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First Report on the Application of Articles 13, 16 and 17 of Directive
2010/13/EU for the period 2009-2010
Promotion of European works in EU scheduled and on-demand
audiovisual media services**

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COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE
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{SWD(2012) 269 final}

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I. INTRODUCTION

This report, composed of two parts, is drawn up pursuant to Article 13(3) and Article 16(3) of Directive 2010/13/EU (hereinafter referred to as ‘the AVMS Directive’)¹.

This is the Commission’s first report on the application of Article 13, concerning the promotion of European works in EU on-demand services, since the adoption of the AVMS Directive, and it covers the period 2009-2010. Pursuant to Article 13 the report is based both on the data which had to be provided by the Member States by December 2011 and on an independent study which was conducted in 2011² (hereinafter referred to as ‘the Study’). The next report on the application of Article 13 is due within four years.

This document also contains a report on the application of Articles 16 and 17³ of the AVMS Directive on the promotion of European works and independent productions in EU television services for the period 2009-2010. This report is biennial.

Unlike previous reports on the former Articles 4 and 5 of Directive 89/552/CE ("the Television without Frontiers" Directive)⁴, this report does not cover the EEA countries⁵ because of the delay in transposing the AVMS Directive into the EEA ‘*acquis*’. Therefore these countries were not invited to submit their data for this report.

¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive). This codified version replaces Directive 89/552/EEC as amended by Directive 97/36/EC and Directive 2007/65/EC.

² Study available on the following website:
http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm#promot.

³ Former Articles 4 and 5 of Directive 89/552/EEC.

⁴ Council Directive 89/552/EEC 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 (JO L 298 of 17.10.1989, p.23).

⁵ Norway, Iceland, Liechtenstein.

II REPORTS

1. COMMISSION REPORT ON THE APPLICATION OF ARTICLE 13

1.1. General remarks

The revision of Directive 89/552/EEC in response to convergence of all audiovisual media enlarged its scope to include non-linear services. The AVMS Directive states that on-demand services shall also promote European works and cultural diversity. As in the case of Articles 16 and 17, Article 13 is designed to meet both an economic and cultural objective, aiming at strengthening the European audiovisual industry. Member States are required to ensure that on-demand services falling under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Given the nascent and specific nature of on-demand services, Article 13 is flexible as to the methods to be used for promoting European works. Article 13(1) provides examples of means of such promotion: financial contribution to the production and rights acquisition of European works, or the share and/or prominence of European works in the catalogues offered by the service providers.

The promotion and accessibility of European programming are among the issues raised in the context of the emergence of connected devices and convergence phenomenon. For a number of years already we have seen audiovisual content distributed and consumed via the Internet. This can include content which reaches viewers outside of the influence of cable operators, Internet Service Providers, or broadcasters. With the emergence of TV sets and set-top boxes with added Internet connectivity and the increasing use of tablet computers and smartphones, convergence is an ever growing part of daily reality.

1.1.1. Article 13 in the context of the European on-demand sector

During the reference period the state of development of the on-demand service market was very uneven in the EU.

According to the above-mentioned Study, the number of on-demand services was estimated at 435 in 2009⁶. Over a quarter of them were catch-up TV services and the predominant delivery system was internet, followed by IPTV. France had the highest number of on-demand services available in 2009 (73 services), followed by the UK (66) and Germany (47). In the majority of Member States the number of on-demand services was between 10 and 20. Most of them were freely available, without any subscription. They were generally advertising-funded or financed through public funding.

⁶ This figure is provided for EU-30, including the EEA countries.

As explained below under 1.1.2., not all national reports provided information on on-demand services. The 14 national reports with data show a very divergent state of market development. Five Member States⁷ reported a total number of on-demand services greater than 10 in 2010. The highest numbers could be found in the UK (82) and Slovakia (36), the lowest ones in Ireland and Spain (3), Belgium's French Community (2) and Austria (1). Cyprus had no on-demand services.

