

[DRAFT] COMMISSION GUIDELINES PURSUANT TO ARTICLE 13(7) OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE ON THE CALCULATION OF THE SHARE OF EUROPEAN WORKS IN ON-DEMAND CATALOGUES AND ON THE DEFINITION OF LOW AUDIENCE AND LOW TURNOVER

I. BACKGROUND

The Audiovisual Media Services Directive¹ (hereinafter ‘the AVMSD’) lays down reinforced rules on the promotion of European works. Article 13(1) provides that providers of on-demand audiovisual media services (hereinafter ‘on-demand providers’ or ‘video on demand (‘VOD’) providers’) must “secure at least a 30% share of European works in their catalogues and ensure prominence of those works”.

Article 13(2) of the AVMSD stipulates “where Member States require media service providers under their jurisdiction to contribute financially to the production of European works (...), they may also require media service providers targeting audiences in their territory, but established in other Member States to make such financial contributions”. Such contributions “shall be proportionate and non-discriminatory”.

Article 13(6) of the AVMSD provides for mandatory exemptions for companies with a low turnover or low audience from the obligations under Article 13(1), as well as from the possible requirement under Article 13(2). The aim of the exemption, as clarified in recital 40, is to ensure that the obligations relating to the promotion of European works do not undermine market development and do not inhibit the entry of new market players.

As required under Article 13(7) of the AVMSD, the Commission provides guidelines regarding:

- (a) the calculation of the share of European works in the catalogues of on-demand providers and
- (b) the definition of low audience and low turnover in the context of the above mentioned exemptions.

The present guidelines, prepared under Article 13(7) of the AVMSD, are not binding and do not create new legal obligations. To the extent that they may interpret the AVMSD, the

¹ For the purposes of these Guidelines, the references to "the AVMSD" or "the revised AVMSD" shall be understood as references to 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 as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 (OJ L 303, 28.11.2018.)

* This draft has been drawn up by Commission services as basis for discussion with the AVMSD Contact Committee and does not engage the Commission as an institution.

Commission's position is without prejudice to any interpretation of this Directive that may be issued by the Court of Justice of the European Union.

II. CALCULATION OF THE SHARE OF EUROPEAN WORKS

1. Method of calculation

A. Calculation per titles

When deciding the most suitable method for calculating the share of European works in on-demand catalogues, it is important to strike the right balance between the objective of ensuring cultural diversity, including the circulation of European works among Member States, and that of avoiding unnecessary burdens on on-demand providers and national regulatory authorities.

The calculation of the share of European works may be based on the counting of the titles (i.e. individual items) present in a video-on-demand (VOD) catalogue: the relevant share in this case would be represented by the number of European titles out of the total number of titles present in a VOD catalogue. Considering that individual titles may have very different durations, an alternative choice would be calculating the share based on the actual duration (viewing time) of the works present in a VOD catalogue.

Under Article 16 of the AVMSD, the share of European works is calculated on the basis of their duration as the relevant provision requires broadcasters to reserve for European works “the majority of their *transmission time*”. The reliance on the duration is intrinsically linked to the specific characteristics of television broadcasting (linear) services that base their programming on daily (24 hours) schedules.

However, such time constraints do not apply to VOD providers. In on-demand services, the inclusion of a certain programme/item is not dependent on the availability of a time slot in a programming schedule. Moreover, the inclusion of a particular programme/item of a specific duration in a catalogue does not imply the exclusion/substitution of another programme/item of a similar duration. In other words, VOD providers do not compose their catalogues based on time-related considerations, but on the attractiveness of a potentially very large number of individual programmes/items placed at users’ disposal.

Similarly, from a user perspective the choice of watching a programme available in the on-demand catalogues is not constrained by what is available at a given point in time. In particular, watching a certain programme does not imply renouncing to watch all other programmes transmitted at the same time. The essence of VOD services lies precisely in the freedom of the user to select and watch an individual programme from a catalogue at the chosen time and as many times as the user wants.

Since the relevant choices of both VOD providers and their users are centred around the individual titles (based e.g. on perceived quality, attractiveness, tastes), the Commission services consider the calculation of the share of European works based on titles to be more appropriate for VOD services.

The choice of titles as the relevant unit of measurement, as opposed to time/duration, is supported by additional considerations. Firstly, the calculation of the share of European works

by titles, for both films and TV series, is more neutral as regards the choice of programmes to be included in the catalogues by the VOD providers. The calculation by duration could create an incentive for providers to favour European works of long duration (e.g. series with a high number of episodes) in order to easily attain the 30% share. By being more neutral, the calculation based on items is likely to facilitate the creation of a more diversified offer of European works.

