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

**Seventh communication 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 2003-2004**

{SEC(2006) 1073}

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(Text with EEA relevance)

1. INTRODUCTION

This communication is 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 ("Television without Frontiers" Directive). It is the Commission's report on the application of Articles 4 and 5 of the Directive³ for the period 2003-2004 (seventh report) and sets out in the first Part the Commission's opinion on the Member States' statistical statements 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 second Part of this document presents the main conclusions to be drawn from the Member States' reports.

The purpose of this bi-annual reporting exercise is, firstly, to bring Member States' statistical statements to the attention of the other Member States, the European Parliament and the Council and, secondly, to check that the measures to promote European and independent production are being properly applied in the Member States. For the first time, the ten Member States which joined the European Union on 1 May 2004 are included in this report for the post-accession period from 1 May to 31 December 2004. The Commission has taken particular care to ensure that these Member States can participate in this complex exercise and meet – in line with the principle of progressive improvement – the objectives of the "Television without Frontiers" Directive, particularly as regards the proportions referred to in Articles 4 and 5.

Additional background information can be found in a Commission staff working paper⁵.

¹ OJ L 298, 17.10.1989.

² OJ L 202, 30.7.1997.

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

⁴ These are non-exhaustive criteria.

⁵ SEC(2006) 1073 – hereinafter "Working Paper".

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

2.1. General remarks

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

The first general observation concerns the steady growth of the number of television channels in Europe. The evaluation of the Member States' reports shows that the total number of reported channels covered by Articles 4 and 5⁶ increased from 584 in 2003 to 767 in 2004. In the previous reference period, the number of such reported channels had risen from 472 in 2001 to 503 in 2002. This means an increase of 61% over four years (2001-2004), which has been mainly due to the European Union's most recent enlargement in 2004. However, even looking at EU-15, there was still a significant rise (39%) from 2001 to 2004 which included a 12% increase from 2003 – 2004⁷. In terms of the number of channels, this reflects the continuous growth in programme hours and the enduring dynamism of the European audiovisual supply industry.⁸

2.1.2. *Methods of implementation and monitoring by Member States*

The second general remark concerns the manner in which Member States implement their obligations resulting from Articles 4 and 5 and fulfil their reporting obligation under the Directive.

There are often significant differences between Member States as regards the nature and intensity of checks: i.e. daily monitoring of programming, statistical reports, surveys, sampling or, in a few cases, estimates only. Monitoring may have been carried out by an independent regulatory authority, by the competent governmental department or by a private research company. In some Member States, public authorities rely on the proportions reported by broadcasters.

Most Member States have provided full and comprehensive information to the Commission. This is a clear improvement compared to the previous reporting period, when some Member States omitted relevant data for a considerable number of channels from their reports. There are only a few Member States that still have to improve their record, especially with regard to the proportions referred to in Article 5⁹. One Member State continued to “exempt” a large

⁶ Cf. Indicator 1, background document 1 of the Working Paper (“Document”).

⁷ This development is confirmed by data published by the European Audiovisual Observatory (EAO). The total number of channels in the EU-15 was around 881 in January 2004, whereas in the previous year the figure was 780, cf. EAO, Yearbooks 2005/2004/2003, Film, Television, Video and Multimedia, Volume 5, Tables T.21.1. The figures include public service and private national channels with analogue terrestrial broadcasting licence, and cable and/or satellite and/or DTT channels. They do 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.

⁸ Cf. Chart 1, Document 2, Working Paper.

⁹ The Czech Republic did not communicate the proportions for works by independent producers and recent works for more than 50% of channels covered by Article 5. France and Sweden did not communicate data on Article 5 for more than 20% of covered channels under their jurisdiction. Concerning recent works, Latvia did not communicate any data at all and Denmark only reported data for less than 2/3 of the channels covered.

number of satellite channels from its reporting obligation under Article 5¹⁰. The Commission would point out that the reporting obligation under Article 4(3) of the Directive applies to **every single** television channel within the jurisdiction of the Member State concerned, regardless of its mode of transmission or audience share¹¹. It is the responsibility of each Member State to provide a comprehensive list of, and full data on, all channels covered by Articles 4 and 5 of the Directive. Member States are not empowered to provide for general “exemptions” from obligations under the Directive, except for cases specified by the Directive and when specific reasons are given.

