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**SIXTH COMMUNICATION FROM THE COMMISSION
TO THE COUNCIL AND THE EUROPEAN PARLIAMENT**

**on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without
Frontiers", as amended by Directive 97/36/EC, for the period 2001-2002**

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TABLE OF CONTENTS

1.	INTRODUCTION.....	3
2.	COMMISSION OPINION ON THE APPLICATION OF ARTICLES 4 AND 5	4
2.1.	General remarks – Application of Articles 4 and 5.....	4
2.1.1.	Articles 4 and 5 in the context of a dynamic European audiovisual landscape	4
2.1.2.	Implementation modes and monitoring by Member States	4
2.1.3.	Tools of analysis and assessment.....	5
2.2.	Application of Article 4	6
2.3.	Application of Article 5	7
3.	CONCLUSIONS.....	8

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Text with EEA relevance

1. INTRODUCTION

This communication, drawn up pursuant to Article 4(3) of Council Directive 89/552/EEC¹ of 3 October 1989 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 of the European Parliament and of the Council of 30 June 1997², constitutes the Commission's sixth report on the implementation of Articles 4 and 5 of the Directive³. It sets out the Commission's opinion on the statistical statements submitted by the Member States on the achievement of the proportions referred to under Articles 4 and 5 for each of the television programmes falling within their jurisdiction. Article 4(3) of the Directive states that the Commission may take account in its opinion, in particular, of progress achieved in relation to previous years, the share of first broadcast works in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audiovisual production capacity or restricted language area⁴.

The purpose of this document is to bring the statistical statements of the Member States and the Commission's opinion to the attention of the other Member States, the European Parliament and the Council. The reporting period (2001-2002) concerns the EU-15. The ten new Member States, which joined the EU on 1 May 2004, are not covered by this document. However, they will be included for the first time in the next application report for the monitoring period 2003-2004. The Commission will take particular care to ensure that the new Member States can participate in this complex exercise and to meet – in line with the principle of progressive improvement – the aims of the "Television without Frontiers" Directive, particularly in respect to the proportions referred to in Articles 4 and 5.

The appreciation of the reports from the European Free Trade Association Member States (EFTA) participating in the European Economic Area is done in a separate report published by the EFTA Secretariat.⁵ However, Annex 5 of the accompanying Commission staff working paper⁶ reproduces summaries of their reports accompanied by a short analysis.

¹ OJ L 298, 17.10.1989.

² OJ L 202, 30.7.1997.

³ Meaning the "Television without Frontiers" Directive or "the Directive".

⁴ These are non-exhaustive criteria.

⁵ Annex X to the EEA Agreement regulates –with certain adaptations – the application of the Directive to EFTA States participating in the EEA.

⁶ SEC (2004) 1016 – hereinafter "Commission staff working paper".

This document includes two parts:

- Part I – Commission opinion on the application of Articles 4 and 5;
- Part II – Conclusions drawn from the above opinion and the Member States' reports.

Additional and detailed information can be found in the eight Annexes of the Commission staff working paper.

2. COMMISSION OPINION ON THE APPLICATION OF ARTICLES 4 AND 5

2.1. General remarks – Application of Articles 4 and 5

2.1.1. Articles 4 and 5 in the context of a dynamic European audiovisual landscape

The first general observation concerns the trend in the number of television channels in Europe. As a preliminary point, the total number of channels in the EU-15 which were concerned⁷ by Articles 4 and 5 of the “Television without Frontiers” Directive was around 880 as at 1 January 2003. The comparable number of channels in the previous year (January 2002) was around 780.⁸ In terms of number of channels, this represents an increase of over 12% in a single year, reflecting the dynamism in European audiovisual supply.

This development is also reflected by the results of the evaluation of the Member States' reports for the present reference period. The total number of reported channels covered by Articles 4 and 5⁹ rose from 472 in 2001 to 503 in 2002.

2.1.2. Implementation modes and monitoring by Member States

The second general remark regards the methodology of Member States in fulfilling their reporting obligation under the Directive. Some Member States still failed to provide full and comprehensive information, particularly with regard to satellite and/or cable television channels which were frequently omitted from national reports, e.g. Netherlands and Germany failed to report on a considerable number of channels and Italy systematically excluded

⁷ The reporting obligation under Article 4(3) applies to all transmissions by broadcasters within the jurisdiction of a Member State, with the following exceptions: Articles 4 and 5 do not apply to “news, sports events, games, advertising, teletext services and teleshopping”. Article 9 states 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 97/36/EC states 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) states that the Directive 97/36/EC 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.

