

Expert Group

CULTURAL DIVERSITY AND THE PROMOTION OF EUROPEAN AND INDEPENDENT AUDIOVISUAL PRODUCTION

Preliminary remarks

The **objective** of the “Television without Frontiers” Directive¹ is to create a level playing field by establishing a common legal framework for the free movement of broadcasting services. To this end, it coordinates certain laws, regulations and administrative provisions of the Member States aimed at ensuring that certain important general interest objectives are achieved, such as the promotion of cultural diversity and European and independent audiovisual production.

In 2003, the Commission held a broad **consultation process** designed to review the Directive. As regards the promotion of European and independent production, there was no majority in favour of changing the present regulations in substance. Whereas producers, scriptwriters and trade unions proposed raising the majority proportion for European works, some Member States and private broadcasters considered broadcast quotas to be an disproportionate restriction of broadcasters’ scheduling freedom. A majority of Member States were in favour of keeping the status quo.

As a result of the consultation process in 2003, the Commission drafted a **Communication on the future of European regulatory audiovisual policy**,² proposing that in the medium term a thorough revision of the “Television without Frontiers” Directive might be necessary to take account of technological developments and changes in the structure of the audiovisual market. It concluded that the Commission will enlist the help of experts to reflect on whether any changes to content regulation in general might be necessary at Community level.

Article 25(a) of the “Television without Frontiers” Directive provides that the revision of Article 4 “... shall take account of an independent study on the impact of the measures in question at both Community and national level.” The final report of this “**Impact Study**”,³ of which the main findings are summarised in the Annex, will be published on our web page in by the end of May.

The mandate of the **Expert Group** on cultural diversity is to examine – on the basis of the outcome of the consultation process in 2003 and the findings of the above-mentioned “Impact Study” – whether there is a need to amend the rules on the promotion of European and

¹ Council Directive 89/552/EEC, as amended by Directive 97/36/EC.

² COM(2003)784 final.

³ “Study on the impact of measures concerning the promotion of the distribution and production of TV programmes (Community and national) provided for under Article 25 (a) of the directive on television without frontiers”, cf. http://europa.eu.int/comm/avpolicy/index_en.htm

independent production. The following is an outline of the items to be put on the agenda of the Expert Group.

Status quo

Chapter III of the “Television without Frontiers” Directive contains measures for the promotion of European and independent audiovisual production. **Article 4** of the Directive requires broadcasters to reserve a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for European works. **Article 5** requires broadcasters to reserve a minimum proportion (at least 10%) of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for European works created by independent producers. Alternatively, Member States may require broadcasters to allocate at least 10% of their programme budget to independent productions. An adequate proportion of works by independent producers should be recent, i.e. less than five years old.

It can be concluded from the consultation process and from the main findings of the “Impact Study” that there is at present no need either to raise or to relax the majority proportion of European works provided for in Article 4 or the minimum proportion of independent production provided for in Article 5. Data show that transmissions of European works have grown consistently.⁴ It was also found that, besides their impact on the scheduling of European works, Articles 4 and 5 have achieved cultural objectives. There are also indications that Articles 4 and 5 have helped to strengthen the European audiovisual industry.

Therefore, in principle the proportions provided for under in Articles 4 and 5 appear **still to be valid** in substance, since they have proved to be an effective and stable framework for promoting European and independent production.

However, a number of important **questions** have arisen in relation to Articles 4 and 5 since the last revision in 1997, which can be structured along the following **six themes**:

1. Scope of Articles 4 and 5

At present, Articles 4 and 5 define qualifying time in negative terms as a channel’s transmission time “excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping”. A majority of Member States have incorporated the definition directly into national legislation. However, some Member States have applied Article 3(1) and adopted more detailed or stricter rules: France and Germany define positively what is included in qualifying transmission time.⁵ Italy excludes talk shows, making the achievement of the majority proportion of European works more difficult because it excludes programming that is likely to be made domestically and that would otherwise count as

⁴ Scheduling of European works has risen from approximately 50% initially to 66% or 2/3 of qualifying programmes in 2003.

⁵ In France, for instance, audiovisual works are considered to be: fiction programmes, animation programmes, current affairs documentaries produced mainly outside the studio, music videos, scientific programmes, concerts and retransmissions of theatrical, lyrical or choreographic programmes. Consequently, entertainment programmes, current affairs programmes, and talk shows in all their forms are also excluded from the ‘relevant transmission time’ in France. Germany also defines what is included as qualifying hours: feature films, television movies, series, documentaries and comparable productions.

European work. The UK excludes acquisitions and repeats, leading to a higher volume of first-run European originations.