The differences in terms of application and interpretation of the Directive in each Member State should also be mentioned. For instance, as regards the requirement to allow a minimum of 10% of broadcasting time (minimum proportion), Article 5 allows proportions based on either broadcasters’ **transmission time** or their programming budget - the choice is made by the Member State when transposing the Directive¹². Another example: certain Member States have introduced a positive definition of programmes which qualify under Articles 4 and 5, thus making it harder to attain the required proportions. Others have directly implemented into national law the negative definition of qualifying transmission time in Articles 4 and 5, which excludes news, sport events, games, advertising and teleshopping. This and other differences complicate the task of generating comparative and reliable data to show how European TV channels are applying Articles 4 and 5. Notwithstanding these variables, the results presented below help in identifying the main trends in this field and in drawing conclusions as to the effectiveness of the implementation measures adopted by Member States.¹³

2.1.3. *Analysis and assessment tools*

Under Article 4(3) of the 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

¹⁰ As in previous reports, Italy’s statistical statement “exempted” systematically all satellite and cable channels, which constitute roughly 50% of all covered channels under Italy’s jurisdiction. The Commission considers these “exempted” channels as “not reported” with the consequence that Italy’s compliance rate under Article 5 (cf. Indicator 5, Document 1) is negatively affected by this omission. Italy adopted in 2005 new measures in order to bring the legal situation in line with its obligations under Article 5. The Commission will continue to monitor closely Italy’s legal and factual application of Article 5 as to its conformity with Community law. It should also be mentioned that Italy does not comply with reporting standards for recent works, which were reported as percentage of all European works instead of as percentage of European works by independent producers rendering thus a cross-European comparison or an EU-average of recent works more difficult. This reporting practice should be adapted to Article 5.

¹¹ 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 practice, only France made use of this option: for three satellite or cable channels the calculation is based on the programming budget and for the six terrestrial channels it is based on the channels’ revenues.

¹³ In this context, 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 was finalised in May 2005 by David Graham and Associates, has contributed to evaluating the economic and cultural impact of Articles 4 and 5 and of the implementation measures in EU-15, cf. http://europa.eu.int/comm/avpolicy/stat/studi_en.htm.

Member States with their monitoring responsibilities, guidelines¹⁴ have been drawn up for monitoring the implementation of Articles 4 and 5. These guidelines are intended to support Member States in their reporting obligation under Article 4(3) by defining certain terms and clarifying key concepts, in order to avoid differences in interpretation.

In addition, a series of new indicators¹⁵ have been defined to provide an objective analysis grid to better assess the statistical statements submitted by Member States.¹⁶ As Member States may establish more detailed or stricter rules in the areas covered by the Directive¹⁷, these indicators help to evaluate progress made in the application of Articles 4 and 5 at both Community and national levels.

This is the general background to the Commission's opinion as it is presented in this document. It identifies the general trends in the application of the measures to promote the production and distribution of European television programmes **at Community level**¹⁸.

2.2. Application of Article 4

This part analyses the achievement at European level in relation to the majority proportion of European works as spelled out in Article 4¹⁹ of the "Television without Frontiers" Directive.

The **EU-average transmission time** reserved for European works by all covered²⁰ channels in all Member States was **65.18% in 2003 and 63.32% in 2004** representing a **1.86 point decrease** over the reference period. Concerning the results of the **previous reporting periods**, the average proportion for European works was 66.95% in 2001 and 66.10% in 2002 in EU-15. This amounts to a fall of 3.63 points over four consecutive years (2001-2004). Taken over six years (1999-2004) there is an overall increase of 2.64 percentage points in the scheduling of European works. Consequently, the overall **medium-term trend was upwards**. The above results must be seen against the background of two important factors: First, the data up to and including 2003 concern EU-15, whereas the 2004 data already include the ten Member States which joined the EU on 1 May 2004. They had a combined average transmission of 61.77% of European works in the post-accession period (1 May to 31 December 2004). Given that broadcasters and regulators in the acceding Member States have had no experience in implementing and applying the measures of promotion of European works and in reporting on their application, a difference of less than 3 percentage points below the average in the EU-15 can be considered as a success and reflects a **generally sound**

¹⁴ Suggested Guidelines of 11 June 1999, cf. http://europa.eu.int/comm/avpolicy/regul/twf/art45/controle45_en.pdf.

