



European production quotas

Proposed guidance on the Television without
Frontiers Directive

Consultation

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Section 1

Summary

- 1.1 Ofcom is seeking views, particularly from television broadcasters, on the guidance that it proposes to issue 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 Ofcom proposes 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 expects 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 does 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. In framing the proposed guidance, Ofcom has also had regard to guidance issued by the European Commission².
- 1.4 The text of the full document is available in PDF format via the link on the home page for this consultation on the Ofcom website.

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.

² 'Suggested Guidelines for the monitoring of the implementation of Articles 4 and 5 of the "Television without Frontiers" Directive', 11 June 1999, European Commission.

Section 2

Requirements of the TWF Directive

Introduction

- 2.1 Prior to the entry into force of relevant parts of the Communications Act 2003 on 29 December 2003, DCMS monitored compliance with Articles 4 and 5 of the TWF Directive. However, in the same month, 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, which now require compliance with Articles 4 and 5, in accordance with any guidance issued by Ofcom.
- 2.2 The TWF Directive, including the recitals to the original Directive and the amending Directive, provides the basis for obligations on television broadcasters licensed in the UK to meet minimum quotas for the inclusion of European productions (including programmes made by European producers who are independent of broadcasters) in their transmissions. The full version of the Directive can be found at http://europa.eu.int/eur-lex/en/consleg/main/1989/en_1989L0552_index.html; the following summary is not intended to be a legally authoritative statement.

European productions

- 2.3 Article 4(1) requires each Member State to ensure that, where practicable and by appropriate means, a majority of the transmission time of broadcasters established in the Member State is reserved for European works. European works are defined separately (see paragraph 2.8 below), and certain types of programming are excluded from the transmission time for the purposes of assessing the obligation (see paragraph 2.7 below).

European independent productions

- 2.4 Article 5(1) requires each Member State to ensure that, where practicable and by appropriate means, at least 10% of the transmission time of broadcasters established in the Member State is reserved for European works by producers who are independent of broadcasters; alternatively, that 10% of a broadcaster's programming budget is spent on independent productions. This proportion is to be achieved progressively on the basis of suitable criteria.
- 2.5 The Directive does not define 'independent producers' so this is a matter for each Member State to determine. In the UK, as the Explanatory Note to The Broadcasting (Independent Productions) (Amendment) Order 2003 explains, the term 'independent producer' is defined for the purposes of the TWF Directive by the Broadcasting (Independent Productions) Order 1991, as amended by The Broadcasting (Independent Productions) (Amendment) Order 1995 and the Amendment Order of 2003³. It is clear from Article 5 of the TWF Directive that eligible independent productions must also qualify as European works.

³ Copies of these Orders and the accompanying Explanatory Notes can be found at <http://www.hmsso.gov.uk/>.

- 2.6 Article 5 requires that an adequate proportion of independent productions must be recent works (defined as works transmitted within five years of production). The meaning of 'adequate proportion' is left to Member States to determine.

Excluded programming

- 2.7 Articles 4 and 5 of the Directive excludes transmissions of news, sports events, games, advertising, teletext services, and teleshopping from calculations of the time allocated to meeting the Directive's obligations. Article 9 disapples the provisions of Articles 4 and 5 to television broadcasts that are intended for local audiences and which do not form part of a national network. Recital 29 of Directive 97/36/EC says that channels broadcasting in a language other than those of Member States should not be covered by these articles, and that where such a language or languages represents a substantial part but not all of the channel's transmission time, the provisions of Articles 4 and 5 should not apply to that part of the transmission time.

