



11 June 1999

**SUGGESTED GUIDELINES FOR THE MONITORING OF THE  
IMPLEMENTATION OF ARTICLES 4 AND 5 OF THE  
"TELEVISION WITHOUT FRONTIERS" DIRECTIVE**

**1. INTRODUCTION**

- 1.1. The following guidelines have been prepared to assist Member States in their duty to monitor the implementation of Articles 4 and 5<sup>1</sup> of Directive 89/552/EEC on "the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities" as amended by Directive 97/36/EC. The Member States' obligations in this respect are laid down in Article 4(3) of the Directive. This stipulates that "the Member States shall provide the Commission every two years with a report on the application of this Article and Article 5. That report shall in particular include a statistical statement on the achievement of the proportion referred to in this Article and Article 5 for each of the television programmes falling within the jurisdiction of the Member State concerned, the reasons, in each case, for the failure to attain that proportion and the measures adopted or envisaged in order to achieve it."
- 1.2. The present guidelines were drawn up in the framework of the "Contact Committee" set up by Article 23a of the Directive in order to clarify certain definitions so as to avoid differences of interpretation which could lead to the Directive being implemented in different ways. They are also intended to render transparent to all interested parties the manner in which the relevant provisions are implemented. This document as such has no mandatory legal force and is merely intended to clarify certain provisions of the Directive. It constitutes the second version of the "guidelines" and incorporates the changes made necessary by certain provisions of the 1997 Directive amending the 1989 Directive.

The new guidelines will apply from 1 January 1999.

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<sup>1</sup> For the sake of clarity, all references to the Articles are to the consolidated version of the Directive.

## 2. DEFINITION OF TELEVISION BROADCASTERS AND SCOPE

- 2.1. A television broadcaster means, according to the definition in Article 1(b) of the Directive "the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of (a) and who transmits them or has them transmitted by third parties".

Paragraph (a) defines "television broadcasting" as "The initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services".

- 2.2. The reporting obligation in Article 4(3) includes all broadcasts by broadcasters under a Member State's jurisdiction with the following exceptions:

- Articles 4 and 5 do not apply to "news, sports events, games, advertising, teletext services and teleshopping".
- Article 9 provides that Articles 4 and 5 do not apply "to television broadcasts that are intended for local audiences and do not form part of a national network".
- Recital 29 of the Directive stipulates that "channels broadcasting entirely in a language other than those of the Member States should not be covered by the provisions of Articles 4 and 5".
- Article 2(6) provides that the Directive does not apply to broadcasts intended exclusively for reception in third countries and which are not received directly or indirectly by the public in one or more Member States.

Consequently, it is not necessary for national reports to include data on the following categories:

- Channels broadcasting exclusively "news, sports events, games, advertising, teletext services and teleshopping";
- Broadcasts "intended for local audiences" which do not "form part of a national network" irrespective of the means of transmission used. As an exception to the general rule, the term "local" should be interpreted strictly and should therefore be taken to mean "sub-regional";
- Channels broadcasting entirely in a language that has no official status as one of the languages of one or more Member States;
- Broadcasts covered by Article 2(6) i.e. those exclusively intended for reception in third countries and not receivable in a Member State.

### **3. JURISDICTION OVER BROADCASTERS**

For the purposes of the Directive, the broadcasters under the jurisdiction of a Member State are, according to Article 2(2):

- those that are established in that Member State in accordance with paragraph 3 (establishment being determined as the place or places where the broadcaster has its head office, takes its editorial decisions about programmes schedules and/or has a significant part of the workforce involved in the pursuit of the television broadcasting activity);
- those to whom paragraph 4 applies (i.e. those broadcasters that, while not being established in a Member State, use a frequency granted by a Member State or a satellite capacity appertaining to a Member State or a satellite up-link situated in a Member State).

### **4. RELEVANT TRANSMISSION TIME**

- 4.1. Programme transmission time, within the meaning of Articles 4(1) and 5(1) is a broadcaster's total transmission time, the test card excluded, less the time reserved for news, sports events, games, advertising, teletext services and teleshopping.
- 4.2. In order to ensure comparability with previous reports, where a broadcaster broadcasts on more than one channel, the proportions (of European and independent works) shall, in principle, be given for each relevant channel. However, Member States may take account, as appropriate, of the specific nature, in particular, of certain new broadcasting services in cases duly justified in their reports
- 4.3. It is not appropriate for Member States to include in their Reports data on transmission time devoted to news, sports events, games, advertising, teletext services or teleshopping, whether of European origin or otherwise.

