



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.2.2006
COM(2006) 49 final

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

on the application of Directive 89/552/EEC “Television without Frontiers”

{SEC(2006) 160}

TABLE OF CONTENTS

1.	Introduction	3
1.1.	Background of this Report	3
1.2.	Development of the television market in Europe.....	3
2.	Notifications by new Member States	5
3.	Application of the Directive.....	5
3.1.	Scope	5
3.2.	Jurisdiction (Article 2)	5
3.3.	Events of major importance for society (Article 3a).....	6
3.4.	Promotion of distribution and production of television programmes (Articles 4 and 5).....	7
3.5.	Rules on advertising (Articles 10 to 20)	7
3.5.1.	Adoption of an interpretative communication	7
3.5.2.	Advertising hoardings around stadia during retransmissions of sporting events.....	8
3.5.3.	Monitoring.....	8
3.6.	Protection of minors and public order (Articles 2a, 22 and 22a).....	9
3.7.	Coordination between national authorities and the Commission.....	9
3.7.1.	Contact Committee.....	9
3.7.2.	Group of regulatory authorities	10
4.	Review of the Directive	10
5.	International aspects.....	10
5.1.	Enlargement	10
5.2.	Cooperation with the Council of Europe	11
6.	Conclusions	11

1. INTRODUCTION

1.1. Background of this Report

With this Communication, the Commission is submitting to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions (for information) the Fifth Report on the application of Directive 89/552/EEC,¹ as amended by Directive 97/36/EC,² “Television without Frontiers” (referred to below as “the Directive”).

Article 26 of the Directive provides that, not later than 31 December 2000, and every two years thereafter, the Commission must submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Directive as amended and, where appropriate, make further proposals to adapt it to developments in the field of television broadcasting, in particular in the light of recent technological developments.

The present Report follows the Fourth Report,³ adopted in January 2003, and deals with the application of the Directive in the years 2003 and 2004⁴.

In an annex to the Fourth Report, the Commission proposed a work programme to open a debate on the possible need to adjust the European Union (EU) regulatory framework in this field because of the developments in markets and technologies. Accordingly, the Commission launched consultations in 2003 for a review of the Directive⁵.

The present Report has to be seen in the context of this debate.

1.2. Development of the television market in Europe

During the years up to 2004, the favourable trend in the development of the EU audiovisual industry reached a high degree of maturity. At the same time, some business models had to face hard tests and in some areas operators underwent a process of consolidation.

New business opportunities, notably “Digital Terrestrial Television”,⁶ and the delivery of audiovisual services through new technological platforms have expanded the presence of such services on the market reinforcing the well-known phenomenon of fragmentation of supply. This trend seems to be stabilising against the background of a softening in advertising resources and little prospect of an increase in public funding.

¹ OJ L 298, 17.10.1989, p. 23.

² OJ L 202, 30.7.1997, p. 60.

³ COM(2002) 778 final, 6.1.2003.

⁴ Whenever necessary, reference to the most recent events in 2005 will also be made.

⁵ See point 4 of the Report.

⁶ The switch-over to “Digital Terrestrial Television” is planned in most Member States between 2006 and 2012.

In practice, the number of channels available is clear evidence of the multiplication of services on offer. While over 660 channels with potential national coverage were broadcast via terrestrial transmitters, satellite or cable at the beginning of 2001,⁷ three years later over 860 such channels were active in the EU-15⁸.

In addition, television broadcasting services targeting non-national markets have seen an even more rapid development. At the beginning of 2004, about 220 such channels were identified⁹. More than 160 of these were broadcast to the EU-25 from other Member States or other countries (in 2001, there were only 68 such channels in the EU-15).

The main precondition for the on-line development of audiovisual services is the wide availability of broadband access. The considerable investment in recent years, and still expanding, has equipped most EU-15 Member States with infrastructures covering, on average by the end of 2004, 88% of the population¹⁰. At the same time, the actual penetration of fixed-line broadband connections has been growing constantly, reaching 10% of the EU-15 population and 9% of the EU-25 population at the end of 2004¹¹.

The overall EU-25 market, assessed in terms of the revenue of broadcasters, is estimated at about €64.5 billion in 2003 (€62.2 billion in 2001, meaning a 3.7% increase)¹².

