted to independent works in 2005 and 2006, respectively; in Romania, the figures were 36.22% and 38.62%.

independent productions at a level well above 25% — in other words one quarter — of total qualifying transmission time.

The situation concerning recent works by independent producers is also very satisfactory: despite a slight decrease over the reference period and over four years, the figures improved over six years. During the reference period, more than 25% of total qualifying transmission time was devoted to recent works.

These results, based on a detailed analysis of the Member States' national reports,<sup>26</sup> demonstrate that the objectives of Articles 4 and 5 of the Directive have been met comfortably over the current reference period at both Community and Member State levels.

#### Development of main indicators from 2003-2006 (Community level)



<sup>26</sup> See Background Document 3, Working Paper.