⁸ These figures are based on the data published by the European Audiovisual Observatory in the 2001, 2002 and 2003 yearbooks. It includes public service and private national channels with analogue terrestrial broadcasting licence, and cable and/or satellite and/or DTT channels. It does not include non-European channels targeting EU Member States, channels targeting third countries and regional, local or territorial channels and regional or local windows on national channels.

⁹ This figure was obtained by determining the total number of reported channels less the number of channels which were exempted due to the nature of their programmes (entire programme made up of news, sports events, games, advertising, teletext services or teleshopping) and less the number of non-operative channels. Channels for which Member States failed to communicate data relating to Article 4 or 5 were included.

satellite channels from its statistical statement concerning Article 5.¹⁰ Terrestrial television, on the other hand, was covered comprehensively in the Member States' reports. The Commission would point out that the reporting obligation under Article 4(3) of the Directive applies to **each** of the television programmes within the jurisdiction of the Member State concerned.¹¹

It is also important to mention that the nature and intensity of checks often differ significantly between Member States: daily monitoring of programming, statistical reports, surveys, sampling and estimates in some cases. Monitoring may be carried out by an independent regulatory authority or, in other cases, directly by the competent governmental department.

The differences in terms of methodology in the application and interpretation of the provisions of the Directive complicate the task of generating figures which reflect the exact state of play of the application of Articles 4 and 5. Notwithstanding these variables, the results presented in this Communication enable the trends in this field to be identified and conclusions to be drawn as to the effectiveness of the measures adopted.¹²

2.1.3. Tools of analysis and assessment

Under Article 4(3) of the "Television without Frontiers" Directive, the Commission is responsible for ensuring the application of Articles 4 and 5 in accordance with the provisions of the Treaty. To assist the Member States with their monitoring responsibilities, guidelines drawn up by the Contact Committee¹³ have been suggested for the monitoring of the implementation of Articles 4 and 5. These guidelines are intended to support Member States in their reporting obligation under Article 4(3) by clarifying certain definitions in order to avoid differences in interpretations.

In addition, a series of indicators¹⁴ has been developed to provide an objective analysis grid in order to better assess the statistical statements submitted by Member States. These performance indicators help to evaluate the progress made in applying Articles 4 and 5 both at Community and at national level. Subject to the option taken by some Member States pursuant to Article 3(1) of the "Television without Frontiers" Directive of establishing more detailed or stricter rules in the areas covered by the Directive¹⁵, these indicators help to give an overview of the implementation and application of Articles 4 and 5.

¹⁰ The report "exempted" satellite channels from the reporting obligation under Article 5 with reference to national legislation. The Commission is currently examining this case as to its conformity with Community law.

¹¹ The second paragraph of Article 4(3) states that "[the] report shall in particular include a statistical statement on the achievement of the proportion referred to in [Article 4] 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."

¹² In this respect there should be mention of the independent "Impact Study of Measures Concerning the Promotion of Distribution and Production of TV Programmes Provided for Under Article 25(a) of the "Television without Frontiers" Directive which is currently in progress and the results of which are to be presented by the end of 2004.

¹³ http://europa.eu.int/comm/avpolicy/regul/twf/art45/controle45_en.pdf

¹⁴ Cf. Annex 1 of the Commission staff working paper.

¹⁵ In practice, a majority of Member States have made use of this option (e.g. exclusion of studio productions in Italy, positive definition of works to be included in Germany). Six Member States (E, F, I, NL, SF, UK) apply higher percentage requirements than those contained in the Directive on some or all of their broadcasters (e.g. 60% requirement for transmission of European works in France, 25% allocation to works by independent producers in the United Kingdom and the Netherlands, etc.).

This is the background against which the opinion set out in this document is presented. It identifies general trends in the application of the measures of promotion of distribution and production of European television programmes both at Community level and in the individual Member States concerned for the period 2001-2002.

2.2. Application of Article 4

This part analyses the achievement of the proportion referred to under Article 4 of the “Television without Frontiers” Directive¹⁶.

The **average transmission time** reserved for European works by channels with the highest viewing figures¹⁷ in all Member States was **66.95% in 2001** and **66.10% in 2002**, representing a **0.85 point decrease**. This slight decrease must, however, be seen against an overall **mid-term increase** of the proportion in the scheduling of European works. **Compared with the previous reference period** (60.68% in 1999 and 62.18% in 2000) there was a **5.42 point increase over four years**. Thus, the medium-term trend was upward overall.¹⁸ Depending on the Member State in question, the average transmission time varied between 46.98% (Portugal) and 87% (Netherlands) in 2001 and between 48.67% (Ireland) and 80% (Luxemburg) in 2002. The trend in terms of growth of average transmission time of European works over the reference period (2001-2002) was positive in eight Member States, stable in one and negative in six. The **overall trend** was therefore **upward** over the reference period.