Secondly, calculation by titles is likely to be less burdensome for VOD providers than calculation by duration. VOD providers are more likely to have an account of the number of European titles versus the total number of titles available in their catalogues rather than an account of the total viewing time of European works versus the total viewing time of all the works included in their catalogues.

Thirdly, calculation by titles is also likely to facilitate the verification by the relevant national regulatory authorities, as titles are easier to track and verify than the total viewing times.

Finally, the calculation by titles is likely to have a positive impact on the circulation of European works with genuine cross-border exploitation potential.

According to a recent study on TV fiction production, mostly short formats (TV fiction titles with 26 episodes or fewer) are produced in the EU. More specifically, 90% of all TV fiction titles have 26 episodes or fewer, out of which 44% are TV films (1-2 episodes). However, they account for a limited proportion of the total TV fiction hours produced in the EU, since they represent 33% of the total. On the contrary, long format TV fiction programmes represent only 10% of the number of titles produced but they account for 67% of all TV fiction hours produced. The same study highlights that shorter formats can be considered to be 'high-end' TV fiction, with a potential for co-productions and exports, while long formats generally have lower production costs and a stronger national background and, probably, less potential for cross-border exploitation.²

In view of the above, the Commission services consider that it is appropriate to calculate the 30% share of European works in on-demand catalogues is based on the number of titles in the catalogue.

B. What constitutes a title

The identification of what constitutes a title is relatively easy for feature and TV films. In such cases, every film constitutes a title in a catalogue. Different films in a franchise should also constitute different titles in a catalogue. Such identification is more complex for TV series or other formats that are presented in a serialised manner (i.e. episode by episode). Episodes of TV series are often grouped into different seasons. In such cases, the question arises whether one title should correspond to one episode, one season or the entire series.

The Commission services recommend to calculate one season of TV series as one title. Like in the case of a film, a season of a TV series is usually the result of a single and continuous creative effort made by the same group of creative persons and actors, with a single budget and over a unitary period of time. For these reasons, the work carried out in order to produce a season of a series can be compared to the work normally required to produce a film.

² TV fiction production in the European Union, European Audiovisual Observatory, Strasbourg, 2017, p. 1.

Furthermore, the release on the market and related promotional activities often concern individual seasons.

In order to take account of TV series which imply higher costs for the providers (for instance in case of significant direct investment or licencing costs for high end fiction, where an episode has a duration and production cost comparable to a feature film), the national regulatory authority, when assessing if the provider fulfils the share obligation, may - in justified cases based on a provider's request give a higher weighting (e.g. a season to count double) to these works.

The possibility of applying this flexibility should be assessed on a case-by-case basis, considering the specific situation of the provider concerned. The information about cases in which such flexibility was used should be communicated to the Commission as part of the reporting obligations under Article 13(4) of the AVMSD.

C. Calculation per national catalogues

Some VOD providers operating within the EU have multiple national catalogues. Such catalogues have different composition, depending on the national market they target. Domestic film titles can be found in a specific national catalogue of a multi-country provider and not be available (or available to a very limited extent) in the catalogues that the same provider offers in other Member States.³ Thus, it is necessary to determine how the share is to be calculated in such cases.

The essence of Article 13(1) of the AVMSD is to ensure that VOD providers actively contribute to the objective of promoting cultural diversity within the EU by providing a minimum share of European works in their offers. The Commission services take the view that this objective is effectively achieved by ensuring that the 30% share of European works is secured in each of the national catalogues offered by multi-country VOD providers. This will ensure that viewers in every Member State where the provider offers national catalogues can have the expected exposure to European works. The calculation of the minimum share in each national catalogue avoids the situation in which viewers in some Member States would be penalised in terms of cultural diversity in that they would have more limited access to European works compared to viewers in other Member States. A related – and desired - effect is that the calculation in each national catalogue is likely to incentivise the circulation of European works across the EU.

It is important to keep in mind that it is for the country of origin to ensure that on-demand providers under its jurisdiction comply with the obligation to ensure the share of European works in their catalogues. If a VOD provider falling under the jurisdiction of a Member State offers different national catalogues in various other Member States, it will be the responsibility of the Member State of jurisdiction (i.e. the country of origin) to enforce the share obligation with regard to all the various national catalogues.

³ Grece C., *Films in VOD catalogues – Origin, Circulation and Age* –Edition 2018, European Audiovisual Observatory, Strasbourg, 2018.

In view of the above, the Commission services consider that the Member State of origin should ensure that the 30% share of European works is secured in each of the national catalogues offered by a multi-country provider under its jurisdiction.

