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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE  
EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Ninth 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**

**(Promotion of European and independent audiovisual works)**

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## **1. INTRODUCTION**

This Communication is drawn up pursuant to Article 4(3) of 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<sup>1</sup> ('Television without Frontiers Directive'), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997<sup>2</sup> and by Directive 2007/65/EC of the European Parliament and of the Council of 11.12.2007 ( 'Audiovisual Media Services')<sup>3</sup>, (hereinafter referred to as 'the Directive')<sup>4</sup>. Through this Communication, the Commission reports, for the ninth time since the adoption of the Directive, on the application of Articles 4 and 5 for the period 2007-2008. The Communication is based on the Member States' statistical statements on the achievement of the proportions referred to in these Articles by each of the television programmes falling within their jurisdiction and presents the Commission's opinion on the application of these provisions, including the main conclusions to be drawn from the Member States' reports.

The purpose of this biennial reporting exercise is twofold. Firstly, pursuant to Article 4(3) of the Directive, the Communication brings the statistical statements by the Member States to the knowledge of the other Member States, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Secondly, it aims to verify whether the measures adopted by the Member States with a view to promoting European works and independent productions have been properly applied.

For this reporting exercise, the Commission provided all the Member States with a pre-defined list of channels extracted from the MAVISE data base<sup>5</sup> of the European Audiovisual Observatory. The purpose was to use a uniform basis to increase the consistency and comparability of the statistical data provided by the Member States. In accordance with the provisions of the Directive, local channels were removed from the list since they are excluded from the scope of Articles 4 and 5 (pursuant to Article 9) as well as channels which do not broadcast in an EU language (Recital 29 of Directive 97/36/EC) and channels which broadcast exclusively for reception outside the EU and cannot be received in the EU (Article

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<sup>1</sup> OJ L 298, 17.10.1989.

<sup>2</sup> OJ L 202, 30.07.1997.

<sup>3</sup> OJ L 332, 18.12.2007.

<sup>4</sup> These three directives were codified as Directive 2010/13/EU after the end of the transposition period of Directive 2007/65/EC. The codification has involved renumbering of the Articles. Articles 16 and 17 now replace former Articles 4 and 5, although their substance remains unchanged.

<sup>5</sup> <http://mavise.obs.coe.int/>.

2 (6)). As had already been the case for the previous report, all channels falling within the jurisdiction of a given Member State had to be considered independently of their audience share. Additional details can be found in the background documents included in the Commission Staff Working Document accompanying this Communication.

For the first time, Bulgaria and Romania, which joined the EU on 1 January 2007 and provided statistical data on a voluntary basis for the 2005-2006 period, fulfilled their obligation to report on the application of Articles 4 and 5 during the 2007-2008 period. It is thus the first time that this Communication includes the compulsory reports of all 27 EU Member States.

## **2. COMMISSION'S OPINION ON THE APPLICATION OF ARTICLES 4 AND 5**

### **2.1. General remarks**

#### *2.1.1. Articles 4 and 5 in the context of the European audiovisual landscape*

During the period under review, the European audiovisual landscape followed the upward trend already registered in the 2005-2006 period. The number of broadcasters and channels is rising every year, in particular as a result of the switchover to digital technology that favours the emergence of new platforms and a large number of specialised 'niche' channels. This phenomenon has led to an increasing fragmentation of the audience share, already underlined in the eighth Communication<sup>6</sup>. According to the data provided by the European Audiovisual Observatory, the number of channels in the EU-27 rose from 5,151 channels in 2006 to 6,067 channels in 2008, representing a 17.8% rate of increase. The number of channels with a national coverage increased from 1967 in 2006 to 2702 in 2008, representing a 37.36% rate of increase.

During the same period, the increase recorded in the total number of channels covered<sup>7</sup> by the reports of the Member States exceeded the rise registered on the market: their number rose from 1,107 channels in 2006 (EU-27<sup>8</sup>) to 1,590 in 2007 and 1,679 in 2008. The 2008 figure therefore represents a 51.6% increase in comparison with 2006.