As for the total number of channels which achieved or exceeded the majority proportion of Article 4 (European works) over the reference period, the **average compliance rate** for all channels in all Member States was 69.93% in 2001 and 74.53% in 2002, representing a **4.60 point increase over the reference period**. Compared with the previous reference period (68.58% in 1999 and 72.50% in 2000) there was a **5.95 point increase over a period of four years** (1999-2002). This is a remarkable figure given the increase in the number of channels, essentially special-interest channels, over the same period. The compliance rates for all types of channels varied between 38% (Sweden) and 100% (Finland) in 2001 and between 43% (Sweden) and 100% (Finland) in 2002. The compliance rate, in terms of number of channels of all types, rose in nine Member States, was stable in five and fell in one.

These **generally positive results** in relation to the application of Article 4 at Community level – most indicators with few exceptions showing an increase within the reference period (2001-2002) and even more in comparison with the previous reference period (1999-2001) – suggest that the objectives of the “Television without frontiers” Directive are being achieved at Community level with regard to the scheduling of European works. A summary table¹⁹ shows the situation relating to the application of Article 4 across the Community over the reference period (2001-2002).

¹⁶ Article 4(1) lays down that “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 excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping.”

¹⁷ The data on the proportion of the average transmission time covers the channels with over 3% audience share.

¹⁸ Cf. Table below on page 9 showing the development of the main indicators in the EU-15 over four years (1999-2002).

¹⁹ Cf. Table 1 in Annex 2 of the Commission staff working paper.

2.3. Application of Article 5

This part analyses the achievement of the proportions referred to under Article 5 of the “Television without Frontiers” Directive²⁰.

As already pointed out above with regard to methodology, some Member States did not provide comprehensive information, particularly for satellite channels in respect to Article 5. Certain Member States completely omitted the relevant data in their reports, for example by “exempting” the channels concerned.²¹ Furthermore, for some channels no data on the adequate proportion of recent European works were provided.

In this connection, the Commission would point out that the obligations referred to under Article 4(3) apply to each of the television programmes falling within the jurisdiction of the Member State concerned. It is the responsibility of each Member State to provide a comprehensive list of all the channels covered by Article 5 of the Directive and to supply full data on them. Member States are not empowered to provide for general “exemptions” from obligations under the Directive except for cases specified by the Directive.^{7 above}

The results presented below must be examined bearing in mind that channels for which no data had been communicated were **not** considered in the calculation of the various performance indicators, e.g. the (average) transmission time of European works or the compliance rate.²²

The first outcome of the assessment of the Member States’ reports in relation to the required minimum proportion of 10% under Article 5 concerns the **average transmission time** or, depending on the choice made by the Member State when transposing the Directive, the average programming budget²³ reserved for European works by independent²⁴ producers: the **average proportion** of works by independent producers broadcast by all European channels in all Member States was **37.75% in 2001 and 34.03% in 2002**, representing a **3.72 point decrease** over the reference period. Compared with the **previous reference period** (37.51% in 1999 and 40.47% in 2001), there was a **3.48 point decrease over four years**. The average proportion reserved for this type of work varied, depending on the Member State concerned, between 21.33% (Italy) and 68.92% (Netherlands) in 2001 and 18.78% (Italy) and 61.42% (Austria) in 2002. Over the reference period, there was an increase in the average proportion of European works by independent producers in six Member States and a decrease in nine.

The second finding concerns the total number of channels of all types achieving or exceeding the minimum proportion of 10% of European works by independent producers: the **average**

²⁰ 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, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, 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.”

²¹ Italy is the most striking example in this respect.

²² Cf. indicator 1 and 2 in Annex 1 of the Commission staff working paper.

²³ In practice, only terrestrial channels and four cable and satellite channels under French jurisdiction made use of this option.

²⁴ Within the meaning of recital 31 of the Directive 97/36/EC of 30 June 1997, which provides that (non-exhaustive criteria): “(...) Member States, in defining the notion of “independent producer”, should take appropriate account of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights”.

compliance rate for channels in all Member States was **90.67% in 2001 and 89.13% in 2002**, representing a **slight decrease** of 1.54 points over the reference period. Compared with the previous reference period (85.02% in 1999 and 84.81% in 2000) there was a **4.11 point increase over four years**. The average compliance rate for channels in each Member State ranged from 72% (Greece) to 100% (Ireland, Netherlands, Austria, Finland and Sweden) in 2001 and from 71% (Sweden) to 100% (Denmark, France, Ireland, Austria and Finland) in 2002. The average compliance rate rose in six Member States, was stable in four (three at 100%) and fell in five.