III. DEFINITION OF LOW AUDIENCE AND LOW TURNOVER

1. Preliminary remarks

According to Recital 40 of the Directive 2018/1808/EU, providers with no significant presence on the market should not be subject to the requirements to promote European works, “in order to ensure that obligations relating to the promotion of European works do not undermine market development and in order to allow for the entry of new players in the market”.

These guidelines aim to create a practical system to determine the exemptions, which does not cause excessive administrative burdens. The exemptions should be based on clear criteria that would allow providers to ascertain if the exemptions apply to them. They should also be simple for the national regulatory authorities to apply.

These considerations are common for both the exemptions from the obligation to reserve the minimum share of European works in on-demand catalogues and ensure prominence of such works and the exemptions from the possible requirement to contribute financially to the promotion of European works in a targeted Member State.

However, there are also differences that need to be considered, in light of the nature of the provisions establishing those obligations (Articles 13(1) and 13(2) respectively):

- It is for the Member State of origin to ensure that on-demand providers under its jurisdiction comply with the share obligation under Article 13(1); it is for the same Member State of origin to apply the exemptions under Article 13(6) to such providers.
- The situation is different for Article 13(2). This provision recognises the possibility for any given Member State to impose non-discriminatory and proportionate financial contribution obligations on providers established in another Member State and targeting audiences in its territory. In this case, it is for the ‘targeted’ Member State to apply both its legislation imposing such contributions and the exemptions under Article 13(6).

In view of these different legal contexts, it is appropriate to consider the exemptions from the two provisions separately.

2. Exemptions from the obligation under Article 13(1)

A. Low turnover

For establishing the threshold of low turnover, which should give rise to an exemption under Article 13(6), the Commission services refer to the Recommendation concerning the definition of micro, small and medium sized enterprises.⁴

Following an established policy making approach,⁵ which is based on the premise that in particular micro enterprises should be a priori excluded from the scope of the proposed legislation, unless the necessity and proportionality of their being covered is demonstrated, the Commission services consider that the threshold for low turnover could be identified by reference to the concept of micro enterprise developed in the above-mentioned Commission Recommendation (i.e. companies with a total annual turnover or annual balance sheet not exceeding EUR 2 million and with a staff headcount that is below 10 persons.)

Due to their limited size and scarce resources, micro enterprises may be particularly affected by regulatory costs. By excluding micro enterprises from the obligations to promote European works on on-demand services avoids hampering the access of new entrants into the market and is therefore consistent with the objective of incentivising the creation of new businesses and promoting market development.

The possible impact of this exemption threshold on cultural diversity is mitigated by the fact that many among the exempted companies are likely to be companies that distribute European works as part of their business model or as a result of incentives stemming from their participation in the MEDIA sub-programme of Creative Europe.

B. Low audience

a. Indicators

According to Recital 40 of the Directive 2018/1808/EU, “low audience can be determined, for example, on the basis of a viewing time or sales, depending on the nature of the service (...)”.

Different from linear services, the concept of audience for VOD is not an established one, and no standardised industry measurements are available across Member States. Thus, there is no data available EU wide on audience, verified by a third party, against which one could check if the audience of a specific provider is low. While this situation might change in the future, it is nonetheless necessary at this stage to define a practical method to determine low audience.

The concept of audience can be associated with the reach of a particular service, i.e. the number of users/viewers of a particular service compared to the total number of potential users/viewers. In VOD markets, the reach can be determined by looking at the number of active users of a particular service, i.e. the number of paying subscribers for SVOD⁶, the number of unique customers/unique accounts used for acquisition for TVOD, and the number of unique visitors for AVOD.⁷

⁴ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ L 124, 20.5.2003, p. 36–41.

⁵ http://ec.europa.eu/smart-regulation/impact/key_docs/docs/meg_guidelines.pdf.

⁶ SVOD= Subscription Video on Demand; TVOD=Transactional Video on Demand; AVOD=Advertising Video on Demand

⁷ This should be determined as a monthly average of active users for an interval of 12 months.

The number of active users should be compared to the potential user population for that particular service. In the Commission services' view, such potential user population for VOD services is represented by the number of households having the capacity to access on demand services in the Member State concerned (i.e. the number of households with fixed or mobile broadband connection)⁸.

These numbers are contained in Eurostat data, which means that they are publicly available and can be easily verified by the competent national regulatory authority in the country of origin for each Member State in which the share obligation has to be respected. The benchmark comparing active users with broadband-enabled households allows providers to determine with certainty if they are covered or not by the low audience exemption. Finally, by establishing the threshold in relation to each Member State, the exemption ensures that different sizes of national markets are taken into account.

b. Threshold

The Commission services consider that providers with a reach of less than [1%] within a given Member State, as defined above, have low audience. This threshold reflects a very limited uptake by the population in a Member State of the services of such providers. This may be, for instance, due to the fact that a provider is a new entrant on that national market, because it offers a niche catalogue or because the market for VOD is nascent in that particular Member State.

