



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 30 October 2007

14519/07

**AUDIO 37
TELECOM 129
CONSUM 124
PI 43**

COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 25 October 2007

to: Mr Javier SOLANA, Secretary-General/High Representative

Subject: **SIXTH REPORT FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND
SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS
on the application of Directive 89/552/EEC “Television without Frontiers”**

Delegations will find attached Commission document COM(2007) 452 final.

Encl.: COM(2007) 452 final



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24.10.2007
COM(2007) 452 final

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THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND
THE COMMITTEE OF THE REGIONS**

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1. INTRODUCTION

1.1. Background of this Report

By means of this Communication and in accordance with Article 26 of Directive 89/552/EEC¹, as amended by Directive 97/36/EC² (the Television without Frontiers Directive, referred to below as ‘the Directive’), the Commission is submitting the sixth application report to the European Parliament, the Council and the Economic and Social Committee. The report deals with the application of the Directive during the period 2005-2006.

The main objective of this report is to describe and analyse the salient facts relating to the application of the Directive during the reference period³. Given that the Commission has adopted a proposal for the modernisation of the Directive, this report will also refer to recent developments concerning this legislative proposal, which is currently being examined by the Council and Parliament under the co-decision procedure⁴.

1.2. Development of the television market in Europe

In recent years, the television market has faced important challenges of both an economic and technological nature. Against a background of revenue stability for the traditional financial streams such as licence fees and advertising, further diversification of revenue sources linked to a multiplication of services has allowed the broadcasting sector to improve its overall economic performance in terms of turnover (the total net revenues of radio/TV companies in 2004 were about €72.8 billion, an increase of 7.9% compared with 2003⁵). However, this trend has not prevented a concentration of operators in specific areas, such as Pay-TV, where business conditions have in many cases not allowed the simultaneous presence of several operators on individual national markets.

The development of digital television broadcasting and, more recently, of IPTV and other forms of online content, has introduced a further element of change in the broadcasting industry, which is now able to multiply its range of services to an extent unknown up until now. These technological developments will certainly continue to influence the sector in the years to come, with increasing competition within the sector as well as from new entrants. However, it is not possible to predict at present which business model will benefit the most from the changing technological conditions. In any case, the Commission has set 2012 as an indicative target for analogue switch-off⁶.

¹ OJ L 298, 17.10.1989. p. 23

² OJ L 202, 30.7.1997. p. 60

³ It follows the fifth application report (COM(2006) 49 final).

⁴ For more information on the modernisation of the Directive, see:
http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm.

⁵ European Audiovisual Observatory, Yearbook 2006.

⁶ Communication of 24 May 2005, COM(2005) 204 final.

The number of services available in the enlarged Community as at mid-2006 has surpassed earlier predictions. In addition to 122 analogue nationwide channels, some 1335 digital channels were available over multiple platforms (cable, satellite, terrestrial, IPTV)⁷. A number of these channels targeted the market of another Member State or were based outside the Union. In mid-2006 there were 370 such services⁸. In addition to channels available nationally or trans-nationally, the number of regional channels is estimated at around 3000⁹.

Confronted with such an increased and diversified offer, viewers have not substantially modified their overall viewing patterns. Clearly, audiences have fragmented more as viewers have to a certain extent switched to new digital channels. However, the long-predicted decrease in the time spent watching television in favour of Internet consumption has not materialised. In certain countries viewing time increased in 2005 compared with 2004 (Belgium, France, Ireland, Poland). Hungary remains the country where audience levels are the highest (265 minutes/day), while Denmark is where viewers spend the least time watching TV (153 minutes/day).

2. APPLICATION OF THE DIRECTIVE

2.1. Jurisdiction (Article 2)

The country of origin principle is the cornerstone of the Directive. According to that principle, services that comply with the law of the country where their providers are established may circulate freely within the Community internal market. However, Article 2a(2) of the Directive allows for Member States to derogate from Article 2a(1) where a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22(1) or (2) or Article 22a.

Making use of this provision, the United Kingdom (UK) government notified the Commission that it intended to proscribe the television service known as “Extasi TV” on 20 December 2004. The reason given was that this television service had manifestly, seriously and gravely infringed Article 22 of the Directive. The service was broadcast via satellite uplinking facilities situated in Spain, but the programming itself was assembled and edited by Digital World Television (DWT), established in Italy. There was thus uncertainty as to which Member State — Italy or Spain — had jurisdiction over this broadcaster.

