

European production quotas

**Guidance on the
Television without Frontiers Directive**

Statement

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Section 1

Summary

- 1.1 In a consultation document published on 14 October 2004, Ofcom sought views, on the guidance that it proposed to issue to television broadcasters in relation to their licence obligations to comply with Articles 4 and 5 of the Television without Frontiers (TWF) Directive¹. These require, amongst other things, that, where practicable, European production should account for over 50% of the transmission hours of each broadcaster established in the UK, subject to certain exclusions. European independent productions must account for at least 10% of transmission hours; of these, an 'adequate proportion' must be works transmitted within five years of production.
- 1.2 Until the end of last year, compliance with the TWF Directive was monitored by the Department of Culture, Media and Sport (DCMS). In December last year, the Secretary of State notified Ofcom of the UK's obligations under Articles 4 and 5 of the TWF Directive, triggering a requirement under section 335 of the Communications Act 2003 on Ofcom to make compliance a licence obligation of television broadcasters. In anticipation of this, Ofcom had consulted on proposals to amend licences, and relevant changes were made in licences issued at the end of the year.
- 1.3 In its consultation document, Ofcom proposed to continue the approach taken by DCMS to assessing the obligations of broadcasters. For example, in assessing the extent to which compliance is or is not 'practicable' in terms of the TWF Directive, Ofcom said that it expected to take account of the same factors advanced by DCMS in its periodic reports to the European Commission (e.g. the specialist nature of some channels). However, as the circumstances in which these factors are relevant will differ from broadcaster to broadcaster, and because there may be other relevant circumstances bearing on practicability, Ofcom did not consider that it would be prudent to fetter its discretion by being unduly prescriptive as to the range of factors or the circumstances that it would take into account. The text of the original consultation document is available on the Ofcom website (http://www.ofcom.org.uk/consult/condocs/e_p_q/191607).
- 1.4 In the light of both the non-confidential and confidential responses to the consultation, Ofcom has concluded that it should publish guidance along the lines it proposed, and this is set out in Annex 1. However, a few changes will be made to the detail of the guidance in the light of comments made. Ofcom's response to the points made by consultees is set out in Section 2.

¹ Council Directive 89/552/EC of 3 October 1989 on the co-ordination 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 19 June 1997.

Section 2

Response to the consultation

- 2.1 In response to questions it posed in the consultation paper, Ofcom received written responses from the BBC, Flextech, Kanal 5, PACT, and Sky, as well as confidential submissions from a number of other broadcasters. In addition, there was a verbal response from the UK Film Council.

Question 1. *Ofcom proposes to publish guidance that preserves scope for Ofcom to take account of all relevant circumstances when considering whether it is practicable for a broadcaster to comply with the TWF Directive. Do you agree?*

- 2.2 There was general support for the approach taken in the draft guidance (BBC, Flextech, UK Film Council and others). Flextech 'wholly endorsed' the approach, while another broadcaster said that it preferred this option. However, it wanted Ofcom to publish a detailed justification for any decision to exempt channels from compliance on grounds of practicability, together with a plan for achieving compliance, where appropriate. Others reiterated the importance of flexibility.

Ofcom response

- 2.3 We note the general support for the proposed approach in the draft guidance. The grounds upon which Ofcom has concluded that full compliance with the TWF Directive by individual broadcasters is not practicable will be included in its report to DCMS, and will be summarised in its annual statistical reports on the communications market.

Question 2. *Ofcom considers that it would be reasonable to adopt five years as transitional period allowed to new channels to comply with Articles 4 and 5, subject to practicability. Do you agree?*

- 2.4 Kanal 5 and two other broadcasters said that a 5 year period seemed reasonable; Kanal 5 asked that Ofcom deal flexibly with cases where, due to their genre or particular programming requirements, full compliance was not practicable within 5 years, or indeed ever. Flextech made a similar point, while agreeing that a 5 year period seemed sensible. Kanal 5 suggested that the 5 year transition period be deemed to start now, and so apply to all broadcasters which were not meeting the quotas, regardless of how long they had been established. However, PACT disagreed with the proposal, and said that no transition period was appropriate: to provide otherwise was to acquiesce in the launch of channels that did not have compliance built in to their business plans.