This difference between the increase rate registered on the market and the increase rate of the number of covered channels may be attributed to the use of a pre-defined list of channels, which constitutes a more comprehensive working base than the one used in the previous reference periods.

#### *2.1.2. Methods of implementation and monitoring by the Member States*

Monitoring methodology is not harmonised and varies substantially from one Member State to another. As was already the case for previous reports, in most of the Member States the broadcasters supply data to the competent authorities. In some of them the collected data is analysed by the national authorities or private research companies. In one case, the data

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<sup>6</sup> [http://ec.europa.eu/avpolicy/reg/twvf/implementation/promotion/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/twvf/implementation/promotion/index_en.htm).

<sup>7</sup> For the definition of 'covered' channels see Indicator 1 in Annex 1 — Staff Working Document: total number of channels identified minus the number of non-operational channels and the number of exempt channels (due to the nature of their programmes) or excluded channels (due to legal exceptions).

<sup>8</sup> For comparability purposes, the data communicated by Bulgaria and Romania on a voluntary basis for 2005 and 2006 have been taken into account to calculate the total number of channels in both years.

comes from the monitoring of daily programming via the competent authority's database. Methods may also vary according to the type of broadcasters concerned (public broadcasters or commercial ones). The monitoring is carried out either on a sampling basis or on the basis of total transmission time. In one country<sup>9</sup> the collection of statistical data has been restricted to channels transmitting via terrestrial means, because the legislation does not enable the national authorities to request the data from other categories of channel.

It is worth noting that in 2008 one national authority (in Portugal) improved its monitoring method by abandoning samples and taking into account the total amount of broadcasting throughout the year in order to assess the performance of channels.

The use of a pre-defined list for this reporting exercise meant that clarifications were necessary in almost all Member States following the removal of a number of channels from the list by the national authorities. The treatment to be given to the different categories of channels was indicated, in accordance with the Commission Guidelines for the monitoring of the implementation of Articles 4 and 5 of the Directive.<sup>10</sup> In two specific cases<sup>11</sup> the Commission reiterated officially that the reporting obligation under Article 4(3) of the Directive applies to 'each of the television programmes' falling within the jurisdiction of the Member States concerned, except in those cases expressly mentioned in Article 4(1).<sup>12</sup>

Overall, the number of national reports containing data for all channels covered has slightly decreased: 12 reports out of 25<sup>13</sup> provide statistical data concerning European works for all channels covered in 2007 and 11 in 2008<sup>14</sup>, compared to 14 reports out of 25 in the previous reference period. More significant is the increase in the number of channels for which data was not communicated in those Member States which failed to provide all the data. According to the eighth Communication, data on European works were not communicated for 13 channels in the Czech Republic in 2005 and for 10 channels in Italy in 2006. During the reference period, data on European works was missing for 97 channels in Italy in 2007 (83 in 2008), 47 in Germany in 2007 and 2008, and 34 in France in 2007 (35 in 2008). This trend may be due to the emergence of a high number of small channels on the market, making data gathering more difficult, but also to the use of a pre-defined list of channels.

Other elements of divergence can be identified in the application of Articles 4 and 5 of the Directive in the Member States. As already stressed in the eighth Communication, the

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<sup>9</sup> See Annex 3 p.120 (Cyprus). The legislative situation is due to change in the coming months.

<sup>10</sup> See [http://ec.europa.eu/avpolicy/docs/reg/tvwf/eu\\_works/controle45\\_en.pdf](http://ec.europa.eu/avpolicy/docs/reg/tvwf/eu_works/controle45_en.pdf).

Only local (sub-regional) channels are excluded from the scope of Articles 4 and 5, as well as channels broadcasting in a non-EU language and those intended for broadcast outside the EU and which cannot be received in the EU.