The findings of the “Impact Study” suggest that the relative proportion of stock programmes – compared to flow programmes of which no repeats are generally broadcast – has decreased relatively compared to all European works.

Question 1:	<i>Should qualifying programmes within the scope of Articles 4 and 5 be defined positively (e.g. fiction films, documentaries)?</i>
Opportunities:	The production value of the proportions referred to under Articles 4 and 5 would rise; stimulus for European content industry; beneficial impact on investment into the (independent) production sector.
Risks:	Broadcasters, especially commercial and/or secondary channels (which generally perform below public and/or primary channels), would have to make higher investments into their programmes, resulting in higher costs.

2. Application of Articles 4 and 5

The findings of the “Impact Study” show that the way in which Member States implement and enforce Articles 4 and 5 is not consistent. This is partly due to the “inbuilt” flexibility implied by the “where practicable” clause. The study also highlights the fact that many broadcasters and producers believe the provisions provided for under Articles 4 and 5 are not systematically monitored or enforced, suggesting that Member State-specific implementation modes of Articles 4 and 5 (transposition, application and enforcement), especially monitoring and enforcement, are relatively relaxed across the EU. It was also found that, the more prescriptive a Member State is in the way it implements Articles 4 and 5, the higher the average ratio of European (independent) works to qualifying transmission hours in that country.

More consistency and predictability could be achieved by **reinforcing provisions** on implementation and monitoring,⁶ as it also could, for instance, by predefining more restrictive and narrower exceptions rather than using the “where practicable” approach. Certain types of channels might be exempted, for example.⁷

Question 2a:	<i>Should certain groups of channels be exempted a priori?</i>
Opportunities:	More reliable results reported by Member States; level playing field between Member States.
Risks:	Could result in unjustified exemptions and distortion of competition <i>between channels</i> ; would undermine the principle that all channels broadcasting “works” should contribute to the Directive’s objectives.

Another option to achieve stricter and more uniform application, monitoring and enforcement could be to **revise the procedural rules in the “suggested guidelines** for the

⁶ Cf. Question 3.

⁷ For instance, very specific thematic or niche channels, new entrants, channels showing primarily sports, news, teleshopping, etc., or special interactive channels with a minimum threshold of turnover.

monitoring of the implementation of Articles 4 and 5” of 11 June 1999.⁸ These *guidelines* were drafted to help Member States monitor implementation of Articles 4 and 5.

The new *guidelines* could provide, for instance, that:

- prior to submission to the European Commission, Member States’ **statistical statements** are **independently audited**;
- the Member States’ representative **producers bodies** are allowed to **preview** the Member States’ statistical statements and to submit comments before their referral to the European Commission;
- Member States ensure **efficient enforcement** and respond to cases of non-compliance and non-reporting;
- channels which do not report data are considered to have transmitted no European or independent productions.

Question 2b: *Should the “suggested guidelines” be revised?*

Opportunities: Revision of guidelines is a less heavy procedure which will provide greater flexibility both now and in the future; more reliable results reported by Member States; level playing field ensuring equal competition *between* Member States; could ensure more stringent and uniform application in all Member States, with more effective results.

Risks: Difficult to differentiate between procedural questions and questions on substance, which are often closely connected with each other.

3. Monitoring of the application of Articles 4 and 5 in the Member States

Article 4(3) currently stipulates that Member States shall provide every two years a **report** on the application of Articles 4 and 5. On the basis of the Member States’ statistical statements, the Commission gives its opinion and publishes a **Communication**.

It emerged from the series of interviews conducted as an integral part of the “Impact Study” that a majority of producers and broadcasters do **not** believe that Articles 4 and 5 are **strictly monitored** by the regulatory authorities in their Member States. The interviews also showed that a majority of producers and broadcasters believe that the regulatory authorities do **not apply sanctions** against channels that fail to meet the requirements of Articles 4 and 5. Another finding was that there are certain **inconsistencies** between the data on the application of Articles 4 and 5 collected by Member State authorities and published by the Commission and the data retrieved in the sampling exercise undertaken as part of the “Impact Study”. Inconsistency was significant particularly with regard to secondary channels broadcasting via satellite or cable.

Question 3: *How can monitoring of the implementation of Articles 4 and 5 be improved?*

Opportunities: Eliminating the reporting obligation would result in **less bureaucracy** for broadcasters and regulators; **specific** checks or controls by the Commission *could* result in more efficiency.

⁸ http://europa.eu.int/comm/avpolicy/regul/twf/art45/control45_en.pdf

Risks:	Member States' statistical reports provide statistical material and the periodic reports from the Commission provide a useful source of information and reference .
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4. Linear and non-linear services

An important question is whether the approach in Articles 4 and 5 is also valid for non-linear services.

