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**REVISED GUIDELINES FOR MONITORING THE APPLICATION
OF ARTICLES 16 AND 17 OF THE AUDIOVISUAL AND
MEDIA SERVICES (AVMS) DIRECTIVE**

1. INTRODUCTION

1.1. The following guidelines have been prepared to help Member States in their duty to monitor the application of Articles 16 and 17 of Directive 2010/13/EU 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, hereinafter "the Directive")¹. The Member States' obligations in this respect are laid down in Article 16(3) of the Directive. This stipulates that *"the Member States shall provide the Commission every two years with a report on the application of this Article and Article 17. That report shall in particular include a statistical statement on the achievement of the proportion referred to in this Article and Article 17 for each of the television programmes falling within the jurisdiction of the Member State concerned, the reasons, in each case, for the failure to attain that proportion and the measures adopted or envisaged in order to achieve it."*

1.2. These guidelines were drawn up in the framework of the "Contact Committee" set up under Article 29 of the Directive. Their aim is to clarify certain definitions and thus avoid differences of interpretation which could lead to the Directive being implemented in different ways. They are also intended to enable all interested parties to clearly understand the manner in which the relevant

¹ Directive 89/552/EEC ("Television without frontiers" Directive) was first amended by Directive 97/36/EC and then by Directive 2007/65/EC. Once the transposition period of this third Directive was over, the three directives were codified as Directive 2010/13/EU. Some recitals and provisions of this codified Directive have been renumbered.

provisions are implemented.. This document as such has no mandatory legal force and is merely intended to clarify certain provisions of the Directive. This is the third version of the "guidelines". It incorporates changes made necessary by certain provisions of Directive 2010/13/EU and by developments on the EU broadcasting market.

2. DEFINITION OF AUDIOVISUAL MEDIA SERVICES, TELEVISION BROADCASTS AND SCOPE

Pursuant to Article 1 (1) (a) (i) an "*audiovisual media service*" means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) or Article 2 of Directive 2002/21/EC.

According to Article 1 (1) (d) "*media service provider*" means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.

Paragraph (e) defines "*television broadcasting*" or "*television broadcasts*" as "an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule".

3. REPORTING OBLIGATION

The reporting obligation in Article 16(3) includes all broadcasts by broadcasters under a Member State's jurisdiction with the following exceptions

- Articles 16 and 17 do not apply to "news, sports events, games, advertising, teletext services and teleshopping".
- Article 18 provides that Articles 16 and 17 do not apply "to television broadcasts that are intended for local audiences and do not form part of a national network".
- Recital 72 of the Directive stipulates that "channels broadcasting entirely in a language other than those of the Member States should not be covered by the provisions of Articles 16 and 17".
- Article 2(6) provides that the Directive does not apply to broadcasts intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.

- In addition, it should be considered that since the wording "where practicable" contained in Articles 16 and 17 leaves to the Member States a certain degree of flexibility in applying the obligations set out in these provisions, on specific and justified grounds, the national authorities might exempt, upon request of the channels concerned, small channels having objective difficulties in complying with the reporting obligation. These individual exemptions will however not apply to the obligation to comply with the proportions of European and independent works set out in Articles 16 and 17 of the Directive.
- Given the technological developments that have taken place on the EU broadcasting market in recent years and the emergence of a high number of channels with a very low audience share, the Commission understands that very small channels might not always have the necessary resources to comply with the reporting obligation set out in Articles 16 and 17.
- The Commission considers appropriate to set up a common framework for the application of the limited margin of flexibility allowed by the Directive in applying the reporting obligations. Slight deviations from this framework may however be possible in very specific circumstances and on justified grounds.
- In this regard, the Commission considers that an audience share of 0.3% could be seen as a "*tolerance threshold*" below which it could be supposed that the reporting obligation may place too heavy a burden on the channels concerned.
- The national authorities might also, in exceptional circumstances and on specific and justified grounds exempt from the reporting obligation small channels with an audience share above the 0.3% "*tolerance threshold*" which would be able to show that they have the same objective difficulties in complying with the reporting obligation.
- The concept of audience share to be used in that context will be the daily audience share taking into account the industry standard measurement in the country of reception.
- It is also important to underline that the application of such a "*tolerance threshold*" (which should not, obviously, be regarded as a general derogation from the obligations laid down in the Directive), shall not have the effect of excluding from the reporting obligation more than 10% of the total audience in a Member State, as this would undermine the level of representativeness and uniformity of the national reports.
- However, this proportion might be exceeded in very specific circumstances and on thoroughly justified grounds (i.e., size of the operators and fragmentation of the market) to be reported by the national authorities in the comments annexed to their reports.
- Such individual exemptions should be granted early in each reporting

period and reviewed every year by the regulators.