The breakdown of on-demand services⁸ also varies greatly from one Member State to another and it is difficult to detect a trend concerning the preferred type of service: six Member States⁹ reported a majority of VOD services, generally with conditional access; another six¹⁰ reported a majority of freely accessible catch-up-TV services, one¹¹ reported a combination of catch-up and mixed services accessible free-of-charge, and another one¹² reported a majority of mixed services.

The Study and the national reports reveal some differences as regards the number of on-demand services in some Member States. This might stem from differences in the interpretation of the kind of services to be taken into account. According to the definition contained in Article 1(1)(g) of the AVMS Directive, services offering audiovisual content only as an ancillary element should not be reported. By contrast catch-up TV services constitute on-demand services and must be reported, unless the programmes they offer are exactly the same as those broadcast on television¹³. Although the wording of Article 13 does not specifically refer to the type of content offered by on-demand services, the purpose of Article 13 is the same as for Articles 16 and 17 of the AVMS Directive. Therefore on-demand services offering exclusively news, sports, games or commercial communications should be excluded from the national reports on the application of Article 13. In the same way the percentage of European works, when applicable, should in principle be calculated as the percentage of qualifying hours¹⁴.

1.1.2. Methodology applied by the Commission

The objective of the Study conducted in 2011 was to analyse the state of play in terms of implementation of Article 13 in the EU Member States at the end of 2010 as well as the

⁷ Belgium (Flemish Community), the Czech Republic, Denmark, Slovakia and the UK.

⁸ The questionnaire sent by the Commission to the Member States distinguished between catch-up TV services, VOD and mixed services (VOD/catch-up).

⁹ Belgium (97.7%), Bulgaria (100%), Denmark (100%), Spain (75%), Luxembourg (80%) and Portugal (55.6%).

¹⁰ Czech Republic (86.2%), Ireland (100%), Greece (76.9%), Austria (100%), Romania (100%) and Slovakia (58.3%).

¹¹ Finland.

¹² Sweden.

¹³ See Recital 27 of the AVMS Directive

¹⁴ Excluding news, sports, games and commercial communications

content of EU non-linear services. It also aimed at providing the Commission with the necessary information to set up performance indicators for the application of Article 13.

Starting from the three examples of European works promotion in regard to non-linear services given in Article 13(1) of the Directive, the Study reviewed the various monitoring modalities as well as their practicability.

On this basis the Commission identified a series of indicators which were defined in the questionnaires sent to the national authorities. As regards prominence in particular, several options were mentioned: description of the works including country of origin, browser by origin, recommendation tools about European works, sections of the service dedicated to European works, trailers promoting European works or promotions of European works. These indicators may need to be refined for future reports.

1.1.3. Methods of implementation and monitoring by the Member States

a) State of play as regards national legislation

Findings of the Study on the application of Article 13

At the end of 2010, 14 Member States had reproduced the wording of the AVMS Directive without imposing concrete obligations concerning on-demand service providers. In certain cases, it is left to the national regulatory authorities to specify later the appropriate methods for promoting European works.

As far as monitoring is concerned, the Study shows that the majority of Member States rely on the information submitted by the on-demand service providers without any verification. Independent monitoring is carried out in only two Member States and the information supplied by on-demand service providers is verified in another four.

National reports

Nine national reports did not contain any information due to belated transposition of the AVMS Directive or late enforcement of the national legislation implementing the Directive. Five Member States reported the absence of registered¹⁵ or recognised¹⁶ on-demand services during the reference period.

¹⁵ Estonia, Latvia, Lithuania and Hungary.

Amongst Member States that had implemented the Directive, (i.e. imposed the obligation to promote European works in on-demand services), only six reports¹⁷ indicated that their legislation specifies concrete measures.