### **5. EUROPEAN WORKS**

- 5.1. The term "European works" is defined in Article 6 of the Directive as:
  - (a) Works originating from Member States;
  - (b) Works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 2 of Article 6;
  - (c) Works originating from other European third countries and fulfilling the conditions of paragraph 3 of Article 6.
- 5.2. The works referred to in paragraphs (a) and (b) above are works mainly made with authors and workers residing in one or more States referred to in those paragraphs provided that they comply with one of the following three conditions:

- they are made by one or more producers established in one or more of those States; or
- production of the works is supervised and actually controlled by one or more producers established in one or more of those States; or
- the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

A producer is considered to be established in a European State if the company is a going concern which has a permanent staff involved in both production and commercial operations at the European location.

- 5.3. The works referred to in paragraph (c) are works made exclusively or in co-production with producers established in one or more Member States by producers established in one or more European third countries with which the Community has concluded agreements relating to the audiovisual sector, if those works are mainly made with authors and workers residing in one or more European States.

The Commission shall draw up a list of the countries that may benefit from the provisions of paragraphs (b) and (c). The Commission and Member States shall make this list available on request to interested parties. It should be noted that application of the provisions of (b) and (c) is conditional on works originating from Member States not being the subject of discriminatory measures in the third countries concerned.

- 5.4. Moreover, works that are not European works within the meaning of the above provisions but that are produced within the framework of bilateral co-production treaties concluded between Member States and third countries shall be deemed to be European works provided that the Community co-producers supply a majority share of the total cost of the production and that the production is not controlled by one or more producers established outside the territory of the Member States.

Member States shall draw up lists of their bilateral co-production treaties. The Member States and the Commission shall make these lists available, on request, to interested parties.

- 5.5. Finally, works which are not covered by any of the above provisions but are made mainly with authors and workers residing in one or more Member States, shall be considered to be European works to an extent corresponding to the proportion of the contribution of Community co-producers to the total production costs.

## **6. THE CONCEPT OF INDEPENDENCE**

- 6.1. This concept should be understood in the light of recital N°31 of the Directive.

A producer with interests in television broadcasting will be regarded as an independent producer only if the interests in question do not constitute his main activity.

6.2. To put it more precisely, in the definition they apply to the wording of Article 5, Member States may take account of the following three indicative criteria, which are not exhaustive:

- Who owns the production company;

The objective is to make sure that a broadcasting organisation does not hold too large a share in the capital of a production company (and *vice versa*). The term "broadcaster" should be understood here as meaning the broadcasting organisation in its entirety, not each channel which comes under the organisation.

- How many programmes are supplied to the same broadcasting organisation;

The purpose of this criterion is to measure independence in terms of the amount of programming supplied, basing the analysis on a period long enough to allow conclusions to be drawn, and bearing in mind any special characteristics of the broadcasting organisation in question.

- Who holds the secondary rights;

This criterion enables the independence of a producer to be assessed in the event that all his rights, including secondary rights, have been bought by broadcasters, leaving the independent producer in a position where he cannot put together a catalogue of material with secondary rights which can be sold on other markets.

## 7. DATA COLLECTION

7.1. Subject to the exceptions set out in section 2.2. above, statistics, expressed in hours and percentages, must cover the relevant output of all broadcasters under the jurisdiction of the Member State during the reporting period, irrespective of whether they are new or special-interest broadcasters.

Member States should submit annual statistics as far as possible for each channel separately (see section 4.2. above).

It is suggested that Member States use the definitions provided above in order to ensure the compatibility of national reports.

If Member States use definitions other than those given above, the monitoring report should include details of the definitions used and how they differ from those given above, and also, where possible, how they affect the resulting data.

7.2. Where broadcasters can code their programmes according to the above mentioned definitions, they should be advised to apply data recording systems in such a way that comprehensive statistics for the entire annual schedule can be compiled.

If the national authorities are satisfied that a derogation from comprehensive reporting is justified in the reference period, then a detailed description of the broadcaster's sampling procedure and basis of estimates should be submitted for consideration to the Commission. Samples should consist of at least one week (chosen at random) per quarter of the reporting period.

7.3. Model

It is suggested that Member States present their reports according to the following model:

Broadcaster	Channel	A. European works (EW)		B. Independent productions (IP)		C. Recent works (RW) (% of B)		Reasons for non-compliance	Measures adopted or envisage to achieve compliance
		1999	2000	1999	2000	1999	2000		