<sup>11</sup> The Commission sent letters to Germany and Portugal concerning the need to apply Articles 4 and 5 to regional channels and cinema channels respectively, as these had been considered exempt by the national authorities. On receipt of the Commission's letter, Portugal has already submitted data relating to cinema channels for 2008 and Germany has undertaken to collect the statistical data from the regional channels for the next reporting period.

<sup>12</sup> Only channels exclusively broadcasting news, sports events, games, advertising, teleshopping and teletext services are exempt from the obligation to apply Articles 4 and 5.

<sup>13</sup> In this case EU-25 has been taken into account for the period 2007-2008 so that the data can be compared with the data of the previous reference period. At any rate, the figures are the same for the period 2007-2008 in EU-27.

<sup>14</sup> This is the case for Estonia, Ireland, Greece, Cyprus, Latvia, Lithuania, Luxembourg, Malta, Austria, Poland, Finland and the UK. The UK has provided data for all the 396 channels covered in 2007 and on all but two in 2008.

minimum proportion of independent works to be achieved pursuant to Article 5 of the Directive can either relate to the channels' transmission time or to their programming budget<sup>15</sup>. The calculation basis may also be different depending on the type of channel<sup>16</sup>. Furthermore, a number of Member States have established more detailed or stricter rules (either for all broadcasters or for public service ones only), exercising the possibility explicitly set out in Article 3(1) of the Directive.

The margin of flexibility permitted by the Directive for its implementation makes it difficult to measure national data in a totally comparable way. Nonetheless, on the basis of the findings presented in this Communication, the Commission can draw reliable conclusions from the national reports on the application of Articles 4 and 5 at EU level.

### *2.1.3. Analysis and assessment tools*

Pursuant to Article 4(3) of the Directive, the Commission shall ensure the application of Articles 4 and 5 in accordance with the provisions of the Treaty. In order to help the Member States fulfil their monitoring and reporting obligations, a document containing guidelines has been drawn up<sup>17</sup>. This document defines a number of terms and clarifies certain concepts. In addition, a number of indicators<sup>18</sup> have been defined to provide an objective analysis tool for assessing the statistical data provided by the Member States.

### *2.1.4. Application of Article 4*

This section provides an analysis of compliance with the obligation to broadcast, where practicable and by appropriate means, a majority of European works as set out in Article 4 of the Directive.

The EU average transmission time dedicated to European works by all reported channels in all EU-27 Member States was 62.64% in 2007 and 63.21% in 2008, representing a 0.57 point increase over the reference period<sup>19</sup>. While the last reporting period registered an upward trend, in 2008 the proportion of transmission time reserved for European works slipped back to the same level as in 2005 with a 63.21% average. The mid-term evolution (2004<sup>20</sup>-2008) presents a relatively stable trend, with a very slight -0.12 point decrease between the average achieved in 2004 (63.52%) and that achieved in 2008 (63.40%).

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<sup>15</sup> France and Italy already announced in the previous reference period that they had opted for the second possibility. See Eighth Communication.

<sup>16</sup> This is the case in France for digital terrestrial channels. The percentage is calculated on the previous year's turnover, which represents a higher assessment basis than the one set by the Directive. In the Staff Working Document accompanying the eighth Communication, the Commission had already invited France to submit their data in a way that accurately reflects French channels' compliance with Article 5 of the Directive.

<sup>17</sup> See footnote 10 above.

<sup>18</sup> See Annex 1, Staff Working Document.

<sup>19</sup> The figures provided at EU-level result from the mathematical average of all national averages calculated on the basis the 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.

<sup>20</sup> 2004 is the first year in which the data (EU-25) can be compared with those of the period 2007-2008. For comparability purposes, the average given for 2008 is calculated for EU-25 (without Bulgaria and Romania).