These measures vary from one Member State to another: in the Czech Republic, Spain, Italy and Austria, on-demand services are subject to the obligation to reserve a proportion of their catalogues for European works (respectively 10%, 30%, 20% and 50%¹⁸). The obligation to contribute to the financing of European works was reported by the French Community of Belgium, the Czech Republic, Spain and Italy (respectively up to 2.2% and minimum 1% and 5% of turnover)¹⁹. The obligation to give prominence to European works in catalogues is to be found in the legislation of the French Community of Belgium, Bulgaria and Austria (for private on-demand services). Ways of doing this include in particular advertising inserts, separate tabs, magazine articles and promotional programmes as well as the adequate identification of European works or indication of the country of origin.

b) National authorities' monitoring methods

Although few national reports provided information on this issue, data on the application of Article 13 was mostly collected by the national authorities directly from on-demand service providers.

Some Member States commented on how they have raised or intend to raise the awareness of on-demand service providers about the need to register and/or to comply with the obligation set out in Article 13²⁰. The French Regulatory Authority CSA informed about spot checks in respect of the share and prominence of European works in catalogues. In Belgium (French Community) where a general prominence obligation has been laid down, interesting and detailed information was provided on the monitoring carried out by the regulatory authority on the proportion of 'promotional occurrences' dedicated to European works in on-demand services²¹.

¹⁶ 23 services were declared at the end of 2010 in the Netherlands but the Media Authority had not yet set out the criteria to decide whether they qualify as on-demand audiovisual media services — see Staff Working Document – Part I – Section 2.

¹⁷ Belgium-French Community, Bulgaria, Czech Republic, Spain, Italy (not yet enforced in 2010) and Austria. Two Member States have not been included in the list: Latvia, where the legislation imposes an obligation to offer European works but does not specify any concrete percentage and Hungary, where the legislation set out a quota for Hungarian works only (this provision has been amended in the meantime).

¹⁸ Only for public on-demand services in Austria.

¹⁹ In the Czech Republic and Italy financial contribution is an alternative to the obligation to offer a specific share of European works in catalogues.

²⁰ In particular the Czech Republic, Latvia, the Netherlands and Sweden.

²¹ See comments on the application of Article 13 in Belgium-French Community – Staff Working Document – Part I – Section 2

The Commission stresses the importance of carrying out efficient monitoring to ensure correct application of Article 13. Although the AVMS Directive does not contain any obligation to set up concrete monitoring systems, the Commission asks those national authorities who have not done so, to put in place systems that allow data provided by the on-demand service providers to be verified.

1.2. Application of Article 13 – On-demand audiovisual media services

Findings of the Study²²

The proportion of European works on catch-up TV services was much higher (96.2% of total hours) than the proportion of European works offered by VOD services (accounting for only 45.1% of total hours). Catch-up catalogues are closely linked to the content broadcast by television services. European works were significantly more prominent in the catalogues offered by broadcasters (81.1% of hours) than by independents (46.7% of hours) and telecom operators (31.2%). They were also significantly more prominent in the catalogues offered by public services (99.1% of hours) as opposed to commercial ones (55.8% of hours). Services with the lowest proportion of European works were generally new players²³ (10-20%). The proportions of European works in terms of ‘qualifying hours’²⁴ (64.5%) were close to those provided for catalogues as a whole (65.1%).

National reports

Data provided by the national reports are not complete and not representative enough to draw reliable conclusions on the application of Article 13.

In spite of the lack of specific obligations set out in the national legislation of some countries, 14 national reports provided some data — to differing extent — on the modalities of European works promotion put into practice by on-demand service providers. These reports indicated quite a high share of European works in catalogues. Averages ranged from 40% (Spain²⁵) to 88.9% (Denmark) in 2009 and from 36.4% (Portugal) to 100% (Austria²⁶) in 2010. Due to the limited number of reports and the very low number of on-demand services (two or three) reported in some Member States, any calculation of EU averages would be meaningless. Comparison between the reported percentages of European works consumption and of European works offered does not allow reliable conclusions to be drawn either. Five

²² For technical reasons the monitoring was carried out in the first half of 2011.

²³ iTunes by Apple, Lovefilm, Germany and Blinkbox in the UK, among others.

²⁴ See footnote 14.

