

DISCUSSION DOCUMENT

REVIEW OF THE "TELEVISION WITHOUT FRONTIERS" DIRECTIVE

THEME 2: PROMOTION OF CULTURAL DIVERSITY AND COMPETITIVENESS IN THE EUROPEAN PROGRAMME INDUSTRY

The main aim of the Directive is to establish the legal framework for the free movement of services. To this end, it coordinates certain laws, regulations and administrative provisions in areas aimed at ensuring that general interest objectives are achieved, such as the promotion of European works with a view to safeguarding the freedom to supply and to receive television broadcasting services and thereby ensure a level playing field.

In this context, the dual aim of promoting cultural diversity and the competitiveness of the European programme industry translates into a series of measures to encourage the distribution and production of European television programmes pursuant to Article 151(4) of the Treaty, which obliges the Community to take account of cultural aspects when acting under other provisions of the Treaty, particularly in order to respect and promote the diversity of its cultures.

This mechanism, which is linked to complementary financial support mechanisms such as the Media programme and is applicable to "television broadcasting" within the meaning of Article 1 of the "television without frontiers" Directive, is based on the provisions contained in Chapter III: Article 4 (promotion of European works), Article 5 (promotion of European works by independent producers), Article 6 (definition of European works), Article 7 (chronology for broadcasting cinematographic works) and Article 9 (exemption of local television broadcasts not forming part of a national network).

Article 25a states that the review of the relevant provisions of the Directive must take into account an independent study on the impact of the measures concerned at Community and national level.¹ Without prejudging the results of this ongoing impact study, and particularly on the basis of the last report on the application of Articles 4 and 5,² the following questions are asked in order to pursue and deepen the debate.

I. Broadcasting of a majority proportion of European works (Articles 4, 6)

Article 4 lays down that the Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time. In practice, the majority of Member States have opted, in accordance with Article 3(1), for more detailed or stricter rules in this field.

¹ Study currently being carried out. Results expected in principle at the end of 2003.

² COM(2002) 612 final - http://europa.eu.int/comm/avpolicy/regul/twf/art45/art45-intro_en.htm

Article 6 of the Directive provides a definition of the concept of European works. This definition is drawn up "*for the purposes*" of Chapter III. In addition, there are different definitions³ of European works at national, Community and international level. Thus at national level, specific provisions have been adopted for transposing the provisions of the Directive and for establishing national support systems for audiovisual works. These definitions take account of the relevant context and of the aim pursued by public policy, particularly support systems, coproductions, etc.

1. In your opinion, do these provisions seem appropriate with regard to the aims pursued? Is there a problem with the interpretation or application of Article 4 in relation to promoting the distribution and production of European works?

2. In your opinion, is there a problem with the interpretation or application of Article 6 in relation to the definition of European works for the purposes of Chapter III? In particular, is there a need to consider a more harmonised definition at Community level of the concept of European works or, alternatively, coordination or provision for mutual recognition of definitions by the Member States? If so, under what criteria?

3. Any other aspects not raised in the preceding questions.

II. European works by independent producers (Article 5)

Article 5 lays down that Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters.

The Directive establishes no definition at Community level of the concept of independent producer or independent production. However, recital 31 of the Directive sets out three non-exhaustive criteria which the Member States should take into due consideration when defining the concept of "independent producers". These are: (i) the ownership of the production company; (ii) the amount of programmes supplied to the same broadcaster; (iii) the ownership of secondary rights. There are therefore a number of differing definitions of these concepts in Europe.⁴

In addition, this proportion is to be achieved by earmarking an "*adequate proportion*" for recent works, that is to say works transmitted within five years of their production. In practice, the majority of Member States have opted, in applying Article 3(1), for more detailed or stricter rules in this field.

1. In your opinion, do these provisions appropriate with regard to the aims pursued? Do you consider that there is a problem with the interpretation or application of Article 5 by the

³ Current definitions include, for example: Council of Europe Convention on cinematographic coproductions; EURIMAGES; the MEDIA programme. Cf. p. 9 and s. Commission staff working paper on certain legal aspects relating to cinematographic and other audiovisual works - SEC (2001) 619, 11.4.2001 - http://europa.eu.int/comm/avpolicy/regul/cinedoc_en.pdf

⁴ Including, in certain cases, for defining the beneficiaries of State aid at national level.

Member States in relation to promoting the distribution and production of European works by independent producers (including recent works) by television broadcasters? Do surveillance and monitoring at national level appear to you to be satisfactory?

2. Is there a need to harmonise or coordinate at Community level the definition of the concept of independent production or producer, and if so under what criteria?

3. Any other aspects not raised in the preceding questions.

III. Media chronology (Article 7)

Article 7 of the Directive lays down that Member States shall ensure that the television broadcasters under their jurisdiction do not broadcast any cinematographic work, unless otherwise agreed between its rights holders and the broadcaster. The broadcasting chronology for the economic exploitation of films in the Member States of the European Union is based on agreements concluded between the economic players concerned.⁵

Given the difficulties of determining at European level the starting date for media chronology (date of cinema release in a given Member State), in the context of the public consultation which preceded the adoption by the Commission of the "cinema" communication,⁶ a consensus has emerged around the fact that this obligation is sufficient and that, provided that the principle of media chronology was guaranteed at European level, deadlines for film exploitation should be left to contractual arrangements between the parties involved.

In addition, new issues in terms of defining on-line and new media rights created by the distribution of European production on-line were highlighted and comments on the implications for different players in the value chain (bundling of rights, etc.) were requested in the context of the adoption of the "cinema" communication. Some players consider there is a case for new measures with regard to negotiation of rights in order to enable all players to benefit equally from the new digital environment. Others are opposed to this.

1. Do the provisions of Article 7 appear adequate to you with regard to the aims pursued? Is there a problem with the interpretation or application at national level of this Article? Does the lack of harmonisation in terms of media chronology hinder the exploitation and circulation of European audiovisual works?

2. How can any difficulties identified be resolved? In your opinion, what instrument at Community level would be appropriate (recommendation, other)?

3. In your opinion, what added value would regulatory intervention or the promotion of co-regulation (and, if so, under what procedures) or self-regulation provide at Community level,

⁵ Supplemented by legislative provisions in Germany, France and Portugal.

⁶ Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works, COM(2001) 534 final, 26.09.2001 - http://europa.eu.int/comm/avpolicy/regul/cine1_en.htm

particularly in the context of a flexible approach to the use of rights for the different "windows of use"?

4. Any other aspects not raised in the preceding questions.