



July 2005

## Issues Paper for the Liverpool Audiovisual Conference

### Cultural Diversity and the Promotion of European and Independent Audiovisual Production

#### INTRODUCTION

**Article 4** of Directive 89/552, the “Television without Frontiers” Directive (the Directive), requires Member States, “where practicable and by appropriate means”, to ensure that broadcasters 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** stipulates that a minimum proportion (at least 10%) of broadcasters’ transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, be reserved 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.

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 trend 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.

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**”<sup>1</sup> is available on the Commission web site.<sup>2</sup>

An **Expert Group** met on 26 May 2005 to examine – on the basis of the outcome of the consultation process in 2003 and the findings of the above-mentioned “Impact Study” – the

---

<sup>1</sup> “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 “Television without Frontiers Directive ”;

<sup>2</sup> [http://europa.eu.int/comm/avpolicy/stat/studi\\_en.htm#3](http://europa.eu.int/comm/avpolicy/stat/studi_en.htm#3)

question whether there is a need to amend the rules on the promotion of European and independent production.

Over the past two years a number of specific issues were discussed in various contacts with the main stakeholders in the sector.

During the **Seminar on the “Television without Frontiers” Directive**, which took place on 30/31 May 2005 in Luxemburg and was co-organised by the Luxemburg Presidency and the European Commission, the findings and the conclusions of the “Impact Study” were presented and a panel discussed the future of the measures of promotion of European and independent production.

From the consultation process in 2003, the findings “Impact Study”, the Expert Group on cultural diversity, the bi-lateral discussions and the panel discussion during the Luxemburg Seminar it can be **concluded** that there is at present no need to modify in substance Articles 4 and Article 5. Data show that transmissions of European works have grown consistently.<sup>3</sup> It was also found in the “Impact Study” that, besides their impact on the scheduling of European works, Articles 4 and 5 have achieved cultural objectives. There are also indications that in general Articles 4 and 5 contributed to a strengthening of the European audiovisual industry. 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.

#### **ISSUE 1: NON-LINEAR SERVICES**

If it was decided that the scope of the new directive should cover non linear audiovisual services, an important question would be whether the approach of Articles 4 and 5 of the Directive should cover such services.

The findings of the "Impact Study" suggest that non-linear services are increasingly offering audiovisual content with high potential as to market shares and profits. As a consequence, a number of medium-sized companies (broadcasters), that operate in a relatively highly-regulated environment as regards the content they distribute, are increasingly having to confront competition from a number of generally larger companies (service providers and “telcos”).

One option to create a more level playing field for all platforms of distribution would lead to the conclusion that there should be, at European level, at least a political signal to the effect that new “non-linear” services will be expected to contribute to the promotion of European works, the availability of which will also be of benefit to them (the new services).

Such a contribution is technically feasible – it could take the form of investment or catalogue requirements for example.

While some stakeholders (mostly producers) argued that the contribution for non-linear services should be introduced as obligation (with the same qualification as in the “Television without Frontiers” Directive: "where practicable ..."), others feared delocalization, especially with IP-based services and rejected compulsory measures. Some broadcasters, transmission companies and Internet providers felt that any measure would be premature at this stage as it

---

<sup>3</sup> Scheduling of European works has risen from approximately 50% initially to 66% or 2/3 of qualifying programmes in 2002, cf. Sixth Communication from the Commission (COM (2004) 524) of 28 July 2004 on the application of Articles 4 and 5 of the *Television without Frontiers* Directive for the reference period 2001-2002.

would risk hindering the development of new services, however they proposed a close monitoring of the production structures in order to determine the right time for future possible intervention (a clause “de rendez-vous” in the new directive would be an option in that approach). Some stakeholders supported the adoption of a “soft” non-binding instrument which according to them would not be a burden on a nascent industry but would give a positive signal for the European content supply industry and create a level playing field between the different platforms.

## **ISSUE 2: MONITORING OF THE APPLICATION OF ARTICLES 4 AND 5 IN THE MEMBER STATES**

Article 4(3) of the Directive 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 integral part of the “Impact Study” that many broadcasters and producers believe the provisions provided for under Articles 4 and 5 are **not systematically monitored** or enforced, suggesting that application, especially monitoring and enforcement are relatively relaxed across the EU. 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, which is submitted by Member States and published by the Commission, and the data retrieved in the sampling exercise undertaken as part of the “Impact Study”. The inconsistency was more significant with regard to Article 5 and secondary channels broadcasting via satellite or cable as compared to Article 4 and primary channels.

In this context, two propositions were submitted for discussion to experts:

First, it was suggested to revise the procedural rules in the “suggested guidelines for the monitoring of the implementation of Articles 4 and 5”<sup>4</sup> of 11 June 1999. These guidelines were drafted to help Member States with the monitoring of the implementation of Articles 4 and 5.

**Revised guidelines** could provide, inter alia, that:

- Prior to submission to the European Commission, Member States’ statistical statements are independently **audited**; where a Member State’s independent regulatory authority carries out such checks itself, this is sufficient.
- Member States’ representative **producers bodies** are allowed to **preview** the Member States’ statistical statements before their referral to the European Commission;
- Member States ensure **efficient enforcement** and respond to cases of non-compliance and non-reporting;
- Channels which fail to report data without giving adequate reasons are considered to have transmitted no European or independent productions at all with **negative impact on Member States’ average compliance rates**.

While some experts stressed that an audit by regulators was considered sufficient, a majority was in favour of a revision of the guidelines in the above sense.