The UK complied with all consultation requirements and the infringements persisted. By letter of 9 February 2005, the UK notified the Commission that an order had been made pursuant to Section 177 of the Broadcasting Act 1990, the effect of which was to make illegal certain acts that are necessary for effective reception of the service in question in the UK. On 11 July 2005, the

⁷ European Audiovisual Observatory, Yearbook 2006.

⁸ European Audiovisual Observatory, Yearbook 2006.

⁹ European Audiovisual Observatory, Yearbook 2006.

Commission decided that the UK measures were compatible with Community law, in accordance with Article 2a(2) of the Directive¹⁰.

Problems likewise arose in deciding the relevant jurisdiction for the services RTL-TV*i*, Club RTL and “Plug TV”, specifically whether Belgium or Luxembourg was competent. At the meeting of the Contact Committee on 15 November 2006, the Belgian delegation presented its submission concerning the issue. A discussion followed with other interested delegations. The delegations agreed to cooperate better in order to find concrete solutions to such problems¹¹.

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

Article 3a(1) of the Directive provides that Member States may take measures to ensure that events regarded as being of major importance for society are not broadcast in such a way that would deprive a significant part of the public of the possibility of following such events on free-to-air television. Under Article 3a(2) of the Directive, the Commission must verify that such measures are compatible with Community law (once notified to it), and publishes the measures once they have effectively been taken by Member States.

On 15 December 2005, in the case *Infront v Commission*,¹² the Court of First Instance ruled that the letter of the Director-General for Education and Culture informing the UK authorities that the Commission had no objections to the measures relating to television coverage of events of major importance in that country constituted a decision within the meaning of Article 249 EC. On this basis, the Court annulled this decision on procedural grounds since it was not adopted in conformity with the Commission’s rules on collegiate procedure, delegation and enforcement of decisions.

Following this judgement, the Commission has adopted a new decision on the UK measures in conformity with its rules on collegiate procedure, delegation and enforcement of decisions. The Commission has also brought all its verifications of Member State measures notified before the *Infront* judgment into line with the findings of the Court and adopted Commission decisions to be published, together with the national measures, in the Official Journal, in accordance with Article 3a(2) of the Directive¹³.

Further, the Commission will act in accordance with the findings of the Court in respect of all Member State measures notified to the Commission after the *Infront* judgement. This has been done in respect of the draft measures notified by Finland to the Commission on 2 October 2006. These measures have been undergoing verification by the Commission following a favourable opinion of the Contact Committee. As previously indicated, a formal decision on the

¹⁰ C(2005) 2335 final.

¹¹ See paragraph 2.6 hereunder

¹² Case T-33/01, European Court reports 2005 page II-05897.

¹³ Decisions of 25 June 2007, unpublished yet.

compatibility of these measures with Community law has been adopted and will be published, together with the measures adopted at national level¹⁴.

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

On 22 August 2006, the Commission adopted the Seventh Communication on the application of Articles 4 and 5 of the Directive. The report covers the EU-25 over the reference period 2003-2004¹⁵.

The average broadcasting time for European works in the EU-25 was 65.18% in 2003 and 63.32% in 2004, representing a decrease of 3.63% over four years (2001-2004). Taken over six years (1999-2004), however, there was an overall increase of 2.64% in the scheduling of European works. Two factors have to be taken into account when evaluating progress under Article 4 of the Directive. First, the figures for 2004 include the ten Member States that joined the EU in 2004. Second, the method of calculation has changed, since secondary channels with audience shares below 3% are now also included in calculating the average proportions of European works. The results show that, notwithstanding the slightly downward short-term trend, the 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 that participated in this monitoring exercise for the first time, this is an encouraging development. It is also worth noting that the compliance rate for the EU as a whole rose by more than 4 points during this reference period. Thus, overall the application of Article 4 of the Directive at European level has been satisfactory.

The share of European works by independent producers within the EU-25 was 31.39 % in 2003 and 31.50% in 2004. It is noticeable that there is hardly any difference here between the channels in the EU-15 and those of the ten Member States that joined the EU in 2004, which achieved an average performance of 31.55% even higher than the EU-15 channels (31.47%). Overall, compared with the previous reference periods, there was a decrease of 6.25% over six consecutive years (1999-2004). However, the level of transmission of recent European works by independent producers remains relatively high (above one fifth of the total qualifying transmission time). The share of European works by independent producers is well above the 10% target set in Article 5 of the Directive.

2.4. The application of the rules on advertising (Articles 10 to 20)

During the reference period the Commission pursued infringement procedures particularly in connection with breaches of the advertising rules. These were identified following citizens' complaints or on the basis of monitoring by an independent consultant. This independent consultant supplied national reports

¹⁴ The Finnish government eventually adopted its measures on 22 February 2007. They were notified to the Commission on 26 March 2007.