Based on the available data on the estimated subscribers of the main SVOD providers in Europe,⁹ such providers tend to have a reach that goes beyond [1%] in the national markets where they are present.

In view of the above, the Commission services consider it appropriate to exempt from the obligation under Article 13(1) in a relevant national catalogue those providers that reach less than [1%] of households with broadband connection in the Member State concerned. Thus, a provider would be able to require from its Member State of origin to be exempted from the share obligation in those catalogues (directed to the Member State of origin or to other Member States) for which the audience is low. The share obligation would need to be fulfilled in the other, non – exempted, catalogues

Such exemption is in line with the objective of cultural diversity, since the required share of European works (and the related prominence of such works) will be ensured not only in the national catalogues of the main VOD providers, but also in catalogues of relatively smaller providers as long as they have an audience exceeding the low audience threshold of [1%] in a particular Member State. Furthermore, the viewers in one Member State would have access to European works also in the national catalogue of multi country services targeting audiences in that state.

⁸ The concept of broadband availability is based on Eurostat methodology and is referring to households that are connectable to an exchange that has been converted to support xDSL-technology, to a cable network upgraded for internet traffic, or to other broadband technologies. It includes fixed and mobile connections, see <https://ec.europa.eu/eurostat/web/products-datasets/product?code=tin00073>

⁹ “Main OTT SVOD Groups in Europe by estimated number of subscribers” (December 2017), published as part of the EAO Yearbook 2018, accessible at <http://yearbook.obs.coe.int/s/document/pan-european>

3. Exemptions from the possible requirement under Article 13(2) AVMSD

A. General considerations

The Commission services remind that the AVMSD aims to facilitate the cross-border circulation of audiovisual media services in the internal market. This is achieved by virtue of country of origin principle, which promotes a competitive and integrated European audiovisual industry and enhances media pluralism throughout the EU. Furthermore, as reflected in Article 13(2), the AVMSD promotes cultural diversity and respects cultural policies in the Member States. In establishing the exemption from the obligation to contribute to the production of European works in a cross border context, the right balance needs to be achieved so that the application of Member States' obligations within their legitimate cultural policies to cross-border providers does not disproportionately hamper the provision of audiovisual media services within the EU.

In this sense, the extension of national obligations to cross-border providers introduces additional financial and administrative burdens for those providers whose activity is not limited to the Member State of origin. These burdens would multiply in case of providers that are present in several Member States: they may be subject to several sets of rules that impose different types and levels of financial contributions. It is thus important to ensure through appropriate thresholds that the national rules on financial contributions do not create disincentives for providers from distributing their services across borders.

B. Distinction between exemptions established by EU and national legislation

Article 13(2) of AVMSD does not harmonise the national obligations to contribute financially to the promotion of European works. The provision merely recognises that Member States have the possibility to extend their national obligations concerning direct investment and levies to cross-border providers that target audiences in their territory, subject to compliance with EU law. It is thus the competence of the Member State that decides to avail itself of this possibility to define and apply the corresponding obligations.

In this sense, if a Member State has in place obligations to contribute financially to European works and these obligations are limited to providers established in that Member State, this part of the guidelines is not relevant. It becomes relevant only if the Member State applies the requirement to contribute financially to European works also to providers established in other Member States, which target audiences in its territory.

It is important to note that Member States applying the financial contribution obligations to providers established in other Member States need to respect the principle of non-discrimination. Therefore, if they have exemptions in place at national level, applicable to providers established in their territory, these exemptions need to be applied also to the cross-border providers, even if the thresholds are higher than the ones recommended in the guidelines.

C. Low turnover

Article 13(2) of the AVMSD refers to two types of financial contributions for the production of European works, namely direct investments in audiovisual content and contributions to

national funds (levies), that are both based on revenues earned in the targeted Member State. In determining the appropriate threshold, the Commission services consider that different impacts of these types of obligations on cross-border providers should be taken into account. The direct investment (e.g. production, co-production, acquisition of rights in works) implies a generally higher administrative effort than the payment of a levy, due to a different degree of financial involvement and the associated risks. The fulfilment of the investment obligation depends also on the availability of European works, including production projects in which a provider may invest with the available resources.

As mentioned under point 2A above, the Commission services consider it appropriate to exempt micro enterprises from the obligations to promote European works. Thus, a Member State that imposes financial contributions obligations on media service providers established in other Member States should consider exempting micro enterprises from such obligations.