When considering the three different groups of Member States<sup>21</sup>, the findings are the following: the overall averages reported by the 15 Member States represent an upward trend over the 4-year period (64.19% in 2008 compared to 63.10% in 2005 representing a 1.09 point increase), while the averages recorded by the EU-10 presented a -2.04 points decrease over the same period (62.11% in 2008 against 64.15% in 2005). The two Member States which joined the EU in 2007 (Bulgaria and Romania) posted an increase in the European works average compared to the previous period: 61.40% in 2008 against 59.40% in 2005 (2 points). Considering their recent accession to the EU, their performance is commendable and confirms that their full integration into the Directive's regime has been problem-free as regards the promotion of European works. Therefore, throughout the period 2005-2008, the overall figures have remained relatively stable, and well above the 50%-threshold required by Article 4.

Looking at the Member State level during the reference period, the average share of transmission time reserved for European works varied between 27.90% (Cyprus) and 85.00% (Poland) in 2007 and between 30.00% (Cyprus) and 83.11% (Poland) in 2008. In terms of the increase in the average share of transmission time over the same period, the trend was positive in 14 Member States, negative in 11 and remained stable in two. In the medium term, comparing the 2008 results with those of 2005, 16 Member States showed an increase, although relatively modest in most cases (equal or inferior to 5% in 11 Member States). On the other hand, 11 Member States registered a decrease (of less than 10% in 8 Member States). Trends in transmission time dedicated to European works over the 4-year period (2005-2008) are reproduced in charts that have been drawn up for each Member State<sup>22</sup>.

Compliance rates for all channels covered at Member State level ranged from 12.5% (Cyprus) to 100% (Estonia) in both 2007 and 2008. Within the reference period, compliance rates rose in 12 Member States, remained unchanged in nine and decreased in six. It is worth pointing out that compliance rates do not merely reflect the channels' achievement, or lack of achievement, of the European works proportions set out in Article 4, but also the level of communicated/non-communicated data<sup>23</sup>.

Three Member States<sup>24</sup> encountered difficulties in reaching the required proportion of European works over the whole reference period, although in all three cases the worst results were recorded in 2007 and were followed by some improvements in 2008, albeit very slight in two cases. Two<sup>25</sup> of them had already failed to reach the required proportion of European works in one of the two years of the previous reference period. The Commission encourages the Member States concerned to support the efforts of the channels falling within their jurisdiction to improve their performance and achieve a continued upturn over the coming years.

These results show that overall performance has remained relatively stable during the reference period, as compared with the previous one, reflecting a generally sound application

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<sup>21</sup> EU-15 (original Member States), EU-10 (Member States which joined the EU in 2004) and the two most recent Member States (Bulgaria and Romania) which joined the EU in 2007.

<sup>22</sup> See charts included in point 2 of Staff Working Document: Application of Articles 4 and 5: detailed analysis.

<sup>23</sup> See Annex 1 — Indicator 3 — Staff Working Document.

<sup>24</sup> Cyprus (27.9% transmission time devoted to European works in 2007, 30% in 2008), Sweden (45.1% transmission time devoted to European works in 2007, 45.5% in 2008) and Slovenia (34.1% transmission time devoted to European works in 2007, 44.6% in 2008).

<sup>25</sup> Slovenia in 2005 and Sweden in 2006.

of Article 4 throughout the EU. It is true that a downward trend was detected in the EU-10 during the period 2007-2008, which may be partially explained by the high number of recently created specialised channels, with a low audience rate, which may need a period of adaptation before reaching the required proportions of European works. Nonetheless, Member States are invited to monitor closely the achievements of all the channels falling within their jurisdiction and encourage all of them to attain the proportion of European works set out in Article 4.

#### *2.1.5. Application of Article 5*

The second part of this Communication presents the results achieved at European level with respect to the proportion of European works made by independent producers (independent productions) set out in Article 5 of the Directive.

