

[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) establishes that providers of on-demand audiovisual media services (hereinafter ‘on-demand’ or ‘video on demand (‘VOD’) services’) 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 that “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 requirements under Article 13(2). The aim of the exemptions, 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.

Pursuant to Article 13(7) of the AVMSD, the Commission shall issue 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 guidelines are not binding. To the extent that they may interpret the AVMSD, the Commission’s position is without prejudice to any interpretation by the Court of Justice of the European Union.

II. CALCULATION OF THE SHARE OF EUROPEAN WORKS

1. Calculation per titles

In the linear world (television broadcasting), the share of European works in broadcasters’ programming schedules is calculated by reference to the transmission time. Article 16 of the

¹ For the purposes of these guidelines, the references to the “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.

AVMSD provides that broadcasters must reserve a majority proportion of their transmission time for European works. This clearly reflects the time-bound nature of linear services, where only a limited number of programmes can be broadcast at the same time and during a determined period. The duration element is thus specifically linked to the intrinsic characteristics of television broadcasting (linear) services that base their programming on daily (24 hours) schedules.

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

Similarly, from a user perspective the choice of watching a programme available in the on-demand catalogues is not constrained time-wise, in the sense that watching a certain programme does not imply renouncing to watching 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 programmes (based e.g. on perceived quality, attractiveness, tastes), the Commission considers 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 television ('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 overall 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 titles 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 out of the total number of titles available in their catalogues rather than an account of the total viewing time of European works out of 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.

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

2. What constitutes a title

In the case of feature and TV films, every film constitutes a title in a catalogue. Different films in a franchise² should also constitute different titles in a catalogue.

The identification of what constitutes a title is more complex for TV series or other formats 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 the whole series, to one season or to one individual episode.

One season of TV series should be calculated as one title. A calculation by seasons would ensure comparability with feature or TV films. Similar to 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 authors/audiovisual professionals, with a single budget and over a unitary period of time. Furthermore, the release on the market and related promotional activities often concern individual seasons. For these reasons, the work carried out in order to produce a season of a series could be considered comparable to the work normally required to produce a film.

Furthermore, a calculation by seasons would reduce possible incentives for providers to favour European works of overall long duration (e.g. series or other formats with a high number of episodes) for the purpose of achieving the share to the detriment of shorter works with higher potential of circulation among Member States (e.g. feature films and high end TV series).³

On the other hand, some TV series may have high production costs, for instance in cases 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. In these cases, where justified, the national regulatory authorities could envisage to give a higher weighting to these works, for example, based on a provider's substantiated request.

3. Calculation per national catalogues

Some VOD providers operating within the Union 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.⁴ Thus, it is necessary to determine how the share of European works is to be calculated in such cases.

² Franchise is a succession of related films sharing the same fictional universe.

³ According to a study of the European Audiovisual Observatory, 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, i.e. 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. From this perspective, a calculation by titles and seasons could have a positive impact on the circulation of European works with genuine cross-border exploitation potential. See G. Fontaine, TV fiction production in the European Union, European Audiovisual Observatory, Strasbourg, 2017.

⁴ C. Grece, Films in VOD catalogues – Origin, Circulation and Age – Edition 2018, European Audiovisual Observatory, Strasbourg, 2018.

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 Union by providing a minimum share of European works in their offers. The Commission takes the view that this objective can effectively be achieved only if 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 have the required exposure to European works. This approach also presents the advantage that it is likely to incentivise the circulation of European works across the Union.

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 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.

4. Temporal dimension

The actual share of European works in VOD catalogues can vary on a day-to-day basis. For example, when a VOD adds a new non-European TV series into its catalogue, this could have an effect of temporarily decreasing the overall share of European works until further European works are subsequently included. This raises the question at which point in time the compliance with the 30% share should be ensured. Providers may be required to ensure compliance at every point in time or on average over a pre-determined period (e.g. one year). The latter approach would allow temporary fluctuations to take place.

The AVMSD does not provide any indications with regard to which of these two methods should be preferred. Both methods could achieve the desired goal of the legal provision, which is to promote cultural diversity in VOD catalogues. Accordingly, the Commission considers that Member States may freely decide what method to adopt in monitoring compliance with Article 13(1) of the AVMSD. When deciding on the monitoring method, Member States should nevertheless take due account of the need to reduce the administrative burden associated with compliance and enforcement.