Definition of 'European works'

- 2.8 Article 6 of the Directive defines or deems European works to include:
- a) works originating from Member States meeting the conditions set out in Article 6(2) (summarised in paragraph 2.9);
 - b) works originating from European third States party to the European Convention on Transfrontier Television meeting the conditions set out in Article 6(2) (summarised in paragraph 2.9);
 - c) works originating from other European countries meeting the conditions set out in Article 6(3) (summarised in paragraph 2.10);
 - d) works produced within the framework of bilateral co-production treaties meeting the conditions set out in Article 6(4) (summarised in paragraph 2.11); and
 - e) works which are not European works within the meaning of (a) to (d), but which are made mainly with authors and workers residing in one or more Member States, but only to the extent corresponding to the proportion of the contribution of Community co-producers to the total production costs (e.g., where Community co-producers accounted for 50% of the total production costs, only half the transmitted hours would count towards the quota).
- 2.9 Article 6(2) requires that works should comply with each of the following conditions:
- a) the productions are made, supervised and controlled by one or more producers established in one or more of those States; and
 - b) 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.
- 2.10 Article 6(3) requires that works are made in co-production with producers established within one or more European third countries with which the Commission has concluded agreements, and that they are mainly made with authors and workers residing in one or more European states.

- 2.11 Article 6(4) requires that 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 Member States.

Section 3

Proposed approach

Policy objective

- 3.1 Ofcom's policy objective is to give effect to its statutory obligation to secure compliance with Articles 4 and 5 of the TWF Directive in the least intrusive way. We consider that this is 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.

Options

- 3.2 Ofcom has considered the following options:
- a) not to publish guidance (Option 1);
 - b) to publish guidance that prescribes in detail how Ofcom will interpret the Directive, thereby precluding or limiting the scope for Ofcom to take account of individual circumstances or unforeseen factors that might otherwise be relevant (Option 2); and
 - c) to publish guidance that provides flexibility for Ofcom to take account of relevant factors and individual circumstances when interpreting those parts of the Directive where Member States have discretion (Option 3).

Option 1

- 3.3 If Ofcom did not publish guidance (Option 1), there could be a lack of transparency as to how, in practice, Ofcom proposed to operate licence conditions securing compliance with the TWF Directive under section 335 of the Communications Act 2003. For example, licensees need to be in a position to understand the basis on which Ofcom determines what it considers to be an 'adequate proportion' of recent works of independent producers. It is also necessary to ensure a consistent approach to determining whether compliance by broadcasters is practicable in terms of the requirements of the TWF Directive.
- 3.4 In effect, licensees would remain subject to a licence obligation to comply with Articles 4 and 5, but would have to interpret the Directive themselves. It seems likely that the outcome would be a variety of different approaches by different licensees. Ultimately, because Ofcom will need to report on compliance by broadcasters with the TWF Directive, the absence of guidance would not absolve Ofcom from the need to decide on the merits of these different approaches. It is inevitable, therefore, that guidance would emerge through the precedents created by Ofcom's interpretation. But any residual uncertainty could be confusing and may arguably increase the risk of challenge by broadcasters who disagreed with Ofcom's interpretation. Accordingly, Ofcom does not consider this to be an attractive option.

Option 2

- 3.5 We also looked at an option at the other end of the regulatory spectrum - publishing guidance that would set out in detail the circumstances in which Ofcom considered it

impracticable for broadcasters to comply with the Directive in different circumstances (Option 2).

- 3.6 In order to provide sufficient certainty to broadcasters, it is likely that such guidance would need to be very detailed, given the multiplicity of different circumstances which could arise that might have a bearing on practicability. For example, in order to set out the scope for exemptions stemming from the ability to secure appropriate European programming at a competitive cost, the rules might need to address variables such as the nature of the programming offered by the channel, the costs of acquisition versus the costs of production for that type of programming, the resources available for producing that kind of programme, the market being served, and the specific circumstances of the broadcaster.
- 3.7 Even so, it is unlikely that the guidance could capture every conceivable issue that would be relevant to practicability. This could limit Ofcom's ability to take account of the individual circumstances of broadcasters, and of factors that might be relevant which had not been foreseen. For these reasons, Ofcom does not consider this option to be the best way forward.