- Each individual exemption granted by the national authorities shall be mentioned in the annex to the national reports, together with the audience share of the exempt channel.

Audience share data to be taken into account are those of the country of reception of a channel, which implies co-operation between the regulatory bodies of the EU Member States, as follows:

- i. If a channel is received in different countries, account shall be taken of its audience shares in all the countries of reception. If its audience share surpasses the 0.3% threshold in one of these countries, this channel will not be able to benefit from an individual exemption foreseen under the "*tolerance threshold*". The national authorities of the country of origin will therefore verify the situation of these channels on the basis of data collected from the regulators of the countries of reception or reliable national audience measurement systems.
- ii. If a channel falling within the jurisdiction of a Member State is wholly or mainly targeted at another country, the regulator in the country of origin shall establish whether or not the channel surpasses the tolerance threshold in the country of reception, on the basis of information provided by the national authorities in the targeted country. When there is a change in the national jurisdiction of a programme service mostly or entirely targeted at another Member State, the regulator in the new country of origin shall inform the regulatory body of the country of reception about the new situation, in order to avoid the adverse effects of the frequent changes of jurisdiction that occur nowadays.

Consequently, it is not necessary for national reports to include data on the following:

- Channels broadcasting exclusively "news, sports events, games, advertising, teletext services and teleshopping".
- Broadcasts "intended for local audiences" which do not "form part of a national network". As an exception to the general rule, the term "local" should be interpreted strictly and should therefore be taken to mean "sub-regional". In order to distinguish clearly between regional and sub-regional levels, Member States shall
 - either apply the definition of "regional" and/or "local" channels that is set out in their national legislation, or

- if the legislation does not contain any such definition, refer to the administrative organisation of their country to define "regional" and "sub-regional" levels. In that case the "regional" level will be the administrative level immediately below the national one (see Annex 1). Channels with a geographical scope corresponding to the administrative regional division shall report on the application of Articles 16 and 17. Channels whose scope corresponds to the sub-regional administrative division(s) are excluded from the national reports.
- Channels broadcasting entirely in a language that has no official status as one of the languages of one or more Member States.
- Broadcasts covered by Article 2(6) i.e. exclusively intended for reception in third countries and not receivable in a Member State with standard consumer equipment.

In addition to the derogations expressly provided by the Directive, national reports should also not include data relating to channels which have been exempted by the national authorities from the Articles 16 and 17 reporting obligation because they fall below the "tolerance threshold" of an audience share of 0.3% or data relating to other small channels which are above the "tolerance threshold" but which have been also granted individual exemptions by the national authorities on a case-by-case basis.

Nevertheless it is important that the application of a "*tolerance threshold*" to a large number of small channels shall not have the effect of excluding from the reporting obligation more than 10% of the total audience in a Member State. As mentioned above, only in very specific circumstances and on detailed and justified grounds it might be possible to exclude a higher proportion of the total audience.

4. JURISDICTION OVER BROADCASTERS

For the purposes of the Directive, the broadcasters under the jurisdiction of a Member State are, according to Article 2(2):

- those established in that Member State in accordance with paragraph 3 (establishment being determined as the place or places where the broadcaster has its head office, takes its editorial decisions about programmes schedules and/or has a significant part of the workforce involved in the pursuit of the television broadcasting activity);
- those to whom paragraph 4 applies (i.e. broadcasters that, while not being established in a Member State, use a satellite up-link situated in a Member State or a satellite capacity appertaining to a Member State).