---

<sup>4</sup> [http://europa.eu.int/comm/avpolicy/regul/twf/art45/controle45\\_en.pdf](http://europa.eu.int/comm/avpolicy/regul/twf/art45/controle45_en.pdf)

Second, experts examined the question on how to improve the monitoring of the application of Articles 4 and 5 at Member State level. One option considered was to **replace the bi-annual reporting obligation with ex-post controls on a sample basis** at Community level. This could be done by similar means as for other provisions of the “Television without Frontiers” Directive, as for example on the provisions on advertising, where the Commission relies on complaints and controls on a sample basis by an independent consultant.

Obviously, such a modification would result in less bureaucracy relieving the broadcasters, the Member States and the European Commission of a heavy administrative burden. It becomes an increasingly complex exercise to collate statistical data of an ever increasing number of channels in now 25 Member States. The added value of the reporting exercise might be exhausted with a proliferation of channels and a fragmentation of audience shares. Another beneficial impact might be increased efficiency by a more focussed control system.

In general, representatives of the producers and right holders who have been consulted on this were reluctant to eliminate Member States’ bi-annual reporting obligation. They stressed that the periodic reports from the Commission provide a useful source of information, but at the same time underlined that reporting should be made less bureaucratic and Commission reports on EU-25 should be brief. These experts are of the opinion that ex post control on a sample basis by independent consultants might in any case be considered as additional measure.

### **ISSUE 3: ENCOURAGE THE PRODUCTION AND DISTRIBUTION OF EUROPEAN 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. National requirements in relation to production in indigenous languages may have acted as barrier to intra-Community trade. The average proportion of non-domestic European works has stagnated at a relatively low level.<sup>5</sup>

It could be envisaged to create incentives for the increased distribution of **European co-productions**<sup>6</sup>.

Among the positive likely impacts of a higher demand for **European co-productions** figure possibly a more integrated “European” film industry, the development of new formats and programmes which address and appeal specifically to a European audience and consequently to larger audiences, which might strengthen the European audiovisual industry, particularly the cinema sector, and help to develop internationally competitive European “majors”. Positive likely impacts in cultural terms might be a deeper understanding of Europe’s cultural diversity and richness and a wider acceptance of the European integration process.

---

The average broadcasting of non-national European works in the EU grew from 10.4% in 1993 to 11.9% in 2002 on primary channels, most of the growth being on public channels. 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 has risen more slowly, implying that channels are making relatively less use of programmes made in another Member State. Also, smaller countries sharing the same language with a larger neighbouring Member State tend to have larger proportions shown on TV, whereas larger Member States tend to have almost no such works.

<sup>6</sup> The promotion of co-productions which constitute European works in the sense of Article 6 (2) lit c, (3) and (4) “Television without Frontiers” Directive appears to be compatible with the EC Treaty, particularly with the principle of non-discrimination.

There was a minority of stakeholders and experts in favour of a recommendation to encourage the circulation of European works of non-domestic origin. Other stakeholders suggested increasing the incentives to broadcast non-national European works.<sup>7</sup>

#### **ISSUE 4: CONCEPT OF “INDEPENDENT PRODUCER”**

The Commission Communications and the “Impact Study” show that the proportions of European works made by independent producers have gradually risen. However, the findings of the “Impact Study” also show that increased transmissions and higher levels of revenues in the independent production sector have not translated into higher earnings. Profitability has dropped. Also, the application of Article 5 differs appreciably across the EU, depending on the different systems in place in each Member State. France, and recently also the UK, have introduced systems allowing producers to retain secondary rights of their works.

Producers claim that the content supply side and distribution platforms should be sufficiently independent from one another if the full potential of the European audiovisual industry is to be realised. This could be achieved by helping to create a healthy content sector on the one hand and a strong broadcasting sector on the other. In this context, one should also take account of increasing offer of non-linear services.

One means of achieving a more uniform application of Article 5 would be to **clarify the concept of “independent producer” and to give the criteria of “retention of secondary rights” a more prominent and compelling position** than at present.<sup>8</sup> The concept of “independent producer” could also be refined in terms of independence from distribution platform, whether offered by traditional linear services or by non-linear services.

The retention of secondary rights would make it easier for producers to attract capital in financial markets. It might facilitate the development of independent European “majors” which are internationally competitive. The “unbundling” of media rights has been successfully implemented in other areas (sports media rights) to trigger new media development. “Sleeping” rights might be put on the market by producers, who have a greater incentive than broadcasters for their own works to be shown repeatedly. This might have also repercussions on an increased level of European (independent) works.

The retention of secondary rights would help underpinning the bargaining power of independent producers. This could become vital in the context of the development of new distribution platforms for the exploitation of secondary rights which would – otherwise – not be turned to account.

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

---

<sup>7</sup> The example given would however be not compatible with Article 12 TEC: An expert suggested doubling the weighting for the transmission of non-national European works with regard to fulfilling the quota of Article 4.

<sup>8</sup> This could be achieved for instance by slightly rephrasing Recital 31 of the 97 Directive: “Whereas Member States, in defining the notion of “independent producer”, should take appropriate account of **at least the following three criteria**: The ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights.”

While producers were in favour of clarifying the concept of “independent producer” taking into account in particular the criterion of “retention of secondary rights”, broadcasters considered this would encourage "free riders" practices and stressed the principle of "rights follows risks".

\* \* \*

The Directorate-General Information Society and Media of the European Commission invites you to make observations to this issues paper by 5 September 2005. Please submit your comments in a generally readable electronic format. All submissions will be published on the Commission’s website if not requested otherwise. If you would like your contribution to be treated confidentially, please indicate this at the top of the first page of your submission. Should you want to add a cover letter please do so in a separate document. In case your comments exceeds four pages please start your submission with an **executive summary**. All submissions should be mailed to the functional mailbox of the Audiovisual Policy Unit of the Directorate-General for Information Society and Media: [avpolicy@cec.eu.int](mailto:avpolicy@cec.eu.int).