Option 3

- 3.8 In this option, Ofcom's guidance would provide clarity in those areas where the TWF Directive is prescriptive, or where uniformity would be appropriate (e.g. in what constitutes 'an adequate proportion' of recent independent works). However, as regards the meaning of 'where practicable', which the TWF Directive leaves to the interpretation of Member States, Ofcom would retain scope to look at all relevant circumstances. Ofcom would invite broadcasters who felt that compliance was not practicable to make their case, and would then provide clarity on whether this was permissible, and whether any remedial measures were appropriate.

Preferred option

- 3.9 For the reasons set out above, Ofcom considers that it should publish guidance, both in order to fulfil the practical requirements of section 335 of the Communications Act 2003, and to avoid creating unnecessary regulatory uncertainty on the part of broadcasters. We believe that Option 3 represents the best balance between providing certainty, and enabling flexibility in assessing whether it is practicable in different circumstances for a broadcaster to comply with the Directive. Against this background, we consider that it represents the least intrusive way of securing compliance with Articles 4 and 5.

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 with this approach?*

Transitional period for compliance

- 3.10 Articles 4 and 5 of the TWF Directive require that broadcasters ensure that a majority of their transmission time is allocated to European works, and that 10% of their transmission time is allocated to European works made by independent producers. These proportions are to be achieved progressively, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, on the basis of suitable criteria.

- 3.11 Ofcom considers that it would be reasonable to adopt five years as a suitable transitional period, given its duty to have regard to the regulatory principle of consistency, amongst others (Section 3(3) of the Communications Act 2003), and having regard to the fact that the 'where practicable' caveat allows Ofcom to consider whether a longer period should be allowed in the light of relevant circumstances.
- 3.12 Ofcom notes that, with the exception of public service broadcasters, broadcasters are not subject to informational, educational, cultural and entertainment responsibilities. As public service broadcasters are already subject to obligations as regards European works and independent works that exceed those set out in the Directive, Ofcom does not consider that its guidance needs to deal with criteria based on these responsibilities.

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

Proposed guidance

- 3.13 The guidance that Ofcom proposes to issue is set out in Annex 3.

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

Section 4

Regulatory impact assessment

Purpose of assessment

- 4.1 This section, when read in conjunction with the rest of this document, represents a Regulatory Impact Assessment (RIA), as defined by section 7 of the Communications Act 2003. You should send any comments on this RIA to us by the closing date for this consultation. We will consider all comments before deciding whether to implement our proposals.
- 4.2 RIAs provide a useful way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making and are commonly used by other regulators. This is reflected in section 7 of the Act, which means that generally we have to carry out RIAs where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. In accordance with section 7 of the Act, in producing the RIA in this document Ofcom has had regard to such general guidance as it considers appropriate, including related Cabinet Office guidance.

Issues

- 4.3 The issues are whether or not to issue guidance to broadcasters on implementation of Articles 4 and 5 of the Directive; if so, what should be the nature of the guidance; and what approach Ofcom should take to using its discretion. Further background to this issue is given in Sections 1 and 3.

Policy objective

- 4.4 Ofcom's policy objective is to give effect to its statutory obligation to secure compliance with Articles 4 and 5 of the TWF Directive in the least intrusive way. We consider that this is 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.

Options

- 4.5 As explained in Section 3, Ofcom has considered the possible merits of each of the following options:
- a) not to publish guidance (Option 1);
 - b) to publish guidance that prescribes how Ofcom will interpret 'where practicable' (Option 2); and
 - c) to publish guidance that provides flexibility for Ofcom to determine what is practicable (Option 3).