5. RELEVANT TRANSMISSION TIME

- 5.1. Programme transmission time, within the meaning of Articles 16(1) and 17 is a broadcaster's total transmission time, the test card excluded, less the time reserved for news, sports events, games, advertising, teletext services and teleshopping. As far as transmission time devoted to broadcasters' self-promotion is concerned, only trailers consisting of extracts from programmes should be considered as programmes in accordance with Recital 96. Trailers of programmes qualifying for the calculation of the proportion of European/independent works should therefore be taken into consideration for reporting purposes.
- 5.2. In order to ensure comparability with previous reports, if a broadcaster broadcasts on more than one channel, the proportions (of European and independent works) shall, in principle, be given for each relevant channel.
- 5.3. 5.2. It is not appropriate for Member States to include in their Reports data on transmission time devoted to news, sports events, games, advertising, teletext services or teleshopping, whether of European origin or otherwise.

6. EUROPEAN WORKS

- 6.1. The term "European works" is defined in Article 1 (1) (n) of the Directive as:
- i. Works originating in Member States;
 - ii. Works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 3;
 - iii. Works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.
- 6.2. The application of the provisions of points (n) (ii) and (iii) of paragraph 1 shall be conditional on works originating in Member States not being the subject of discriminatory measures in this third country concerned.

6.3. The works referred to in points (i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the States referred to in those provisions provided that they comply with one of the following three conditions:

- i. They are made by one or more producers established in one or more of those States;
- ii. The production of the works is supervised and actually controlled by one or more producers established in one or more of those States;
- iii. 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.

6.4. Works that are not European works within the meaning of point (n) of paragraph 1 but that are produced within the framework of bilateral co-production agreements concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Union 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 agreements with third countries. The Member States and the Commission shall make these lists available, on request, to interested parties as well as the list of agreements entered into by the EU and third countries related to the audiovisual sector.

7. THE CONCEPT OF INDEPENDENCE

7.1. This concept should be understood in the light of recital N° 71 of the Directive.

A producer with interests in television broadcasting will be regarded as an independent producer only if the interests in question do not constitute his main activity.

7.2. To put it more precisely, in the definition they apply to the wording of Article 17, Member States may take account of the following three indicative criteria, which are not exhaustive:

- Who owns the production company?

The objective is to make sure that a broadcasting organisation does not hold too large a share in the capital of a production company (and *vice versa*). The term "broadcaster" should be understood here as meaning the broadcasting organisation in its entirety, not each channel which comes under the organisation.

- How many programmes are supplied to the same broadcasting organisation?

The purpose of this criterion is to measure independence in terms of the amount of programming supplied, basing the analysis on a period long enough to allow conclusions to be drawn, and bearing in mind any special characteristics of the broadcasting organisation in question.

- Who holds the secondary rights?

This criterion enables the independence of a producer to be assessed in the event that all his rights, including secondary rights, have been bought by broadcasters, leaving the independent producer in a position where he cannot put together a catalogue of material with secondary rights which can be sold on other markets.

8. DATA COLLECTION

8.1. Subject to the exceptions set out under point 3. above, statistics, expressed in hours and percentages, must cover the relevant output of all broadcasters under the jurisdiction of the Member State during the reporting period, irrespective of whether they are new or special-interest broadcasters.

Member States should submit annual statistics for each channel separately (see section 5.2. above).

It is suggested that Member States use the definitions provided above in order to ensure that national reports from all EU Member States are mutually compatible.

If Member States use definitions other than those given above, the monitoring report should include details of the definitions used and how they differ from those given above, and also, where possible, how they affect the resulting data.

8.2. Where broadcasters can code their programmes according to the above mentioned definitions, they should be advised to apply data recording systems in such a way that comprehensive statistics for the entire annual schedule can be compiled.

If the national authorities are satisfied that a derogation from comprehensive reporting is justified during the reference period, then a detailed description of the broadcaster's sampling procedure and the basis of its estimates should be submitted for consideration to the Commission. Samples should consist of at least one week (chosen at random) per quarter of the reporting period.

9. REVIEW

Following the first full application of these revised guidelines and in the light of the market developments, a review will be carried out in order to assess whether there is a need for any revision. Such review will cover in particular the individual exemptions from the reporting obligation referred to under point 3.