Public service broadcasters have consolidated their presence in EU markets in terms of revenue. The total revenues of public radio and television services reached €29.1 billion (within the EU-25, including €1.6 billion for radio services) in 2003, an amount almost unchanged in comparison to 2002¹³.

EU-25 private broadcasters recorded revenues totalling €18.3 billion in 2003, an amount almost unchanged in comparison to the previous year¹⁴. Pay-television and package subscriptions increased their revenues to an overall amount of €13.6 billion in 2003, which marked a growth of 14.3% compared to the previous year, due to the success of package activities¹⁵.

Advertising remains the main source of revenue for EU television broadcasters. After several years of expansion, interrupted only in 2001, the gross television advertising market in 2004 reached about €25.7 billion for the EU-15 (7.2% increase in relation to 2003)¹⁶. The 2001 fall in advertising revenues is estimated at about 6.8% (2002 data vs. 2000 data)¹⁷. The television advertising market in 2004 was roughly at the level of

⁷ European Audiovisual Observatory, 2001 Yearbook.

⁸ European Audiovisual Observatory, 2004 Yearbook.

⁹ Ibid.

¹⁰ IDATE, Development of broadband access in Europe, 2005.

¹¹ Communications Committee, 2005.

¹² European Audiovisual Observatory, 2005 Yearbook. The calculation excludes some categories of public and private radio broadcasters.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

the year 2000 in nominal terms and accounted for almost one third of overall advertising investment¹⁸.

2. NOTIFICATIONS BY NEW MEMBER STATES

The new Member States, which joined the EU on 1 May 2004, were required to notify their legislation transposing the Directive. The assessment carried out shows that they have complied with their obligations in this respect.

3. APPLICATION OF THE DIRECTIVE

3.1. Scope

Following proceedings brought by Mediakabel BV against a decision by the *Commissariaat voor de Media* (Dutch media authority), the Dutch *Raad van State* asked the European Court of Justice for a preliminary ruling on whether “near video-on-demand” (NVOD) services, i.e. pay-per-view services which allow users to watch “multiplexed” broadcasts for which they pay on an on-demand basis, were subject to the Directive. The Court judgment in this case was pending in 2004¹⁹.

3.2. Jurisdiction (Article 2)

The cornerstone of the Directive is the “country of origin” principle. Accordingly, programmes that comply with the law of the country of origin in line with the provisions of the Directive may circulate freely within the EU.

During the reference period, an infringement procedure against the Dutch authorities was launched by the Commission following the decision of the *Commissariaat voor de media* (Dutch media authority) to grant itself jurisdiction for the channels RTL 4 and RTL 5, which are transmitted by a broadcaster under the jurisdiction of Luxembourg. Without questioning the substantive arguments of the *Commissariaat voor de Media*, a judgment by the *Raad van State* annulled this decision, stating that the *Commissariaat voor de Media* could not grant itself jurisdiction and trigger a situation of dual jurisdiction in conflict with the Directive. Given that there was no longer a situation of dual jurisdiction following the judgment, the Commission decided to close the case.

Concerning exceptions to the country of origin principle under Article 2a(2), a conflict arose in the case of “Extasi TV”. The United Kingdom (UK) government notified the Commission on 20 December 2004 that it intended to proscribe the television service known as “Extasi TV”. The reason given was that the television service concerned had manifestly, seriously and gravely infringed Article 22 of the Directive. Here, there was uncertainty as to which Member State had jurisdiction over this broadcaster.

Jurisdiction conflicts also occurred outside the ambit of Article 2a(2), in cases where the legislation of the receiving Member States contained stricter or more detailed rules than the legislation of the country where the broadcaster was established. For example,

¹⁸ Ibid.

¹⁹ Case C-89/04. The judgment was delivered on 2 June 2005, cf. Commission Services Working Document accompanying the Report.

the Swedish Broadcasting Commission indicated to the Commission that it considered the channels TV3 and Canal 5, under UK jurisdiction, to fall under Swedish jurisdiction. Instead of taking unilateral measures, Sweden initiated a dialogue between the relevant regulatory authorities. To the extent that such discussions do not question the country of origin principle, the Commission welcomes this approach and offers its assistance. There were similar issues between Ireland and the UK.