The Commission services understand that in some Member States where the audiovisual market is particularly small, cross-border media service providers could have a significant presence on the targeted market, even if they are micro enterprises. In order to cater for such situations, it could be envisaged that that micro enterprises targeting audience in those Member States could still be subject to cross-border levies if they have more than [2%] of the revenues in the relevant market of the targeted Member State.

The Commission services consider that the adjustment mechanism should be used by Member States in the case of exemptions from cross border levies, and not from the obligation of cross border direct investment. As explained above, the obligations of direct investment implies a higher regulatory burden than the payment of a levy,¹⁰ and thus, in the view of the Commission services, **as a minimum**, micro enterprises should be exempted from direct investment obligations in the targeted Member State.

Depending on the size of the audiovisual markets of the Member States concerned, the Commission services recommend also to give special consideration to the situation of small companies (that have a total turnover or balance sheet below 10 million EUR and staff headcount below 50 persons) targeting the specific Member State. More specifically, the Commission services invite Member States, in particular those with larger audiovisual markets, to consider exempting small enterprises targeting their audiences from the obligation of direct investment according to the legislation of that Member State, or at least make them subject to a lighter regulatory regime or give them the flexibility on how to fulfil the obligation of direct investment, taking account also of the possible difficulties to find audiovisual productions to invest in with the available resources.

D. Low audience

a. On-demand audiovisual media service providers

¹⁰ It should be noted also that, as clarified in recital 36 “[m]edia service providers that are required to contribute to film funding schemes in a targeted Member State should be able to benefit in a non-discriminatory way, even in the absence of an establishment in that Member State, from the aid available under respective film funding schemes to media service providers”

As suggested above, the calculation of low audience for VOD services should be based on the number of active users compared to the households with broadband connection.

The Commission services consider it appropriate that, for the purposes of exemption from the possible requirement under Article 13(2), the threshold should be higher ([2%]) than the threshold of [1%] set out for the exemption from Article 13(1).

As explained under point A above, the extension of national obligations to cross-border providers introduces additional financial and administrative burdens for those providers whose activity is not limited to the Member State of origin. The higher threshold of [2%] would aim to ensure that the national rules on financial contributions do not create disproportionate disincentives for providers from distributing their services across borders.

The AVMSD limits the application of financial contribution requirements in a targeted Member States by expressly providing that such contributions may only be imposed on the revenues generated in that targeted Member State. Such revenues should be of sufficient value to justify the additional administrative and financial burdens imposed on providers established in other Member States.

In view of the above and in line with the principle of proportionality, the Commission services consider that the threshold for low audience applicable for the exemption from possible obligations under Article 13(2) should be set at [2%].

b. Linear audiovisual media service providers

For linear services, audience is an established concept, and audience measurement services exist in several Member States. The definition of low audience should thus be based on indicators that are already accepted and constantly used in the context of the AVMSD, namely the daily audience share¹¹ calculated for the reference year.

In terms of presence of non-domestic providers, the linear services market is different from VOD market. For VOD, the national markets are largely dominated by non-domestic providers, however this is not the case for linear services. The top players are usually TV groups that attain in general the entire or large parts of their audience share in their domestic markets. According to a recent study, the EU audiovisual market is characterised by a limited number of TV channels that capture a large part of the audience. The vast majority of channels have low audience shares: only 5% of TV channels have an audience share above 10% and around 80% of TV channels in any given country in the EU have an audience of 2% or less.¹²

Given the structure of the linear audiovisual market, characterised by very significant shares of a few channels (typically 80% of the audience share is covered by the top 20% of the channels) and a high number of channels with small audience (on average 80% of TV channels in Europe have an audience share of 2% or less), the Commission services consider that cross-border channels with an individual audience share below [2%] in a given targeted Member State would have low audience in the sense of Article 13 (6) of AVMSD.

¹¹ See Revised Guidelines For Monitoring The Application Of Articles 16 And 17 Of The Audiovisual And Media Services (Avms) Directive, Doc CC AVMSD (2011) 2, page 3

¹² Schneeberger A., The internationalisation of TV audience markets in Europe, European Audiovisual Observatory, Strasbourg, 2019, p. 16 (

IV. REVIEW

Following the reporting by Member States and the independent study required by Article 13(4) and respectively 13(5) of the AVMSD, the Commission will assess the need for revising the guidelines, and particularly the recommended thresholds for low audience and low turnover, taking also account of market developments and possible advancements in measurement of audience for VOD services while bearing in mind the objective of cultural diversity

DRAFT