Clearly, obligations based on “transmission time” are not appropriate for non-linear services. At this stage, the Commission takes the view that it would not appear desirable to impose European-level compulsory measures for the promotion of European production in non-linear services.

However, non-binding instruments recommending the application of the **principles** underlying Articles 4 and 5 to non-linear services could be considered.

The findings of the "Impact Study" suggest that non-linear services will, in the long run, increasingly offer audiovisual content with high potential as to market shares and profits.

Concerning the appropriate **tool**, a recommendation on scheduling proportions would not be feasible for non-linear services; consideration might be given to a recommendation to Member States to introduce an **investment** obligation or a recommendation to invest in European programmes (acquisition or production). Another option could be for non-linear services to provide a majority/minimum of European (independent) audiovisual content in their **catalogues**. A **choice** between those options could be offered directly to service content providers.⁹

As regards Article 5, initial evidence seems to indicate that providers of these services do not have a high proportion of self-produced content and thus have to acquire content. However, the provider can acquire content from a broadcaster or from an independent producer.

Question 4:	<i>Should there be a recommendation (complementing the new Directive) on the promotion of European and independent production applicable to non-linear services?</i>
Opportunities:	Could strengthen European (independent) production sector, especially in view of the economic potential of non-linear audiovisual services; Could favour a strong presence of European content in new audiovisual services established in EU; European content industry might expand into and develop new formats; Opportunity for independent producers to attract new investments on capital markets, with possible development of independent European “majors” which can compete on international markets;
Risks:	Possibility of hampering developments of new services, especially for new entrants and start-ups or small and medium-sized businesses if applied without exceptions; Higher costs for service content providers; Little evidence available to assess actual impact of measures recommended.

⁹ Concerning the appropriate **form**, this obligation could be included in a “Recommendation on the promotion of European production for non-linear services” complementing the new Directive

5. Promotion of non-domestic European works and co-productions

The “Impact Study” suggests that Article 4 may have reinforced national objectives to protect and encourage the domestic content sector rather than fostering a truly European market in programming and encouraging the **exchange/circulation of European TV programmes within Europe**. For instance, national requirements in relation to production in indigenous languages may act as a barrier to intra-Community trade. The average proportion of non-domestic European works has stagnated at a relatively low level.¹⁰

However, it is not clear what the **legal basis** could be for such a provision.¹¹ The Commission does not therefore consider it appropriate to introduce a binding sub-proportion for non-domestic European works. However, a recommendation to Member States to encourage the transmission of European works of non-domestic origin and European co-productions or to reserve a minimum proportion for non-domestic European works and European co-productions could be envisaged.

Question 5:	<i>Should there be a recommendation (complementing the new Directive) providing (inter alia) for the promotion of circulation of non-domestic European works and European co-productions?</i>
Opportunities:	Formats and programmes which address and appeal specifically to a European audience will have larger audiences which could provide a stimulus for the European audiovisual industry and help to develop European “majors” which are also internationally competitive. Socio-cultural impact (with possible impact on wider acceptance of European integration process).
Risks:	Other measures (e.g. financial support) might be more appropriate.

6. Definition of “independent producer”

The Commission Communications and the “Impact Study” show that the proportions of European works made by independent producers have gradually risen. The 10% minimum proportion of Article 5 is currently exceeded on average by more than 10 – 23%.

However, the findings of the “Impact Study” also show that application of Article 5 differs appreciably across the EU, depending on the different systems in place in each Member State. One means of achieving more uniform application of Article 5 would be to clarify the concept of “independent producer”.

¹⁰ The average broadcasting of non-national European works in the EU, which increased in the middle of the 1990s, declined between 1999 and 2002. From 1993 until 2003, however, the proportion of non-domestic works grew from 10.4% to 11.9% on primary channels, most of the growth being on public channels. However, while the total volume of European works increased substantially over the period from 1993 to 2002, the number of hours of non-domestic European works have risen more slowly, implying that channels are making relatively less use of programmes made in another Member State.

¹¹ The introduction of a binding sub-proportion for non-domestic European works seems to be in contradiction with the non-discrimination principle (Article 12 TEC) since such a clause would result in the positive discrimination of non-national service providers. However, it is questionable whether the introduction of a non-binding clause encouraging Member States to promote the circulation of non-domestic European works and European co-productions might not also be in breach of the non-discrimination principle.