Lastly, the issue of third country programmes inciting to hatred coming under the jurisdiction of a Member State by virtue of Article 2(4) became especially important during the reference period. Al Manar was transmitted by several European satellite providers. France was the first country to take action against the transmission of this channel via the Eutelsat satellites, which come under its jurisdiction in accordance with Article 2(4). Following the broadcast by Al Manar of a series of anti-Semitic programmes, the French authorities issued an injunction to the satellite operator on 13 December 2004 ordering it to cease broadcasting the Al Manar television service. This ruling was implemented without delay and broadcasting ceased on 14 December 2004.

After the prohibition of Al Manar by the French authorities, this channel was still available via the satellite providers New Sky Satellite (headquarters in The Hague) and Hispasat. The case was the subject of a number of meetings and discussions between Member States and the Commission. Consequently, the Dutch and Spanish authorities also ordered a halt to the transmission of Al Manar. This close cooperation has enabled Europe to efficiently fight incitement to hatred by broadcasts from third countries.

3.3. Events of major importance for society (Article 3a)

Article 3a(1) of the Directive covers national measures to protect events considered to be of major importance for society. By the end of 2004, measures under Article 3a(1) of the Directive were in force and notified to the Commission for the following Member States: Italy, Germany, the United Kingdom, Austria and Ireland. The Irish draft measures were discussed in the Contact Committee on 30 January 2003 (which adopted a positive opinion on them) and subsequently published in the Official Journal in April 2003²⁰. Draft measures submitted by Belgium and France were discussed with the respective national authorities and in the Contact Committee in March 2004, which adopted positive opinions on them. Subsequently, in the course of 2004, Belgium notified to the Commission its final measures, which were published in the Official Journal²¹.

Under Article 3a(2) of the Directive, a consolidated list of the measures taken by Member States must be published once a year in the Official Journal. The last consolidated list was published in August 2003²².

²⁰ OJ C 100, 26.4.2003.

²¹ OJ C 158, 29.6.2005. In 2005, France also notified to the Commission its measures (adopted in December 2004), which shall be published in due course.

²² OJ C 183, 2.8.2003. No consolidated list was published in 2004 as, at that moment in time, no changes were required to the list. The new consolidated list, containing the Belgian and French measures, will be published by the Commission as soon as the French list is published in the Official Journal.

A case concerning the role of the Commission in relation to Article 3a of the Directive is still pending before the European Court of First Instance²³.

3.4. Promotion of distribution and production of television programmes (Articles 4 and 5)

On 28 July 2004, the Commission adopted the Sixth Communication on the application of Articles 4 and 5 of the Directive. The report covers the EU-15 over the reference period 2001-2002. The average broadcasting time for European works in the EU-15 was 66.95% in 2001 and 66.10% in 2002, representing an increase of 5.42 percentage points over four years (1999-2002). The share of European works by independent producers within the EU-15 was 37.75% in 2001 and 34.03% in 2002, i.e. works by independent producers stabilised at around one third of all qualifying transmission time, or roughly 50% of all European works. This is well above the 10% target set in Article 5 of the Directive. These results reflect that demand for national and European works, which has been constantly increasing over the last decade, reached a new peak in 2002, accounting for almost two thirds of all qualifying transmissions. Given the 50% proportion called for by the Directive, 66% is a satisfactory result and testifies to the strength of the European audiovisual industry.

In 2004, the Commission carried out a voluntary stocktaking exercise in seven of the new Member States that joined the EU on 1 May 2004 in order to be able to better assess the future impact of Articles 4 and 5 in their territories. The reference period was the pre-accession period from January 2003 until April 2004. On average, a proportion of 60% European works was scheduled in 2003 and 62% in the first months of 2004, with a compliance rate of 77% and 83% respectively. The share of European works made by independent producers was 30% in 2003 and 31% in the first months of 2004. Given that these figures concern the pre-accession period, they point to a generally satisfactory application of Articles 4 and 5 in the Member States concerned.

The Seventh Communication on the application of Articles 4 and 5 for the period 2002-2004, which is expected to be adopted by the Commission in the first half of 2006, will include for the first time statistics from all 25 Member States.