Ofcom response

- 2.5 We note the general support for the proposed five year transition period. As regards the point made by PACT, Ofcom considers that depriving channels of the opportunity of the transitional period envisaged by the TWF Directive could raise the entry barriers for new channels, and would not be conducive to broadening choice for consumers. On the other hand, Ofcom does not consider that it would be justified to post-date the start of the transitional

period for individual channels to a current date, as Kanal 5 propose – if it is practicable for channels to comply, Ofcom believes that five years from launch is a reasonable period. If, on the other hand, there are well-founded reasons why a channel cannot comply, then the length of the transitional period is immaterial.

Question 3. *Do you have any comments on the draft guidance in Annex 3 that not covered in your answers to other questions?*

- 2.6 Sky said that it would like Ofcom to elaborate on the procedure under which broadcasters would be invited to make their case that it was not practicable to comply with the Directive. It also said that Ofcom should provide guidance on the types of remedial measures it might require, and in what circumstances proceedings for breach of licence condition or licence revocation would be contemplated. PACT made a similar point, and said that Ofcom should set out the sanctions that would be imposed for non-compliance.
- 2.7 The BBC pointed out that, although the Commission had encouraged Member States to report on compliance with Articles 4 and 5 on a channel by channel basis, the Directive applied the obligations in Articles 4 and 5 to broadcasters. Flextech asked that the wording of the guidance be amended slightly to make clear that the proportion of independent production that constituted recent works should be 50% of the overall 10% quota.

Ofcom response

- 2.8 As DCMS did previously, Ofcom will ask broadcasters which have not achieved the minimum amounts of European and independent production required by the Directive and which are not clearly exempt in accordance with Ofcom's guidance to explain in their annual information returns why they consider that it was not practicable to fulfil the quotas. In the meantime, Ofcom does not consider that it would be sensible to set out a range of hypothetical circumstances in which proceedings for breach of licence condition or licence revocation would be contemplated since no two cases are likely to be the same, and it would not be appropriate for Ofcom to fetter its discretion. If Ofcom did determine that a licensee was in breach of its obligations, it would, of course, consider what remedial measures were appropriate, and would have regard to its penalty guidelines². Any remedial measures that were imposed would be focussed on securing compliance with Articles 4 and 5 of the Directive.
- 2.9 We agree with the points made by Flextech and the BBC and have made corresponding amendments to paragraph 1 of the draft guidance at Annex 1.

Question 4. *Ofcom has considered the advantages and disadvantages of three options relating to guidance on Articles 4 and 5 of the TWF Directive. Are there other, more appropriate but practical, options which would fulfil the policy objective?*

- 2.10 Flextech, Kanal 5 and another broadcaster agreed that the approach taken by the guidance was the most sensible of the options. PACT urged Ofcom to push for changes to the TWF Directive that would raise quotas, give more

² Ofcom's Penalty Guidelines

(http://www.ofcom.org.uk/codes_guidelines/penalty_guidelines/?a=87101)

protection for producers to hold onto their intellectual property rights, and improve access to European television schedules.

Ofcom response

- 2.11 While we recognise that PACT would like to see the TWF Directive amended, this is a matter for the UK Government. Ofcom considers that the approach set out in the draft guidance is the most appropriate way of giving effect to the TWF Directive as it stands, having regard to its stated policy objective of securing compliance with Articles 4 and 5 the TWF Directive in the least intrusive way, consistent with Ofcom's duty to citizens and consumers to facilitate the availability of a wide range of television services appealing to a variety of tastes and interests.