²⁵ This figure corresponds to the unique service reported in 2009.

²⁶ This figure corresponds to the unique catch-up TV service reported in 2010.

Member States²⁷ also reported financial contributions to European productions and six national reports²⁸ indicated the use of some prominence tools²⁹.

The Commission can only welcome the presence of a relatively high share of European works in on-demand services.

2. COMMISSION OPINION ON THE APPLICATION OF ARTICLES 16 AND 17

2.1. General remarks

2.1.1. Articles 16 and 17 in the context of the European audiovisual landscape

The European audiovisual market continued to grow steadily over the period 2009-2010. Figures show a trend of accelerated increase of channels. According to the European Audiovisual Observatory, in December 2010 there were 7,622 television channels in EU-27 — of which 3,126 were local channels — compared to 6,067 in 2008. This represents a 25.6% increase, higher than the one registered between 2006 and 2008.

During the same period, a decrease was registered in the total number of covered channels³⁰ compared to the previous period: their number went from 1,679 in 2008 to 1,313 in 2009 and 1,390 in 2010 for European works³¹, due to a change in the methodology allowing the exemption of very small channels from the reporting obligation, as mentioned under 2.1.2.1.below. However, when using the methodology applied for the previous report – i.e. taking into account the channels exempted from the reporting obligation – the figures show that the number of covered channels rose by 21.8% between 2008 (1,679) and 2010 (2,045), with a slightly lower growth rate than the one registered on the market.

2.1.2. Methods of implementation and monitoring by the Member States

2.1.2.1. Changes in methodology

²⁷ Belgium-French Community, Bulgaria, Greece, Spain and Sweden.

²⁸ Belgium-French Community, Bulgaria, Greece, Spain, Romania and Sweden.

²⁹ See Staff Working Document – Part I – Section 2 .

³⁰ ‘Covered’ channels: total number of channels identified minus the number of non-operational channels and the number of channels exempted from their reporting obligation (see paragraph 2.1.2.1.) and of exempt (due to the nature of their programmes) or excluded channels (due to legal exceptions) - see Indicator 1 in Staff Working Document - Part II – Annex 1 .

³¹ For Independent works, the number of covered channels went from 1 585 in 2007 to 1 311 in 2009 and 1 387 in 2010.

Given the emergence of channels with a very low audience share (below 0.3%) it was decided to give them the possibility to request an individual exemption from their reporting obligation under Articles 16 and 17. The detailed conditions for granting such exemptions are set out in the ‘Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the AVMS Directive’, which will be reviewed after their first full implementation foreseen in 2014³².

Overall, the number of national reports providing data for all covered channels increased in comparison with the previous period. Fifteen reports out of 27 provided statistical data on European works for all channels in 2009 and 2010 (12 and 11 respectively in 2007 and 2008). For independent productions, 14 and 15 national reports provided data for all channels in 2009 and 2010 respectively (11 in 2007 and 2008). The Commission welcomes this trend which reflects more efficient monitoring by the national regulatory authorities. However this can also be explained, at least partially, by the exemption of very small channels from the reporting obligation since these channels typically encounter more difficulties in providing statistical data.

2.1.2.2. Monitoring

As stated in previous reports, there is no uniform monitoring methodology in the EU. In Cyprus the competent authority could only monitor channels broadcasting via analogue technology during the reference period pursuant to the legislation³³. Greece and Slovenia reported difficulties in collecting data from all channels³⁴.

By contrast, improvements were registered in three Member States. The Slovenian regulatory authority started verifying data submitted by some broadcasters. The inclusion of data concerning public regional channels in the German report must also be seen as a monitoring improvement. In Sweden the efforts of the supervisory authority to increase broadcasters’ awareness about the importance of correct implementation of Articles 16 and 17 seemed to be bearing fruit since the proportion of European works, which was below the required quota during the previous period, passed the 50 % threshold in 2009 and 2010.