¹⁵ Cf. Document 1, Working Paper.

¹⁶ For instance, compliance rates (Indicators 3 and 4) were adversely affected by channels for which no data had been reported.

¹⁷ Cf. Article 3(1): In practice, a majority of Member States have made use of this option (e.g. exclusion of studio productions in Italy, positive definition of qualifying programmes in Germany). Six Member States (E, F, I, NL, SF, UK) apply higher percentage requirements than those contained in the Directive to 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.).

¹⁸ Details of the **application in each Member State** are presented in **Document 4** of the Working Paper.

¹⁹ 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."

²⁰ Cf. above 2.1.1 (Indicator 1, Document 1, Working Paper).

application of Article 4 throughout the EU. Secondly, it should be mentioned that, for the previous reporting periods, the average proportions of European works were based exclusively on data on the channels with the highest viewing figures. For the reporting period 2003-2004, the Commission has included data on all channels concerned, both primary and secondary, regardless of their importance in terms of audience share²¹.

At Member State level, the average transmission time varied between 52.75% (Ireland) and 86.2% (Denmark) in 2003 and between 49.12% (Czech Republic) and 86.33% (Denmark) in 2004. The trend in terms of increase in the average transmission time of European works over the reference period (2003-2004) was positive in seven Member States and negative in eight.

Looking at the total number of channels which attained or exceeded the majority proportion of Article 4, the **average compliance rate** for all channels in all Member States was **68.20% in 2003 and 72.80% in 2004**, representing a **4.60 point increase over the reference period**. Compared with the previous reference period (69.93% in 2001 and 74.53% in 2002) there was a **2.87 point increase over a period of four years (2001-2004)**. This is a remarkable result given the increase in the number of channels, essentially special-interest channels, over the same period. The Member States' average compliance rates for all channels covered ranged from 50% (Belgium and Ireland) to 100% (Finland) in 2003 and from 45% (UK) to 100% (Estonia, Latvia, Malta and Slovakia) in 2004. Over the reference period the compliance rate rose in ten Member States, was stable in two and fell in three.

The above results suggest that the **objectives** of the “Television without frontiers” Directive are being **achieved comfortably at Community level in terms of the scheduling of European works**. Particularly in the light of the inclusion of the ten Member States which joined the EU in 2004 these figures represent an encouraging sign of the effective application of Article 4 throughout the European Union.

2.3. Application of Article 5

This part analyses the achievement at European level of the proportions referred to under Article 5 of the “Television without Frontiers” Directive²².

²¹ Whereas the previous approach of excluding from consideration under Article 4 channels with less than 3% audience share (“de-minimis criterion”) may have had the merit of achieving more “weighted” results, there is no basis in the “Television without Frontiers” Directive for this approach. Also, Annex 7 of the Working Paper shows that there is very little actual difference between the EU-average transmission time of European works broadcast by primary channels (**64.45% in 2003 and 63.87% in 2004**) and of those broadcast by all channels. Therefore, this report, which also reflects the situation in the EU-25 for the first time, adopts a different methodology and presents the average proportions of European works from **all** channels covered by Article 4. **Annex 7** of the Working Paper lists the channels with audience shares above 3% and their respective proportions of transmission time reserved for European works.

²² Article 5 states 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.”

The **EU-average proportion** reserved for European works by independent²³ producers (independent productions) broadcast by all covered channels in all Member States was **31.39% in 2003 and 31.50% in 2004**, representing a **0.11 point increase** over the reference period. Compared with the **previous reference periods** (37.51% in 1999, 40.47% in 2000, 37.75% in 2001 and 34.03% in 2002), there was a considerable decrease of 6.25 points in four years (2001-2004) and an equally large decrease (6.01 points) over six consecutive years (1999-2004). Thus, it could be said that the **overall medium-term trend was downwards**. It was noticeable that there was hardly any difference between the achievements of the channels in the EU-15 and the ten Member States which joined the EU in 2004, whose channels achieved an average performance of 31.55% - even higher than those of EU-15 (31.47 %).