The third result refers to the **average share allocated at Community level to recent European works by independent producers**, i.e. works broadcast within five years of their production: the average share, for channels in all Member States, allocated to recent European works by independent producers was **61.78% in 2001 and 61.96% in 2002**, representing a slight **0.18 point increase** over the reference period; these are percentage figures in relation to all (recent or not recent) European works made by independent producers. Compared with the previous reference period (53.80% in 1999 and 55.71% in 2000) there was a **8.16 point increase over four years**; consequently, in a mid-term perspective considerable progress had been achieved in relation to the development of works by independent producers. The average share allocated to this type of work varied, according to Member State, between 22.72% (Spain) and 98.75% (Ireland) in 2001 and 23.75% (Spain) and 98.75% (Ireland) in 2002. In seven Member States there was a positive growth in the average allocation of this type of work, in one it was stable and in seven there was a decrease. In relation to the total qualifying transmission time, recent works by independent producers were lying constantly above 20% with a slight increase of 0.92% points over four years.

A summary table²⁵ gives an overview of the application of Article 5 at Community level over the period concerned (2001-2002).

3. CONCLUSIONS

The principal conclusions which can be drawn from the Member States' reports on the application of Articles 4 and 5 for the period 2001-2002 are presented below. A detailed analysis of the application of Articles 4 and 5 in each Member State can be found in Annex 3 of the Commission staff working paper and summaries of the Member States' reports are enclosed in Annex 4.

The figures on the average transmission time for the EU-15 indicate that for the first time there has been **no progress at Community level in the scheduling of European works** (Article 4). However, notwithstanding a **slight decrease (-0.85 points)** over the present reference period (2001-2002), there was a more apparent increase of 5.42 points over four years (1999-2002) which demonstrates a **stabilisation in the scheduling of European works at almost 2/3 of total qualifying transmission time**. Consequently, **from a mid-term perspective there has been an overall satisfactory application of Article 4** of the "Television without Frontiers" Directive.

As regards the application of **Article 5**, the trend is **less positive**. For the first time, there was – looking at EU-average figures – a **decrease** both within the present reference period (**-3.70**

²⁵ Cf. Table 2 in Annex 2 of the Commission staff working paper

points) and also compared with the previous reference period (**-3.46 points**). However, the EU-average transmissions of European works by independent producers were **constantly at levels which are well above the minimum proportion of 10%** set by the Directive. In addition, there were relatively **high levels of transmissions of recent European works by independent producers**²⁶. In relation to European works by independent producers overall (recent or not), recent works were even increasing. In this perspective, the positive development over the reference period continued the positive trend of the previous reference period (1999-2001). The overall assessment is therefore that the **objectives of the Article 5** of the “Television without Frontiers” Directive **have broadly been met**. The application of Article 5 in respect to the scheduling of **recent European works** made by independent producers was **generally satisfactory**.

The summary table at the end of this report shows the development of the main performance indicators in the EU-15 (EU-average transmissions of European works, of European works by independent producers and of recent European works made by independent producers) over a period of four years (1999 – 2002).

The **national reports reflect – with a few exceptions – an overall satisfactory application by the Member States of the provisions of Article 4** (European works) **over the reference period** (2001-2002). Eight Member States increased the average majority proportion over the reference period. Also, from a **mid-term perspective**, in relation to the previous reference period (1999-2000), for the **majority of Member States** there has been, in line with the principle of progressive improvement, **constant progress** at national level. Nine Member States increased the average majority proportion in relation to 1999.

Concerning Article 5 (European works created by independent producers), for the majority of Member States the results are **less positive**. Only six Member States increased the minimum proportion over the reference period, while there was a negative trend in nine Member States. Nor was there any major improvement at national level compared with the previous reference period. Although an improvement was noted in seven Member States, in eight others there was a fall in relation to the proportions in 1999. This trend is however alleviated by two aspects. First, the decreases concerning Article 5 at national level were comparatively moderate in terms of percentage points²⁷. Second, as already pointed out above, all in all, the average transmissions of European works by independent producers stabilized over four years at above 1/3 of total qualifying transmission time.²⁸ Although Article 5 stipulates only a “minimum” threshold this is nevertheless a notable proportion.

As a consequence, detailed examination of the Member States’ reports reveals, in a context of a general increase in the number of channels, **stability** in the broadcasting of European works, including those – to a lesser extent – by independent producers, particularly in the case of recent works.