However, there is still room for progress. The Commission reiterates the importance of monitoring to ensure correct application of Articles 16 and 17. Although the AVMS Directive does not contain any obligation to set up concrete monitoring systems, the Commission asks those national authorities who have not done so to put in place systems that allow data provided by the broadcasters to be verified.

2.2. Application of Article 16 – Majority proportion of European works

³² http://ec.europa.eu/avpolicy/docs/reg/tvwf/eu_works/guidelines_2011_en.pdf.

³³ This situation changed on 1 July 2011.

³⁴ See Greek and Slovenian comments in the Staff Working Document – Part II – Section 3.

The average transmission time dedicated to European works by all reported channels in the EU-27 was 63.8% in 2009 and 64.3% in 2010³⁵. Figures show an **upward trend** as indicated in the table below **which partially offsets the drop registered between 2006 and 2007**.

2009-2010: 0.5 percentage point increase

2007-2010: 1.7 percentage point increase

From 2007 to 2010 the increase was stronger in the 'new Member States'³⁶.

EU-15: 1.7 percentage point decrease (65.8% in 2007, 64.1% in 2010)

EU-12: 5.9 percentage point increase (58.7% in 2007, 64.6% in 2010)

The Commission welcomes the progress registered by the EU-12 which has enabled them to slightly surpass the level achieved by the EU-15.

At Member State level, the average share of transmission time devoted to European works during the reference period varied between 44% (Ireland) and 83% (Hungary) in 2009 and between 47.4% (Slovenia and UK) and 81% (Hungary) in 2010. Over the same period, the trend was positive in 12 Member States, negative in 12 and remained stable in three.

Trends in the transmission time reserved for European works over the period 2007-2010 in each Member State have been reproduced in charts³⁷.

The rule on the promotion of European works in linear services is generally working well although it has a limited effect on the circulation of programmes throughout the EU as it does not ensure the distribution of non-domestic European works. Non-domestic European works make up 8.1% of the total qualifying transmission hours, while most non-European works are American³⁸. Some successful audiovisual works such as 'Borgen' or the co-production 'Borgia' have crossed national borders but these cases still remain too limited. It is of key importance to have European works that appeal to audiences across borders. This can be achieved for example by means of co-productions that have an appeal for a wide European audience.

³⁵ Figures provided at EU level result from the mathematical average of all national averages calculated on the basis of statistical data communicated by the Member States. They have not been weighted since not all the parameters necessary for a correct weighting are available for all channels.

³⁶ Member States which joined the EU in 2004 and 2007 (EU-12) – EU-15 is composed of Member States which joined the EU at an earlier stage (up to 1995).

³⁷ See Staff Working Paper – Part II – Section 2.

³⁸ The Study .see footnote 2.

EU-average compliance rates regarding European works were fairly stable over the reporting period but registered a considerable increase over the period 2007-2010, rising from 59.6% to 69.6% with notable growth in the EU-15 (11.3 percentage points).

It is worth noting that compliance rates reflect not just the channels' achievement with regard to the European works proportion, but also the level of communicated/non-communicated data. The improvement registered during the reference period regarding communicated data (see section 2.1.2.1.) has played a role in better compliance rates.

Three Member States³⁹ encountered difficulties in reaching the required proportion of European works over the whole reference period. At the same time two Member States which registered averages below 50% during the previous period were able to reach the required proportion of European works in 2010⁴⁰. The Commission encourages the Member States concerned to support the efforts of the channels falling within their jurisdiction to improve or sustain their performance over the coming years.

2.3. Application of Article 17 of the AVMS Directive – European works created by independent producers (independent productions) and recent works

The EU-average proportion reserved for **independent productions** broadcast by all reported channels in all Member States was 34.1% in 2009 and 33.8% in 2010, having slightly decreased during the reporting period.

2009-2010: 0.3 percentage point decrease (34.1% in 2009, 33.8% in 2010)

2007-2010: 1.5 percentage point decrease (35.3% in 2007, 33.8% in 2010)

This downward trend was already detected in the ninth report⁴¹. Member States are therefore invited to reflect upon ways of reversing this trend.