Annex 1

Guidance on compliance with Articles 4 and 5 of the Television without Frontiers Directive

1. In accordance with the Television without Frontiers ('TWF') Directive, television broadcasters shall ensure that, where practicable, and subject to paragraphs 2 and 3:
 - (a) a majority of their Transmission Time is devoted to European programming;
 - (b) at least 10% of their Transmission Time or programming budget is devoted to European programming created by producers who are independent of broadcasters; and
 - (c) at least 50% of programming included in their Transmission Time in accordance with (b) above is created no less than five years earlier by producers who are independent of broadcasters.
2. The requirements in paragraph 1 shall apply as follows:
 - (a) new channels are required to meet the targets set in paragraph 1 within five years of their launch, and should demonstrate progress towards those targets during the five year transitional period. In cases of doubt, Ofcom will determine whether a channel is a new channel or the continuation of a previous channel; and
 - (b) television broadcasters who consider that it would not be practicable to meet one or more of the targets set out in paragraph 1 should explain why to Ofcom, which will advise whether any remedial measures are necessary.
3. Television channels that:
 - (a) are not receivable in the European Union;
 - (b) comprise programming broadcast in a language other than a language of the European Union;
 - (c) serve a local or regional audience, and do not form part of a national network; or
 - (d) are comprised wholly of news or sports event programming, games, teletext services or teleshopping,are exempt from the requirements of paragraph 1.

Reports

4. To enable the United Kingdom to fulfil its reporting obligations under the TWF Directive, television broadcasters must report to Ofcom, as part of the annual return:

- (a) the performance of each channel in relation to the targets set out in paragraph 1;
- (b) the reasons for the failure to achieve any of the targets set out in paragraph 1, and the remedial measures they are undertaking; and
- (c) the grounds for any exemption they are claiming for any channel from the requirements set out in paragraph 1.

5. The format of the reports required will be set out in guidance on the annual return.

Definitions

‘Television broadcasters’ means television broadcasters licensed in the United Kingdom and the BBC.

‘European programming’ has the meaning attributed to ‘European works’ in Article 4 of the TWF Directive. This includes:

- (a) Works originating from European Union Member States;
- (b) Works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 2 of Article 6. A full list of parties to the Convention may be found on the Council of Europe’s website (<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=132&CM=8&DF=11/02/04&CL=ENG>); and
- (c) Works originating from other European third countries and fulfilling the conditions of paragraph 3 of Article 6.

The works referred to in paragraphs (a) and (b) above are works mainly made with authors and workers residing in one or more States referred to in those paragraphs provided that they comply with one of the following three conditions:

- they are made by one or more producers established in one or more of those States; or
- production of the works is supervised and actually controlled by one or more producers established in one or more of those States; or
- the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

A producer is considered to be established in a European State if the company is a going concern which has a permanent staff involved in both production and commercial operations at the European location.

The works referred to in paragraph (c) are works made exclusively or in co-production with producers established in one or more Member States by producers established in one or more European third countries with which the Community has concluded agreements relating to the audiovisual sector, if those works are mainly made with authors and workers residing in one or more European States.

It should be noted that application of the provisions of (b) and (c) is conditional on works originating from Member States not being the subject of discriminatory measures in the third countries concerned.

Moreover, works that are not European works within the meaning of the above provisions but that are produced within the framework of bilateral co-production treaties concluded between Member States and third countries shall be deemed to be European works provided that the Community co-producers supply a majority share of the total cost of the production and that the production is not controlled by one or more producers established outside the territory of the Member States. Member States shall draw up lists of their bilateral co-production treaties. The Member States and the Commission shall make these lists available, on request, to interested parties.

Finally, works which are not covered by any of the above provisions but are made mainly with authors and workers residing in one or more Member States, shall be considered to be European works to an extent corresponding to the proportion of the contribution of Community co-producers to the total production costs.

‘European programming created by producers who are independent of broadcasters’ means European programming (as defined) created by ‘independent producers, as defined in the Broadcasting (Independent Productions) Order 1991, and amended by the Broadcasting (Independent Productions) (Amendment) Order 1995 and the Broadcasting (Independent Productions)(Amendment) Order 2003.

The **‘Television without Frontiers (TWF) Directive’** is the European Council Directive of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting services (89/552/EEC) as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997.

‘Transmission time’ means the period during the day when the broadcaster is broadcasting, but excludes the time used for transmitting news, sports events, games, advertising, teletext services and teleshopping programmes. It also excludes the time used for broadcasting programmes in languages other than Community languages, where these comprise a substantial proportion of Transmission Time.