At Member State level, the average proportions in 2003 ranged from 15.81% (Denmark²⁴) to 44.95% (Austria) and in 2004 from 16.24% (Slovenia) to 46.38% (Austria). Over the reference period, the average proportion of independent productions increased in eight Member States and decreased in seven. The trend was therefore upward in the majority of Member States.

The **EU-average compliance rate** for channels in all Member States was **78.40% in 2003 and 81.92% in 2004**, representing a **3.52 point increase**. Compared with the previous reference periods (85.02% in 1999, 84.81% in 2000, 90.67% in 2001 and 89.13% in 2002) the compliance rate fell by 8.75 percentage points over a period of four years (2001-2004) and by 3.10 points over six years (1999-2004), representing a slight mid-term decrease in complying with the minimum requirement for broadcasting independent productions. The average compliance rate for channels in each Member State ranged from 44% (Italy²⁵) to 100% (Greece, Ireland and Finland) in 2003 and from 27% (Italy²⁶) to 100% in nine Member States (Cyprus, Estonia, Greece, Ireland, Latvia, Lithuania Malta, Slovakia and Finland) in 2004. The average compliance rate rose in seven Member States, was stable in four (two at 100%) and fell in four. This represents a positive development overall.

The **EU-average share allocated to recent European works by independent producers** (recent works²⁷) was **71.66% in 2003 and 69.09% in 2004**, representing a **2.57 point decrease** over the reference period. (These are percentages relating to all European works (recent or not) created by independent producers. Compared with the previous reference periods (53.80% in 1999, 55.71% in 2000, 61.78% in 2001 and 61.96% in 2002), there were a 7.31 point increase over four years (2001-2004) and an even larger increase of 15.29 points over six years, representing an increase of almost 30% from 1999 until 2004. Consequently, from a **mid-term perspective, considerable progress was achieved in the development of recent works**.

²³ Within the meaning of Recital 31 of Directive 97/36/EC of 30 June 1997, which provides (under the non-exhaustive criteria) that: "... 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".

²⁴ Noteworthy is the fact that, for both 2003 and 2004, Danish channels had the highest average proportions of European works (cf. 2.2 above) but at the same time very low proportions of independent productions suggesting that the share of in-house broadcasting productions in Denmark is very high.

²⁵ As mentioned above, the Commission considers 39 out of 57 "exempted" satellite channels in 2003 as "non-reported", which has an adverse effect on the compliance rate (Indicator 5).

²⁶ The Commission considers 43 out of 60 "exempted" satellite channels in 2004 to be "non-reported".

²⁷ i.e. works broadcast within five years of their production.

At Member State level, the average shares in 2003 ranged from 31.87% (Greece) to 97.50% (Ireland) and from 22.2% (Cyprus) to 100% (Slovakia) in 2004. One Member State did not communicate data on recent works. In seven Member States there was positive growth in the average allocation of recent works, in one it was stable and in seven there was a decrease. Also during this reporting period, recent works stayed above 20% of total qualifying transmissions, having fallen slightly by 1.55 points over four years²⁸.

3. CONCLUSIONS

Reported data indicate that, for the first time, there has been a **slight decrease in the scheduling of European works (Article 4)** at Community level during the current reference period. However, the medium-term (1999-2004) trend is positive. Two factors have to be taken into account when evaluating progress under Article 4. First, the figures for 2004 include the ten Member States which joined the EU in 2004. Second, the method of calculation has been altered inasmuch as secondary channels with audience shares below 3% are now also included in the average proportions of European works. Considering these factors, the decrease has been relatively small. Also, the average EU-compliance rate rose by more than 4 points during this reference period. These results show that, notwithstanding the slightly downward short-term trend, **scheduling of European works has stabilised in the EU at a level well above 60% of total qualifying transmission time**. Particularly for the ten Member States which participated in this monitoring exercise for the first time this is an encouraging development. Thus, overall **the application of Article 4** of the Directive at European level has been **satisfactory**.