At Member State level, the average share of transmission time devoted to independent productions ranged from 14.5% (Slovenia) to 59.7% (Belgium) in 2009 and from 14.8% (Italy) to 61.7% (Belgium) in 2010. As in the previous period all Member States achieved the 10% proportion of independent works. 21 Member States in 2009 and 19 in 2010 posted results above 25% of total qualifying transmission time reserved for independent productions.

³⁹ Ireland, Slovenia and the United Kingdom.

⁴⁰ Cyprus and Sweden.

⁴¹ 9th Communication on the application of Articles 4 and 5 of Directive 89/552/EEC, as amended by Directive 97/36/EC and Directive 2007/65/EC for the period 2007-2008 available at: http://ec.europa.eu/avpolicy/reg/tvwf/implementation/promotion/index_en.htm.

EU-12 nearly closed the gap on EU-15:

EU-15: 4 percentage point decrease (38.5 % in 2007, 34.5 % in 2010)

EU-12: 1.7 percentage point increase (31.2 % in 2007, 32.9 % in 2010)

Although the EU-12 registered better developments than the EU-15, the proportion of independent productions they achieved in 2010 remained behind that attained by the EU-15.

EU-average compliance rates regarding independent works follow a similar trend as for European works, with a moderate increase over the reporting period and a considerable one over the period 2007-2010 (11.5 percentage points), especially in the EU-15 (15.4 percentage points).

Regarding **recent European works by independent producers** (recent works⁴²), EU-average figures also show a downward trend:

2009-2010: 0.3 percentage point decrease (62.1 % in 2009, 61.8 % in 2010)

2007-2010: 1.2 percentage point decrease (63 % in 2007, 61.8 % in 2010)

When considering the two different groups of Member States⁴³, findings for the period 2007-2010 are as follows:

EU-15: 0.6 percentage point increase (65.4 % in 2007, 66 % in 2010)

EU-12: 4 percentage point decrease (60 % in 2007, 56 % in 2010)

Although overall results regarding recent works are satisfactory, the Commission encourages the Member States, in particular the EU-12, to make efforts to promote the transmission of recent independent works in their countries.

3. CONCLUSION

⁴² i.e. works broadcast within five years of their production.

⁴³ See footnote 36

This first report does not provide sufficient data to draw any conclusions on the promotion of European works by on-demand service providers (Article 13). Belated transposition of the Directive in the Member States and very uneven development of the on-demand service markets make any analysis and comparisons difficult. The way Article 13 has been transposed also differs from one Member State to another. In some countries the legislation imposes specific tools for the promotion of European works, while in others no concrete measures to be applied by on-demand service providers have been specified. In accordance with Article 13(3), the Commission will take technological developments into account, and will analyse these matters in the context of the emergence of connected devices and the convergence phenomenon. The Commission will engage soon in discussions with Member States on the appropriate ways to implement Article 13.

Regarding Article 16 of the Directive, the data provided by the Member States showed that overall performance improved during the reference period. The 64.3% average of European works achieved in 2010, well above the proportion set out in Article 16, reflects generally sound application of this provision throughout the EU. However, the great majority of European works consist of domestic works. Member States are invited to monitor closely the achievements of all the channels falling within their jurisdiction and encourage failing channels to reach the required proportion of European works.

In 2010, with an average of 33.8%, the requirements of Article 17 were met comfortably in terms of independent productions broadcasting. However, the results showed a declining trend with respect to the level achieved in 2007 for both independent and recent works. Although the EU-12 posted better performance regarding independent productions than the EU-15, all Member States are called upon to monitor the application of Article 17 by the broadcasters and encourage efforts aiming at the transmission of a higher proportion of European independent productions and recent works. An increase in their ratio will help to support and strengthen the EU independent production industry as well as boost employment in that sector.

The Commission calls on Member States to take account of the low circulation of non-domestic European works and address this issue where possible.

Development of Main Indicators from 2007 to 2010 (EU-27)