The EU-average proportion reserved for independent productions broadcast by all reported channels in all Member States was 35.26% in 2007 and 34.90% in 2008, representing a -0.36 point decrease over the reference period. This slight decrease follows an upward trend that has been registered since 2003. When considering the four-year period 2005-2008<sup>26</sup>, the averages achieved in 2008 represent a -0.83 point decrease in relation to those achieved in 2005. Member States should therefore encourage broadcasters falling within their jurisdiction to increase their transmission time of independent productions in order to reach, at least, the level attained in the previous reference period.

During the period 2007-2008, 13 Member States registered a positive development and 14 Member States a negative one. During the reference period all Member States attained the 10% threshold of independent productions. In the previous reference period<sup>27</sup> one had not attained this threshold. In the 4-year period from 2005 to 2008, eight Member States registered increases ranging from 1.40 point (UK) to 32.20 points (Cyprus). In all, 19 Member States presented a decrease compared to 2005, ranging from -0.20 point (Portugal) to -16.80 points (Sweden). In relation to the 2005 figures, the proportion of independent productions registered in 2008 represented a decrease of -4.36 points for the EU-15, an increase of 4.56 points for the EU-10 and a decrease of -1.35 points for the two most recent Member States. The average registered by the EU-10 in 2008 (35.10%) is not far off the level achieved by the EU-15 during the same year (36.02%).

The EU-average compliance rate for channels in all Member States was 70.39% in 2007 and 72.35% in 2008. Over a period of four years, the compliance rate for EU-25<sup>28</sup> fell by -1.06 point from 2005 to 2008. Compared with the 2004 results, the decrease was -7.06 points. These decreasing figures may be partly attributed to an increase in the number of channels covered during the reference period and the amount of non-communicated data on independent productions broadcasting<sup>29</sup>.

The average compliance rate in each Member State ranged from 35.13% (Bulgaria) to 100% in four Member States (Estonia, Lithuania, Luxembourg and Malta) in 2007 and from 35.12%

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<sup>26</sup> For comparability purposes, the averages considered for 2005 and 2006 include the data provided on a voluntary basis by Bulgaria and Romania, which joined the EU on 1.1.2007.

<sup>27</sup> Cyprus registered an independent productions average of 9.7% in 2005 and 6.5% in 2006, while in the reference period the averages were 39.6% in 2007 and 41.9% in 2008.

<sup>28</sup> The EU-25 basis has been taken in order to allow for a comparison with the period 2004-2008.

<sup>29</sup> For the purpose of this indicator, channels for which no data were communicated are considered non-compliant — see Annex 1: Performance indicators — Indicator 5.

(Italy) to 100% in three Member States (Estonia, Lithuania and Malta) in 2008. Over the reference period, average compliance rates increased in 10 Member States, remained unchanged in eight Member States and fell in nine Member States. EU-10, with an average compliance rate of 78.67% in 2007 and 83.30% in 2008, presented a higher rate than the EU-15 with 68.92% and 69.24% respectively in 2007 and 2008, confirming the successful implementation of Article 5 in the Member States of EU-10.

The EU average share reserved for recent European works by independent producers (recent works<sup>30</sup>) was 62.99% in 2007 and 63.88% in 2008 of all European works created by independent producers, representing a slight increase (0.89 point) over the reference period. However, compared with the average achieved in 2005<sup>31</sup> (68.75), the 2008 average represented a decrease of -4.87 points. In the mid-term, figures show a continued downward trend, with the 64.88% average achieved in 2008 in the EU-25<sup>32</sup> representing a decrease of 4.21 points in relation to the 2004 result (69.09%). This decreasing trend has to be compared with the increase of 4.97 points over the period 2001-2006 which was reported in the eighth Communication. When taking into consideration the 2005-2008 period, the recent works average registered by the EU-10 group in 2008 (65.39%) represented a decrease of -6.90 points in relation to the 2005 figure (72.29%). The EU-15 group achieved a lower average than the EU-10 group, in both 2008 (64.53%) and 2005 (66.23%), but the decrease registered from 2005 to 2008 (- 1.69 points) was also more limited than for the EU-10. The results achieved by the EU-10 therefore reconfirm that Article 5 has been successfully implemented in these countries, although efforts should be made to correct a perceptible downward trend, also in the EU-15.