As regards the application of **Article 5**, the **slight increase** during the present reference period (+ 0.11 percentage points) can be seen as a positive development, bearing in mind that the data for 2004 include the ten Member States joining the EU in 2004. However, from a mid-term perspective, this short-term upward trend is offset by a serious drop of more than 6 percentage points (or a decrease of more than 16%) compared with the averages for 1999 or 2001. However, this **downward mid-term trend** is offset to some extent by three factors: Firstly, the EU-average **compliance rate has risen** within the present reporting period, meaning that in 2004 substantially more channels in the EU complied with the minimum proportion set in Article 5 than in 2003. This is also reflected in the relatively small number of cases of non-communication, which has fallen considerably compared to the previous reference periods. Secondly, **levels of transmission of recent European works by independent producers were relatively high**.²⁹ In relation to independent productions, recent works have risen by 30% in six years.³⁰ Thirdly, it must be remembered that the proportions have remained at levels **well above the 10%-minimum** set by the Directive. Overall, therefore, the application of Article 5 has been generally satisfactory.

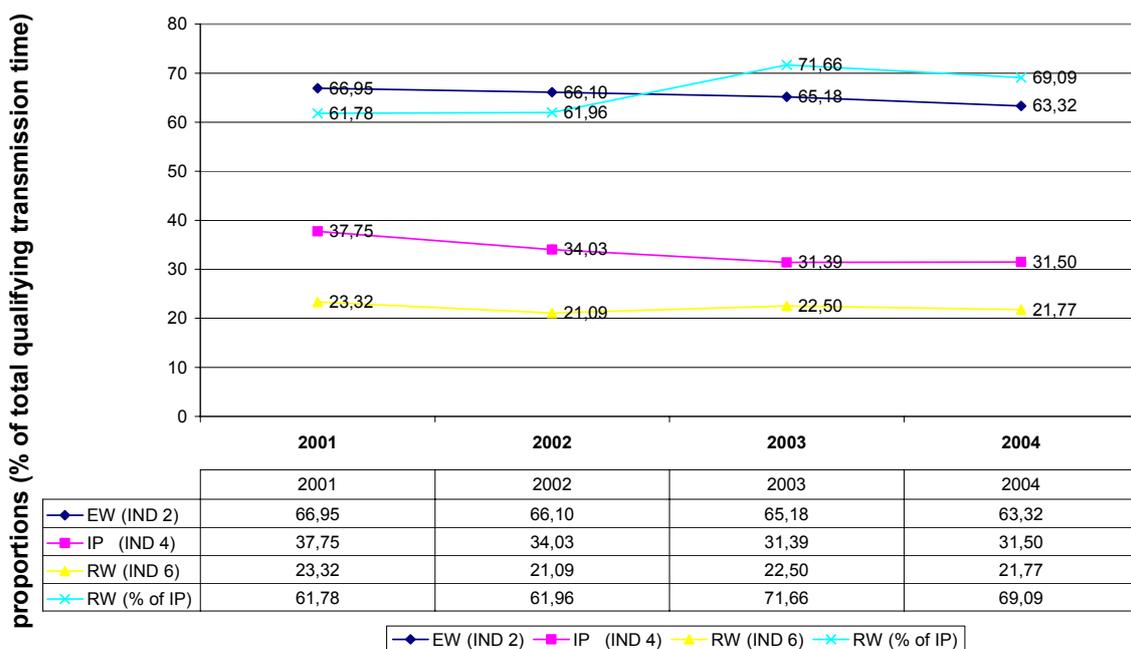
²⁸ Cf. overview Chart 2, Document 2, Working Paper.

²⁹ Recent European works were over a period of six years consistently above one-fifth of total qualifying transmission time corresponding approximately to two-thirds of all works by independent producers. In 2003, this ratio was even exceeded with recent works accounting for more than 71% of all independent productions.

³⁰ In absolute terms (in relation to total qualifying transmission time), this positive development is, however, offset by the parallel drop in independent productions.

In conclusion, the evaluation of the above results and the detailed analysis of the Member States' reports³¹ suggest that the **objectives of Articles 4 and 5** of the "Television without Frontiers" Directive have **been comfortably met** over the current reference period (2003-2004), as in previous reporting periods, both at European level and at level of Member States, including the ten Member States which joined the EU in 2004.

Development of main indicators from 2001-2004 (Community-level)



³¹ Cf. Document 3, Working Paper.