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?*

Costs, benefits and risks

- 4.6 Ofcom sees no tangible benefits from not publishing guidance (Option 1). In practice, Ofcom would still be under a statutory obligation to secure compliance with the TWF Directive, so would need to make decisions on issues which the Directive leaves to Member States. The absence of guidance could complicate this process, leading to unnecessary uncertainty for broadcasters (for example, about what constituted an adequate proportion of recent independent works). This uncertainty could result in inadvertent failure to comply, or an over-cautious approach that unnecessarily distorted commercial policy decisions, although it is not possible to quantify the cost of these hypothetical outcomes. It seems unlikely that uncertainty would be conducive to the consumer-citizen interest; to the extent that it had any impact, it might discourage investment in new channels. Finally, the lack of guidance would increase the risk of challenge by broadcasters who disagreed with Ofcom's interpretation of their specific obligations under the TWF Directive, which would result in additional costs both for Ofcom and those broadcasters.
- 4.7 While Option 2 would avoid the costs associated with regulatory uncertainty, there is a significant risk that guidance on 'where practicable' would not foresee circumstances that Ofcom would otherwise consider to be relevant circumstances. While it is not possible to estimate how often this would occur, or to quantify the impact in such cases, it is possible that it would force some broadcasters to incur the costs of complying with the TWF Directive even if Ofcom might otherwise agree that this was not practicable. As with Option 1, it seems unlikely that this approach would be conducive to the consumer-citizen interest; it would tend to make the environment for investing in channels less attractive.
- 4.8 Option 3 would offer immediate certainty to broadcasters who considered compliance to be practicable about their obligations under the TWF Directive. While broadcasters who wished to argue that full compliance was impracticable in their case would face a short period of some uncertainty, the guidance would also provide a mechanism for them to secure a decision from Ofcom. This approach would also provide them with the opportunity to explain any relevant circumstances to Ofcom. To the extent that it would provide greater flexibility for broadcasters, it would also provide a more favourable environment for broadcasters, which would facilitate a wider range of television services appealing to a variety of tastes and interests.

Conclusion

- 4.9 The proposal to issue guidance that provides clarity in those areas where it is possible to do so, and establishes Ofcom's responsibility for determining whether it is practicable for licensees to comply with the TWF Directive, is:
- a) the least intrusive way of ensuring that Ofcom complies with the requirement under section 335 to secure compliance with the UK's international obligations; and
 - b) the most likely to facilitate a wider range of television services appealing to a variety of tastes and interests.

Section 5

Responding to this consultation

How to respond

- 5.1 Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on Thursday 9 December 2004**.
- 5.2 Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.
- 5.3 Please can you send your response to peter.bourton@ofcom.org.uk.
- 5.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Peter Bourton
Content & Standards
Floor 5
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3806

- 5.5 Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.
- 5.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views, and how Ofcom's proposals would impact on you.

Further information

- 5.7 If you have any want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Peter Bourton on 020 7981 3806.

Confidentiality

- 5.8 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheer that this is acceptable).
- 5.9 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any

confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

- 5.10 Ofcom reserves its power to disclose certain confidential information where this is necessary to fulfil its functions, although in practice it would do so only in limited circumstances.
- 5.11 Please also note that copyright and all other intellectual property in responses will be assumed to be assigned to Ofcom unless specifically retained.

Next steps

- 5.12 Following the end of the consultation period, Ofcom intends to publish guidance on its website.
- 5.13 Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

- 5.14 Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 1) which it seeks to follow, including on the length of consultations.
- 5.15 The consultation period (8 weeks) is shorter than Ofcom's standard 10 week period because the guidance would only affect broadcasters established in the UK, would have a limited effect on the market, and deals with the proposed mechanism for implementing existing policy, rather than the policy itself.
- 5.16 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.
- 5.17 If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Philip Rutnam, Partner, Competition and Strategic Resources, who is Ofcom's consultation champion:

Philip Rutnam
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3585
Fax: 020 7981 3333
E-mail: philip.rutnam@ofcom.org.uk

Annex 1

Ofcom's consultation processes

Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

1. Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

2. We will be clear about who we are consulting, why, on what questions and for how long.
3. We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.
4. We will normally allow ten weeks for responses, other than on dispute resolution.
5. There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.
6. If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

7. We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 2

Consultation response cover sheet

- A2.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A2.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A2.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A2.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A2.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation**BASIC DETAILS**

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)

Annex 3

Draft 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, on each channel, 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 the Transmission Time devoted to European independent productions comprises programming 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 licensee 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.

Annex 4

Consultation questions

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?*

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

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

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?*