¹⁵ The European Commission is now preparing the Eighth Communication on the application of Articles 4 and 5 for the period 2005-2006.

containing relevant facts and evidence relating to the concrete application of the quantitative rules on television advertising by broadcasters of certain Member States over a particular period of time. In 2006, the situation in five Member States was examined and corresponding reports were duly delivered to the Commission, which will provide for appropriate follow-up.

Further to its reasoned opinion sent to the Kingdom of Belgium in 2004 on the basis of a monitoring report provided by the independent consultant, the Commission had in-depth discussions with the Belgian authorities. In view of the improvements achieved in the meantime by the regulatory bodies in their monitoring of broadcasters' activities under their responsibility, the Commission decided to close the case on 4 April 2006¹⁶. A letter of formal notice was sent to Italy in view of the introduction of short advertising spots, usually called mini-spots, during the retransmission of football matches, which were deemed to contravene the rules of the Directive. This case — brought on account of non-compliance with the rules of the Directive — was eventually closed by the Commission on 12 December 2006 following changes in Italian legislation on TV advertising¹⁷.

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

In 2004, the Commission informed the *Asociación Nacional para la Protección y el Bienestar de los Animales* (ANPBA) that it would refuse the request by this association to prohibit the broadcasting of bull fights by Spanish broadcasters, taking into account the absence of any complaint from Member States where such programmes are received, indicating their intention to derogate from the principle of freedom of reception contained in Article 2a(2) of the Directive. Following this letter, the ANPBA filed a complaint with the ombudsman. Following examination of the case, the latter found no trace of maladministration by the Commission when dealing with the complaint and closed the case accordingly by decision of 12 January 2006¹⁸. In the meantime the Commission had closed the case¹⁹.

On 20 December 2006 the European Parliament and the Council adopted a Recommendation on the Protection of Minors and Human Dignity and on the Right of Reply. The Recommendation builds upon the earlier 1998 Council Recommendation, which will remain in force. It extends the scope to include media literacy, the cooperation and sharing of experience and good practices between (self- and co-)regulatory bodies, action against discrimination in all

¹⁶ Most of the breaches of the Directive identified in the monitoring report were by broadcasters established in Flanders. Since then, substantial progress has been noted in the supervision of the broadcasters and the way in which they implement the rules laid down in the Flemish Media Decree. Further, the Flemish media regulator (Vlaamse Regulator voor de Media) was established on 10 February 2006 by the Flemish Government, with more powers than the former Commissariaat van de Media.

¹⁷ See in particular amendments made to Article 4 of delibera Nr. 538/01/CSP by delibera 250/04/CSP.

¹⁸ Complaint 3133/2004 JMA against the European Commission, decision published in: <http://www.ombudsman.europa.eu/decision/en/043133.htm>.

¹⁹ The decision was taken on 12 October 2005.

media, and the right of reply concerning online media. The Commission will deliver regular reports on the implementation and effectiveness of this Recommendation, and review it if necessary.

2.6. Coordination between national authorities and the Commission

Meetings of the Contact Committee took place on 6 April 2005 [22nd meeting], 14 October 2005 [23rd meeting] and 15 November 2006 [24th meeting]. In its 21st meeting on 21 October, the Contact Committee decided to make its minutes publicly available, in order to increase transparency. They are now posted on the Commission's website.²⁰

The Committee followed the preparations of the review of the Television without Frontiers Directive, dealt with jurisdiction issues on multiple occasions and in general followed issues relating to the application of the Directive. In the context of the 24th meeting, the Luxembourg and Belgian delegations declared their willingness to find a solution that would guarantee respect by the company, CLT, of the commitments regarding audiovisual productions under the regulations of the French Community of Belgium. During the same meeting, the Committee gave a favourable opinion on the Finnish measures under Article 3a TVWF (major events).

Further to the meeting in March 2005 on the issue of incitement to hatred in broadcasts from outside the European Union, such as *Al Manar* or *Sahar 1*, Commissioner Reding convened the High Level Group of National Regulatory Authorities for an annual meeting in March 2006. Several issues were discussed, in particular the follow-up to some of the commitments undertaken in March 2005 to safeguard the fundamental freedoms enshrined in the Charter of Fundamental Rights of the European Union and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3. PROPOSAL FOR AN AUDIOVISUAL MEDIA SERVICES DIRECTIVE (AVMS)

A legislative proposal for a modernised audiovisual services directive was adopted in December 2005²¹. The adoption followed two public consultations in 2003 and 2005 and a stakeholder conference in September 2006 in Liverpool.²²

The legislative proposal is now in the co-decision procedure with Parliament and Council. After a first discussion in May 2006 on the Commission proposal, the Council agreed a general approach on 13 November 2006 under the Finnish Presidency.