The two most recent Member States registered a very good performance (56.7% average in 2007 and 51.35% in 2008) in the period under review, which confirms their problem-free integration into the Article 5 regime.

The results show that the requirements of Article 5 are being met comfortably at EU level in terms of independent productions broadcasting, including an adequate proportion of recent works, although a declining trend has been observed with respect to the level achieved in 2005. Member States are therefore called upon to monitor the application of Article 5 by the broadcasters falling within their jurisdiction and to encourage a positive development in the scheduling of European independent productions and recent works.

### 3. CONCLUSION

According to the statistical data provided by the Member States, the scheduling of European works at the EU level registered a very slight increase during the current reference period. Over the period 2005-2008, development was stable, although some variations were registered between 2005 and 2007 (upward trend followed by a decrease in 2007). However, in 2008 European works scheduling was back at the same level as in 2005 (63.2% for the EU-27). This demonstrates stabilisation at a relatively high level, well above the required proportion set out in Article 4. Furthermore, this result has to be interpreted against the background of a continued increase in the number of channels on the market, with the emergence of small specialised channels which may well find it difficult to meet the required

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<sup>30</sup> i.e. works broadcast within five years of their production.

<sup>31</sup> For comparability purposes, the figures have been calculated on a EU-27 basis

<sup>32</sup> EU-25 is taken as a basis in order to make comparison possible with the 2004 figure.



proportion of European works from the start of their operations. This aspect was already stressed in the eighth Communication and should be taken into account when assessing overall performance with respect to the scheduling of European works in the EU over the current reference period.

Although the overall situation is satisfactory, there is still some room for progress. Firstly, the three Member States which failed to attain the required proportions of European works in 2007 and 2008 should step up their efforts in order to improve their performance and strengthen the increase (in one case, very slight) already registered in 2008. Since two of these underperforming Member States belong to the EU-10, an increase in their European works averages would have a positive impact on the downward trend registered by the EU-10 between 2005 and 2008, which should also be corrected.

Finally, it is worth drawing attention to the high level of European works scheduling achieved by the two most recent Member States during the reference period and the increase they registered over the 2005-2008 period.

With respect to the implementation of Article 5 of the Directive, the overall development observed during the reference period shows a slight downward trend for independent works. According to the statistical statements provided by the Member States, a decrease was registered over the current reference period as well as in the period 2005-2008. Although it is not a significant decrease (-0.83 point from 2005 to 2008), it reverses the positive trend that was registered in the previous period. As far as independent productions are concerned, it should be noted that the EU-10 improved their performance.

There is a somewhat sharper downward trend as regards recent works by independent producers over the period 2005-2008. Member States are invited to encourage the channels falling within their jurisdiction to step up their efforts in order to increase the scheduling of independent productions and recent works.