III. DEFINITION OF LOW AUDIENCE AND LOW TURNOVER

1. Preliminary remarks

According to Recital 40 of 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”. While the above considerations are common for both Article 13(1) and Article 13(2), these provisions present some specific differences that need to be considered:

- 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 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 specificities of these obligations when defining the rules concerning the exemptions from the two provisions. In particular, it should be recalled that, as clarified by Recital 36, Member States are allowed to impose financial obligations on media service providers targeting their territory, in view of “the direct link between financial obligations and Member States' different cultural policies”.

When defining low audience and low turnover, it is thus important to find a right balance between the objectives of preserving a necessary innovation space for smaller audiovisual players and that of promoting cultural diversity through adequate financing for European works under Member States' cultural policies. Therefore, while the guidelines envisage that micro enterprises/companies with a low audience as defined below are exempted from the obligations under Article 13, some additional safeguards in specific cases may be needed, particularly for the application of levies in view of ensuring sustainability of financing of national audiovisual funds.

2. Distinction between exemptions established by EU and national legislation

Article 13(2) of the 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 option to apply their national obligations concerning direct investment and levies also to cross-border providers that target audiences in their territory, in compliance with the principles of non-discrimination and proportionality. 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 or introduces obligations for media service providers to contribute financially to the production of European works and these obligations are limited to providers established in that Member State, the present guidelines do not apply. They become relevant if the Member State also applies such requirements to providers targeting audiences in its territory but established in other Member States. In any case, the aim of the exemptions provided by the AVMSD is not to replace the exemptions established at the national level, but to provide safeguards for cross border providers. Therefore, the definitions set out in this section of the guidelines are without prejudice to the freedom of the targeted Member State to establish different thresholds at the national level applicable to providers under its jurisdiction.

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 or introduce exemptions at national level applicable to providers established in their territory, these exemptions also need to be applied in a non-discriminatory manner to cross-border providers, even if the thresholds are higher than the ones envisaged in the guidelines.

3. Low turnover

For establishing the threshold of low turnover, which should serve as a basis for an exemption under Article 13(6), the Commission refers to the Recommendation 2003/361/EC concerning the definition of micro, small and medium sized enterprises.⁵

Following an established policy making approach, micro enterprises should a priori be excluded from the scope of the proposed legislation, unless the necessity and proportionality of them being covered is demonstrated.⁶ Therefore, the Commission considers 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 below 10 persons).

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

At the same time, Recital 40 of the AVMSD provides that “the determination of low turnover should take into account the different sizes of audiovisual markets in Member States”. In some Member States, the size of the national VOD markets is in the order of a few million euro. In several cases, such markets are significantly below ten million euro. In these markets, even micro enterprises may be considered to have a non-insignificant market position.

In view of the above, the Commission considers that Member States should be able to apply the obligations under Article 13 to micro enterprises having a share of more than [1%] of the overall revenues in the national audiovisual markets concerned.

4. Low audience

4.1 Video on demand services

4.1.1 Methodology

According to Recital 40 of 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 (...)”. In linear services, audience is traditionally measured by reference to viewing time. 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 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 for the purposes of Article 13 of the AVMSD.

⁵ Commission Recommendation 2003/361/EC 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.

⁶ http://ec.europa.eu/smart-regulation/impact/key_docs/docs/meg_guidelines.pdf.

In line with Recital 40 of Directive 2018/1808/EU, the concept of audience can be associated with the sales of the services. In a VOD environment, the number of users/viewers of a particular service is a proxy for such sales. In particular, the audience could be determined by looking at the number of active users of a particular service, i.e. the number of paying subscribers⁷ for Subscription Video on Demand (SVOD), the number of unique customers/unique accounts used for acquisition of works for Transactional Video on Demand (TVOD),⁸ and the number of unique visitors for Advertising Video on Demand (AVOD).⁹

In practice, the audience should be determined in terms of the share of active users attained by a particular service: the audience of a VOD service would be the number of its users divided by the total number of users of (similar) VOD services and multiplied by 100 to obtain a percentage.

Since audience shares constitute a good proxy for sales and, therefore, the market position of the service concerned, providers with a low number of active users would have no significant presence in the market, thus justifying an exemption from the obligations. This method is also close to the notion of TV audience share, which refers to actual TV set holders tuned to particular channels in a given period of time compared to the total number of TV sets in the sample.

4.1.2 Threshold

The Commission considers, as a starting point, that providers with an audience share of less than [1%] within a given Member State may be deemed to have low audience. This threshold reflects a limited uptake of the services of such providers compared to the relevant national markets. This may, for instance, be because a provider is a new entrant on that national market. Based on the available data, the main SVOD providers in Europe¹⁰ tend to have a share that goes well beyond 1% in the national markets where they are present.