3.5. Rules on advertising (Articles 10 to 20)

3.5.1. Adoption of an interpretative communication

In view of the development of new advertising techniques such as split screens, interactive advertising, virtual advertising, and even product placement, on 23 April 2004 the Commission adopted an interpretative communication to clarify the meaning of certain provisions in the Directive²⁴. The communication specifies in particular how the relevant rules of the Directive are to be applied to split screens, mini-spots, telepromotions, virtual sponsorship and interactive advertising. In accordance with the case law of the Court of Justice of the European Communities, the interpretative communication applies the principle that the ban of a technique or type of advertising is valid only if it is explicitly provided for by the Directive. Nevertheless, Member States

²³ Case T-33/01, a hearing took place on 7 July 2005.

²⁴ Commission interpretative communication on certain aspects of the provisions on televised advertising in the 'Television without Frontiers' Directive, OJ C 102, 28.4.2004, p. 2.

are free to adopt stricter or more detailed provisions for broadcasters under their jurisdiction.

3.5.2. *Advertising hoardings around stadia during retransmissions of sporting events*

The French law against smoking and alcoholism (the Evin law) bans direct or indirect television advertising of alcoholic beverages. It therefore follows that, for retransmission in France of bi-national sporting events mainly aimed at a French audience, French broadcasters have to use all available means to prevent advertising of alcoholic drinks appearing on screen.

Two cases relating to these rules were brought before the European Court of Justice: an infringement action²⁵ and a reference for a preliminary ruling²⁶. The preliminary ruling, which is our main point of interest in this Report, deals with the fact that channel TF1 called on Groupe Darmon and GiroSport, which were commissioned to negotiate on its behalf for television broadcasting rights for football matches, to ensure that the brand names of alcoholic beverages do not appear on screen. As a result, Bacardi France was refused rental of advertising hoardings around sports stadia, and therefore sought an order before the French courts that TF1, Darmon and GiroSport should cease to put pressure on foreign football clubs. Under these circumstances, the French Cour de Cassation submitted a preliminary question to the Court on whether the French system was contrary to the provisions of Community law, including the Directive.

In its ruling of 13 July 2004, the Court found that indirect television advertising of alcoholic beverages resulting from hoardings visible during the retransmission of sporting events does not constitute a separate broadcast announcement in order to promote goods or services within the meaning of the Directive. The Court considered how impossible it would be from a practical perspective for broadcasters to show such advertising only during the intervals between the different parts of the television programme concerned. Accordingly, the Court ruled for the non-enforcement of the Directive's provisions and the compatibility of the French regulation on televised advertising with Community law.

3.5.3. *Monitoring*

The Commission has regularly monitored (three countries per year) whether Member States properly ensure that broadcasters under their jurisdiction comply with the rules of the Directive on advertising. For this purpose, the Commission is assisted by an independent consultant, whose role is to collect the relevant facts and information.

On the basis of the monitoring reports, infringement proceedings were initiated against some Member States and a reasoned opinion was sent to the Kingdom of Belgium. The number and significance of the infringements of the Directive's rules on advertising suggested that the responsible authorities of this Member State did not properly monitor the application of the rules by broadcasters under their jurisdiction.

²⁵ Case C-262/02.

²⁶ Case C-429/02.

3.6. Protection of minors and public order (Articles 2a, 22 and 22a)

The second evaluation report²⁷ from the Commission to the Council and the European Parliament on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity was adopted on 12 December 2003. A questionnaire was addressed to the Member States, EEA states and the (then) accession countries²⁸.

The second evaluation report showed that the Recommendation was still being applied in different ways by the Member States, but that developments were in general positive.

On 30 April 2004, the Commission followed up the second evaluation report by proposing an additional recommendation: a Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry²⁹.

This additional Recommendation was proposed in order to keep up with the challenges posed by technological developments. The proposal builds upon the original 1998 Recommendation and covers media literacy, media education, the right of reply across all media, the cooperation and sharing of experience and good practices between (self-) regulatory bodies dealing with the rating or classification of audiovisual content, and action against discrimination in all media.

It is currently under discussion in the Council and the European Parliament.

3.7. Coordination between national authorities and the Commission

3.7.1. Contact Committee

Application of the rules of the Directive is the responsibility of each Member State. Systematic contacts with the national regulatory bodies have been maintained, particularly through the Contact Committee set up by the Directive (Article 23a). In the period covered by this Report, the Committee met on 5 occasions.