²⁰ http://ec.europa.eu/comm/avpolicy/reg/twvf/contact_comm/index_en.htm.

²¹ http://ec.europa.eu/comm/avpolicy/reg/twvf/modernisation/proposal_2005/index_en.htm.

²² http://ec.europa.eu/comm/avpolicy/reg/twvf/modernisation/index_en.htm.

In its first reading on 13 December 2006, Parliament largely confirmed the Commission's proposal with a clear consensus on scope, co- and self-regulation, European works and the two-tier approach. The amendments adopted are largely consistent with the Council's general approach²³. The Commission adopted its amended proposal on 29 March 2007. A political agreement on a Common Position was adopted on 24 May 2007 under the German Presidency²⁴.

4. INTERNATIONAL ASPECTS

4.1. Enlargement – prospects

The EU grew from 25 to 27 members during the period under review, following the accession of Romania and Bulgaria on 1 January 2007. Relations between the Union and the (then) candidate countries developed in accordance with the pre-accession strategies. The Commission monitored the process, paying particular attention to the development of the administrative and judicial capabilities necessary to implement the Directive.

Croatia, Turkey and the Former Yugoslav Republic of Macedonia are now candidate countries. The EU officially launched accession negotiations with Croatia and Turkey on 3 October 2005. Negotiations with the Former Yugoslav Republic of Macedonia have not yet started.

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

4.2. International framework for cultural diversity

During the reporting period, important steps to underpin the common objectives of European audiovisual policy were taken with the affirmation of cultural diversity at international level.

On 18 December 2006, the Community ratified the Convention on the protection and promotion of the diversity of cultural expressions, adopted by the UNESCO General Conference on 20 October 2005, thus making a decisive contribution to the rapid entry into force of the Convention (3 months after the deposit of the 30th instrument of ratification, i.e. on 18 March 2007) and to the launching of the implementation process.

²³ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0559+0+DOC+XML+V0//EN&language=EN>.

²⁴ For more information see:
http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm

Furthermore, the EU concluded a series of negotiations with 17 members of the World Trade Organisation (WTO) on the modifications of trade commitments in services under the General Agreement on Trade in Services (GATS) further to the accession to the EU of 13 Member States since 1995, in order to align such commitments to those of the EC-12, and consolidate them into a single EC-wide Schedule of trade commitments (EC25 consolidated GATS Schedule of commitments). The result of these negotiations represents a positive outcome for cultural diversity in that the audiovisual sector now enjoys the same guarantees across the enlarged EU under the GATS (i.e. absence of market access and national treatment commitments), it is now clarified explicitly for the 25 Member States that the provision of content is excluded from the commitments on telecommunications services and safeguards are secured regarding the exclusion of audiovisual services enabled by computer and related services from the commitments in the computer services area.

4.3. Cooperation with the Council of Europe

The Commission attends meetings of the Steering Committee on the Media and New Communication Services (CDMC) as an observer delegate. The CDMC steers the work of all expert groups and subordinate bodies dealing with media and communications issues. The most pertinent of these bodies is the Standing Committee on Transfrontier Television, which monitors the implementation of the Council of Europe Convention on Transfrontier Television. This committee, in the presence of a Commission observer, recently launched the preparatory work for a review of the Convention. It was decided to maintain the consistency that both institutions have fostered over many years between both instruments.

The European Commission also launched an initiative to raise the level of information on European audiovisual regulatory standards in the Western Balkans region and to support policy reform in collaboration with the Council of Europe. A series of seminars were held in the Western Balkans and Brussels to allow an exchange of information on European regulatory standards and the state-of-play on media policy in each of the Western Balkan countries. The main achievements of this initiative were strengthened regional cooperation and increased awareness of European standards for media freedoms and the EU audiovisual *acquis*²⁵.

5. CONCLUSIONS

The Directive continues to function effectively as a means of ensuring the freedom to provide television services in the European Union. The Commission — acting as guardian of the Treaty — continues to verify the effective implementation of the Directive and takes action where necessary to ensure it. The seventh report on the application of Articles 4 and 5 of the Directive indicates generally satisfactory results in terms of channels meeting the requirements for European works. At the same time, technological and market

²⁵ http://ec.europa.eu/avpolicy/ext/enlargement/index_en.htm

developments that have opened the way to the development of new audiovisual services — for example on-demand services — confirm the need to modernise the EU legal framework. This will be done once the amending Directive on audiovisual media services is finally adopted.