In view of the above, the Commission considers it appropriate, in principle, to exempt from the obligations under Article 13 those providers that have an audience share of less than [1%] in the Member State concerned.

With regard to Article 13(1), this means that these providers would be able to ask 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 their audience share is below the above-mentioned threshold. With regard to Article 13(2), this means that these providers would be able to ask the targeted Member State to be exempted from the obligation to contribute financially to the production of European works.

⁷ In case of subscribers that pay for bundled services which include also a VOD account, audience of the VOD services might not be accurately represented by the number of paying subscribers of those bundled services as a whole, as some might not be VOD users. In such cases, regulatory authorities may apply a measurement based on users who have in fact accessed the video content of the service within a period of 12 months.

⁸ Active users in this case should refer to users that have acquired at least one title in the catalogue in the previous 12 months.

⁹ This should be determined as a monthly average of active users for an interval of 12 months.

¹⁰ “Main OTT SVOD groups in Europe by estimated number of subscribers” (December 2017), published as part of the European Audiovisual Observatory Yearbook 2018, Strasbourg, December 2017.

4.2 Linear audiovisual media services

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

In terms of the presence of non-domestic providers, the linear services market is different from VOD market. For VOD, national markets are largely dominated by non-domestic providers; 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 Union have an audience of 2% or less.¹²

Given this structure of the linear audiovisual market, cross-border channels with an individual audience share below [2%] in a given targeted Member State should be considered to have low audience in the sense of Article 13(6) of the AVMSD.¹³ In case of providers with multiple targeting channels, Member States may consider the overall position of the provider in the national market when applying the exemption.¹⁴

5. Adjustments to take account of the specific nature of financial contributions

Article 13(2) of the AVMSD refers to two types of financial contribution obligations for the production of European works, namely direct investments in audiovisual content and contributions to national funds (levies). The Commission considers that, when determining the appropriate thresholds, the 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) generally implies a higher entrepreneurial 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 also depends on the availability of European works, including production projects in which a provider may invest with the available resources.

Taking account of the above, the Commission understands that in some Member States, depending in particular on the size and structure of the audiovisual market, it may be considered important to apply cross-border levies also to VOD providers that are micro enterprises or have an audience share of less than [1%] as well as cross-border linear services with an audience share below [2%], in particular pay TV services, as their presence in the national markets may still be deemed important. In order to cater for such situations, Member States may, in duly justified cases and in line with their cultural policy objectives, including

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, p. 3.

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

¹³ Such markets are 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).

¹⁴ They may assess if overall the provider is one of the top providers covering 80% of the audience share in that country.

the objective to ensure the sustainability of national film funds, decide to apply lower thresholds.

These thresholds should respect the principles of non-discrimination and proportionality, should not undermine market development and should allow for the entry of new players on the market. Any lower threshold should be communicated to the Commission.

As regards cross-border direct investment obligations, the Commission invites Member States, in particular those with larger audiovisual markets, to consider exempting small enterprises (those having a total turnover or balance sheet below 10 million EUR and staff headcount below 50 persons)¹⁵ or at least make them subject to a lighter regulatory regime, taking account, in particular, of the possible difficulties to find audiovisual productions to invest in with the available resources in the Member States concerned.

IV. PROCEDURAL REMARKS

The responsibility for the implementation of Article 13(1) and 13(2) of the AVMSD lies with the competent national regulatory authorities. However, national regulatory authorities are encouraged to cooperate actively with their counterparts in other Member States in the areas covered by the present guidelines. This cooperation could be desirable especially with a view to gathering relevant data or information and to limit the risks of divergent interpretations by national regulatory authorities. The European Regulators Group for Audiovisual Media Services (ERGA) is the appropriate forum to facilitate such cooperation.

In view of the above, national regulatory authorities are invited to exchange information, data and best practices within ERGA and to discuss any issues faced in the application of the present guidelines. In this context, ERGA should bring significant issues in the approaches taken by national regulatory authorities to the attention of the Commission. The Commission will keep the AVMSD Contact Committee informed about such developments.

In the framework of the reporting obligations under Article 13(4) of the AVMSD, Member States should inform the Commission about the application of the present guidelines.

¹⁵ See Article 2 of the Annex to Commission Recommendation concerning the definition of micro, small and medium-sized enterprises, C(2003) 1422, OJ L 124 of 20.07.2003, p 36.