²⁶ Recent European works by independent producers were over four years constantly above 1/5 of total qualifying transmission time which corresponds approximately to 2/3 of works by independent producers.

²⁷ With the exception of the Netherlands and Portugal, all decreases were ranging below 3% for the present reference period.

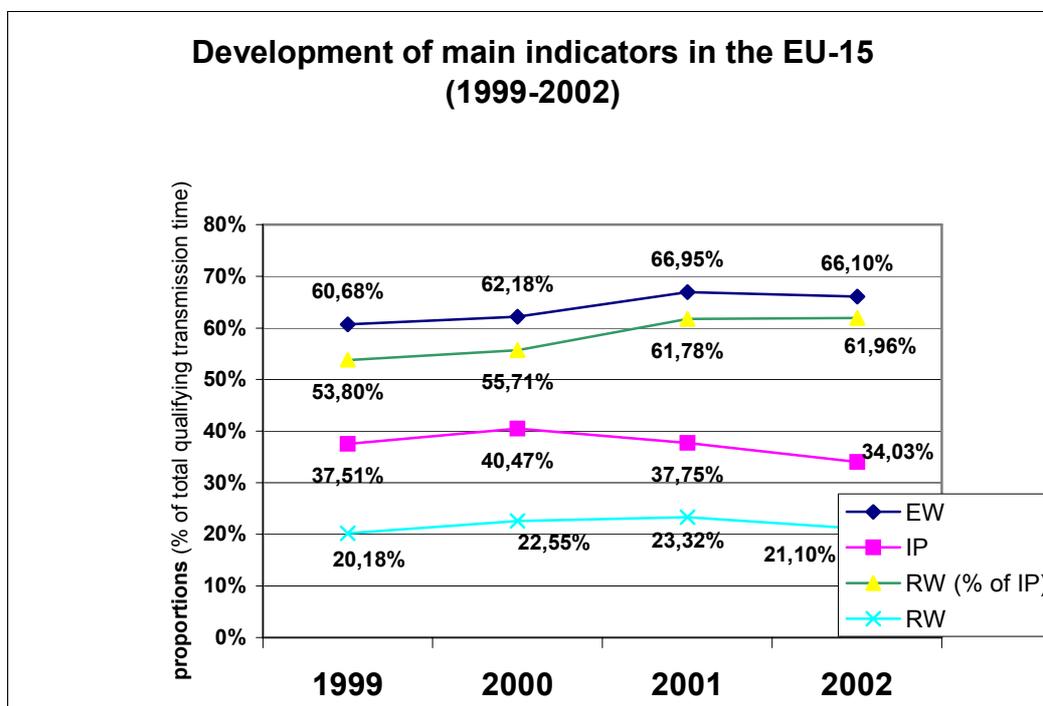
²⁸ This corresponds to more than 1/2 of European works overall (whether or not by independent producers).

This generally positive situation must, however, be qualified given that certain Member States did **not communicate data on a considerable number of channels** which are covered by Articles 4 and 5. In this respect, the Commission would remind the Member States of the need for increased controls and monitoring of the channels concerned and the importance of ensuring – for reasons of fair competition – that these channels comply with their obligation under national law to communicate the requested data as other channels do. In addition, Member States should ensure that the channels concerned achieve – where practicable and appropriate – the proportions of transmission time laid down by Articles 4 and 5 of the “Television without Frontiers” Directive, in line with the principle of progressive improvement.

In practice, the **reasons given for the instances of non-compliance**²⁹ were often combined in Member States’ reports. Moreover, they did not differ notably from one Member State to the other or compared with the reasons given for the previous reference periods. The channels in question are often the same in the various Member States concerned.

²⁹ The most frequent reasons were the following: Groups of channels belonging to the same broadcaster meet, if taken together, the majority proportion but not individually; special-interest nature of the channels’ programmes and progress achieved; the recent nature of the channel; subsidiaries of non-EU companies.

In conclusion, the evaluation of the findings presented above suggests that the **objectives of Article 4 and 5** of the “Television without Frontiers” Directive have been **achieved** over the reference period (2001-2002) and also compared with the previous reference period (1999-2000).



EW European works (in relation to total qualifying transmission time)

IP European works made by independent producers (in relation to total qualifying transmission time³⁰)

RW (% of IP) Recent European works by independent producers (in relation to European works by independent producers)

RW Recent European works by independent producers (in relation to total qualifying transmission time).

³⁰ Or, depending on the choice made by the Member State when transposing the Directive, the average programming budget reserved for European works by independent producers.