The Committee has fulfilled the tasks conferred on it by the Directive. It has delivered opinions under the procedure laid down in Article 3a(2) concerning events of major importance for society³⁰.

To facilitate the implementation of the Directive through regular consultation on practical problems arising from its application, the Contact Committee has discussed, among other things, the Commission's Interpretative Communication on Advertising.

During 2002-2004, the review of the Directive was discussed at several meetings of the Contact Committee. The Commission reported to the Committee on the public consultation in 2003 and the work of the Focus Groups³¹.

²⁷ COM(2003) 776 final, 12.12.2003.

²⁸ See http://europa.eu.int/comm/avpolicy/regul/new_srv/secondreport_en.htm.

²⁹ COM(2004) 341 final, 30.4.2004.

³⁰ See point 3.3 of this Report.

³¹ See point 4 of this Report.

The Contact Committee was also informed of the UK's intention to take measures under Article 2a of the Directive and discussed the issue of the identification of the competent Member State³².

3.7.2. *Group of regulatory authorities*

Although the Directive does not explicitly refer to the national regulatory authorities, the Commission organised on 27 March 2003 the inaugural meeting of the High Level Group of Regulatory Authorities, which brings together the Member State authorities responsible for the enforcement of broadcasting regulation. These meetings, which are held on average twice a year, are aimed at reinforcing cooperation between national regulatory authorities so as to ensure the consistent application of the EU regulatory framework.

4. REVIEW OF THE DIRECTIVE

The review of the Directive — including public hearings and a written consultation — was launched in 2003 with the work programme annexed to the Fourth Application Report³³.

The Commission drew its conclusion from this first consultation in its Communication on the Future of European Regulatory Audiovisual Policy³⁴. To ensure that the Directive continues to make a positive contribution to the free movement of broadcasting services within the EU, some issues were identified that need to be addressed in the medium term. The 2003 Communication established Focus Groups with experts to discuss these issues.

The European Parliament was actively involved in the consultation process, in particular through the participation of several MEPs³⁵. The adoption of a draft legislative proposal by the Commission is envisaged for the end of 2005.

5. INTERNATIONAL ASPECTS

5.1. Enlargement

During the reporting period, the EU has grown from 15 to 25 members, with 10 new Member States having joined the Union on 1 May 2004.

Relations between the Union and the (then) candidate countries developed in accordance with the pre-accession strategies. On the basis of the progress achieved in the alignment of national legislation with the Directive, negotiations concerning culture and audiovisual policy were definitively closed with the future Member States at the European Council in Copenhagen in December 2002. The Commission monitored the process, giving particular attention to the development of a suitable administrative and judicial capacity to implement the Directive.

³² See point 3.2 of this Report.

³³ COM(2002) 778 final, 6.1.2003.

³⁴ COM(2003) 784 final, 15.12.2003.

³⁵ Several MEPs acted as rapporteurs at the Liverpool conference and the report prepared by Henri Weber on the application of Articles 4 and 5 of the Directive concerns the Directive's review.

The EU is now preparing for the next enlargement. Bulgaria and Romania are expected to join the European Union in 2007. Croatia and Turkey are candidate countries.

As regards the Western Balkan countries, the European Council has underlined their prospects of EU membership on several occasions. The Commission pursues a strategy for the convergence of the audiovisual policies of these countries with European media standards, in cooperation with the Council of Europe.

5.2. Cooperation with the Council of Europe

Cooperation between the European Commission and the Council of Europe has been further developed, in particular with regard to the exchange of information on the development of the European Convention on Transfrontier Television. A Commission representative has participated as observer in 5 meetings of the Standing Committee on Transfrontier Television (T-TT) and 4 meetings of the Steering Committee on the Mass Media (CDMM), as well as in the Council of Europe's Ministerial Conference on Mass Media in Kiev.

6. CONCLUSIONS

The "Television without Frontiers" Directive continues to function successfully in ensuring the freedom to provide television services in the European Union. The fundamental objectives of public interest that the Directive aims to safeguard in establishing a minimum harmonisation in the internal market remain valid. The Directive provides effective regulation for the European audiovisual sector and the Report confirms the validity of the common European approach to audiovisual matters.

However, in view of market and technological developments, a need to review the current EU regulatory framework, as outlined above, has become apparent. Therefore, the Commission intends to come up with a proposal for revision of the Directive at the end of 2005.