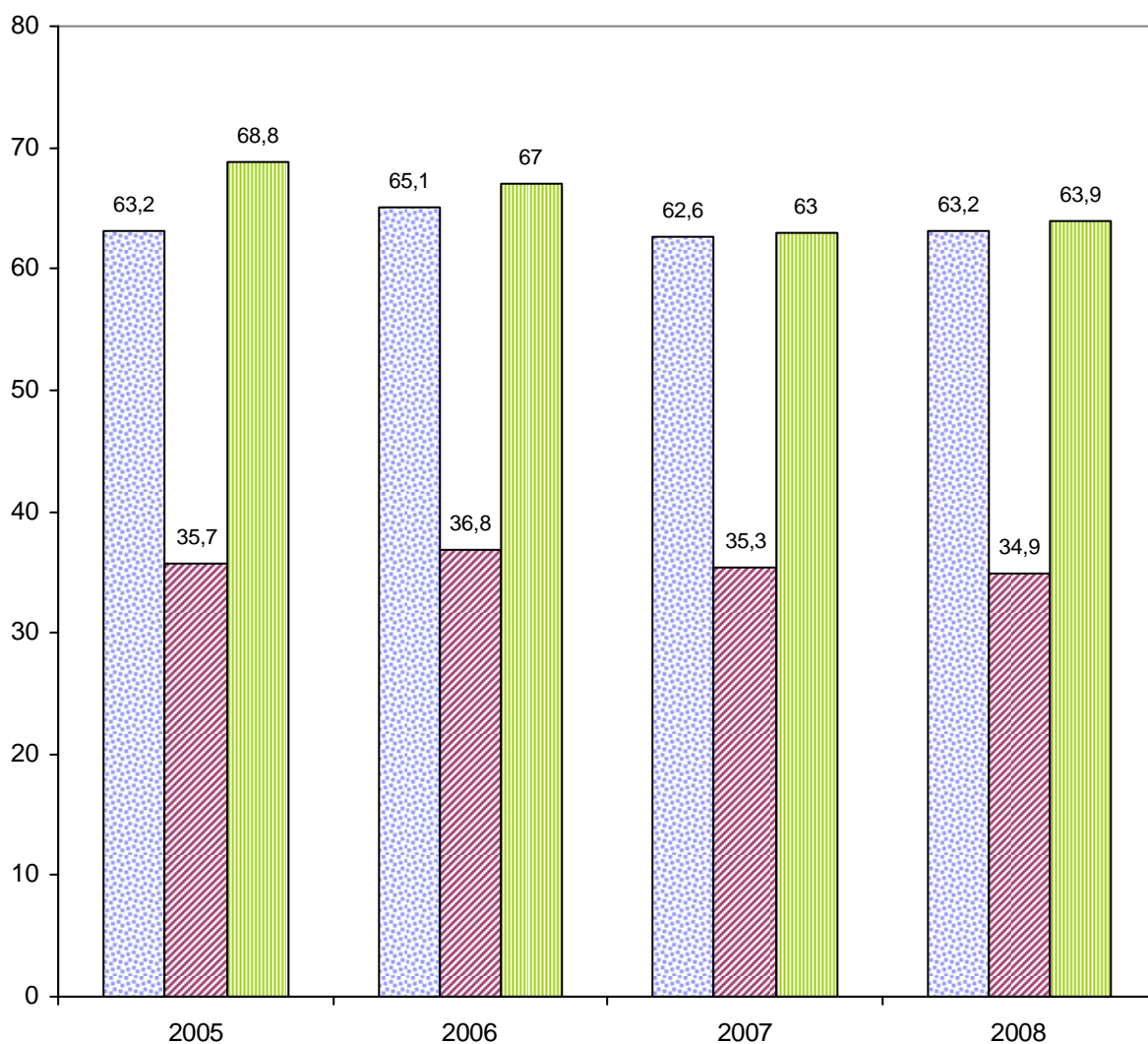
Nonetheless, the results achieved during the reference period testify to a satisfactory implementation of Article 5, with a level of achievement well above the proportions required by this provision.

As already stated in the eighth Communication, the results of the analysis of the reports submitted by the Member States<sup>33</sup> show that the requirements set out in Articles 4 and 5 of the Directive have been met comfortably during the period 2007-2008, as reflected in the charts reproduced below.

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<sup>33</sup> See point 2 of Staff Working Document: Application of Articles 4 and 5: detailed analysis.

### Development of Main Indicators from 2005-2008 (EU-27)



- IND 2 = %European works/Total qualifying transmission time
- ▨ IND 4 = %European works by independent producers/ Total qualifying transmission time
- ▤ IND 6 = %European recent works by independent producers/Transmission time devoted to independent productions