France, and recently also the UK, have introduced systems allowing producers to retain secondary rights of their works. Similar measures at European level could strengthen the European audiovisual industry by helping to create a strong distribution and broadcasting sector, on the one hand, and a healthy content sector, on the other. Both sides should be sufficiently independent of one another if the full potential of the European audiovisual industry is to be realised. The retention of secondary rights underpins the bargaining power of independent producers. This could become vital in the context of the development of new distribution platforms and secondary rights which would– otherwise – not be turned to account.

Question 6: *Should the concept of “independent producer” be (re)defined?*

Opportunities: The retention of secondary rights would make it easier to **attract capital** in financial markets; it might facilitate the **development of independent European “majors”** which are internationally competitive; “**unbundling**” of media rights has been successfully implemented in other areas (sports media rights) to trigger development of new media; “sleeping” rights and catalogues are put on the market by producers who have a **greater incentive** than broadcasters for their own works to be shown repeatedly.

Risks: Broadcasters would have to relinquish secondary rights to some extent, arguing that they provide most of the investment for the programmes they commission.

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ANNEX I

Study prepared by DGA (main findings)

- The study draws its conclusions on the basis of the following **preparatory works**:
 - A review of the published compliance data (the Commission's six Communications on the implementation of Articles 4 and 5)
 - A review of **implementation modes** at Member State level and additional national legal measures
 - An **economic analysis of the European broadcasting market** and its financial performance
 - A self-conducted **survey** of TV channel output from 1993 to 2002 (sampling of 83 representative channels for a two-week period in 1993, 1996, 1999 and 2002) and a regression analysis of the survey datasets
 - A series of **interviews** conducted with more than 70 representatives of broadcasters, producers and national regulatory authorities.
- After a first analysis of the final report, the following **results** of the DGA Study can be identified:
 - The **findings** of the Study are largely consistent with the results published in the six Commission Communications on the application of Articles 4 and 5. The study confirms that there was an **increase** between 1993 and 2002 in the scheduling of **European works** (from approximately 50% in 1993 to 60% in 2002). At the same time, the proportion of European stock programmes has decreased. **Commercial** broadcasters tend to transmit a lower proportion than public service broadcasters. **Secondary and small primary** commercial broadcasters with audience shares of less than 8% do not reach the 50% European works level. The **slight increase** in works by **independent producers** over the same period (from approximately 17 - 20%) was nonetheless smaller than the EU average reported by the Member States (approximately 34% in 2002). This inconsistency might be due to the fact that the study adopted a stricter definition of what constitutes an independent producer – a concept which is not harmonised at Community level.

Although not achieving the majority proportion of 50% of European works, secondary channels account for over 20% of all qualifying programmes from European **independent producers** (due to the fact that generally they have no in-house production capacities).

With regard to the possible **economic impact** of Articles 4 and 5 on the European production and broadcasting sector, the findings are not clear-cut.

Data on **primary commercial broadcasters** suggest that **annual revenue growth has been about 4.5%** a year since 1997, with a decline in 2002 due to the general advertising recession. Revenue for **public broadcasters** – which covers TV and radio – has been rising by about **5%** a year, with most of the revenue in the form of licence fees. Within **pay TV**, the revenue of premium pay TV secondary channels – which comes mainly from subscription fees - has risen by about **10%** a year since 1997, while revenue for secondary basic and free channels – which comes from advertising and subscription fees - has risen by 20% a year. Pay-TV packagers – who own premium and basic secondary channels and

delivery platforms – have seen revenue rise by 26% a year as the pay-TV market has grown.

While Article 5 and, in particular, a stricter mode of implementation in some countries may have initially helped to increase the size of the **independent production sector** since 1993, it seems **not to have helped the financial performance** of independent producers. Data suggest that programme spending on new commissions, including news, has risen by less than the average 6.5%, probably nearer to 4 % a year.

Trade figures across the EU suggest **US imports grew** by about **15%** a year between 1997 and 2000. This is due to stagnating exports from the EU into the US and channel proliferation in the EU.

- The study does not draw any clear-cut conclusions as to the **impact of Articles 4 and 5 on the scheduling** of European works and works by independent producers. **No clear link** between cause and effect could be established. Rather, there appear to be a **variety of factors** influencing broadcasters' choice of programming. These include:
 - the **size** and the **competitive structure** of the broadcasting market;¹²
 - evolving **audience tastes**;
 - channels' **budgets** (European works – which are largely commissioned – are generally more expensive);
 - Member State-specific **implementation modes and additional requirements** which go beyond Articles 4 and 5 (e.g. language and/or investment requirements);
 - the control of **rights retained** by broadcasters/independent producers.

¹² The proportion of European works rises with the number of competitors and the audience share of each channel; this might suggest that a **degree of competition helps to encourage more European works**, but if competition creates too much audience fragmentation it may leave channels with **insufficient budgets** to commission such works.